Allahabad High Court
Chandradeo Singh And Ors. vs Mata Prasad And Ors. on 5 March, 1909
Equivalent citations: 1 Ind Cas 479
Author: J Stanley
Bench: J Stanley, Knox, Banerji, Aikman, Richards
JUDGMENT John Stanley, C.J.

1. This second appeal was directed to be laid before a Full Bench in consequence of a conflict in the decisions of this and the other High Courts upon the main question involved in it.

2. The suit is one to enforce payment of a mortgage by sale of the mortgaged property. The mortgage was executed by the late Ram Narain Singh, who was the head of the defendant's family, on the 4th of September 1883, to secure a principal sum of Rs. 400, in favour of Ram Narain Kalwar, the father of the plaintiff-respondent Sheo Balak Singh and grandfather of the appellant Chanderdeo Singh. The parties are governed by the law of the Mitakshara. It was found by the Court of first instance that the mortgage was not executed for the purpose of satisfying any antecedent debt and there was no evidence that the consideration was required for the legal necessities of the family, or that the lender made any enquiry as to the purposes for which the money was borrowed.

3. On the other hand, it was not proved, or even alleged, that the debt was tainted with immorality. On these findings the Court mainly relying on the decision in the case of Debi Dat v. Jadu Rai 24 A. 459. decreed the plaintiff's claim.

4. Upon appeal this decision was upheld by the learned Officiating District Judge. He held that the money advanced to the mortgagor could not be said to have been applied to the discharge of any antecedent debt, but at the same time that the debt was not tainted with immorality and consequently the appeal was without any force.

5. A second appeal was preferred, the first ground of appeal being that the mortgage not being one for the payment of an antecedent debt, nor for family necessity, was not binding on the appellants. There is a second ground of appeal, namely that the claim of the plaintiffs, so far as it is based on the pious duty of sons to pay their father's debt, is barred by time.

6. In view of the pious obligation of Hindu sons in; a Mitakshara family to pay their father's debts, the learned Counsel for the appellants did not for a moment contend that this pious duty did not lie upon his clients. He admitted that they were so liable, but he contended that the mortgage of the 4th of September 1883, not having been made to satisfy an antecedent debt, or for family necessities, was not binding upon the appellants. The sole question then for the Court is whether a father of a Hindu family governed by the Mitakshara law, can execute a mortgage which will be binding upon his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

7. The rule of the Mitakshara is to be found in Chapter I, Section 1, Clause 27. Clause 27 runs as follows: "Therefore, it is a settled point that property in the paternal or ancestral estate is by birth, although the father have independent power in the disposal of effects other than immoveables, for

indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth: but he is subject to the control of his sons and the rest, in regard to the immoveable estate, whether acquired by himself or inherited from his father, or other predecessor; since it is ordained, 'though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made"; and then follows in Clause 28 an exception to this rule. It runs as follows: "Even a single individual may conclude a donation, mortgage or sale, of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes". This means, I take it, that a donation, mortgage or sale cannot be made except for the purposes named or one of them.

8. This is the foundation of all the decisions governing the competency of a Hindu father in a family governed by the Mitakshara to dispose of the joint property of the family. He can dispose of it during a season of distress for the sake of the family or for pious purposes.

9. Until recently the decision of this High Court in the case of Jamna v. Nain Sukh 9 A. 493., was regarded as a binding ruling. In that case Sir John Edge, C.J., and Mahmood, J., held that as a rule a creditor endeavouring to enforce his claim under an hypothecation bond given by a Hindu father against the estate of a joint Hindu family in respect of money lent or advanced to the father, should prove either that the money was obtained by the father for a legal necessity, or that he (the creditor) made such reasonable enquiries as would satisfy a prudent man that the loan was, contracted to pay off an antecedent debt or for the other legal necessities of the family. In that case in a suit against the members of a joint Hindu family upon a bond given by their father by which family property was hypothecated, no evidence was given on either side, as here, as to the circumstances under which the bond was given. It was held that the burden of proof lay upon the plaintiff to show that either the money was obtained for legal necessity or that he had made reasonable inquiries and had obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family.

10. In the case of Badri Prasad v. Madan Lal 15 A. 75, (F.B.) a Full Bench of this Court consisting of all the Judges held that the sons in a joint Hindu family were liable to be sued along with their father upon a mortgage bond given by the father alone after the birth of the sons, which purported to mortgage the joint family property, the consideration having been money advances antecedently made by the mortgagee to the father, not as manager of the family, or with the authority of the sons, or for family purposes, but not for purposes of immorality or for purposes which if the father were head would exonerate the sons from the pious obligation of paying such debts of the father. In this case, as appears from the judgment of Edge, C.J., the consideration for the bond in suit was a sum of Rs. 1,457-3-0 due under a prior bond of the 7th of October 1881, Rs. 181-4-0 interest due under this bond, and a present advance of Rs. 11-9-0. The money was borrowed to pay off an antecedent debt, the present advance of Rs. 11-9-0 being regarded as a negligible quantity. The decision, therefore, gives no support to the contention of the respondents.

11. In the case of Manbahal Rai v. Gopal Misra, (1901) 21 A.W.N. 57. Sir Arthur Strachey, C.J., and my brother Banerji expressed the view that a sale of ancestral property by a father in a joint Hindu family may be set aside on suit by the sons, so far as it affected their interest in the property, if there were no antecedent debt or valid necessity to support it, although the transaction was not shown to be tainted with immorality. In his judgment Sir Arthur Strachey, C.J., commenting upon the view expressed by the learned Judge of this Court from whose decision the appeal had been preferred, observed as follows: "The learned Judge held that the plaintiff was entitled to no relief whatever, inasmuch, as he was 'a Hindu son impeaching the sale of ancestral property of a joint family made by his father' and it had been 'constantly hold that when the vendor is the father in a joint family, the son can impeach the sale only on the ground that the money was raised for debauchery and other immoral purposes.' In my opinion that proposition is too broadly laid down by the learned Judge. The doctrine limiting the son's power to impeach an alienation of joint family property made by his father is based solely on the pious duty which the Hindu law recognises as incumbent upon a son to pay his father's debts not tainted with immorality. The true rule is that the son cannot impeach an alienation of ancestral joint family property made by a father, for which the consideration is an antecedent debt of the father not tainted with immorality or the object of which is to pay such a debt. That this is the true scope of the doctrine is shown by the numerous authorities, of which it is sufficient to refer to Lal Singh v. Deo Narain Singh 8 A. 279., the decisions of the Privy Council cited in the judgment in that case, and the judgment of the Full Bench in Badri Prasad v. Madan Lal 15 A. 75, (F.B.). These cases show that the doctrine has no application to a case in which no antecedent debt of the father, that is a debt antecedent to the alienation in question, is concerned, as the consideration or object of the alienation. In the present case the deed does not state any antecedent debt of the father as the consideration or the object of the sale." (The italics are mine.) Nothing can be clearer than this language of the learned Chief Justice.

12. In his judgment my brother Banerji endorsed the view expressed by Sir Arthur Strachey in the following language: "According to the well known rulings of the Privy Council, an alienation of joint family property made by the father of a joint Mitahshara family cannot be impeached by his sons, if such alienation has been made in lieu of an antecedent debt or for the payment of the father's debt, unless the son can prove that the debt was incurred for an immoral purpose, the reason for the rule being that it is the pious duty of the son to pay his father's debt not tainted with immorality. Had the transaction in the present case been that of a sale made in lieu of an antecedent debt, or for the payment of a debt due by the father, the principle which the learned Judge of this Court has applied would have been applicable. But in this case there was no allegation that the consideration for the sale was an antecedent debt of the father or that it was taken for the purpose of paying off the father's debt." Now in that case it was found that there was no consideration at all for the sale. Consequently the suit was bound to succeed, but I cite the case as showing the view of the law which was entertained at this time by the learned Judges who decided it. This was the case of a sale but it is obvious that there can be drawn no distinction between alienation by, out and out, sale and alienation by mortgage. A mortgage is a sale sub modo. The word 'alienation' frequently met with in the textbooks and judgments embraces both sale and mortgage.

13. In the case of Ram Dayal v. Ajudhia Prasad 28 A. 328., my late brother Burkitt and myself adopted the view of the law expressed in Manbahal Rai v. Gopal Misra (4) (1901) 21 A.W.N. 57.

14. Now by the expression antecedent debt I understand a debt which is not for the first time incurred at the time of a sale or mortgage, that is presently incurred, but a debt which existed prior to and independently of such sale or mortgage. It must be a bona fide debt not colourably incurred for the purpose of forming a basis for a subsequent mortgage or sale or other similar object.

15. This was the interpretation placed upon the expression by the Calcutta High Court in the case of Hanuman Kamat v. Dowlut Mundar 10 C. 528., in which it was held that although no member of a joint Hindu family governed by the Mitahshara or Mithila law has the authority, without the consent of his co-sharers, to sell or mortgage even his own share in order to raise money on his own account, and not for the benefit of the joint family, yet if a father does alienate even the whole joint property of his own and his sons in order to pay off antecedent personal debts, the sons cannot avoid such alienation unless they prove that the debts were immoral; that to make the alienation to this extent binding upon the sons who did not consent to it, it must be shown that it was made for the payment of antecedent debts, and not merely in consideration of a loan, or a payment made to the father on the occasion of his making the alienation; and that in the case of a voluntary sale the purchase money does not constitute an antecedent debt such as to render that sale binding on the sons unless they prove the transaction to have been immoral.

16. Again in the same High Court in the case of Surja Prasad v. Golab Chand 27 C. 762, Ghose and Harington, JJ., held that in a case of a joint Mitkashara family where the father raised money on a mortgage hypothecating ancestral family property and it was not proved that the money was required for payment of any antecedent debt or that the money was raised or expended for illegal or immoral purposes, or that any inquiry was made on behalf of the mortgagee as to the purpose for which the debt was incurred, the mortgage security could not be enforced against the son (the father having died), unless it could be shown that the debts for which the mortgage was created were antecedent to the transaction in question and that under the circumstances the mortgage was not binding upon the son, but that the debt not having been proved to have been incurred for immoral or illegal purposes, the mortgagee would be entitled to a money decree against the sons, not upon the mortgage security, but upon the simple obligation created by the bond, and that a suit for such a relief must, under the Limitation Act, be instituted within six years from the date of the mortgage bond.

