Madras High Court
K.R. Subramania Aiyar And Ors. vs Sabapathi Aiyar And Anr. on 9 December, 1927
Equivalent citations: 110 Ind Cas 141, (1928) 54 MLJ 726
Author: Waller
JUDGMENT Murray Coutts Trotter, Kt., C.J.

1. My general views on the subject of the pious obligation of the son to pay such debts of his father as are vyavaharika are to be found in several reported cases. So 1 content myself on this occasion with a summary statement of those propositions which I conceive to be established law and which lead up to the exact point which we are called upon to decide.

2. So far as I am aware, the obligation is a peculiar feature of Hindu law, and is not to be found in any other organized system of jurisprudence in the world. The obligation is based on a religious doctrine which I should imagine not to be regarded as tenable now-a-days by educated Hindus, even the most orthodox. Under the old Hindu law, the liability was a personal one resting on the son and doubtless did not operate upon him until after the father's death. A series of Privy Council decisions culminating in Brij Narain v. Matigal Prasad (1923) LR 51 IA 129 ; ILR 46 A 95 : 46 MLJ 23 (PC) have both extended and limited the old law. It has been extended in that the son's share of the undivided family property is made liable in execution of a decree given against the father during the latter's lifetime; and also in that the son can be impleaded jointly with the father in order that the question whether the debt was or was not vyavaharika may be settled in the suit and not left for discussion in the execution proceedings. It has been limited in that the son's liability has for many years been confined to his share of the joint family property.

3. So far I think we are in the domain of reasonably settled law. But the question was bound to arise and did arise : What is to be the application of these principles to a case where a partition is effected between father and son after the father has contracted the suit debt, and the property consequently is divested of its character of joint family property and becomes the individual property of the father and son respectively, but where no provision is made in the partition for the discharge of the father's debt? It is said in several of the Madras cases that if the partition was a sham, a mere device to defeat those creditors who would otherwise be entitled to satisfy themselves out of the joint family property, the creditors' rights are not affected when the appropriate steps have been taken to set the partition aside. We have not been referred to any actual decision on the point, but I think we may assume that the view expressed is right for the simple reason that the effect of a determination that the act purporting to divest the property of its character as joint family property is to be set aside as a sham transaction is to declare that the property has never in truth lost its original character of joint family property. But what is to happen if, as in this case, the partition was honest in the sense defined by Ramesam, J., in Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 at 626 : 46 MLJ 590, viz., that enough property was assigned to the father to satisfy the claims of his personal creditors? The point first came to a head in Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 : 9 ML J 197, where it was held that a decree obtained against the father alone could not be executed against the share of the son which had come to him in a subsequent partition. That decision has not been questioned so far as I know and it has stood for nearly 30 years and doubtless many titles to property are now founded upon it, so that even if I thought it wrongly decided I should not venture

to disturb it. Next in order of date came the decision in Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555. At first sight it appears to be a direct authority in favour of the respondent, but it clearly is not, because the debt there was not a personal debt of the father, but a debt incurred by him as manager of a Hindu joint family and obviously binding on the joint family property as it stood at the date of the debt, whatever subsequent dispositions of it were made. No question of the pious obligation of the son did or could arise. But the case is undoubtedly significant for a further reason, viz., that the ground of distinction from Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 : 9 MLJ 197 was taken that whereas in Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 : 9 MLJ 197 the father alone was made a party to the suit, in Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555 the son had also been impleaded and judgment had gone against him.

4. Following the history of the Madras cases, we next come to Kameswaramma v. Venkatasubba Row (1914) ILR 38 M 1120 : 27 MLJ 112. There is no question that Wallis, J., in that case expressed the opinion quite definitely that a Hindu son is liable for his father's debt "to the extent of the joint family property which came to his hands at partition." Having regard to the actual decision, which on other grounds discharged the son, that was clearly an obiter dictum ; and I do not think it is worth while to speculate whether the language vised by the same learned Judge in Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519 is or is not to be regarded as showing that he had altered the view he had taken in Kameswaramma v. Venkatasubba Row (1914) ILR 38 M 1120 : 27 MLJ 112 though the language used by him at page 141 would seem very strongly to suggest that he had. That brings us to Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590 and there is no doubt that that case is a direct authority for the plaintiff, and all that we have to ask ourselves is whether we agree with it or not.

5. After the most anxious consideration, I have come to the conclusion that that case should not be followed. I have had the advantage of reading the judgment prepared by my brother Srinivasan, and he has dealt with the matter so fully, that I can give my own reasons briefly for arriving at the same conclusion. I think first that the doctrine of the pious obligation should not be extended beyond the point to which the cases have carried it. The doctrine is as I have said an illogical relic of antiquity unsuited to any but a primitive and patriarchal society. We have to apply it within the limits made binding upon us by the decisions, but I think we should refuse to go a step further. A father and his son can partition the joint family property and put an end to the father's power to alienate or charge any part of the property except that which has become his own absolutely by reason of the partition. The cases lay stress on the consideration that the creditor's right is nothing but a right to exercise such power over the property as is vested in the father. In effect, Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590 imposes a fetter on the right to partition which to my mind is unwarranted either by principle or authority. The creditor's right is surely safeguarded amply by the power of the court in a proper case to declare a purported partition whose object is to defeat creditors to be a nullity. Or to put it in another way, the right of the creditor has always been exercisable only against that which at the time he exercises it was joint family property : either because there has been no attempt to partition it, or because the attempt made is void, and unavailing therefore to divest it of its original character.

6. I therefore would answer the question propounded in the negative, but as the majority of the court is of the contrary opinion the answer of the Full Bench will be in the affirmative.

Waller, J.

7. The question referred to us is:

Whether a simple creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a bona fide partition has taken place between the father and the sons?

A further question seems to me to be considered and that is what is meant by a bona fide partition. What is meant is, I suppose, a real division of property between a father and his sons, not entered into with the dominant view of defeating the father's creditors. But, if the effect of the division is to defeat them--no provision having been made for the discharge of the father's legitimate debts out of the family assets--I do not see how such a partition can properly be described as bona fide.

8. On the question referred, two divergent views have been expressed by two Benches of this Court. One is to be found in Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590 and the other in Peda Venkanna v. Sreenivasa Deekshatulu (2). The former is directly in point and follows another decision of this Court, Ramatchandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555 which seems to me to be equally directly in point. The latter--if a case is to be considered an authority only for what it actually decides--is not exactly in point, although I concede that both of the Judges who decided it gave utterance to opinions that are very much in point. The question for our consideration is which of these two divergent views should be followed.

9. The Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519 view put shortly is this. The creditor's right to bring to sale the sons' shares for an antecedent debt is based on the father's right to sell the sons' shares for such a debt. The father's right ceases on partition and "as the creditor can only work out the father's right at the date of the suit, he can have no right if that right is lost owing to a bona fide partition." The other view is that the only difference partition makes is that a creditor cannot, after it, on a decree against the father alone, proceed against the sons' shares in execution. On principle, I can see no reason why a partition should exempt a son's share from liability for a pre-partition debt for which it was liable before partition. The creditor advances money to the father on the credit of the joint family property. Why should he be deprived of all but a fraction of his security by a transaction to which he was not a party and of which he was not aware? And what becomes of the son's pious obligation? It was binding as regards the particular debt before partition; does it cease to apply to the debt simply because there has been a partition? The obligation was, of course, at one time absolute. In the judgment of Muthuswami Aiyar, J., in Ponnappa Pillai v. Pappu-vayyangar (1881) ILR 4 M 1 at 20 (FB) occurs this passage:

In II Strange's Hindu Law (second edition), a case is cited, in which a widow was sued for a debt contracted by her husband's father, who was dead, and her husband was also dead, but left a son who was only an infant. The law officer stated that failing the son, the grandson of him. who contracted the debt was liable, consequently the infant would be liable when he came of age. In his

remarks on this case Colcbrooke observed that the grandson would not be liable, if he were separated from the family partnership. This view, it seems to me, is not consistent with the Hindu Law as expounded by the Mitakshara as to the character of the son's special obligation. Neither coparcenary relation nor the taking of assets is a pre-requisite.

The obligation was, then, originally absolute and not conditioned by the continuance of the coparcenary relation or by the taking of assets. The rigour of that rule has been relaxed to the extent of making the taking of assets a condition of its enforcement. We are now, it seems to me, being asked to relax it still further by declaring that the obligation is dependent on the continuance of the coparcenary relation. I concede that it does not attach to post-partition debts, but, as I have already observed above, I am unable to see why a partition should have the effect of detaching it from pre-partition debts. In point of fact, a proper partition does not extinguish the liability for such debts. On the contrary, it should provide for their discharge out of the joint property.

The debt of his father...must be discharged by a parcener jointly with his kinsmen when partition is made"--Katyayana.

