

(1954) 02 MAD CK 0043
In the Madras High Court
Case No : Appeal No. 619 of 1948

Abdul Hameed Sait and Another

APPELLANT

Vs

The Provident Investment Co. Ltd. and Others

RESPONDENT

Date of Decision : 22-02-1954

Acts Referred:

Cutchi Memons Act, 1920 — Section 1
Cutchi Memons Act, 1938 — Section 1
Limitation Act, 1908 — Article 12, 142, 144
Shariat Act, 1937 — Section 1 , 3

Citation : AIR 1954 Mad 961 : (1954) ILR (Mad) 939 : (1954) 67 LW 681 :
(1954) 2 MLJ 416

Hon'ble Judges : Subba Rao, J;Rajagopala Ayyangar, J;Panchapakesa Ayyar, J

Bench : Full Bench

Advocate : K.S. Sankara Ayyar, for K. Jagannadha Aiyar and K.R. Krishnaswami Aiar, for the Appellant; V.C. Gopalaratnam and L.V. Krishnaswami Aiyar, for the Respondent

Final Decision : Dismissed

Judgement

Subba Rao and Ramaswami, JJ.—This is an appeal preferred in the pauper form against the decree and judgment of the learned Subordinate Judge of Ootacamund in O. S. No. 17 of 1946.

2. The facts are : In 1928 the second defendant Mohamed Elias Sait entered into a partition arrangement with four other descendants of one Hajee Abdul Rahiman and the registration copy of the partition deed is Ex. P. 2. This partition deed mentions three earlier family arrangements of the years 1918, 1919 and 1921. In this partition of 1928 items 2 to 7 and 9 to 11 of the plaint schedule were got allotted to the share of the second defendant. This second defendant subsequently acquired items 1 and 8 from his brother Hajee Mohammad Ibrahim Sait.

3. On 5-12-1929 the second defendant executed a mortgage deed hypothecating

items 1 to 9 in favour of the first defendant company, the Provident Investment Co., Ltd., Bombay, and borrowed Rs. 1,50,000. This mortgage was executed and registered in Bombay. The registration copy of the mortgage deed is Ex. P. 1. On 4-10-1930 the Provident Investment Co., Ltd., to protect their interests further took a release deed in respect of the items of hypotheca from the four other members of the family who were parties to the partition arrangement of 1928. This release deed is Ex. D. 2 and it recites that the properties mortgaged belonged to the second defendant and that those four persons had no right in any portion of the same.

4. The mortgage amount, principal and interest, remained unpaid in spite of repeated demands. The second defendant was putting off payment taking time. Therefore, a suit was filed after giving notice to the second defendant on 6-8-1931 on the original side of the Bombay High Court in O. S. No. 1442 of 1932. See Ex. D. 1, copy of the plaint to that suit. On 16-11-1932, Mirza J. passed a preliminary decree; see Ex. D. 4. This decree was made absolute on 11-7-1933 and at that stage the plaintiff. Provident Investment Co., was represented by Sir J. B. Kanga and this second defendant Mohammed Elias Sait was represented by Mr. M. C. Chagla; see Ex. D. 5.

5. While execution proceedings for the sale of the hypotheca were pending, the second defendant in order to prevent the sale and obtain time entered into negotiations with the Provident Investment Co., and the arrangement came to was that the second defendant would offer two more items, items 10 and 11 in the plaint schedule, as collateral security and that in that event the sale must be postponed to 30-4-1935. This request presented by Mr. Razakhan for this Mohamed Elias Sait and Mr. Kolah advocates for the plaintiff was granted and the High Court recognised the arrangement and passed a consent order in terms thereof, copy of which is Ex. D. 6 dated 30-8-1934.

6. The second defendant was unable to pay the decree amount even within this extended time and the properties were brought to sale inclusive of the two additional items mentioned in the consent order Ex. D. 6. The decree-holder became the auction purchaser. Ex. D. 7 dated 22-11-1935 is the copy of the Judge's order confirming the sale of items 1 to 9 and 11. Ex. D. 10 dated 26-6-1936 is a similar order in respect of item 10. The auction purchaser took delivery of possession of these properties in April 1936.

7. The Provident Investment Co., Ltd., after taking delivery of possession of these properties sold on 12-8-1945 the 9th item to 19 persons and they are in possession of the same.

8. The purchasers are said to have effected improvements to the suit properties to the value of Rs. 4,84,656. The sale proceeds were insufficient to discharge the decree amount and therefore on 16-3-1937 as seen from Ex. D. 11 a personal decree was passed against the second defendant for the balance and that is still outstanding.

9. It is in these circumstances that a son of the second defendant and the former's son have come forward with a suit filed in the pauper form for the following reliefs, viz., for a declaration that the mortgage dated 5-12-1929 executed by the first plaintiff's father, the second defendant, in favour of the first defendant-company is not valid and binding on either of the plaintiffs; for a declaration that the decree in O. S. No. 1442 of 1932 on the file of the High Court, Bombay, passed on the foot of the said mortgage is likewise not binding on the said plaintiffs or on the plaint properties; for a declaration that the purchase by the first defendant in execution of the said decree conferred no rights on the said first defendant in respect of the said properties; for a direction to the first defendant to deliver up possession of the plaint properties to the joint family comprised of plaintiffs and defendants 2 to 4; and for recovery of past mesne profits for ten years from 1936 amounting to Rs. 7,30,000 and further mesne profits at the same rate.