17. In the Madras High Court in the case of Venkataramanaya Pautulu and another v. Venkataramana Dass Pantulu and others 29 M. 200. Sir Arnold White, C.J., and Subramania Ayyar and Davies, JJ., held, following several decisions of that High Court, that when a debt was incurred at the time of sale or mortgage it was not an antecedent debt within the meaning of those words as used in the judgment of the Privy Council in Suraj Bunsi Koer v. Shoo Persad Singh 5 C, 148; 4 C.L.R. 226; L.R. 6 I.A. 88. In their judgment the learned Judges observed: "As regards the question of sale there does not appear to be any decision either of the Privy Council or of the Courts of this country, that a sale is binding on the son's share when the debt was not antecedent in the sense that it existed prior to and independently of the sale."

18. I take it to be beyond question that the expression 'antecedent debt' means what it expresses, namely a debt incurred prior to and independent of the sale or mortgage sought to be enforced.

19. The propriety of the decision in the case of Jamna v. Nain Sukh 9 A. 493. was questioned in the two cases of Debi Dat v. Jadu Rai 24 A. 459. and Babu Singh v. Bihari Lal 30 A. 156.. In the first mentioned case my brother Banerji seems to me to have resiled from the view laid down by him in Manbahal Rai v. Gopal Misra (1901) 21 A.W.N. 57. He and my brother Aikman held, in a suit for sale on a mortgage of joint family property executed by a father and three of his sons, that the fourth son, who was a minor, and four grandsons, also minors, who were not executants of the mortgage, were properly arrayed as defendants, inasmuch as their own interests in the joint family property would be liable under the mortgage, unless they could show that either the mortgage debt was never incurred or that it no longer subsisted or that it was tainted with immorality. The learned Judges delivered a very short judgment holding that the ruling in the case of Jamna v. Nain Sukh 9 A.493. was overruled by their Lordships of the Privy Council. They say: "It is true that the ruling referred to above has not in express terms been over ruled: but having regard to the later Full Bench ruling in Badri Prasad v. Madan Lal 15 A. 75, (F.B.) and to the ruling of the Privy Council in Nanomi Babuasin v. Modhun Mohan 13 C. 21 (P.C.); L.R. 13 I.A. 1, it can no longer be considered as law. The sons and grandsons of a mortgagor can only dispute the validity of the mortgage either on the ground that the debt was never incurred, or is no longer in existence, or that it was tainted with immorality." I may here again point out that in the case of Badri Prasad v. Madan Lal 15 A. 75, (F.B.), the consideration for the mortgage which formed the basis of the suit was with a trifling exception money advances antecedently made by the mortgagee to the father.

20. In the case of Babu Singh v. Bihari Lal 30 A. 156., which was a suit for sale upon a mortgage, my brothers Banerji and Richards held that the decision in the case of Jamna v. Nain Sukh 9 A.493. could no longer be supported and that it was sufficient in order to establish the liability of a son to pay the personal debt of his father, if the debt be proved and the son cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the son to discharge. In that case my learned brothers quoted with approval my words in the Full Bench case of Karan Singh v. Bhup Singh 27 A. 16. as follows: "It is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes, or was such a debt as does not fall within the pious duty of the sons to discharge." Now the suit of Karan Singh v. Bhup Singh 27 A. 16. was not a suit to enforce payment of a mortgage debt. It was a case in which a creditor obtained a decree for profits against the lambardar of a village and in execution of that decree attached immoveable property belonging to a joint family of which Tota Ram, the lambardar, was the head. The sons and grandsons of the lambardar were the plaintiffs in the suit, and in it they sought a declaration that their interests in the property attached were not liable to attachment and sale in execution of the decree against their father. As pointed out in the judgment, there was no allegation that the debt, in respect of which the execution proceedings were had, was for immoral purposes or was such a debt as the sons and grandsons were relieved from their pious obligation to satisfy. This being so, and the sons being liable to satisfy the debt, the joint family property was liable to attachment and sale in execution of the decree. The claim was in fact enforced against the sons by reason of their pious obligation to pay their father's debts. My brothers Banerji and Richards seem not to recognize any distinction between a case in which a Hindu son is sued on the basis of his pious obligation to pay his father's debts, and a case in which a mortgagee of

the father seeks to enforce a mortgage against the son by sale of the mortgaged property.

21. In the case before us, as I have said, it is not denied that sons in a Mitakshara family are liable to pay their father's debts, provided those debts be not tainted with immorality. What is denied is that a mortgage by a father in such a family is binding upon his sons if that mortgage had not been executed to satisfy an antecedent debt or a family necessity and the mortgagee has failed to show that he made any reasonable inquiry as to the necessity for the loan. A son admittedly may be successfully sued for the debt of his father on the basis of his pious obligation to discharge his father's debts, provided that the suit be not barred by limitation, and a decree passed in such a suit may be enforced in execution by sale of the ancestral property of the family.

22. Now let me turn to the decisions of their Lordships of the Privy Council which have been relied upon as supporting the view that a mortgage executed by a Hindu father in a Mitakshara family not shown to have been made to satisfy an antecedent debt or a family necessity, but not shown to have been for a debt tainted With immorality, is binding upon his sons. The first to which I shall refer is the case of Suraj Bunsi Koer v. Sheo Persad Singh 5 C, 148; 4 C.L.R. 226; L.R. 6 I.A. 88.. In that case an ex parte decree for money had been obtained against a Hindu governed by the Mitakshara law upon a bond, whereby he had mortgaged his ancestral immoveable estate and the estate was attached and sold. Prior to the sale in execution the judgment-debtor died and his infant sons and co-heirs, on filing a petition of objections, were referred to a regular suit. They instituted a suit after the sale against the execution creditor and the purchasers for a declaration of their right to the property sold and to have the mortgage bond, the ex parte decree and the execution sale set aside. It appeared that the father's debt had been incurred without justifying necessity and it was held that as between the infants and the execution creditor neither they nor the ancestral immoveable property in their hands was liable for the father's debt, but that as regards the judgment-debtor's undivided share in the estate sold, whether or not his own alienation was valid by the law as understood in Bengal, it was capable of being seized in execution and that the effect of the execution sale was to transfer the said share to the purchasers, the execution proceedings having at the time of the judgment-debtor's death gone so far as to constitute in favour of the execution creditor a valid charge thereon which could not be defeated by the judgment-debtor's death before the actual sale. It will be observed that as between the infants and the execution creditor neither they nor the ancestral property in their hands were held to be liable for this debt. In delivering the judgment of their Lordships, Sir James W. Colvile remarked that "the rights of the co-parceners in ah undivided Hindu family, governed by the law of the Mitakshara which consists of a father and his sons, do not differ from those of the coparceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligations of paying their father's debts which the Hindu law imposes upon sons (a question to be hereafter considered) and the fact that the father is in all cases naturally and in the case of infant sons necessarily the manager of the joint family estate. The right of co-parceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the Courts of India, and it cannot be said that there has been complete uniformity of decision respecting it. All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied at least in the case of minors if it can be shown that the alienation was made by the managing member of the family for legitimate family

purposes. It is not so clearly settled whether in order to bind adult co-parceners, their express consent is not required." His Lordship then referring to the case of Girdharee Lall v. Kantoo Lall L.R. 1 I.A., 321; 22 W.R. 56; 14 B.L.R. 187. observed: "This case is undoubtedly an authority for these propositions: first, that where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debts, his sons, by reason of their duty to pay their father's debt, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they wore so contracted; and secondly, that the purchasers at an execution sale being strangers to the suit if they have no notice that the debts were so contracted, are not bound to make inquiry beyond what appeal's on the face of the proceedings."

23. The first of these propositions, it will be observed, deals with cases where joint ancestral property has passed out of a joint family' either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family and with no other cases, and the words 'antecedent debt' seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of Hindu father seeks to enforce his mortgage as against the sons.

24. The next case to which I would refer is that of Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1. In that case the suit was instituted by the widow of a Hindu on behalf of her minor sons and herself to set aside a sale made in execution of a personal decree obtained against the father and husband, at which the defendant had become the purchaser and had, as such, obtained possession not only of the father's interest but also that of his sons. In this case it will be observed, the ancestral property had passed out of the joint family under a sale in execution of a decree for the father's debt and therefore it fell within the propositions laid down in. Suraj Bunsi Koer's case 5 C, 148; 4 C.L.R. 226; L.R. 6 I.A. 88. In delivering the judgment of their Lordships, Lord Hobhouse made the following pronouncement: "There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case. It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable for the father's debts and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

25. This pregnant statement of his Lordship has created much misconception and it is upon the meaning intended to be conveyed by his Lordship that the Judges in the various Courts in India have differed. On the one hand, it has been held that this dictum is an authority for the proposition that a Hindu father in a joint Mitakshara family can give a valid mortgage of the joint ancestral property as security for an advance made to him at the time not to satisfy an antecedent debt or a family necessity but not made for an immoral purpose. On the other hand, the view taken by other Judges is that this interpretation is too wide and that a mortgage to be valid must have an antecedent debt or some family necessity to support it, or at least the mortgagee must after reasonable inquiry have satisfied himself as to the existence of an antecedent debt or a family necessity for the loan.

26. In the leading case of Hunooman Pershad Pandey v. Mussamut Babooee Mundraj Koonwaree 6 M.I.A. 393; 18 W.R. 81, in which the powers of a manager for an infant heir to charge ancestral property by loan or mortgage were dealt with, the question was considered as to the party upon whom the onus of proof lay to prove that the alienation of a manager was bona fide. Their Lordships remark that the question on whom such onus lay was not capable of a general and inflexible answer, and then they observe (at page 419 of the report): "Thus where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan;" and they later on observe as follows: "Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money." Their Lordships were dealing in this case with the powers of the manager of a Hindu family, but the rule laid down by them is equally applicable to transactions in which a father in derogation of the rights of his sons under the Mitakshara law has made an alienation of ancestral family estate.

27. In the case of Kameswar Pershad v. Run Bahadur Singh 6 C. 843, (P.C.); 8 C.L.R. 361; L.R. 8 I, A. 8, it was held by their Lordships that in transactions such as the alienation by a Hindu widow of her estate of inheritance derived from her husband, any creditor seeking to enforce a charge on such estate, was bound at least to show the nature of the transaction and to show that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities, that the principle was that the lender, although he is not bound to see to the application of the money and does not lose his rights if upon bona fide enquiry he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things, namely, to enquire into the necessity for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the borrower is acting in this particular instance for the benefit of the estate. Their Lordships referred to the principles laid down in the case of Hunooman Pershad Pandey v. Mussamut Babooee Mundraj

Koonwaree 6 M.I.A. 393; 18 W.R. 81, and observed: "They have applied those principles in recent cases not only to the case of a manager for an infant, which was the case there, but to transactions on all fours with the present, namely, alienations by a widow, and to transactions in which a father in derogation of the rights of his son under the Mitakshara law has made an alienation of the ancestral family estate." The italics are mine. "The principle broadly laid down is that although the lender is not bound to see to the application of the money, and does not lose his rights if upon a bona fide, enquiry he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things," and then their Lordships specify what was required of the creditor in the case to which we have referred. This decision is in consonance with the provisions of Section 38 of the Transfer of Property Act, which are quoted in the Bombay case to which I shall presently refer.