The partition referred to in this quotation was a partition at the father's death, but though partition was subsequently allowed inter vivos, the principle has, I conceive, remained unchanged, that the sons must provide for the discharge of the father's legitimate debts. It has been suggested that the principle is sufficiently complied with if the share allotted to the father is large enough to satisfy those debts. The correct method, I think, is for the debts and the property to be shared equally. If that be so, it seems to me impossible for the sons--in a case where no provision has been made for the discharge of the father's debts at partition--to contend that they are not liable to be sued by the creditor. Had they done what was proper and provided for the discharge of those debts rate-ably among themselves, he could have sued them and they cannot take advantage of their own default in order to evade their obligation.

10. Having stated what I conceive to be the proper principle applicable, I will deal briefly with the case-law. It establishes definitely one proposition, that a creditor cannot in execution of a decree passed against a father alone on a pre-partition debt proceed against the shares allotted to the sons at partition. That--and nothing more--was laid down in Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 : 9 MLJ 197. The proposition is based, reasonably enough, on the hypothesis that, the father's power to dispose of the sons' shares having ceased, the creditor could no longer exercise that power. The District Judge--afterwards a Judge of this Court--whose decision was appealed against and confirmed, pointed out that the creditor should have made the son a party to the suit. It was not necessary for the Appellate Judges to express any opinion on that view, but they did not, at any rate, dissent from it. The question we are now concerned with arose directly in Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555 and it was decided against the son, the Bench holding that the son was liable only to the extent of the family property which had come to him under the partition.

It is said that the case is only an authority for the position that the son is liable for a family debt contracted before partition. If it decided something so self-evident and commonplace, the case

would never have been reported. It seems to me clear that it decided very much more than that. The Krishnasami Konan v. Ramaswami Aiyar case (1899) ILR 22 M 519 : 9 ML J 197 was one of a father's personal debt and Bhashyam Aiyangar, J., pointed out in the course of the argument that if the son had been made a co-defendant the property which had fallen to his share would have been liable. In the judgment, again, the point of distinction between the two cases was emphasised. "The case relied on by the appellant, Krishnasami Konan v. Ramaswami Aiyar(1899) ILR 22 M 519 : 9 MLJ 197, is clearly distinguishable. In that case the suit was brought after partition against the father alone, and the point decided was that property taken by a son under a partition effected before the suit could not be seized in execution of a decree obtained against the father alone in such a suit. The case turned on the plaintiff's rights in execution, not, as here, on the question whether the plaintiff is entitled to judgment as against the son." This is all perfectly clear. The distinction between the two cases was not that one was of a personal debt and the other of a family debt, but that one was of executing against the son's share a decree passed against the father alone and the other of a suit against both father and son. There was no question in either of the creditor's right or the son's obligation; the only question was as to the proper method of enforcing them after partition. That is how I understand the decision in Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555, and how it was understood by Wallis, J., in the next case, Kameswaramma v. Venkatasubba Row (1914) ILR 38 M 1120 : 27 MLJ 112, where he quoted and approved it. The last was, from the creditor's point of view, a most unfortunate case. The trial court found that the partition was a deliberate fraud, the share allotted to the father being disproportionately small. The first appellate court came, on somewhat inadequate grounds, to a different conclusion. The High Court had therefore to proceed on the assumption that the partition was bona fide and followed Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 : 9 MLJ 197. The son had not been made a party to the decree which was being executed after partition and his share was held not to be liable. I do not for a moment contend that this case is an authority in favour of the view that I am propounding, but it is important to note, with particular reference to the next case, that Wallis, J., quoted in his judgment, Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555, with approval. The next case, Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519 is, as I have already observed, not exactly in point, that is if a case is authority for nothing more than it decides. What it decided was this:

That a son is not liable...on a promissory not executed by his father after partition in renewal of a note executed by the father before partition.

I grant that, on the language used by the learned Judges, their decision would probably have been the same if the note had not been renewed by the father after partition, but it is, I think, impossible to assert that that fact was not, to a very large extent, the real basis of their conclusion. Kumaraswami Sastri, J., regarded the renewal as a fresh obligation and Sir John Wallis gave as one of the grounds of his decision "that the father had no authority from the son to renew the note." No doubt his other ground was that the suit which had been brought against the father and the sons had been filed after partition. That ground seems to be inconsistent with the approval expressed by him of Ramachandra Pddayachi v. Kondayya Chetti (1901) ILR 24 M 555 in his judgment in Kameswaramma v. Venkatasubba Rao (1914) ILR 38 M 1120 : 27 MLJ 112. That decision he did not consider at all much less expressly dissent from-though it was a direct authority contrary to the

conclusion he arrived at. Kumaraswami Sastri, J., did consider it, but distinguished it for the reason that it ought to have been decided on a ground which, I think, never occurred to the Judges who decided it. If the renewal by the father of the promissory note without the consent of the sons is to be regarded as a fresh obligation incurred after partition, Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519 is not an authority for the position that a son cannot be sued after partition on a pre-partition debt contracted by his father. The latest case is Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590 which lays down that the creditor can sue the son after partition on a pre-partition debt and recover it from the share allotted to him on partition. With respect I think that that conclusion is correct both on principle and on authority. With the authorities I have now dealt and the principle I have already stated. If a father, before partition, has incurred such debts as his sons are under an obligation to pay, two courses are open at partition. Either sufficient property must be allotted to the father in addition to his proper share to cover the sons' proportion of those debts or the debts must with the property be divided equally between the co-parceners. If the first course be adopted, the sons, on being sued by a creditor after partition__the debts being still unpaid--might--I do not say that they could--plead 'with success that they had discharged their obligation in full. If the debts have been provided for at the partition by making all the coparceners equally liable, the creditors have, of course, a right of suit against all of them after the partition. If, on the other hand, neither of these courses has been adopted, if the property has been equally divided between the co-parceners and no provision whatever has been made for the sons' obligation to discharge the father's debts, I must confess that I can see no principle on which they should be allowed to escape from a liability, for the discharge of which they should have, but have not provided. They cannot plead the benefit of their own default.

11. In the result, I would answer the question referred to us in the affirmative. I may add that I cannot agree that Brij Narain v. Mongol Prasad (1923) LR 51 IA 129 : ILR 46 A 95 : 46 MLJ 23 (PC) throws any light on it.

Jackson, J.

12. The reference before us cannot be decided by any plain and direct rule of Hindu Law. That law lays down that a son is under pious obligation to pay the debts of his father; but the British Courts have not accepted the rule in its entirety. They have limited the obligation to the extent to which the son is possessed of family property. If it is joint family property, there is no difficulty : the law is clear that the son is bound. If it is family property, but divided family property, then the questions arise, has the law in these circumstances recognized the obligation, and is it an obligation which the law should recognize? To my mind the two questions are clearly connected; because if it is found that the general trend of the law has been to enforce the pious obligation even after partition, then I should hesitate to hold that merely out of regard for modern conditions the law should now be varied by judicial decision. Countless creditors will have legitimately reckoned the whole family property whether divided or undivided as available for their debts, and they ought not to be suddenly disappointed. A legislative enactment releasing the son in possession of divided property in regard to debts contracted after a certain date would be entirely a different matter. In Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 at 143 : 33 MLJ 519 Kumaraswami Sastri, J., has treated partition as analogous to a conveyance. If the father chooses, not in fraud of creditors,

to alienate property, that is an ordinary risk which any creditor who has not got an actual charge upon the estate must be prepared to take. It is not open to him to say that he never expected alienation, nor is it any more open to him to say that he never expected partition. But I venture to doubt if the cases of partition and conveyance are quite parallel. The conveyance must be for family necessity; and a creditor may well say, I took the risk, such as it was, of an alienation for family necessity, but I never expected to be confronted with a partition, undertaken voluntarily and under no necessity, which has resulted in my debtor having only a fraction of the assets previously available. So that I think if the previous decisions of our Court have led creditors to expect that the family property will be available to them and not affected by partition, it is a legitimate expectation which we should not defeat on the ground that modern conditions may render the law obsolete.

13. In my opinion, to put them no higher, the rulings in Ramchandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555 and Kameswaramna v. Venkatasubba Row (1914) ILR 38 M 1120 : 27 MLJ 112 and Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590 do establish a distinct trend of opinion that the son is under pious obligation notwithstanding partition to discharge the not immoral debts of his father incurred before partition. In Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555 the plaintiff sued a father, who had incurred debt when trading on behalf of a trading family, and also his sons 2nd and 3rd defendants without alleging a cause of action which would entitle plaintiff to 'a personal decree against either son. But the lower court finding that the 2nd defendant was practically a partner passed against him a personal decree. 2nd defendant appealed. He successfully contended that no personal decree was asked for in the plaint, and he also tried to contend that in any case he was not liable for the debts of his father, though incurred before partition. For this plea he depended upon Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 : 9 MLJ 197. But Bhashyam Aiyangar, J., at once repelled that suggestion. If the son in Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 : 9 MLJ 197 had been made a co-defendant, the property, he said, which had fallen to the son's share, would be liable. On this point respondent's vakil was not asked to reply and the appellant only succeeded in having the personal decree cancelled. As against the property which came into his hands after partition the decree stood.

14. It has since been suggested that, if the respondent had replied, he could have disposed of the appellant's case at once by pointing out that the debt was one incurred by the family manager on the family's behalf. He need not have relied upon any plea of pious obligation. That may be quite correct; but as a matter of fact the respondent did not reply, no such ground was apparently taken, and the appellant was defeated on his own ground that his pious obligation ceased at partition. When it was ruled that the pious obligation did not cease at partition there was no need for the respondent to say anything more.