28. Their Lordships, it will be observed, did not, in the case of Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1., profess to state any principle of law which had not been previously enunciated. The question determined in it was whether the entirety of a family estate including the shares of minor sons had passed to a purchaser at a sale in execution of a decree obtained against the father alone, the minors not having been represented in the suit nor in the execution proceedings.

29. The case of Jamna v. Nain Sukh 9 A. 493. is on all fours with the case before us. The learned Judges who decided it drew a distinction between it and cases in which a decree had been obtained against the father and the joint property sold, or cases in which the sons come into Court to ask for relief against a sale effected by their father for an antecedent debt. Is it the case then that this ruling can no longer be considered as law in view of the ruling in Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1.? It will be noticed from the judgment that the learned Judges who decided it had in view and considered the rulings of their Lordships of the Privy Council.

30. Let us see now what has been the trend of the rulings of this and other High Courts upon the question before us since the decisions of the Privy Council in the cases to which I have referred. I have already mentioned the cases of Dobi Dat v. Jadu Rai 15 C. 253. and Babu Singh v. Bihari Lal 30 A. 156.. In the case of Ram Dayal v. Ajudhia Prasad 28 A. 328, my late brother Sir William Burkitt and myself, adopting, as I have said, the view of the law expressed in Manbahal Rai v. Gopal Misra (1901) 21 A.W.N. 57., held that a sale of ancestral property by a father in a joint Hindu family might be set aside on a suit by the sons, so far as it affected their interests, if there was no antecedent debt or valid necessity to support the sale, although the transaction might not be shown to be tainted with immorality.

31. In Maharaj Singh v. Balwant Singh 28 A. 508. in the same volume of the Law Reports, at page 508, the question now before us was discussed in the judgment of myself and Sir William Burkitt and the authorities were referred to. It was not necessary in that case to determine the point which is for determination in this appeal, but an expression of our view of the law is to be found at page 541. In the case of Jamsetji N. Tata v. Kashinath Jivan Manglia 26 B. 326., the facts wore these. By a written agreement of the 9th of March 1900, the first two defendants, a mother and a son, contracted to sell to the plaintiff certain ancestral property. The plaintiff discovered that the first

defendant had a minor son and he instituted a suit against the first and second defendants and the minor son for specific performance of the agreement, contending that the minor's interest was bound inasmuch as the property was sold in order to pay family debts. It was held that no decree could be made against the minor defendant; that in order to satisfy such of his debts as would be binding on his heirs, a Hindu father can sell the entirety of the family property so as to pass even his son's interest therein, but in the case before the Court there was no evidence of debts which justified the sale, and that it lies on the party who seeks to bind an infant to prove justifying circumstances and this the plaintiff had failed to do. The case came before Sir Lawrence Jenkins, C.J. and Starling J., on appeal from Russell, J. The learned Chief Justice in delivering the judgment observed as follows: "The cases have now established that to satisfy such of his debts as would be binding on his son a Hindu father can sell the entirety of the family property so as to pass even his son's interest therein, while Section 38 (in error described as Section 34) of the Transfer of Property Act provides that--'where any person authorised only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall as between the transferee on the one part and other person (if any) affected by the transaction on the other part, be deemed to have existed if the transferee after using reasonable care to ascertain the existence of such circumstances has acted in good faith.'" The learned Chief Justice then remarks: "This statutory provision is substantially a statement of the principle deducible from the cases on this point. But this principle obviously has no application where the transaction is still incomplete; for it presupposes an actual transfer for consideration. Here there has been no transfer, nor has the consideration for the transfer been performed. Therefore, the declaration sought in this suit against the infant defendant must be supported on some other basis. But the only basis suggested is the analogy of this very rule; for it is argued that as the completed transaction would have been supported and sanctioned against the infant son, so ought the incomplete transaction to be enforced against him. True, there is a superficial resemblance between the two positions, yet it is but superficial: the essential basis of the rule is absent. The duty to discharge the father's debts justifies the acquisition of the money required for that purpose even though it be by sale of the ancestral immoveable land. But the existence or a reasonable belief by the purchaser in the existence of those debts is a necessary condition. Now it is quite clear that the plaintiff's agents--by whom alone the negotiations were conducted--made no enquiry as to the existence of justifying debts." Then later on he observes: "We, therefore, have to see whether there are now debts that call for or at any rate justify the conversion of the ancestral immoveable property into money. On the evidence before us I am not satisfied of this, and it follows as a necessary consequence that in my opinion the declaration should not be made." This ruling supports the appellant's contention.

32. The ruling of Boddam and Bhashyam Ayyangar, JJ., in the case of Chidambara Mudaliar v. Koothaperumal 27 M. 326, on the other hand, supports the respondent's contention, but it was overruled by the Full Bench of the Madras High Court in the case of Venkataramanaya Pantulu v. Veukalaramana Doss Pantulu 27 M. 326. In the first mentioned case it was held that a debt incurred by a Hindu father, which was not shown to be illegal or immoral, was even during the life-time of the father binding on the son's interest in the family property, and that in the case of a mortgage debt incurred by the father, the mortgage was binding on the son, notwithstanding that there was no debt anterior to the mortgage but only the debt incurred at the same time as the mortgage, the

mortgage being executed as security therefor. The learned Judges observed that: "On principle it is difficult to make any distinction between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son and the enforcement of the security exonerates the son from the burden of the father's debt. Such a distinction does not really afford any protection to the son, for his share in the mortgaged property can, as a general rule, be seized and brought to sale, even in the latter case, for the recovery of the debt as a personal debt due by the father (though also secured by a mortgage), unless such share has been validly alienated in favour of a third party, since the date of the mortgage but prior to its attachment". This observation is plausible, but it is capable I think of ready refutation. The remedy of the creditor on the basis of the son's pious duty is not co-extensive with his remedy on foot of a binding security. In principle the statement is opposed to the rule of the Mitakshara. In practice it would not be correct, inasmuch as the observance of the rule of the Mitakshara does afford some protection to the interests of sons. The greed which exists for the acquisition of landed property in this Province is well known. Money-lenders are ever ready to advance money to thriftless or extravagant land-owners on the security of their landed property with a view to the ultimate acquisition of the property. Interest is allowed to accumulate until the mortgage debt has reached such dimensions that it is unlikely that the owner can redeem. Then a suit for sale is instituted on foot of the security, the mortgagee gets leave to bid and buys, and the family loses its ancestral property. Moneylenders are charged of making large advances to land-owners on personal security. Now if in negotiations for a loan on a mortgage lenders are obliged to make enquiry and satisfy themselves that the loan is required to meet legal necessity, this will afford some protection to the other members of the coparcenary body. If a father in a joint Mitakshara family can borrow money on the security of the joint ancestral estate to satisfy any extravagant whim or fancy he may form, it is obvious that the rule of the Mitakshara is a dead letter and that the other members of the family are robbed of all protection. A father of extravagant habits might on the security of the ancestral property borrow large sums to satisfy extravagant fancies. He might emulate the folly of the eccentric king, of whom we have lately read, who expended the treasure of his kingdom in building castles on airy heights, and so strip his posterity of their ancestral possessions. The question is not one of mere academic interest but one of substance. The decision in Chidambara Mudaliar v. Koothaperumal 27 M. 326. was overruled, as I have said, by Sir Arnold White, C.J., and Justices Subramania Ayyar and Davies, in the later case which I have already cited, in which it was held, following the earlier decision in Sami Ayyangar v. Ponnammal 21 M. 28 that a sale or mortgage of joint family property by a father' is binding on the son's share only when there is an antecedent debt, that is a debt existing prior to and independently of the sale or mortgage. In the course of their judgment the learned Judges remark that there does not appear to be any decision either of the Privy Council or of the Courts of this country that a sale is binding on the son's share when the debt was not antecedent in the sense that it existed prior to, and independently of the sale." This is a direct authority in support of the contention advanced by the appellants.

33. Of the cases in the Calcutta High Court the first to which I shall refer is that of Luchmun Dass v. Giridhur Chowdhry 5 C. 855, (F.B.), which came before a Fall Bench consisting of Sir Richard Garth, C.J., and. Jackson, Pontifex, Morris and Mitter, JJ. In that case the manager of a joint Mitakshara family, consisting of a father and a minor son, raised money on the mortgage of family property. It was not proved, on the one hand, that there was legal necessity for raising the loan, nor, on the

other, that the money was raised or expended for immoral purposes, or that the lender enquired as to the purposes for which the money was required. It was held, amongst other things, that the mortgage itself, upon which the money was raised, could not been forced, but the debt contracted by the father being itself an antecedent debt within the rules of the Privy Council and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole of the ancestral estate, inclusive of the mortgaged property. This is an important decision which supports the view contended for by the appellants. I next come to the case of Surja Prasad v. Golab Chand 27 C. 762.. In that case a father in joint Mitakshara family raised money on a mortgage hypothecating ancestral property and it was not proved that the money was required for payment of any antecedent debt or that the money was raised or expended for illegal or immoral purposes, or that any enquiry was made on behalf of the mortgagee as to the purposes for which the debt was incurred. The facts are on all fours with those in the case before us. It was there contended that, in view of the later decisions of the Privy Council, a debt contracted by the father, if not tainted with immorality, is binding on the sons from its very inception, and that there was no reason why the debt should be antecedent to the mortgage in order to make it binding on the sons, that the sons are bound to pay all debts whether secured or unsecured provided they were not incurred for illegal or immoral purposes. On the other side the argument was that the bond could only be enforced against the sons as a simple money bond if a suit were instituted within six years from the due date of the bond and that as the suit was instituted after the expiry of six years from the due date, it was barred by limitation. Ghose, J., (now Sir Chunder Madhub Ghose), an eminent authority on Hindu Law, and Harington, J., held that the mortgage was not binding on the son, but that the debt not having been proved to have been incurred for illegal or immoral purposes, the mortgagee would be entitled to a money decree against the defendants, not upon the mortgage security but upon the simple obligation created by the bond, and that a suit for such a relief must, under the Limitation Act, be instituted within six years from the due date of the bond. The decision in Luchmun Dass v. Giridhur Chowdhry 5 C. 855, (F.B.) to which I have referred, and also in Khalilul Rahman v. Gobind Pershad 20 C. 328., were relied on.

34. In the latter case of Maheswar Dutt Tewari v. Kishun Singh 34 C. 184. Brett and Sharf-ud-din, JJ., dissenting from the decision in Luchmun Dass v. Giridhur Chowdhry 5 C. 855, (F.B.) and Surja Prasad v. Golab Chand 27 C. 762., held that a mortgage by a father in a joint Mitakshara family, composed of father and sons on receipt of a loan, which the sons failed to prove to have been taken for immoral purposes, was binding on the sons and that the limitation applicable to a suit on the bond against the sons as well as the father was that provided by Article 132, Schedule II of the Limitation Act. The learned Judges decided this case on the assumption that the law as laid down in the case of Luchmun Dass v. Giridhur Chowdhry 5 C. 855, (F.B.) could not be held to be any longer binding in view of the later decisions of the Privy Council.

35. The same question came before another Bench of the Calcutta High Court, consisting of Mookerjee and Holmwood, JJ., in case of Kishun Pershad Chowdhry v. Tipan Pershad Singh 34 C. 735. In that case a father in a joint Mitakshara family, consisting of father and his minor son, mortgaged property belonging to the joint family. It was not proved that there was any legal necessity for the loan, or any enquiry by the lender, nor that the loan was contracted for illegal or immoral purposes. It was held in a suit by the mortgagee to enforce his security that he was entitled

to have the security enforced as against the share of the mortgagor and also to a decree which would enable him to realise the debt by the sale of the share of the son in the ancestral property. The learned Judges held that the decision in Luchmun Dass v. Giridhur Chowdhry 5 C. 855, (F.B.) had not been overruled by the Privy Council and was binding upon them and pointed out the distinction existing between the position of a son in a suit in which the mortgage by his father is sought to be enforced against his share in the property and his position after the alienation has been completed by an execution sale. They dealt with the question at considerable length and pointed out that the Judges who decided the case of Maheswar Dutt Tewari v. Kishun Singh 34 C. 184. not only extended the principle laid down by their Lordships of the Judicial Committee in connection with a case where property has passed out of the family to cases where the security given by the father is sought to be enforced against his sons, but also extended the rule laid down by the Judicial Committee as applicable to cases of complete alienation to cases of partial alienations such as mortgages. They point out that their Lordships limited their observations in Girdharee Lall v. Kantoo Lall L.R. 1 I.A., 321; 22 W.R. 56; 14 B.L.R. 187. to cases of conveyance executed by the father in consideration of an antecedent debt and sales in execution of decrees for the father's debt.

35. Now I do not profess to have exhausted the authorities on the question before us, but I think that the cases to which I have referred fairly illustrate the contending views expressed on that question.

36. My learned brothers who decided the cases of Debi Dat v. Jadu Rai 24 A. 459. and Bahu Singh v. Bihari Lal 30 A. 156. treated the case of Jumna v. Nain Sukh 9 A. 493. as overruled, contenting themselves by stating that "Having regard to the Full Bench ruling in Badri Prasad v. Madan Lal 15 A. 75, (F.B.), and to the ruling of the Privy Council in Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1., the ruling in Jamna v. Nain Sukh 9 A. 493. can no longer be considered as law."

37. Is there any solid foundation for the contention that their Lordships of the Privy Council overruled in the cases which I have cited the clear and definite rule of the Mitakshara? According to that rule it is a settled point that property in ancestral estate is by birth, and that the father is subject to the control of his sons in regard to that estate, it being ordained that a gift or sale of such should not be made without the concurrence of all the sons, this being the only exception that "a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress, for the sake of the family, and specially for pious purposes." A son being under a pious obligation to pay his father's debts, an alienation by the father has been held to be binding on him in view of this obligation, but only, as I think, so binding where the debt is an antecedent debt. The rule of the Mitakshara, it is said, must be deemed to have been modified by the rulings of the Privy Council, but admittedly it has not been expressly overruled. The dictum in Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1., which I have quoted, namely: "Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debts, if not tainted, with immorality" is relied on as establishing this proposition. It appears to me to do nothing of the kind. That the sons cannot set up their rights against their father's alienations for an antecedent debt 1 admit, but that they cannot resist the enforcement of a mortgage made by their father alone to secure money

borrowed at the time and not proved to have been borrowed to meet a family necessity or to satisfy an antecedent debt I deny. It is contended that their Lordships' words that the sons cannot set up their rights against their father's creditors' remedies for their debts, if not tainted with immorality," justifies the view that a Hindu father can create a valid mortgage of the joint family property which will be binding on his sons for a debt which is not antecedent. It seems to me that this interpretation of the dictum is too wide and that the words against his creditor's remedies for their debts" refer to those remedies only which legally the creditors of the father possess, for example, in the case of an ordinary debt a right to sue the son for the recovery of the debt on the basis of his pious obligation to satisfy that debt and on obtaining a decree to attach and sell the joint family property. This interpretation my brother Aikman suggested during the argument. The two principles of the Hindu Law are not antagonistic, the one being that a Hindu father can create a valid mortgage of the joint family property to satisfy an antecedent debt or a family necessity, but only to satisfy such debt or necessity; the other being that a Hindu son is bound under a pious obligation to satisfy his father's debt if it be not tainted with immorality. The right to maintain a suit in each case is, of course, controlled by the law of limitation. In the one case there is a secured debt. In the other case there is merely a personal liability.

38. According to the law as administered by the Court of this Province, a member of a joint family cannot validly mortgage his undivided share in ancestral estate held in coparcenary on his own private account without the consent of the co-sharers in that estate, Balgobind Das v. Narain Lal 15 A. 339, (P C.); L.R. 20 I.A. 116. It follows from this that if the mortgage in suit is not binding in toto, it is not binding as to the mortgagor's share in the mortgaged property.

39. I have examined the later decisions of the Judicial Committee with a view to ascertain if there be any pronouncement which, supports the broad interpretations of the ruling in Suraj Bunsi Koer's case 5 C. 148; 4 C.L.R. 226; L.R. 6 I.A. 88., for which the plaintiffs respondents contend, but without success. On the contrary, their Lordships express their indisposition to extend the doctrine of the alienability by a co-parcener even of his undivided share without the consent of his cosharers beyond the decided cases. In Lakshman Dada Naik v. Ram Chandra Dada Naik 5 B. 48, (P.C.);.L.R. 7 I.A. 181; 7 0. L.R., 320 Sir James W. Colvile, who delivered the judgment in Suraj Bunsi Koer's case 5 C. 148; 4 C.L.R. 226; L.R. 6 I.A. 88., referring to the principle that the co-parcener's power of alienation is founded on his right to a partition, pointed out that Suraj Bunsi Koer's case 5 C. 148; 4 C.L.R. 226; L.R. 6 I.A. 88. was one of an execution against a mortgaged share and was decided on the ground that the proceedings had then gone so far in the life-time of the judgment-debtor (in report 'mortgagor') as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers." He then remarks: "Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share without the consent of his co-sharers beyond the decided cases." In the case of Kameswar Pershad v. Sun Bahadur Singh 6 M.I.A. 393; 18 W.R. 81., it was held by the Judicial Committee that in transactions such as the alienation by a Hindu widow of her estate of inheritance derived from her husband, a creditor seeking to enforce a charge on such an estate is bound at least to show the nature of the transaction and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the reognised necessities. Sir James W. Colvile again commented upon the decision in Hunooman Pershad Pandey's case 6 M.I.A. 393; 18 W.R. 81. and the law as therein laid

down, and then observed: "It appears to their Lordships that such being the law, any creditor, who comes into Court to enforce a right similar to that which is claimed in the present suit, is bound at least to show the nature of the transaction and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognized necessities". This was, it will be observed, the case of a mortgage. In the case of Madho Parshad v. Mehrban Singh 18 C. 157,(P.C.); L.R. 17 I.A. 194, in which it was held that where a Hindu without the consent of his coparcener had sold his undivided share in the family estate for his own benefit and received the purchase money to his own use; his surviving co-parcener was entitled on his death, under the Mitakshara law, by survivorship to recover the share so sold from the purchaser, and that the latter had no equity or charge thereon against such survivor in respect of his purchase money. Lord Watson, who delivered the judgment of their Lordships, commented upon the decision in Suraj Bunsi Koer's case 5 C. 148; 4 C.L.R. 226; L.R. 6 I.A. 88. and pointed out that the right of the purchaser in that case was affirmed on the ground that before the death of the judgment-debtor execution proceedings had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the joint estate to the extent of the undivided interest of the deceased, which could not be defeated by that event, but at the same time observed that if no proceedings had been taken to enforce the debt in the life-time of the judgment-debtor, his interest in the property would have survived on his death to his sons so that it could not be afterwards reached by the creditor in their hands." Then again in the case of Balgobind Das v. Narain Lal 15 A. 339, (P C.); L.R. 20 I.A. 116., it was held to be the settled law of the Mitakshara, as administered in Bengal and the North-Western Provinces, that a Hindu cannot, without the consent of his co-parceners, sell or mortgage his undivided share in ancestral estate for his own benefit. Sir Richard Couch in delivering judgment approved of the passage in the judgment in the case of Lakshman Dada Naik v. Ram Chandra Dada Naik 5 B. 48, (P.C.);.L.R. 7 I.A. 181; 7 C.L.R., 320, which I have quoted, and also the judgment in Madho Prasad v. Mehrban Singh 18 C. 157, (P.C.); L.R. 17 I.A. 194. In regard to the judgment in the last mentioned case, he observes: "In the judgment delivered by Lord Watson it is said that the counsel for the appellant conceded in argument that the rules of the Mitakshara law, which prevail in the Courts of Bengal, are applicable in Oudh to the alienation of interests in a joint family estate, and that he likewise conceded that the sales being without the consent of the co-parcener, and not justified by legal necessity, were according to that law invalid: but he maintained that the transactions being real and the prices actually paid, the respondent could only recover the shares sold subject to an equitable charge in the appellant's favour for the purchase money. It was held that it might have been quite consistent with equitable principles to refuse to the seller restitution of the interest which he sold, except on condition of its being made at once available for the repayment of the price which he received but that the respondent who took by survivorship was not affected by any equity of that kind and that an equity which might have been enforced against the seller's interest whilst it existed could not be made to affect that interest when it has passed to a surviving co-parcener except by repealing the rule of the Mitakshara law." In view of these rulings it seems to me impossible to hold that their Lordships have extended the principle which underlies the decision in Suraj Bunsi Koer's case 5 C. 148; 4 C.L.R. 226; L.R. 6 I.A. 88. On the contrary, they seem to me to have guarded themselves against the suggestion that the clear and explicit rule of the Mitakshara, which precludes the alienability of immoveable property by a co-parcener without the consent of his co-parceners, had been repealed or might be treated as a dead letter.