15. In Kameswaramma v. Venkatasubba Rao (1914) ILR 38 M 1120 : 27 MLJ 112 the father had stood surety in execution proceedings, and had become liable for the amount when the decree under which the execution had proceeded was reversed. His family land was attached, and his son objected, claiming that a subsequent partition had put him in exclusive possession of the property, which therefore was no longer liable for his father's debt. His claim was rejected and he brought a suit pleading that the property was not liable after partition. The trial court found that the partition

was in fraud of creditors, and so the property was liable. The lower appellate court found that there was no fraud, and therefore the property was not liable. The 4th defendant who was practically the attaching creditor appealed to this Court, claiming that even though the partition was not fraudulent, the family property in the son's hands would still be liable.

16. The first ground of Second Appeal was:

The lower court ought to have held (assuming that the partition between the plaintiff and defendant was not effected with the intention of defrauding creditors for evading execution) that the family property is liable in the hands of the son for the liability incurred by the father prior to the date of the partition.

17. This Court accepted that plea, holding that a Hindu son is liable for the surety debt of his father to the extent of the joint property which came to his hands at partition. But the respondent had another defence to the decree of the lower appellate court. Though the son might be liable if directly sued, was he liable, after partition, to execution, under a decree obtained against his father alone before partition? When the father had no longer the right to bring the property to sale, had the judgment creditor a higher right? On this plea the decree of the lower appellate court was upheld and the appeal was dismissed. But on the main ground taken in appeal the appellant succeeded and the Court held in terms (vide headnote) that the son is liable for the debt of his father to the extent of the joint family property which came to his hands at partition. So whether or no this be described as obiter, it did undoubtedly add distinctly to the previous trend of opinion. This again was followed in Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590 to which I myself was a party, and which I merely cite as adding to this trend.

18. The only reasoned opinion to the contrary is that of Kumaraswami Sastri, J., in Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519. His Lordship first lays down the generally accepted proposition that the strict rule of Hindu Law enjoins the pious obligation irrespective of possession of any assets; but it is now well settled that such obligation is circumscribed by the possession of assets. The difficulty is to discover what exactly is to be implied by assets. In the words of this judgment they are 'assets or joint family property' as though family property could only be reckoned as assets so long as it was held jointly, but not after partition. Yet is it not equally logical to reckon family property as assets after partition? No, it is argued, because if the father owing to partition has lost his power of dealing with the son's interest the creditor can be in no better position. But this argument would seem to assume that the creditor's claim is entirely based upon the father's power of dealing with his son's interests and not also based upon the pious obligation of the son. I fully see the force of the assumption if the creditor is trying to execute a decree obtained against the father alone against assets held by the son after partition, which the father has no present power to bring to sale. Then the creditor can be in no better position than the father. But I should hesitate to assume that the creditor's rights are equally circumscribed, when he has made the son a party to the suit, and, by virtue of the son's pious obligation, has obtained a decree against assets in the son's hands. His claim then is based upon the son's pious obligation, and, in my opinion, is not affected by the circumstance that the father has no longer the power to sell. This is the distinction brought out in the headnote to Kameswaramma v. Venkatasubba Rao

(1914) ILR 38 M 1120 : 27 MLJ 112.

19. The argument then proceeds to the analogy between a partition and a conveyance which I mentioned at the outset, and it concludes with a reference to Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555, and Kameswaramma v. Venkatasubba Rao (1914) ILR 38 M 1120 : 27 MLJ 112. The latter case is cited as authority for the proposition that the creditor 'has no right to proceed against the son's properties'; but it is also authority for the proposition that a Hindu son is liable for the debt of his father to the extent of the joint family property which came to his hands at partition.

20. As regards Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555 it is noted that the liability was under a contract entered into for the benefit of the joint family, which is perfectly correct, but, as observed above, that was not the ground taken.

21. Thus to my mind there is no convincing rule of law nor line of argument which would justify a departure from the clear trend of previous rulings in this Presidency. 1 would reply to the reference in the manner proposed by Waller, J.

Srinivasa Aiyangar, J.

22. The question referred for the opinion of the Full Bench in this case is not only of considerable importance but is likely to arise frequently in the future. The question having been specially referred to a special Full Bench of five Judges in view of the conflict of opinion among the Judges of this Court, calls for a consideration on the principles of Hindu Law and the decisions of their Lordships of the Judicial Committee and cannot in my opinion be satisfactorily answered by a mere reference to the decided cases in this Court, many of which are at conflict with one another.

23. The question referred is in the following terms:

Whether a simple creditor of a father in a Hindu joint family is entitled to recover the debt from the shares of the sons after a bona fide partition has taken place between the father and the sons?

24. From the question so stated it follows that the joint family, before partition, was constituted only by the father and his sons, that the creditor did not under the contract with the father get any family property as security for his debt, that the debt was incurred by the father when the father was still the manager of the family and the family itself was undivided, that subsequently a valid partition was effected by and between the father and his sons, that such partition was bona fide by which we may understand that it was not a mere sham, was not unfair and was not also intended to defraud, defeat or delay the father's creditors. It is not possible to spell out any more from the question itself. One thing more however we may also assume, and that is, that the creditor wants for some reason to proceed to recover the debt due to him, not only from the father who is still alive and from the share allotted to him on partition, but also from the son, that is to say, from the property allotted to the son on partition.

25. From this fact alone the inference would not be reasonable that the property set apart for the father on partition was not sufficient to meet all the father's debts which were not immoral or illegal. On the other hand one may almost be inclined to take the view, that, if knowing the extent of the father's debts, the father was on partition left with property not sufficient to pay off all his proper or vyavaharika debts, the intention of the parties to the partition must have been to defeat or delay the creditors of the father. But as the basis on which the question has been propounded is that the partition has been effected in good faith and is fair, there are no materials before us on which one can say whether the anxiety of the plaintiff to proceed against the son's share is really because the father's share is at present insufficient to pay off and discharge the suit debt or has been prompted by some ulterior purpose. If there are numerous cases of partitions brought about with the sole object of defeating the father's creditors, cases also are not wanting in this country of fathers who, falling out with their sons, set up their creditors to proceed against and molest the sons. The observation, however, in this connection would not be improper that in cases in which the partition is found to be fair and in good faith the courts may have and exercise the power, at any rate, on the rule of justice, equity and good conscience, to require the creditor to proceed in the first instance against the father's share and to have recourse to the son's share only after the father's share should be exhausted.

26. As the question, however, has no reference to any such considerations, it has only to be answered on the true legal principles applicable to the case. I shall first deal with what I consider to be such legal principles and then proceed to discuss how far those principles have found acceptance or not in the decided cases.

27. The plaintiff in such cases is suing the son along with the father in order to recover a simple money debt due by the father. The debt of the father lies in contract. There is no question of the obligation of the son being under the contract itself, as it may be in a case in which the contract is made or alleged to be made by the father in his representative capacity as manager and on behalf of the family. In a suit on a contract by the father, the son is, properly speaking, not a proper party at all. After the innumerable decisions of all the Courts and of their Lordships of the Judicial Committee that a decree against the father may, as such merely, be executed against the sons' interest in the family property also and that in such proceedings all that the sons can do is to show that the debt in respect of which the decree was passed was an illegal or immoral debt, it follows logically as referred to and explained in several judgments that the joining of the sons also as defendants originally is merely to afford to the sons an opportunity to allege and prove, if possible, that the debts are improper. It may be too late at the present day to seek to object meticulously to such form of action, but it must fall to be observed that the liability of the son to be made a party defendant in such an action has never been stated to be any legal obligation of the son himself to the creditor.

28. It has sometimes been stated that the liability of the son to be so made a party is on the basis of a pious obligation of the son under the Hindu Law to pay the father's debt. I shall later on have to refer to the true nature and history of this obligation. But for the present purpose the inquiry may be limited to investigating it for seeing whether that can be regarded as the true legal ground of the right of a creditor. It has never been to my knowledge suggested that the pious obligation as it may

be of the son was towards any person other than the father himself. Otherwise, if it should be deemed to be towards the creditor, it is difficult to see what room there is for any piety.

29. The right of the creditor therefore is only against the lather. If it were against the son also, the general rule should be that the son should also be made a party to the suit itself in every case and a decree obtained, and that no decree obtained merely against the father is capable, as such, of being executed against the interest of the sons also in the family property. It seems to me therefore that there can be little doubt that the pious obligation of the son is only towards the father. The right of the father corresponding to this obligation on the part of the son is his admitted right to alienate the entire family property including the son's share for bona fide antecedent, debts of his own. Being a power of sale, although only under certain circumstances, it is really in the nature of property and that is how it comes about that in mere execution of the decree against the father this power of sale is enforced and made available for the satisfaction of the decree.