40. For the foregoing reasons I am of opinion that the Court below was wrong in treating the ruling in Jamna v. Nain Sukh 9 A. 493.as no longer binding and that the appeal should, therefore, be allowed as regards the first plea.

Knox, J.

41. The question submitted to us for our consideration in this second appeal is whether a father, the head and managing member of a Hindu family, can mortgage the family property and exclude his sons from questioning the transaction when it is not proved that the mortgage was executed on account of an antecedent debt.

42. It has been found, and we must accept the finding, that A. 459. there is no evidence to show that the money which formed the consideration of the mortgage was borrowed or applied to the discharge of any antecedent debts; 9 A. 493. the appellants who are sons and grandsons of the mortgagor, who died before the institution of the suit, have not alleged, much less proved, that the debt secured by the mortgage was tainted with immorality.

43. The text of Hindu Law which bears upon the question is to be found in the Law of Inheritance in the Mitakshara, Chapter I, Section 1, paras. 27, 28 and 29. I give the translation as it occurs in the edition by Mr. Girish Chandra Tarkalankar (1870). So far as I can judge the translation is accurate, sufficiently accurate, at any rate, for the present purpose and so far as I can find, the text under consideration with one exception has not been doubted. That exception is the passage in para. 27 which runs no gift or sale should be made." The words nadanan no chivikriah used in the passage are read by Raghunandana as vritti lopo vigarhita. According to him the correct reading in place of no gift or sale should be made" is the cutting off or the expenditure of the means of livelihood is censured." The only interest that attaches to this reading is that apparently any tendency there has been to question the text is in the direction of widening, not of narrowing its meaning.

44. The passage there runs as follows:

27. Therefore, it is a settled point that property in the paternal or ancestral estate is by birth, (although) the father have independent power in the disposal of effects other than immoveables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth, but he is subject to the control of his sons and the rest, in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained, though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support: no gift or sale should, therefore, be made.

28. An exception to it follows: Even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress, for the sake of the family, and especially for pious purposes.

29. The meaning of that text is this:

While the sons and grandsons are minors, and incapable of giving their consent to gift and the like: or while brothers are so and continue unseparated: even one person, who is capable, may conclude a gift, hypothecation or sale, of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.

45. So far as this passage can be any guide, it lays down--I. The broad rule that though the power of a father in respect of movable property is unlimited, in the case of immoveable property it is limited, and he is with regard to it subject to the control of his sons. II. An exception to that rule, viz. that even a single owner may conclude a donation, mortgage or sale of immoveable property under certain stated circumstances.

46. There is no longer any question that it is a duty of a son to pay the debts contracted by his father unless they are tainted with immorality. This text of the Mitakshara, Chapter VI, 47, is almost too well-known to need reproduction: A son is not bound to pay, in this world, his father's debts if they are incurred for spirituous liquor, or for gratification of lust, or in gambling, nor is he bound to pay any unpaid fines, or tolls, or idle gifts."

47. Viewed from the stand-point of Hindu text-writers it seems obvious that a creditor, who claims that he has lent money to the father of a Hindu family and then presses that father to charge immoveable property with that debt, has to follow the general rule and principle which applies to the proof of exceptions to a rule. On him lies the burden of proving that the father was by reason of a pious purpose empowered to conclude a mortgage. If he fails, his claim to enforce the charge fails. This principle is entirely in accord with the principles laid down for evidence in Hindu Law. Cf. Mitakshara on the Administration of Justice, Chapter I, Section 6. Moreover, the transaction, though secured by a mortgage, is virtually a debt of a ready money character creating no moral obligation--Katyayna, 1 Dig. 299--and it is a well-known and constantly recurring principle of Hindu Law that moral obligations take precedence of legal rights.

48. I do not propose to deal with the difficulties that have sprung from the case-law that has risen round these texts. I have had the advantage of reading and carefully considering the exhaustive judgment of the learned Chief Justice on this point and I can add nothing to it with advantage. I would, therefore, quoad the first plea, allow the appeal and set aside the decrees of both the Courts below.

Banerji, J.

49. This appeal arises out of a suit for the enforcement of a simple mortgage by sale of the mortgaged property. The mortgage was made by one Ram Narain Singh in favour of Ram Narayan Kalwar and the property mortgaged is the joint ancestral property of the family. Both the mortgagor and the mortgagee are dead. The plaintiffs are the son and the grandson of the mortgagee. The defendants are the sons and grandsons of the mortgagor. The suit was defended by some only of the

defendants who denied the mortgage and urged that even if it was made by their ancestor it was not for a family necessity and was not, therefore, binding on them and their interests in the mortgaged property. The Court below has found, in concurrence with the Court of first instance, that the mortgage was executed by the defendant's ancestor for valuable consideration, that it was not proved that the money borrowed had been, applied to the payment of an antecedent debt, that it had not been alleged or proved that the debt secured by the mortgage was tainted with immorality. Accordingly a decree has been passed for sale of the mortgaged property. A question of limitation was raised, but the lower appellate Court did not try it in view of the conclusion at which it had arrived. From this decree the present appeal has been preferred and the two pleas set forth in the memorandum of appeal are: (1) the mortgage being not one for payment of an antecedent debt nor for family necessity was no binding on the appellants," and (2) the claim based on the pious duty of sons to pay their father's debt was barred by time."

50. Upon the findings of the Court below the position is this. The father and manager of a joint Hindu family consisting of father, sons and grandsons, contracts a debt for such purposes as would make it the pious duty of the sons to pay the debt and, as collateral security for it, mortgages joint ancestral property. The question is, can such a mortgage be enforced against the interests of the sons in the mortgaged property unless the mortgagee can show that the debt was incurred for family necessity? The question is really one of the burden of proof, that is, whether it is for the mortgagee to prove affirmatively that the loan was incurred for the necessities of the family or whether the sons must prove, in order to avoid liability for the debt, that it is tainted with immorality.

51. In my judgment, both upon principle and upon authorities, the onus is on the sons. The following propositions may be regarded as established beyond controversy:

(1) It is the pious duty of a Hindu son to pay his father's debt if not tainted with immorality.

(2) In the case of a personal debt of the father, the sons are liable, if they cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge"; and it is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family." (See the Full Bench case of Karan Singh v. Bhup Singh (13)). For the realization of such a debt the joint ancestral property of the family is liable to be sold by auction and the burden of proof is solely on the son.

(3). If a mortgage is made by the father to pay an antecedent debt, or if part of the consideration for such a mortgage is an antecedent debt duo to the mortgagee himself, the mortgage may be enforced against the son even in the life-time of the father. The onus in such a case is on the son to prove that the debt was of such a nature that it was not his pious duty to pay it. This was held by the Full Bench of this Court in Badri Prasad v. Madan Lal 15 A.75, (F.B.) (4). If joint ancestral property has been sold by the father for the payment of his debt, or if it has been sold in execution of a decree for a mortgage debt, or a simple debt of the father, the son cannot recover the property unless he can show that the debt was contracted for immoral purposes. This has been held by their Lordships of the Privy Council in numerous cases commencing with the case of Girdharee Lall v. Kantoo Lall (14).

(5). Where a son comes into Court to assail a mortgage made by his father or a decree passed against his father upon the mortgage or a sale threatened in execution of such decree, the onus is on the son to establish that the debt which he desires to be exempted from paying was of such a character that he would not be under a pious obligation to discharge it. (See Beni Madho v. Basdeo Patak 12 A. 99 approved in subsequent cases). What we have to consider is whether the burden of proof is shifted where a creditor of the father seeks as plaintiff to recover his debt by enforcement of the mortgage security given to him by the father.

52. The liability of a son to pay his father's debt arises as pointed out by Mr. Mayne (Hindu Law, Section 303, 7th Ed.): "from the moral and religious obligation to rescue him from the penalties arising from the non-payment of his debts." This obligation has been held by their Lordships of the Privy Council to be a legal duty. This legal duty attaches to all debts of the father, not tainted with immorality, and by reason of it all debts of the father not so tainted are from their very inception binding on his sons. A debt secured by a mortgage is as much a debt of the father as an unsecured debt, and so far as the liability of the son is concerned, 1 can find no difference in principle between the two classes of debts. In both cases the money borrowed is the debt of the father. The mortgage is only collateral security for the payment of the money and provides a means for the realization of it. If the debt is binding on the son, a mortgage to secure that debt must equally be binding. It is conceded that a mortgage made for an antecedent debt of the father is binding on the son oven when the antecedent debt was due to the same creditor. I fail to see on what principles it can be held that there is a distinction between such a mortgage and a mortgage made for a loan incurred on the date of the mortgage. It is contended on behalf of the appellants that the Mitakshara, in Chapter I, Section 1, paragraphs 27, 28 and 29, prohibits a mortgage by the father except during a season of distress, for the sake of the family, and that an antecedent debt being a 'distress" of the family, a mortgage made for an antecedent debt comes within the exception. As regards these paragraphs 1 may, in the first place, observe that they must be read as qualified by the obligation of a son to pay his father's debts. Further, it seems to me that an antecedent debt incurred by the father himself cannot be deemed to be a distress" of the family any more than a debt incurred at the time.