30. Again it is in the view that this power to sell possessed by the father is in the nature of property, that the legislature under certain systems of insolvency vests such power in the Official Assignee for the benefit of the creditors. The remedies of a father's simple creditor during the father's lifetime may all of them be defined and explained with reference to this power of the father. And I may also further add that they cannot be satisfactorily formulated on any other basis. It has been recognized by the Courts and approved by the Privy Council that during the father's lifetime his creditor may get a decree against the father and execute such decree against the son's share also, if the son should be unable to prove the debts to have been tainted with illegality and immorality or else may, after making the son also party to such a suit and obtaining an adjudication from the Court that the debt is a proper debt of the father, get a decree executable against the entire family property. During the father's lifetime he has undoubtedly the power to sell the whole of the ancestral estate in satisfaction of an antecedent debt and it is only in cases he does not do so and discharge the debt, that the creditor is given the right to proceed in one of the two courses above indicated.

31. I am therefore unable to agree that apart from the father's right of sale there is during the father's lifetime such a thing as the pious obligation of the son to pay the father's debts, and that such obligation is capable of being regarded as one in favour of a creditor and enforced as such.

32. The true principle of Hindu Law is that a father while living should pay up all his debts but if he should die indebted and his debts should not be discharged, he is a sinner and he has to suffer penalties in a state of existence after death. The son himself, the Putra etymologically is he, who saves from hell, and according to all true and correct notions of Hindu Law the pious obligation arises only after the death of the father and not before.

33. When Lord Shaw delivering the judgment of the Board in the case of Sahu Ram Chandra v. Bhup Singh (1917) LR 44 IA 126. ILR 39 A 437 : 33 MLJ 14 (PC) makes the following statement, that learned Lord was merely re-stating accurately and succinctly the ancient Hindu Law on the point:

While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in

respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged.

34. The review of this judgment by their Lordships in the case of Brij Narain v. Mangal Prasad (1923) LR 51 IA 129 : ILR 46 A 95 : 46 MLJ 23 (PC) seems unfortunately to have led to the view that the whole of the passage above cited should be deemed to have been overruled. There is no doubt that in the latter case their Lordships gave effect to what they clearly considered to be the result of a series of decisions extending over a long time in all the courts in this country and recognized and allowed as an exception to the general rule that even during the father's lifetime the son can be proceeded against for the debt of the father to the extent of the joint family property in his hands. But merely because a creditor was so allowed to proceed against the son either in a suit or in execution, it does not necessarily follow that the true basis, or at any rate the true legal basis of even such exception as it may be regarded to be, is the pious obligation of the son. If the Hindu Law had merely contented itself with postulating the pious obligation of the son and not proceeded to create or recognize other rights as the consequence thereof, I for my part should have had great difficulty in accepting as logical and except on the principle of mere stare decisis the exceptions in the nature of the right of the father's creditor to proceed against the son even during the father's lifetime. But the Hindu Law itself, because of this pious obligation, recognized in the father the right to alienate the entire ancestral estate for his antecedent debts not being illegal or immoral, and cast the disability on the son of not questioning such alienations by the father except on the ground of the debts for the satisfaction of which such alienations were made, having been either illegal or immoral. The right therefore of the father to make such alienations is a right which he enjoys during his own lifetime, though no doubt the right grew out of and is based on the pious obligation of the son after his father's death to pay off his father's debts. But once such a right is recognized, there is no reason why the right of the father's creditor to proceed against the son during the father's lifetime should be referred to or based on the ultimate pious obligation of the son and not on the right of the father to alienate during his own lifetime. To my mind, Sahu Ram Chandra v. Bhup-Singh (1917) LR 44 IA 126 : ILR 39 A 437 : 33 MLJ 14 (PC) has not been overruled in its entirety by the case of Brij Narain v. Mongol Prasad (1923) LR 51 IA 129 : ILR 46 A 95 : 46 MLJ 23 (PC) and it must be regarded as having been merely modified to the extent of engrafting the exceptions recognized by their Lordships of the Judicial Committee on the ground of stare decisis. The matter, it seems to me, has been put very clearly and cogently by the following sentence in the judgment of Lord Shaw in Sahu Ram Chandra v. Bhup Singh (1917) LR 44 IA 126 : ILR 39 A 437 : 33 MLJ 14 (PC):

If accordingly he has incurred a debt, and the debt was not for immoral purposes, the pious obligation resting upon the sons and grandsons to discharge this debt is in practice worked out by giving effect to any mortgage or sale of the family property, in which they, with the father, its manager, were joint owners, so as to enable the debt to be discharged.

35. The true view therefore would seem to be that the pious obligation of the son no doubt arises only after the father's death but because of that obligation a power of sale has been created in the father and because of this power of sale it is possible to proceed even during the father's lifetime

against the son's share. If we should bear in mind these principles, the answer to the question propounded would seem to be clear and conclusive. As the creditor's rights and remedies have reference to and are based on the father's power of alienation, it would follow that the creditor would have such right only if and so long as the father has such right. This extraordinary power of the father is one possessed by him only as the manager of the family. That is to say, the managers of joint Hindu families, under the law of Mitakshara, have certain powers, but in the case of father-managers their powers are larger and include the power of alienation above referred to.

36. On a partition of the family property there is a disruption of the family and the managership of the father ceases and with the managership being lost, the power is also lost of the father to effect an alienation of the family property not only for purposes of family necessity but also for his own antecedent debts. In the present case a bona fide partition effected by and between the father and the son being the basis of the question, it follows that on such partition being effected the father lost or ceased to possess his power to sell the son's share. If therefore after partition between the father and the sons, the father lost that power of sale, it must follow that the creditor cannot seek to enforce any rights based on or referable to the existence of such power.

37. The answer therefore to the question propounded must be in the negative and it must be held that a simple creditor of the father in a Hindu joint family is not entitled to recover the debt from the shares of the sons after a bona fide partition has taken place between the father and the sons.

38. This conclusion which I have arrived at on what I regard as the general principles applicable to the case is the very conclusion, it seems to me, their Lordships of the Judicial Committee have stated in the case of Brij Narain v. Mangal Prasad (1923) LR 51 IA 129 : ILR 46 A 95 : 46 MLJ 23 (PC). Summing up the propositions which their Lordships indicate they would wish to lay down as the result of the authorities, their Lordships state the following five propositions:

(1) The managing coparcener of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but (2) If he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

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

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

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

39. Proposition No. 2 begins with the expression "If he is the father and the reversionaries are the sons." Reversionaries are obviously reversionaries to the managership of the family. The pronoun 'he' refers to the subject in the previous clause, the managing co-parcener of a joint undivided estate.

In other words, the nature, the scope and the limits of the exception engrafted by their Lordships of the Judicial Committee on the law as stated in Sahu Ram Chandra v. Bhup Singh (1917) LR 44 IA 120 : ILR 39 A 437 : 33 MLJ 14 (PC) is defined to be as follows:

If the managing co-parcener of a joint undivided estate is the father and the other members of the family are his sons the father may by incurring debt so long as it is not for an immoral purpose lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

40. It is clear that their Lordships did not refer to the case of the son himself being sued by the creditor as a party in the suit in which the decree is obtained because as already explained such making of the son a party is only for the purpose of concluding him with regard to raising the question of illegality or immorality of the debt. It is further significant that their Lordships, being obviously anxious to lay down the proposition in proper juristic form, should have taken care to refer to the proceeding in execution not as the right of the creditor but as the act by which the father lays the estate open. In other words, it is in full accordance with the principle I have tried to indicate that in all such suits and proceedings the creditor of the father is seeking to exercise no right of his own against the son but is only seeking to work out a right of his own debtor, the father. The language used by their Lordships leaves no doubt whatever that during the lifetime of the father the only manner in which the son's share can be attained is as indicated by them. That, according to the language used by them, can only be when the father still is or continues to be the managing coparcener of the joint undivided estate. Their Lordships were there engaged in postulating and formulating all the exceptions to the general rule and principle of coparcenary. Therefore it follows that so long as the father is alive the creditor can proceed against the son's share only if the father is and fills the character of a father-manager at the time when the decree is sought to be executed against him.

41. I am therefore clearly of the opinion that as their Lordships have not included or recognized any other exception to the general rule and having regard also to the language so carefully employed by them, to answer the question propounded to us in any other manner would not be in consonance with their Lordships' decision. Having therefore arrived at what I consider to be the true principles of the case and shown that such conclusion is in entire consonance with the highest and the latest authority of the Full Board of their Lordships of the Judicial Committee, I shall now proceed briefly to discuss the cases bearing on the point in this Court indicating my own view with regard to the same.

42. For the purposes of the present question it is unnecessary to examine all the earlier oases in which the question did not actually arise and in which therefore language has been used which we cannot regard as having been used with any special reference to the question.

43. I shall therefore begin only with the case of Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 : 9 MLJ 197. The decision in that case was by Subramania Aiyar and Davies, JJ. No doubt the form in which the question arose was of the liability of the son's share obtained on a partition with the father, for being proceeded against in execution of a decree obtained by the father's creditor against the father subsequent to the partition and without making the son a party to the suit even

though the debt itself was a debt incurred by the father before partition. The learned Judges state thus in their judgment:

The principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of the father, is that the father, under the Hindu Law, is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time the property is seized it remains the undivided estate of the father and the son. If the estate were divided, the father could not sell what does not fall to him in the division. Ergo, property taken by the son in partition cannot be seized on account of such unsecured personal debt of the father, even though the debt had been incurred before the partition.