53. In the case of an antecedent debt it is not necessary that it should have been incurred for the benefit of the family. Mr. Dillon, the learned Counsel for the appellants, went the length of conceding that even if the antecedent debt was an immoral debt, a mortgage for such a debt is binding on the son. I do not deem it necessary for the purposes of this case to express any opinion on the point. If, however, a mortgage for a debt previously incurred by the father but not for the necessities of the family, is binding on the son, there appears to be no reason why a mortgage made for a loan incurred at the time should not be equally binding if the purpose for which the loan was taken was not immoral. On this point. I am in full accord with the opinion expressed by Boddam, J., and that eminent Hindu Lawyer, Bhashyam Ayyangar, J., in Chidambara Mudaliar v. Koothaperumal 27 M. 326. The learned Judges say: In the case of a mortgage debt incurred by the father the debt is the primary obligation and is binding upon the son if it is not for an illegal or immoral purpose, and the mortgage is only a collateral security for the discharge of the debt either by the receipt of the rents and profits by the mortgagee or by causing it to be sold after the debt has become payable. If the debt is binding upon the son, the discharge of the debt, either by making a usufructuary mortgage or by enforcing the security by sale, is equally binding upon, the son,

inasmuch as he is thereby exonerated from liability to discharge the debt of the father by means of other joint family property. If a sale of joint family property made by the father for the purpose of discharging his debt which is not illegal or immoral is binding, it is difficult to see on what principle it can be held that a mortgage executed by the father as security for the discharge of the debt will not bind the son simply because the debt was not anterior to the mortgage but was incurred at the same time as the mortgage and the mortgage was executed as security therefor. On principle it is difficult to make any distinction between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son and the enforcement of the security exonerates the son from the burden of the father's debt".

54. It was strenuously contended by the learned Counsel for the appellants that, as it had been held by this Court that a sale by the father for consideration paid at the time of the sale and not for an antecedent debt was not binding on the son, the same principle applied to the case of a mortgage. In support of this contention the ruling in Manbahal Rai v. Gopal Misra (1901) 21 A.W.N. 57., to which I was a party, was relied upon. In my opinion the case of a mortgage is distinguishable from that of a sale. Where a sale is not made by the father for an antecedent debt or for the payment of an antecedent debt, no question of the pious liability of the son for his father's debts arises. The amount of consideration paid down at the time of the sale is not a debt of the father though it may, in some cases, subsequently become a debt of the father. Therefore, a sale by the father must, in order to bind the son, be a sale for the necessities of the family or sale for a consideration which consists of an antecedent debt of the father or of money received for the payment of the father's debts, provided of course that the debt is not tainted with immorality. In the case of a mortgage, however, there is primarily a debt incurred by the father and the mortgage is only, as I have said above, collateral security for the debt. By reason of the son's pious duty he is liable for the father's debt and, therefore, for the mortgage made to ensure the recovery of the debt. In my judgment the case of a mortgage is not similar to that of a sale and the argument based on the analogy of a sale is fallacious. The distinction in this respect between a mortgage and a sale is often overlooked.

55. The view I have taken above is not only consistent with Hindu Law and legal principles but is also supported by authority.

56. In the well-known case of Hanuoman, Pershad Pandey v. Mussamut Babooee Hundraj Koonwaree 6 M.I.A. 393; 18 W.R. 81., Lord Justice Knight Bruce, in delivering the judgment of their Lordships, said (at p. 421): Though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt by the father. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu Law, 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." In the case of Girdharee Lall v. Kantoo Lall L.R. 1 I.A.,321;22 W.R. 56; 14 B.L.R. 187, their Lordships, after quoting the above observations, remarked: That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property in which the son, as the son of his father, acquires an interest by birth, is liable to the

father's debts. The rule is, as stated by Lord Justice Knight Bruce, 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'." Their Lordships then proceeded to consider what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the ancestral property.

57. In Suraj Bunn Koer v. Sheo Persad Singh 5 C. 148; 4 C.L.R. 226; L.R. 6 I.A. 88., their Lordships formulated the propositions which were deduced from the earlier rulings and stated the first of these propositions in the following terms:Where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover the property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted." Relying upon the words antecedent debt," as mentioned in the judgment of their Lordships, it has been contended in this case, and held in some cases, that a mortgage is not binding on the sons unless it was made for an antecedent debt. In my humble judgment it would be placing too strained a meaning on the decision of their Lordships to hold that they intended to lay down the general rule that in every case of a transfer by the father, whether it was a sale or a mortgage, the transfer would not be binding on the son unless it was made for an antecedent debt. In the particular case before their Lordships a sale had taken place for an antecedent debt and, therefore, in formulating the rules applicable to such a sale, reference seems to have been made to an antecedent debt. As I have pointed out above, a sale by the father not made for a family necessity would not be binding on the sons unless it was made for an antecedent debt which was binding on them by reason of their pious liability to pay their father's debts, In the absence of an antecedent debt the consideration for the sale cannot itself be deemed to be a debt of the father and no question of pious obligation would arise. It was, therefore, necessary in the cases before the Judicial Committee, to refer to antecedent debts. But I fail to find anything in their Lordships' judgment to show that they held or intended to hold that in the case of a mortgage too it must have been made by the father for an antecedent debt.

58. The most important decision of the Privy Council, which, in my opinion, concludes the matter, is that in the case of Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1. After referring to the fact that the decisions either in India or in the Privy Council were not in harmony, Lord Hobhouse, in delivering the judgment of their Lordships, laid down the law in the following terms, apparently with a view to settle all controversy in future: Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against the creditor's remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think: that there is now no conflict of authority." That by the above pronouncement Lord Hobhouse intended to decide the matter conclusively and to bring into harmony all conflicting rulings, is manifest from the remarks made by him in the later case of Kahabir Pershad v. Maheswar Nath Sahai 17 C. 584, (P.C.); L.R. 17 I.A. 11, wherein he expressed the hope that recent decisions of the Committee would lessen the difficulties which had been felt before. The words or against his creditors' remedies for their debts"

do not, in my opinion, leave any room for doubt. What are a creditor's remedies for his debt"? His remedies are a suit, a decree in the suit and a sale in pursuance of the decree. In the case of a mortgage his remedy by decree is a decree for the sale of the mortgaged property. According to their Lordships, the sons cannot set up their rights against the remedies to which I have referred, if the debts are not tainted with immorality. There is no reason to assume that their Lordships confined their remarks to the remedies of an unsecured creditor and did not intend them to apply to secure creditors also. In my judgment the words quoted above contemplate every one of the remedies open to every class of creditors whose debts are not of an immoral nature. This is further evident from the following observations of their Lordships: "If his (the debtor's) debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit." It would surely be putting too limited a meaning on the words of their Lordships to hold that these remarks do not apply to the case of a mortgagee. Upon the authority of this ruling of the Privy Council it is no longer open to a son to resist the claim of a mortgagee from his father, except on the ground that the debt was not incurred at all or that it is tainted with immorality or that it is time-barred and it is not incumbent on the mortgagee to prove that the debt was contracted for the benefit of the family. In view of this ruling of their Lordships the dictum contained in the decision in Kameswar Pershad v. Run Bahadur Singh 6 C. 843, (P.C.); 8 C.L.R. 361; L.R. 8 I, A. 8., on which Mr. Gokul Prasad relied, cannot be followed. If it be assumed that the question now before us is not concluded by the ruling in Nanomi Babuasin's case 13 C. 21 (P.C.); L.R. 13 I.A. 1. that question has never yet been decided by their Lordships in any other case. It is, therefore, open to us to consider it on its own merits. The question did not arise, and was not decided, in the case of Suraj Bunsi Kuer 5 C. 148; 4 C.L.R. 226; L.R. 6 I.A. 88. which was a case of a Sale in execution of a decree passed upon a mortgage given by the father for an antecedent debt. And I am not aware of any other ruling of the Privy Council on the subject.

59. Turning now to the decisions of the different High. Courts in this country, 1 shall first consider those of our own Court.

60. In Sitaram v. Zalim Singh 8 A. 231., a mortgagee from the father and head of a joint Hindu family sued the mortgagor for sale of the joint ancestral property mortgaged by him. During the pendency of the suit the mortgagor died and his son was brought on the record as his legal representative. It was found that the money was not borrowed to meet any family necessity and on this ground the Court below made a decree for the sale of the father's interests only and exempted the share of the son. Petheram, C.J., and Tyrrell, J., held, following the case of Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1., that the mortgagee was entitled to a decree for the sale of the whole of the joint ancestral property, it not being proved that the loan was taken for immoral purposes. The decree of the Court below was set aside and a decree was made enforcing the mortgage against the entire family property.

61. In Kishan Lal v. Garuddhwaja Prasad Singh 21 A. 238, the Court below found that the mortgagor had taken the loan for his own private purposes and dismissed the suit against his minor son. Blair and Burkitt, JJ., held that this was not a sufficient reason for exonerating the son from the pious duty of paying his father's debt and made a decree for sale of the son's interests comprised in the mortgage. Burkitt, J., who delivered the judgment of the Court, said: "It is now settled law in this

Court since the case of Badri Prasad v. Madan Lal 15 A.75,(F.B.), that a son can be sued jointly with his father to recover a debt contracted by the father, if the debt had not been contracted for purposes such as would exonerate the son from the pious duty of paying his father's debt."

62. In Badri Prasad v. Madan Lal 15 A.75,(F.B.), which is a decision of a Full Bench of the whole Court, the father mortgaged joint ancestral property, the consideration for the mortgage being some money advanced at the time and some personal debts due by the father to the mortgagee himself by which the family did not benefit, but which were not tainted with immorality. It was held that the matter was concluded by the decision of their Lordships of the Privy Council in Nanomi Babuasin's case 13 C. 21 (P.C.); L.R. 13 I.A. 1. and that the son's interests were liable under the mortgage. A decree was made for sale of the mortgaged property including the interests of the sons, in enforcement of the mortgage. In considering the effect of this decision the learned Judges, who decided the case of Maharaj Singh v. Balwant Singh 28 A. 508., to which I shall refer hereafter, expressed the opinion that according to this decision "no obligation lay on the plaintiff to prove that any inquiry was made by the lenders as to the necessity of the loans when money was advanced by them and also the burden of proving that the debts were tainted with immorality lay upon the son."

63. In Debi Dat v. Jadu Rai 24 A. 459., Chail Behari Lal v. Gulzari Mal 6 A.L., J.R., 133; 1 T.C. 478, Kallu v. Fatch 1. A.L., J.R., 316 and Babu Singh v. Behari Lal 30 A. 156., it was held that it is not necessary for the mortgagee to prove that the debt secured by the mortgage was incurred for the benefit of the family and that the burden of proof lies on the son and not on the mortgagee, plaintiff. To the first two of these cases my brother Aikman was a party. In Maharaj Singh v. Balwant Singh 28 A. 508., the question was not decided but the learned Judges (Stanley, C.J., and Burkitt, J.,) observed in passing" that in their opinion it would be not unreasonable to require proof on the part of the creditor that before he entered into the transaction he at least made such reasonable inquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family." (P. 541.)

64. The only case in which the point was decided and the contrary view was held in this Court is that of Jamna v. Nain Sukh 9 A. 493. The reasoning by which the judgment in that case is supported was criticised and dissented from, by the Bombay High Court in Chintamanrav Mehendale v. Kashinath 14 B. 320. With much of that criticism I agree. For the reasons I have already stated, I am, with great respect, unable to concur in this ruling. Furthermore, one of the cases from which the rule of law laid down in that case was deduced, is that of Lal Singh v. Deo Narain Singh 8 A. 279., decided by Straight and Tyrrell, JJ. With reference to that case the same learned Judges said, in the later case of Bhawani Bakhsh v. Ramdai 13 A. 216; that upon further consideration they had come to the conclusion that so far as it laid down that the onus rested upon the creditor," the case had been wrongly decided, having regard to the decisions of the Privy Council. I see no reason to alter the opinion expressed by me in other cases that the ruling in Jamna v. Nain Sukh 9 A. 493. can no longer be regarded as good law.

65. I may mention that since the hearing of this appeal I have come across an unreported case decided by the learned Chief Justice and Mr. Justice Burkitt, the principle of which supports the view taken above. It is the case of Lala Subba Ram v. Ram Singh, F.A. No. 70 of 1905, decided on the

20th of April 1907, after the decision of the case of Maharaj Singh v. Balwant Singh 28 A. 508. The facts of the case are set forth in the judgment of those learned Judges in Ram Singh v. Sobha Ram 29 A. 544, which was a cross appeal from the same decree. The claim was to recover the amount due on a mortgage of the 24th August, 1893, executed by Badan Singh, the father of the defendants, and for sale of the 3/4th interests of the defendants in the mortgaged property. The amount secured by the mortgage was Rs. 2,000 of which Its. 900 had been paid in cash on the date of the bond. The Subordinate Judge dismissed the claim for the amount of the bond on the finding that the debt was incurred for purposes of immorality and also because the bond was not executed by Badan Singh on account of any legal necessity or for the benefit of the joint family. "On appeal by the plaintiff the learned Chief Justice and Mr. Justice Burkitt said in their judgment: We do not propose to consider, was the debt contracted for any legal necessity or for the benefit of the joint family. These matters appear to us to be immaterial." (The italics are mine). The learned Judges then proceeded to consider the evidence as to the nature of the debts and came to the conclusion that the defendants had failed to prove that it was tainted with immorality. They accordingly made a decree for sale of the interests of the sons in the mortgaged property, it is clear from the judgment that the learned Judges were of opinion that the question of necessity did not arise in a suit by the mortgagee against the sons and was immaterial for the purposes of the suit. The necessary inference is that the learned Judges considered that the burden did not lie on the plaintiff in such a suit to prove necessity.

66. It is thus manifest that with the exception of the solitary case of Jamna v. Naik Sukh 9 A. 493., the rulings of this Court so far from bearing out the contention of the appellants are against it.

67. The decisions of the Bombay High Court fully support my view. In Chintamanrav Mehendale v. Kashinath 14 B. 320 Sargent, C.J., and Nanabhai Haridas, J., held, in concurrence with West and Birdwood, JJ., that the effect of the decisions of the Privy Council in Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1. was that the father's disposition of the family estate is made to affect the son's as well as the father's interest, except so far as the son can establish that the voluntary disposal was made under circumstances which deprived the father of the disposing power. "They further held that this view of the power of the father to bind the son's interest in the family estate, except in certain special cases, necessarily throws the onus on the sons of defeating his creditor's remedies against the ancestral estate by establishing the existence of those circumstances." Following this ruling it was held by Parsons and Ranade, JJ., in Ramchandra v. Fakirappa 2 Bom. L.R. 450., that ancestral property is available for the payment of the debt of the father, unless the son can prove that the debt was contacted for an immoral or illegal purpose." The suit in that case was brought by a mortgagee to enforce two mortgage bonds against the father, the mortgagor, and his sons. The District Judge dismissed the claim in respect of one of the bonds on the ground that it had not been proved to be for family necessities. The High Court reversed the decision of the Judge and decreed the claim for sale.

68. The decisions of the Madras High Court are conflicting. In Chidambara Mudaliar v. Koothaperumal 27 M. 326., to which I have already referred, Boddam and Bhashyam Ayyangar, JJ., held that a mortgage made by the father for a debt then incurred is binding on the son's interest if not tainted with immorality. This ruling was reversed by a Full Bench of three Judges--White, C.J., and Subrahmania Ayyar and Davis, JJ.,--in Venkaiaranunaya, Pantulu v. Venkataranutna Doss

Pantulu 27 M. 326. The learned Judges said that having regard to the word "antecedent," as used in the judgment of the Privy Council in Suraj Bunsi, Koer's case, 5 C. 148; 4 C.L.R. 226; L.R. 6 I.A. 88. they were unable to adopt the view taken in Chidamabara Mudaliar v. Koothaperumal 27 M. 326., "although on principle they might be disposed to do so." For the reasons I have given in an earlier part of this judgment I feel myself unable to take the same view of the effect of the decision in Suraj Bunsi Koer's case, 5 C. 148; 4 C.L.R. 226; L.R. 6 I.A. 88. as the learned Judges of the Full Bench.

69. As for the rulings of the Calcutta High. Court they also are not in harmony. The first case on the point is that of Luchmun Dass v. Giridhur Chowdhry 5 C. 855, (F.B.), decided by a Full Bench. In that case it was held that mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property. "In Gunga Prosad v. Ajudhia Pershad Singh 8 C. 131, however, Mitter and Maclean, JJ., made a decree for the sale of the mortgaged property both against the father and the son. In Khalilul Rahman v. Gobind Pershad 20 C. 328., the Full Bench ruling referred to above was followed and a decree made in the terms laid down in that ruling. The same was the case in Surja Prasad v. Golab Chand 27 C. 762., decided by Ghose and Harrington, JJ. These cases were dissented from by Brett and Sharffuddin, JJ., in Maheswar Dutt Tewari v. Kishun Singh 34 C. 184, and it was held that a mortgage made by father on receipt of a loan, which, the sons failed to prove to have been taken for immoral purposes, was binding on the son. The learned Judges considered that in view of the decisions of the Privy Council in Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1., and Bhagbut Pershad Singh v. Girja Koer 15 C. 717, the law laid down by the Full Bench in Luchmun Dass v. Giridhur Chowdhry 27 C. 762. could not be held to be binding. All these decisions were discussed by Mookerjee and Holmwood, JJ., in Kishun Pershad Chowdhry v. Tipan Pershad Singh 34 C. 735., and the learned Judges held that the Full Bench ruling mentioned above was still binding on the Court, apparently on the ground that it had not been expressly overruled by the Privy Council. They were of opinion that as the decision of the Full Bench was binding on them it was unnecessary to inquire whether it is well founded on reason and principle," but they added that the matter, if it were res Integra, might not be free from considerable doubt and difficulty. "With regard to these rulings I may quote the following apposite remarks of Mr. J.C. Ghose in his Principles of Hindu Law, 2nd edition, p.445;--"The rule that if the debt is antecedent, say by a day, to the mortgage, it binds the estate but that it does not do so if the consideration for the mortgage is paid at the time, is certainly based on the earlier rulings of our Courts, but it is difficult to say that it is based on reason or on any principle of law The distinction is so fine that for practical purposes it might have been disregarded. The rule of Hindu Law is clear that the sons cannot even take ancestral property without paying the father's debts, for on partition the father's debts, which are not improper, should be first paid."

70. For the reasons stated above the conclusions at which I have arrived are that as regards a Hindu son's liability to pay his father's debt not tainted with immorality, there is no distinction in principle between a debt secured by a mortgage and an unsecured debt, that unless the debt is of such a nature that it is not the pious duty of the son to pay it, a mortgage of joint ancestral property made by the father is binding on, and enforceable against, the son and his interest in the property,

whether the loan secured by the mortgage was incurred at the time of the mortgage or had been taken at some date anterior to that of the mortgage; and that in a suit brought against the son to enforce the mortgage the onus is not on the plaintiff to prove that the debt was incurred for the benefit of the family but that it is for the son to prove that having regard to the nature of the debt it was not his pious duty to discharge it.

71. I would, therefore, dismiss the appeal.

Aikman, J.

72. The question which has to be decided by this Full Bench is one upon which great conflict of opinion has prevailed. This conflict of opinion has long existed, so far back as 1885. Lord Hobhouse in delivering judgment in the case Nanomi Babuasin v. Modhun Mohuu 13 C. 21 (P.C.); L.R. 13 I.A.1., said "it is impossible to say that the decisions on the subject are on all points in harmony either here or in India." The numerous cases of more recent date cited by the learned Counsel on each side in their able argument before us, show that great divergence of opinion still prevails. I do not propose to enter on a review of the mass of authorities cited to us. The most important of these have been set forth by the learned Chief Justice in his judgment, which I have had the advantage of reading. The question we have to decide is whether a mortgage of joint family property executed by a Hindu father as security for money advanced to him can be enforced as a mortgage after his death against his sons and grandsons, there being on the one hand no suggestion that the mortgage debt was tainted with immorality, whilst on the other is nothing to show that the money was taken either to discharge an antecedent debt, or to meet family necessities.

73. In deciding this question we have to bear in mind two great principles of Hindu Law, one being that sons by birth have an equal ownership with the father in respect of ancestral immoveable property; the other that so long as a father's debts are not tainted with immorality, sons are under a pious obligation to discharge them. The question is whether the liability of a son for his father's debts overrides the principle of the son's co-parcenary rights to such an extent as to enable a Hindu father, so long as in incurring obligations he avoids the taint of immorality, to deal with the joint family property as if he were the full owner of the property in which Hindu Law declares he has only a limited interest. In my opinion the question must be answered in the negative. A son may be liable to discharge his father's debts, and the father's creditor by taking proper steps may be able to sell up the son's interests in the family property which has passed to the son on his father's death. But in my judgment, it does not follow from this that, unless under special circumstances which are not shown to exist in this case, a Hindu father can make a mortgage of his son's interests in the family property which can be enforced against the sons as a mortgage after the father's death.

74. It is now settled by decisions of the Privy Council that a father can make a mortgage of the joint family estate in order to discharge an antecedent debt, and that such a mortgage can be enforced as a mortgage against the sons. At first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt and a mortgage for a debt incurred for the first time when the mortgage is executed. But if the distinction is observed, it will tend to preserve the property in the family as it will render it more difficult for a Hindu father to incur debts which might ultimately

have the effect of dissipating that property.

75. In the judgment in the case referred above, Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1., there occurs the often quoted passage: Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions 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 creditor's remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think there is now no conflict of authority."