44. In the judgment of Ramesam, J., in the case of Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590, which is the judgment that has given rise to the present reference, the learned Judge after referring to the fact that that was the first case which considered the effect of a partition states thus:

The whole decision and the exception in the case of a mala fide partition relate to the seizure in execution of a decree to which the son was not a party.

Apparently the learned Judge seems to have thought this a sufficient criticism and explanation of the case. It seems to me that neither the criticism nor the explanation can be regarded as correct or well founded. No doubt the District Judge from whose decision the case came up on appeal to the High Court seems in one place to have observed that though the son may be liable to pay the debt, his liability must be enforced in a suit against himself. But! one has only to look at the other sentence in the judgment of the learned Judge extracted in the report of the case to see that that was not the only ground that he himself was thinking of. In any case the learned Judges in the High Court based their judgment not on any such distinction but upon the principle that the son's disability to object to ancestral property being seized in execution for an unsecured personal debt of the father, is the circumstance that the father is entitled to sell the whole of the undivided estate and that therefore after partition the creditor had no such right. This judgment is therefore clear authority for the position that the right of the creditor during the father's lifetime is based on and has reference to the right of the father to sell. It is also an authority for the further position that after partition the father loses such right of sale. The learned Judges did not base their decision on the mere circumstance that the son was not made a party to the suit in which the decree is passed. They state that the matter might conceivably have been otherwise if the partition had been made with a view to delay or defraud the creditor. It is impossible to suppose that the learned Judges thought that if the partition had been made with a view to delay or defraud the creditors the decree-holder against the father could proceed to execute the decree against the son's interest also even though the son was not a party to the decree. The learned Judges were speaking only of the liability of the son's share being proceeded against in execution of a decree, because in proper legal view even when the son is made a party to the suit during the father's lifetime and a decree is obtained, it is done not by way of enforcing any right against the son but merely to have settled in the suit itself the questions as to illegality and immorality which may be raised after decree. I am therefore clearly of the opinion that this decision of the learned Judges twenty-eight years ago in Madras was clear authority in

favour of the contention that the father's debts are not binding on the son's share after partition and that there is no substance whatever in the manner in which it has been attempted to explain away this case.

45. The next case in Madras in order of date is the case of Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555. The judgment in this case has been regarded in some quarters and by Ramesam, J., in the case above cited as an authority for the proposition that the son after partition is liable for the pre-partition debt of the father. The learned Judges in this case clearly held that the debt, the subject-matter of the suit, was one which arose out of a contract entered into by a father as the managing member of an undivided family. In that view the debt was of course the debt of the family itself including the son, and in respect of such a family debt the partition could not possibly affect the liability of a son to pay the family debts from and out of the property of the family. The mere fact that the case of Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 : 9 MLJ 197 was sought to be distinguished on one ground cannot be regarded as excluding the other grounds of distinction. As the judgment in that case could be regarded only as an authority for what it actually decided, it must follow that as an authority it is available only in respect of the family debts which of course are entirely different to the mere personal debts of the father.

46. Then we come to the case of Kameswaramma v. Venkatasubba Rao(1914) ILR 38 M 1120 : 27 MLJ 112 Ramesam, J., has referred to this case as containing a reasoning conclusive against the contention that the son is not liable after partition. This case was one in which the question that arose no doubt was, whether a decree for a personal debt obtained against the father before partition can be executed against the property in the son's share allotted to him on partition. The point however to be remembered as regards that case is that the son who wished to have his share exempted from liability was the plaintiff who had succeeded in both the lower Courts and the second appeal by the other party was dismissed by the learned Judges. The abstract in the head-note therefore in the case to the effect that a Hindu son is liable for the debts of a father to the extent of the joint family property which came to his hands on partition, was not necessary for the decision of the case and was apparently based on the decision in the case of Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555 without any close examination of the facts of that case. It is however significant that Wallis, J., (as he then was) states in his judgment at page 1124 that the cases referred on the other side were all cases in which the property remained joint and so subject to alienation by the father in satisfaction of his debt. This observation by the learned Judge would seem clearly to indicate that in his view the right of the creditor was really based on the father's right of alienation.

47. In the case of Rathna Naidu v. Aiyanachariar (1890) 18 MLJ 599, Munro and Abdur Rahim, JJ., held that after partition a Hindu father had no right of alienating property that fell to the share of the son on the partition, even though the debts of the father for which the father purported to alienate such property were personal debts of the father not shown to be either illegal or immoral and even though antecedent to the partition. The principle of the decision of this case is apparently approved of in its entirety even by Ramesam, J., in his judgment in the case of Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590. The learned Judge seems to think it obvious that the father has no such power but only that the case does not help the point under discussion.

48. I have already attempted to show that the right of a father's creditor to proceed even during the father's lifetime to recover the father's debt even from the son's share of the joint family property is really rested on the power of the father to alienate and not on the mere pious obligation of the son to pay the father's debt. But even if that position should not be accepted, if it should be conceded that after a partition though the pious obligation of the son to pay the personal debts of the father continues, still the right of the father to alienate the son's share ceases, the position would be this. Though the father's power of alienation and the creditor's right to proceed against the son's share are both based on the pious obligation of the son, still on a partition, what is put an end to is only the right of the father to alienate and not the right of the creditor. I find it absolutely difficult to understand the law or the logic of such a position. As already observed, I refuse to agree to the notion that there is any direct obligation on the part of the son towards the creditor, and if the pious obligation subsists, it must subsist for all purposes and the admitted fact that on partition the power of the father to alienate ceases can only be regarded as conclusive also of the other position, namely, that the power of the creditor also ceases.

49. The decision of this Court in Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519, by Wallis, C. J., and Kumaraswami Sastriar, J., is a direct authority for the contention now advanced by the appellant in this case. Both the Chief Justice and Kumaraswami Sastriar, J., have in a long and considered judgment dealt with and discussed the whole question after an examination of all the case-law on the point. I am glad to be able to find myself in entire agreement with the views of both those learned Judges. A desperate attempt has been made to distinguish that case on one solitary ground and that was that the promissory note on which the suit was based was not the original pre-partition debt of the father but a renewal of it. I am unable to agree that that can make a real distinction in the matter. There was the pre-partition debt of the father and the renewal merely keeps it alive and does not extinguish it. What has to be looked at is the substance of the transaction and not its mere form. The learned Chief Justice really bases his judgment on the ground that the suit was filed by the creditor after partition, though he adds the words "to say nothing of the further ground that the father had no authority from the son to renew the note after partition." As I understand that sentence it can only mean that though the learned Chief Justice did attach some importance to the fact that when the father renewed the promissory note he had ceased to have any right to renew it on behalf of the son also, still his conclusion in the case was based on the fact that the suit by the creditor was instituted after partition. The whole of the reasoning in that case is in agreement only with that view. At page 140, the learned Chief Justice says:

As regards our own Court, the case is, if anything stronger, be* cause it has expressly based the creditor's right to bring to sale the soil's shares for an antecedent debt on the father's right to sell the sons' shares for such a debt.

He proceeds further to point out by an examination of the entire case-law on the point that that has been the current and correct view. Mr. justice Kumaraswami Sastriar bases his decision in the case on the narrow ground that a son is not after partition liable to be proceeded against in respect of a simple personal debt incurred by the father before partition whatever his rights may have been if they had continued joint. The question in the case with reference to which the expression "proceeded against" was used, was, not whether the son can be proceeded against in execution of a

decree, but only proceeded against in a suit by the creditor. It is impossible therefore to seek to distinguish the case on any such ground as that the expression "proceed against him" may mean proceed against in execution. Kumaraswami Sastriar, J., also" bases the creditor's right to proceed against the son's share on the father's right to alienate. This is what he says at page 142:

So far as the creditor of the father is concerned, all that he can do is to avail himself of any remedy that may be open to the father and work it out either by suit or in execution proceedings and if the father has lost his power of dealing with the son's interests owing to a bona fide partition between them, the creditor can be in no better position.

50. The decision therefore of the Chief Justice and Kumaraswami Sastriar, J., in the case of Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519 is a direct and well-considered decision on the question before us. It is therefore surprising that the learned Judges in the case of Jagmnatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590 should have proceeded as though the case was distinguishable and even refused to refer the question to a Full Bench. With all respect I consider that a case cannot be regarded as distinguishable merely because one could have seen his way to arrive at the same conclusion on some ground or reasoning other than that on which the judgment has been arrived at : but only if and when the ground of reasoning is such that the principle thereof fails to be available or applicable on account of some matter or step in the reasoning itself.