76. It will be noted that their Lordships here admit that the decisions referred to are destructive of the principle of independent co-parcenary rights which the sons undoubtedly possess.

77. In my opinion we should not go further in destroying the important principle of the sons' co-parcenary rights than we are compelled by authoritative decisions to do. We have not been referred to any decisions binding upon us as a Full Bench which compel us to hold that the plaintiffs-respondents, who have not succeeded in showing that the mortgage upon which they come into Court was either for an antecedent debt, or to raise money for the necessities of the family, can enforce their bond as a mortgage against the defendants.

78. I was a party to one of the decisions relied on by the Courts below, i.e., Debi Dat v. Jadu Rai 24 A. 459. In that case it was taken for granted that the decision of this Court in. Jamna v. Nain Sukh 9 A. 493. could no longer be considered as law. After hearing the question more fully argued, I am not prepared to adhere to the view then expressed.

79. In the present case the mortgagee took a mortgage from one whom he must be deemed, to have known to possess only a limited, interest in the property mortgaged and according to the law as laid down by the Privy Council in Kameswar Pershad, v. Run Bahadur Singh 6 C. 843, (P.C.); 8 C.L.R. 361; L.R. 8 I.A. 8.and in Jamna v. Nain Sukh, 9 A. 493., as well as the principle embodied in Section 38 of the Transfer of Property Act, it was for him to show that he had taken reasonable care to satisfy himself that circumstances existed which would justify the father in mortgaging the joint family estate in derogation of his sons' rights. This burden the plaintiffs-respondents have failed to discharge. I, therefore, concur with the learned Chief Justice in thinking that the first plea in the memorandum of appeal must succeed, and in the order proposed by him.

Richards, J.

80. This appeal arises out of a suit to realise the sum of Rs. 976 principal and interest alleged to be due on foot of a mortgage, dated the 4th of September 1883, and made by one Ram Narayan Singh in favour of one Ram Narayan Kalwar. The plaintiffs are the son and grandson of Ram Narayan Kalwar and the defendants are the sons and grandsons of Ram Narayan Singh who constituted a joint Hindu family. It was alleged in the plaint that the mortgage was executed by Ram Narayan Singh as manager of the family for the benefit thereof. In the written statement it was not admitted that the mortgage was executed by Ram Narayan Singh as manager or that the family were benefited

and it was alleged that the loan was simply the recent and personal debt of Ram Narayan Singh. It was not alleged that the money was raised for immoral purposes.

81. The Courts below have found that the mortgage was executed for good consideration. The Court of first instance found that it was not proved that the creditor made reasonable enquiries such as would satisfy a prudent lender that the money was required to pay off an antecedent debt for the legal necessities of the family. The lower Court of appeal also found that it was not proved that the money was borrowed to pay off an "antecedent" debt. On the other hand both. Courts found that the defendants had not proved that the debt was tainted with immorality. On these findings both the Courts below concurred in granting the usual decree for the sale of the mortgaged property under Section 88 of the Transfer of Property Act, 1882, hence the present appeal. The defendant's counsel in opening his argument admitted that if the plaintiffs had sued for a simple money decree they would on the findings (subject to the law of limitation) have been entitled to such a decree against the defendants and that the ancestral property and all other property acquired from Ram Narayan Singh would have been liable to be sold in execution of such a decree. Mr. Dillon also admitted that if the plaintiffs had proved that the mortgage had been made to secure a prior debt (even the prior private debt of Ram Narayan Singh himself) the mortgage would have been a good mortgage and the defendants could not have resisted the sale of the ancestral property. It is contended, however, that the plaintiffs in the present suit were not entitled to a decree for sale of the property comprised in the mortgage because they failed to prove that there was an "antecedent" debt. The plaintiffs on the other hand say that once it was proved that the mortgage was made for valuable consideration, the defendants, as sons and grandsons of Ram Narayan Singh, are liable for his debts and that the property can and should be sold under the mortgage created by him and that the only defence open to the defendants was to prove that the debt was tainted with immorality. There are two principles of Hindu Law which both plaintiffs and defendants admit to be applicable in the present case. The first principle is that no single member of a joint Hindu family can sell or mortgage the family property without the consent of the other members of the family save for legal necessity or for pious purposes. I may here say that for the purposes of this principle Ram Narayan Singh must be looked upon as simply a member of the co-parcenary body without any reference to his powers as father or manager of the family. The second principle is that if a Hindu incurs debts, his sons and grandsons are liable to pay these debts unless they are tainted with immorality. It is not surprising that the attempt to give effect to each of these principles has given rise to much difficulty and confusion. There is much conflict in the decisions not only in this Court but also in the other provinces of India and their Lordships have recognised that even in the decisions in the Privy Council there is not complete harmony. It seems to me after hearing the arguments in the present case in the course of which we were referred to a vast number of judicial decisions that it would be well if the legislature would step in and settle the matter once and for all. I confess myself quite unable to reconcile the conflict even in the more recent decisions. In the absence of authority I should feel much inclined to hold that where a plaintiff claims under a deed executed by a member of a joint family alienating absolutely or partially (that is by lease or mortgage) the family property, the onus should lie upon him of showing the existence of circumstances which alone under Hindu Law would justify the alienation, that is to say "legal necessity" or a pious purpose. In cases where the alienation was made to meet an old or what might be called an "ancestral" debt, I think that the Court would be justified in holding that proof of this fact would be at least prima facie sufficient evidence of legal necessity.

Again in the absence of authority I should also be inclined to hold that under no circumstances could a member of a joint family alienate (wholly or partially) the family property for his own private debt whether antecedent or otherwise. The creditor could no doubt sue the sons or grandsons and obtain a simple money decree and sell the property in execution but he would not acquire the priority and other rights that a mortgage gives. Were it possible so to hold it seems to me that effect could be given in a measure at least to the two admitted principles of Hindu Law stated above. It is, however, impossible, having regard, to the ruling of their Lordships in the case of Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1., to hold that under all circumstances it is necessary for the creditor to prove legal necessity. At page 35 of the report of the case of Nanomi Babuasin v. Modhun Mohun 13 C. 21 (P.C.); L.R. 13 I.A. 1. their Lordships say: "Destructive as it may be of the principle of independent co-parcenary rights in the sons the decisions have for sometime established the principle that the sons can not set up their rights against the father's alienation for an antecedent debt or against his creditors' remedies for their debts if not tainted with immorality." Unfortunately it is not very clear what their Lordships meant by the expression "antecedent debt" or creditors' remedies for their debts." Possibly their Lordships meant by antecedent debts" ancestral debts and by "creditors' remedies for the debts" their Lordships meant the creditors' remedies for such debts, i.e., ancestral debts. The meaning of the expression antecedent debt has led to a conflict of decision between this Court and the Calcutta High Court. If the expression antecedent debt is to be construed literally, it would follow that a Hindu father might incur a debt for a private purpose and a few days after, mortgage the family property to secure that debt and the mortgage would be a good mortgage according to the judgment of their Lordships and binding upon the sons and grandsons. In the case of Badri Prasad v. Madan Lal 15 A. 75, (F.B.), a mortgage of the family property was made to secure moneys advanced antecedently to a Hindu father not as manager or for family purposes, yet it was held that the mortgagee was entitled to have the property sold, the debts not being tainted with immorality. This was the unanimous decision of a Bench of six Judges of this Court and it is binding upon us. It is probable that the advances in this case were made a considerable time before the mortgage but once we hold that a private personal debt of a Hindu father can be an antecedent" debt within the meaning of the expression in their Lordships' judgment, it is very difficult to understand on what principle money advanced a year or a week before (or even simultaneously with) the mortgage is not an "antecedent" debt. In the usual form of a mortgage in this country there is a recital that the mortgagor has taken a loan from the mortgagee and an hypothecation of the property follows. A mortgage in most cases pre-supposes a debt. In the case of Suraj Bunsi Koer v. Sheo Persad Singh 5 C. 148; 4 C.L.R. 226; L.R. 6 I.A. 88. their Lordships of the Privy Council referring to the case of Muddun Thakoor v. Kantoo Loll (14) say as follows: This case then, which is a decision of this tribunal, is an authority for these propositions: 1st. That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted; and secondly, that the purchasers at an execution sale being strangers to the suit if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings." The result of these authorities seems to be that a creditor of the father of a joint Hindu family may sue the father alone, obtain a decree against him,

sell the family property and the sons (who are perhaps minors) cannot recover the property unless they prove that the debt was tainted with immorality and (where a stranger buys) the further fact that the purchaser had notice. Again the father can himself sell or mort gage the property not merely to raise money to pay off an antecedent debt, but he can also do so in consideration of or to secure an antecedent debt. I have already pointed out that in this Court, at least, we are bound to hold that the "antecedent debt" may be the private debt of the father and a debt which when it was incurred would not (according to the principles of Hindu Law) have justified the alienation of the property and this even if the sale was to the mortgagee himself. It is impossible to reconcile this state of things with the admitted principle of Hindu Law that a father as a member of the co-parcenary body has no power to alienate the family property without the consent of the other members save for legal necessity. It is contended, that the existence of a debt whether ancestral or private implies legal necessity I cannot follow this contention; it might well happen that a father possessed of ready cash or other moveable property might not with standing mortgage the family property to secure his own private debt. It seems to me that if the sons and grandsons are liable on a mortgage of the family property made to secure the private debt of the father incurred a year or two previously, and if the sons and grandsons cannot set aside a sale made in consideration of such a debt, it ought to follow that they are equally liable on a mortgage made to secure a bona fide debt although, incurred simultaneously with the making of the mortgage. It is said that such a decision destroys the principle of Hindu Law that the joint property can only be alienated for legal necessity or for a pious purpose. Perhaps this would be so if there was any principle left to destroy. In deciding in favour of the plaintiff I wish it understood that 1 only do so because I think that such a decision necessarily follows from the Full Bench ruling in Badri Prasad v. Madan Lal 15 A. 75, (F.B.). If I could see any real distinction between the private debt of a Hindu father incurred before the mortgage and a debt incurred simultaneously with the mortgage, 1 would be glad to decide in favour of the defendants which I think would be more in accord with the principle of Hindu Law that no member of a joint family can alienate save for legal necessity. I would dismiss the appeal.

82. The first question in the appeal having been determined by the majority of the Full Bench in favour of the appellants, the counsel representing the parties now ask that the appeal be referred back to the bench which referred the matter to a Full Bench for determination of the only other question remaining undecided. We order accordingly. The bench in question will finally determine the appeal including the question of costs,