51. The decision in that case was in 1917 and since then at any rate till the later decision of this Court by Ramesam and Jackson, JJ., in the case of Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590 which was in the year 1924, it has been considered as good law and followed in this Presidency. It is enough to refer merely to the judgment of Abdur Rahim and Oldfield, JJ., in the case of Karri Venkatareddi v. Chelluri Satyanarayanamoorthi (1920) 40 MLJ 473.Ramesam, J. disposes of this case with the observation that the decision cannot be accepted as binding because it rests solely on the ground that the matter was concluded by the case of Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519. No doubt both the learned Judges treated the decision in Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519 as finally determining the question and as binding on them. But it is worthy of note that Mr. Justice Abdur Rahim makes the following observations with regard to the son's liability during the father's lifetime:

This is not really based on the pious obligation of the son to discharge the father's debt but that it is the right of the father himself to deal with the property for such debts.

52. Again the reference by Ramesam, J., to the unreported decision in Appeal No. 914 of 1918 by Abdur Rahim and Phillips, JJ., would also only go further to show that the principle of the decision in Peda Venkanna v. Sreenivasa Deckshatulu (1917) I.L.R. 41 M 136 : 33 MLJ 519 was accepted and followed as good law by several Judges of this Court.

53. On a careful examination therefore of the entire case-law in this Court I find that at least ten Judges from the year 1899 have accepted the principle and taken the view which I have taken of the

question referred to us, namely, Subramania Aiyar, J., Davies, J., Sir Arnold White, Chief Justice, Bhashyam Aiyangar, J., Munro, J., Abdur Rahim, J., Wallis, Chief Justice, Oldfield, J., Phillips, J., and Kumaraswami Sastriar, J.

54. My lord the Chief Justice in the course of the discussion of the question before us seemed at one stage to consider that the view contrary to the one I am taking might be regarded as stare decisis. I am afraid that having regard to the volume of opinion and length of time, over a quarter of a century, during which the view that I have taken has been approved of and followed by the learned Judges of this Court, it is impossible to regard as settled law such opinion to the contrary as might have been held by some Judges.

55. As regards the case of Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590 which, to my mind, is really the only decision on the other side, I must take leave to observe that Ramesam, J., who delivered the leading judgment, has proceeded not on any examination of legal principles but merely on what he regarded some of the previous decisions to have decided. I have already referred to those very decisions and tried to point out how the learned Judge has dealt with them. Jackson, J., the other learned Judge, has in his judgment referred only to some observations and certain text-books and given his own criticism or explanation of the same. I am unable to agree with the decision in that case and I feel strongly persuaded that it was against the current of decisions of this Court for over a quarter of a century.

56. I have so far dealt with the case firstly on general principles and then with reference to the decisions of this Court. It seems to me however that with all respect to my learned brothers the question is really concluded by the highest authority because I consider that in Brij Narain v. Mongol Prasad (1923) LR 51 IA 129 : ILR 46 A 95 : 46 MLJ 23 (PC) their Lordships of the Judicial Committee have taken particular care to lay down almost in statutory form the exceptions engrafted by judicial decision on the general rule of Hindu Law as set out in Sahu Ram Chandra v. Bhup Singh (1917) LR 44 IA 126 : ILR 39 A 437 : 33 MLJ 14 (PC). As I read these exceptions, the statement is clear that it is only when the managing coparcener of a joint undivided estate is the father and the reversionaries are the sons, he may, by incurring debt so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of his debt. The act of laying open the estate is properly and accurately referred to as the act only of the father, or, in other words, their Lordships of the Judicial Committee regard it in the nature of the father's right. According to that statement the father who can so lay it open should be the managing coparcener of a joint undivided estate, thereby clearly indicating the principle that the right so to lay it open is possessed by the father only so long as he continues to be the head of the undivided family.

57. It seems to me that I have striven really to arrive at the same result by showing that even the Courts in this country have allowed the creditor of the father to proceed against the son's share not really on the ground of any direct extension of the pious obligation of the son under the Hindu Law but only on the right of the father to alienate for proper debts, his sons' shares also.

58. In the view therefore I have taken we are bound by the decision of their Lordships of the Judicial Committee in Brij Narain v. Mangal Prasad (1923) LR 51 IA 129 : ILR 46 A 95 : 46 MLJ 23 (PC) to

answer the question referred to us only in the manner indicated by me, namely, in the negative.

59. Before I conclude it seems to me necessary that I should briefly refer to what I cannot but consider as the reductio ad absurdum of holding that even after partition the father's creditors can make the son's share liable by suit. I, must take it that the principle on which the son's share is to be held to be so liable is somewhat as follows : __The son is under a pious obligation to pay the father's debt. It has been held by several Courts that even during the father's lifetime his share can be proceeded against by the father's creditor. If so, the father and son cannot by any act of their own free the son's share from liability to the creditor of the father. This, to my mind, would seem to be based on some fallacious idea that the debt of the father is in some incomprehensible way a sort of a charge on the son's share. No doubt when the question is put directly it is not claimed that there is any such charge. But if there is really no charge what principle is there for lugging in the charge again by the back-door? It seems to me therefore that the moment it is conceded that there is no charge in law as such, it must be held on first principles that a partition puts an end to that state of things which enables the creditor to proceed against the son's share also. I do not see why the case of a Hindu father debtor should be treated as really worse than or different from a case of any other ordinary debtor. A debtor in respect of a simple money debt may have considerable property and, if there be no question of any alienation in fraud of the creditors, may come to dispose of the entire property without making any provision whatever for that creditor. Can it then be said that the debt was a charge on the estate which has been alienated?

60. Again it may be argued that the undivided sons being liable in respect of their shares for the debts of the father should on partition make suitable provision for the discharge of all such debts. That again is a question which is really one of the partition having been bona fide or not and with that question we have nothing to do because for the purposes of the question we have been asked to assume that the partition between the parties in this case was in good faith and was otherwise also proper.

61. Let us take the case of the sons on partition having allotted to the father sufficient property to pay off his personal debts and if such a father should waste or dispose of all that he obtained on partition without paying off his creditors, what equitable rule or principle can be referred to or relied upon for the purpose of enabling-the creditor of the father who has slept over his rights afterwards to wake up and proceed to claim payment of his debt from the properties allotted to the son? If the creditor can be attempted to be defrauded by a mala fide partition, it is equally open to the father to collude with his creditors and vex and annoy the son with whom he may become disaffected.

62. I have made these observations not because they have any hearing on the question of law before us but only to show that in answering the question we should not allow ourselves to be influenced by any considerations of creditors being defeated.

63. If therefore the father's debt is not a charge on the son's share and if the liability of the son's share should be founded simply on his so-called pious obligation, it seems to me as a matter of legal principle impossible to limit the liability of the son's share only to pre-partition debts. I take it that it

is conceded on all hands whether as a matter of logic or of law that the son's share is not liable for the post-partition debts of the father. It is permissible in such a case to ask, what is the legal principle on which the liability is sought to be excluded? Excepting perhaps the answer that it may be just and convenient to do so I do not see how, if pious obligation should alone be the legal ground, the liability of the son's share for all the debts which the father may go on borrowing even after partition can be excluded. The injustice and inequity of so holding may be felt to be quite obvious; but there is no escaping from it if the ground of liability should be regarded or decided to be the pious obligation of the son.

64. The result therefore would undoubtedly be that no son under the Hindu Law could possibly in any manner or by any means effectively protect himself and his share in the family property against a borrowing or designing father. Whatever the law was in the pre-Mitakshara days the law of Mitakshara finally and conclusively established the right of a son as a coparcener in the family property, subject no doubt and subject only to certain well-defined exceptions. The right of the son as such coparcener would be reduced to merest nullity and rendered absolutely illusory if the question before us should be answered against the son.

65. The claim to partition and separation has always been held and regarded as the only instrument available to a coparcener for the purpose of preventing maladministration of the family estate or waste by the managing member, and if in the case of most joint families constituted by the father and son the son's right to partition should come to be held to be absolutely ineffectual for the main purpose in view, it would only come to a virtual denial of the right of partition to the Hindu son. I venture to think that that is not the law of Mitakshara. I have therefore been constrained to come to the conclusion that the answer to the question which is in most consonance with principle, with the decisions of this Court, and with the highest authority in the matter and also with justice and equity, is as I have already indicated, viz., in the negative, that the father's creditor has no right to proceed after a bona fide partition to seek to recover from the son's share though in so answering the question I have had to differ from some of my learned brothers. My only consolation is that I have arrived at the conclusion after giving the matter my most anxious and serious consideration.

Anantakriskna Aiyar, J.

66. The question referred to the Full Bench for decision is whether a simple money creditor of a father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a bona fide partition has taken place between the father and the sons.

67. In discussing this question I may start by stating that under the old Hindu Law texts, a Hindu son is liable to pay the debts of his father which are not illegal or immoral, though he did not inherit any ancestral property. See Ponnappa Pillai v. Pappuvayyangar (1881) ILR 4 M 1 at 18 (FB). At p. 21 it is mentioned "Neither coparcenary relation nor the taking of assets is a pre-requisite". The author of the Mitakshara observes:

If no assets of the father or grandfather have been left, then the debts must be paid by the son or the grandson.

But English writers on Hindu Law construed the Hindu Law texts as imposing only a moral obligation on the sons to discharge their father's debts, in case the son inherited no ancestral property.

In their Proceedings of the 27th February, 1837, and in their Circular Order, dated 8th December, 1840, the judges of the late Sadr Court observed that when no assets were inherited the question of the sou's liability for the father's debts was one of contract and governed under Section 16 of the Madras Regulation III of 1802, not by Hindu Law, but by the rule of equity and good conscience.

The Sadr Court held that, inheritance is the cause of son's civil obligation; that its value is the extent of that obligation and that any duty recognized by the Hindu Law in excess of it is not enforceable by a Court of Justice.

68. Similarly in Masit Ullah v. Damodar Prasad (1926) LR 53 1 A 204 : ILR 48 A 518 at 526 : 51 MLJ 792 (PC), the Privy Council observed as follows:

The Hindu lawyers appear to have made difference in the obligations resting upon sons, grandsons and great-grandsons. The son was bound to discharge the ancestral debt as his own, principal and interest, whether he received any assets or not from the ancestor. The grandson had to discharge the debt without interest and the great-grandson's liability arose only if he received any assets from the ancestor. The British Indian Courts have held that the son and grandson are not liable for any debt unless they receive assets and that the obligations of each of them, sons and grandsons, arc co-extensive.

69. In Girdharee Lall v. Kantoo hall (1874) LR 1 IA 321 at 331 the Privy Council observed:

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 acquired an interest by birth is liable to the father's debts.

It must therefore be taken as settled law that to the extent of property received by the son; the son is bound to pay the debts of his father which are not shown to have been incurred for illegal or immoral purposes.

70. The next question whether the pious obligation of a son exists during the father's lifetime or comes into existence only after the death of the father has now been definitely decided by the Privy Council. Having regard to the observations of the Privy Council in Sahu Rain Chandra v. Bhup Singh (1917) LR 44 IA 126 : ILR 39 A 437 : 33 MLJ 14 (PC) and Chet Ram v. Ram Singh (1922) LR 49 IA 228 : ILR 44 A 368 : 43 MLJ 98 (PC), the question was re-argued before a Full Board of the Privy Council in Brij Narain v. Mongol Prasad (1923) LR 51 IA 129 : ILR 46 A 95 : 46 MLJ 23 (PC). The Privy Council held that the pious obligation of the son existed during the lifetime of the father and agreed with the Full Bench decision of the Madras High Court in Arutimgam Chefty v. Muthu Kaundan (1919) ILR 42 M 711 : 37 MLLJ 166 (FB). The law is now settled that under Hindu Law the pious obligation of a son to pay his father's debts exists whether the father is alive or dead.

71. It seems to be thus settled that if a creditor lends money to a Hindu father, having sons undivided with him, the debt is enforceable by the creditor not only personally against the father, but by proceeding against the whole of the joint family properties of the father and the sons. The Full Bench decision in Ramaswami Naddn v. Ulaganatha Goundan (1898) ILR 22 M 49 : 8 MLJ 312 (FB) held that the cause of action against the sons arose at the same time as it arose against the father and that the creditor could prosecute his claim against the sons also in the suit he files against the father and could obtain a decree making the sons' shares also in the family property liable for the father's debts.

72. If a creditor does not make the sons parties to the suit against the father but obtains a decree against the father only, and if the father should die after the decree, then the sons' shares are not liable to be taken in execution of the decree against the father to which the sons were not parties. As stated in Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 at 520 : 9 MLJ 197:

He could not proceed in execution against the son's property which fell to him at the partition. That is, the son's own share though liable for the father's debts is not liable to be taken on a decree to which the son is not a party." "If the estate were divided, the father could not sell what does not fall to him in the division. Ergo, property taken by the son in partition cannot be seized on account of such, unsecured personal debt of the father even though the debt had been incurred before the partition.

73. The learned Judges, Subramania Aiyar and Davies, JJ., used the words "cannot be seized". What exactly was meant by that expression was explained in Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555 by Sir Arnold White, C. J., and Bhashyam Aiyangar, J. At page 557, the learned Judges say as follows:

The decision in the case in Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 at 520 : 9 MLJ 197 is clearly distinguishable from the present case. In that case the suit was brought after partition against the father alone and the point decided was that property taken by a son under a partition effected before the suit could not be seized in execution of a decree obtained against the father only in such suit. The case turned on the plaintiff's right in execution, not as here on the question whether the plaintiff is entitled to judgment as against the son.

After thus explaining the decision in Krishnaswami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 at 520 : 9 MLJ 197 the Court held that the son was liable to the extent of the family property which had come to him under the partition for a debt incurred by the father before partition. The father was made the 1st defendant to the creditor's suit and the divided son was made the 2nd defendant to the suit. The Court held as follows:

In our opinion the plaintiff is entitled to judgment as against the 2nd defendant in respect of this liability, but the 2nd defendant's liability is limited to the extent of the family property which came to him Under the partition.

In Periyasami Mudaliar v. Seetharama Chettiar (1903) ILR 27 M 243 at 247 and 248 : 14 MLJ 84 Bhashyam Aiyangar, J., discussed the same principles. In Kameswaramma v. Venkatasubba Rao (1914) ILR 38 M 1120 : 27 MLJ 112 Wallis, J., understood the decision in Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555 as laying down the following proposition:

I think it is also clear that plaintiff as a Hindu son is liable for the debt to the extent of the joint family property which came to his hands at partition.

74. In this state of authorities the question came before Wallis, C. J., and Kumaraswami Sastriar, J., in Peda Venkattna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519. There, after partition, a Hindu father executed a renewed promissory note in favour of the creditor, who sued the father and the sons on the footing of the renewed promissory note. The Court held that a Hindu son is not liable during his father's lifetime on a promissory note executed by the father after partition in renewal of a note executed by the father before partition.

75. The actual decision of the Court was thus confined to the case of a suit instituted on the basis of a renewed promissory note executed by -he father partition. In the coures of the judgment there are no doubt observations by Kumaraswami Sastriar, J., to the effect that a son is not after partition liable to be proceeded against in respect of a simple personal debt incurred by the father before partition whatever his rights may have been if they had continued joint.

The judgment also proceeds to state that it is clear that whatever may be the pious duty of the son after the father's death, the duty in the father's lifetime is only to pay if the father is unable to do so.

76. This was long before the decision of the Privy Council in Brij Narain v. Mangal Prasad (1923) LR 51 IA 129 : ILR 46 A 95 : 46 MLJ 23 (PC) in which, as already observed, the Full Board of the Privy Council explained the previous decisions of the Board in Sahu Ram Chandra v. Bhup Singh (1917) LR 44 IA 126 : ILR 39 A 437 : 33 MLJ 14 (PC) and Chet Ram v. Ram Singh (1922) LR 49 IA 228 : ILR 44 A 368 : 43 MLJ 98 (PC) and definitely decided that the pious obligation of a son to pay his father's debts exists whether the father be alive or dead.

77. It will be seen from the above discussion that the trend of judicial decisions has been to this effect, namely, that a Hindu son is bound to pay the debts of his father not incurred for illegal or immoral purposes to the extent of the ancestral properties received by him; that the creditor should make the son also a party with the father to the suit and thus obtain a decree binding on the son, to the extent of the property in their hands, in execution of the decree; that if the sons be not made parties to the suit and decrees be obtained against the father only, then in case the father should happen to die before the decree is satisfied, the family property in the hands of the son could not be seized in execution of the decree against the father; and that even after partition the family property that fell to the share of the son would be liable to a pre-partition creditor of the father, but that the creditor should make the father and the son both parties to the suit; and that the creditor could not by obtaining a decree against the father in a suit in which the sons were not parties proceed to execute the decree against the properties allotted to the sons under the partition. And finally if the cause of action for the suit be not the original debt incurred before the partition but a promissory

note executed by the father alone after partition though in renewal of a promissory note executed by him before partition, the sons are not liable to any extent if the suit be based on the renewed promissory note only.

78. In this state of authorities the question whether the property in the hands of a divided son could be made liable, by making him also a party to the suit instituted by the creditor after partition though in respect of a debt incurred by the father prior to partition, came on for decision before Abdur Rahim and Oldfield, JJ., who held in Karri Venkataraddi v. Chelluri Satyanarayanamoorthi (1920) 40 MLJ 473 that the property in the hands of the son was rot liable; but the learned Judges did not discuss the question but simply stated as follows:

All the Madras and some other decisions as well were considered in the recent case of Veda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519 decided by the learned Chief Justice and Mr. Justice Kumaraswami Sastriar.

It would be seen that the actual decision in Peda Venkanna v. Sreenivasa Deekshatulu (1917) ILR 41 M 136 : 33 MLJ 519 turned on the fact that there the suit was based on a renewed promissory note given by the father alone after partition. When therefore the same question raised in Karri Venkalareddi v. Chelhiri Satyanarayanamoorthi (1920) 40 MLJ 473 arose again for decision in Jugannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590, Ramesam and Jackson, JJ., held that the decision in Karri Venkatareddi v. Chelluri Satyanarayanamoorthi (1920) 40 MLJ 473 was not justified by the prior authorities; and deeming it unnecessary to refer the question to a Full Bench, the learned Judges held that the pre-partition creditor could after the partition sue the son also and recover the debt from the joint family properties allotted to the son at the partition.

79. In Brij Narain v. Mangal Prasad (1923) LR 51 IA 129 : ILR 46 A 95 : 46 MLJ 23 (PC) the Privy Council make the following observations. After observing that while on the one hand sons acquire right in the joint family property by birth and on the other hand the father could bind the sons' shares also in the joint family property, their Lordships state at page 101:

It is more than apparent how in practice these two principles may clash....It is probably bootless to speculate as to how these seemingly conflicting principles were allowed to develop;

and finally say as follows at page 102:

In such a matter as the present, it is above all things necessary stare decisis not to unsettle what has been settled by a long course of decisions.

The course of decisions in this Presidency as stated already is in favour of the view taken in Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590. There is also the following statement in Section 271 of "A Manual of Hindu Law as prevailing in the Presidency of Madras" by T. L. Strange (formerly a Judge of this Court):

S. 271.--In making partition, debts and other charges on the property are to be provided for (I. 191, 192). This may be done by division of the liabilities among the co-heirs (ii 283 : C), or by special allotment of property to meet the demand as when provision of maintenance is in question. The creditors however would not be debarred by such partition or arrangement from pursuing the whole property.

The reference to (1. 191, 192) is to the learned author's father's Hindu Law, i.e., Sir Thomas Strange's Hindu Law, Volume I, pages 191 and 192. See also Venknreddi v. Venku Reddi (1926) ILR 50 M 535 : 52 MLJ 387 (FB).

80. Thus on the ground of stare1 decisis above, the decision in Jagannatha Rao v. Viswesam (1924) ILR 47 M 621 : 46 MLJ 590 (which followed the previous decisions of this Court) should, I think, be followed, in preference to the decision in Karri Venkatareddi v. Chelluri Salyanarayanamoorthi (1920) 40 MLJ 473.

81. On principle also I think we should come to the same conclusion. If the creditor had the right to proceed against the whole of the joint family property for satisfying his debt, which was incurred by the father when he was undivided with his sons, it is difficult to see on what principle the creditor would lose that right simply because subsequently the father and the sons effected partition among themselves. If the property passed out of the family and into the hands of bona fide purchasers for value, then the creditor who holds no charge on any specific property of the family would not in equity be allowed to proceed against the property in the hands of such bona fide purchasers. But that principle would not apply when the property remains in the possession of the members of the family--namely, the sons--after partition. The circumstance that the partition arrangement was arrived at bona fide does not really matter, so far as the family creditors are concerned. We are not now concerned with the question whether a partition arrangement under which no due provision is made for the discharge of such family debts incurred by the father could be upheld as in fact a bona fide one; but proceeding on the assumption (as we have to do to answer the present reference before the Full Bench) that the partition was a bona fide one, it seems to me that such a creditor is entitled by taking proper proceedings to make the family property allotted to the sons also liable for his debt which was incurred by the father before partition and which is not of an illegal or immoral nature.

82. On reference to modern text-book writers on Hindu Law I find that the following learned authors take the view that family property allotted to the son on a partition could be proceeded against by a creditor for pre-partition debt incurred by the father when the same was not incurred for illegal or immoral purposes. See Gopalchander Sarkar Sastri's Hindu Law, 5th edition, page 348; Ghose's Hindu Law, Volume I, page 520; Mulla's Hindu Law, 5th edition, page 299; Gour's Hindu Code, paragraph 118, page 595. I may quote one passage from Sarkar Sastri's book as expressing the learned author's opinion on the point under discussion.

It would seem that partition is the only remedy by which a son may now protect his interest from the liability of paying off the debts of an extravagant father, but this would apply only to debts incurred after the partition.

83. We have not been referred to any definite pronouncement by their Lordships of the Privy Council on the point now under consideration. Mr. T. M. Krishnaswami Aiyar, the learned vakil for the appellants, strongly relied upon certain passages occurring in some of the Privy Council cases as indicating their Lordships' opinion that the existence of an undivided estate was a condition precedent to entitle such a creditor to enforce the pious obligation of the sons to pay their father's debts. Sura] Bunsi Koer v. Sheo Persad Singh (1879) ILR 5 C 148 at 169 ; Nanomi Babuasin v. Modhun Mohun (1885) ILR 13 C 21 at 35 (PC) and Brij Narain v. Mangal Prasad (1923) LR 51 IA 129 : ILR 46 A 95 at 104 : 46 MLJ 23 (PC). After giving my most careful consideration to the judgments in the above cases, I am not able to accept this argument. No doubt, there is reference to "joint estate" [Nanomi Babuasin v. Modhun Mohun (1885) ILR 13 C 21 at 35 (PC)], "family and undivided estate" [Brij Narain v. Mangal Prasad (1923) LR 51 IA 129 : ILR 46 A 95 at 104 : 46 MLJ 23 (PC)] in the judgments of the Privy Council. But the Privy Council had not to decide the present question at all nor is there even a reasonable indication that their Lordships were considering the question which arises for decision in the present reference. In all these oases, the father and the sons were (if I am not mistaken) undivided, and consequently the use of the expressions "joint estate,"--"family and undivided estate,"--was natural. If there be a definite dictum of the Privy Council on this point, then, no doubt, the same would be entitled to the highest respect and I would be justified (and in fact bound) in deciding in accordance with the same. But as matters stand, I do not feel that I am entitled to take the above expressions occurring in the judgments of the Privy Council as in any way indicating their Lordships' opinion on the present question, much less as concluding the matter, so as to overrule the decisions of this Court mentioned before.

84. On the question as to what is the proper procedure to be followed by the creditor in such cases, cases have laid down that the effect of partition is to take away from the father the right to represent the sons, whether in Court or outside. Though by reason of his position at the time of incurring the debt he had the right to make the debt binding on the sons' shares also of the family property, he loses the right to represent the sons after partition. The creditor who wants, after partition, to make the family property allotted to the sons also liable for his debt should make the sons also parties to his suit. By obtaining a decree against the father only, the creditor could not execute the decree against the properties allotted to the sons. Nor could the father, after partition, mortgage or sell the property allotted to the sons even though it be in connection with a pre-partition debt incurred by him. With reference to any debt incurred by the father after partition, it goes without saying that neither the father nor the creditor could in any way make the properties allotted to the sons liable. I may mention by way of analogy the case of a Malabar Tarwad. A simple money debt incurred by the Karnavan for Tarwad purposes would be binding on the Tarwad properties in the sense that the creditor could get satisfaction of his decree by proceeding against those properties; but supposing the Karnavan who contracted the simple debt was removed from Karnavanship by decree of Court or otherwise, then it could not be pretended that the creditor could by obtaining a decree only against the executant of that bond--the Quandum Karnavan--and ignoring the present Karnavan, execute that decree against the Tarwad properties. By reason of his removal from Karnavanship, the Quandum Karnavan lost his right to represent the corporation called the Tarwad. Similarly a Hindu father after partition would cease to represent the Quandum corporation of the joint Hindu family. Creditors should in such cases make the other members also parties, in case the properties allotted to them at the partition are also sought to be proceeded against to satisfy the decree. That is a matter

of procedure.

85. On principle, it seems to me that a simple money debt incurred by a joint family manager for purposes binding on the joint family, which a creditor of a family could enforce payment of by proper proceedings against all the family properties, does not cease to be so enforceable simply because a partition has subsequently been effected among the members of the joint family. The same rule, it seems to me, would apply to the case of a simple money debt contracted by an undivided Hindu father (not proved by the sons to have been incurred for immoral or illegal purposes) when a partition takes place between the father and the sons.

86. Hindu Law texts prescribe that debts of the father should be paid at the time of the partition and only what is left should be divided. No doubt ordinarily a partition of the estate was" not contemplated during the father's lifetime. But whenever it took place, the texts seem to be clear that the debts of the father should be paid and only what is left be divided. See Smrithi Chandrika, Chapter II, Section 11, paragraph 23 (page 228 of Setlur's translation--Volume I). See also page 342 of Ghose's Hindu Law, Volume II--edition of 1917.

87. It seems to me that the answer to be given to the question now referred to the Full Bench has already been furnished by the learned Judge, Sir V. Bhashyam Aiyangar, J., in the course of the argument in Ramachandra Padayachi v. Kondayya Chetti (1901) ILR 24 M 555 at 557. After distinguishing the decision in Krishnasami Konan v. Ramaswami Aiyar (1899) ILR 22 M 519 : 9 MLJ 197 on the ground that "there, the suit was brought by the creditor against the father alone after partition; and in execution property which fell to the son's share was attempted to be taken," the learned Judge is reported to have wound up the discussion by saying that "if the son had been made a co-defendant, the property which had fallen to his share would have been liable." (The italics are mine.) This shows how the law was understood in this Presidency in 1901. I respectfully agree with the opinion of the learned Judge and it seems to me that it furnishes the answer to the question referred to the Full Bench.

88. For the above reasons I would answer the question referred to the Full Bench in the affirmative.