There was also a prayer that the fifth defendant who has become the purchaser of item 9 of the plaint properties from the first defendant, be directed to deliver up possession thereof to plaintiffs with mesne profits from date of sale in his favour upto redelivery of possession at the rate of Rs. 15,000 per annum. These claims are based on the footing that the first plaintiff and his son, the second plaintiff, and defendants 2 to 4 constitute as Cutchi Memons members of a joint Hindu family governed by the ordinary Hindu Law in every respect relating to joint family property and the second defendant executed the mortgage deed in 1929 and subsequently charged items 10 and 11 as additional security as if he were the absolute owner of the said properties and that the debt was not incurred for family necessity and that in the suit the second defendant alone was impleaded as the absolute owner of the properties and not in a representative capacity and that in consequence thereof the plaintiffs and defendants 3 and 4 are not bound by the decree in O. S. No. 1442 of 1932, the execution proceedings resulting therefrom and that they are entitled to the reliefs asked for.

The rejoinder of the second defendant to these contentions is two-fold in the main. Cutchi Memons ever since they were converted to Mohamedanism and until 7-10-1937, were governed by principles of Hindu Law in matters relating only to succession and inheritance, and in all other matters they were governed by the Muslim Personal Law. Plaintiffs and defendants 2 to 4 were never governed by the ordinary Hindu Law relating to the joint family property. But even granting that that law applied to them at any time, it ceased to be applicable after the passing of the Shariat Act of 1937 and the Cutchi Memons Act of 1938, both of which laid down that the rule of decision for all Muslims would in future be the Muslim Personal law in all matters. Since the passing of the aforesaid Act therefore, it is not open to the plaintiffs and defendants 3 and 4 to set up any rights based upon any usage and custom inconsistent with Muslim personal law. Therefore, it is futile for the said parties to now impeach the second defendant's alienations on the ground that the properties dealt with were joint family properties, because the Hindu Law of joint family property could no

longer be invoked by Cutchi Memons.

As a matter of fact at the time of the mortgage the second defendant was the absolute owner of items 2 to 7 and 9 which had fallen to his share in the partition of 1928 and of items 1 and 8 which had been purchased by him after the said partition. Plaintiffs and defendants 3 and 4. acquired no interest by birth in any of those items. Even assuming, however, that at that time the second defendant and his sons were governed by the Hindu Law relating to joint family property, the mortgage was nonetheless binding on the first plaintiff and his brothers, defendants 3 and 4, because it was executed for legal necessity and for discharge of antecedent debts of the second defendant. The sons being under pious obligation to pay up the said debts, were bound both by the mortgage and by the decree passed thereon and the execution sales which followed.

Even assuming however that the mortgage was not for a purpose binding on the family and therefore could not operate on the interests of the sons, it resulted in a mortgage decree passed against the second defendant and since the properties were sold in pursuance of that decree the sons, who were under a pious obligation to discharge the debt "qua" decree, were bound by the Court sales. The second plaintiff, in any event, has no right whatsoever to challenge the mortgage because he was not born at the time of that alienation. In addition, the first defendant put forward a plea of limitation. In the written statement the plea taken was that the plaintiffs' suit for a declaration was barred by limitation as more than six years had elapsed since the mortgage decree and sales. In arguments at the bar the first defendant contended that the suit was barred under Article 12 of the Limitation Act. The plaintiffs' rejoinder was that the Article applicable was Article 144 of the Limitation Act.

10. On the motion of Mr. Kolah appearing for defendants 1 and 5 after hearing arguments, the learned Subordinate Judge for acceptable reasons which he has mentioned in paragraph 8 of his judgment treated Issues 2, 3(b), 3(c), 5 and 10 as preliminary Issues and gave judgment dismissing the suit with costs and making plaintiffs liable to pay the court-fee due on the plaint. Hence, this appeal by the defeated plaintiffs.

11. The points which fall for consideration before us are three in number, viz., (i) whether plaintiffs and defendants 2 to 4 constituted a joint family on the date of the mortgage and does the Hindu Law so far as it relates to joint family applied to the said parties on the date of the mortgage notwithstanding the Shariat Act and the Cutchi Memons Act; (ii) whether in the circumstances of this case the mortgage decree can be construed to be a debt which can be avoided only on the ground of non-existence of the debt or that it is tainted by illegality or immorality; and (iii) what is the Article of the Limitation applicable to this case.

12. POINT 1: It is well-settled law now that in questions of succession and inheritance the Hindu Law is to be applied to Hindus and Mahomedan Law to Mohamedans; in the judgment by Lord Kingsdown in -- "Charlotte Abraham v.

Francis Abraham", 9 Moo Ind App 195 (PC) (A), it is stated that this rule must be understood to refer to Hindus and Mohamedans not by birth merely but by religion also. Therefore, Mahomedans are ordinarily governed by Mahomedan Law.

13. The exception thereto is in the case of certain sections of Mohamedans who were originally Hindus and got converted to Mohamedanism. The two well known instances are the Khojas of Bombay and the Cutchi Memons. On account of the fact that the Khojas and Cutchi Memons spread out from Bombay Presidency to various parts of India, the question as to how far the Khojas and Cutchi Memons have adopted the rule of Hindu Law had naturally been debated in the Bombay High Court. (See -- "Khoja's case: (1847) Perry O. C 110 (B)"; -- "Gangbai v. Thavar Mulla", 1 Bom HC 71 (C); -- "In the goods of 2 Bom HC 276 (D)"; -- "Hirbai v. Gorbai", 12 Bom HCE 294 (E); -- "Rahimathbai v. Hirabi", 3 Bom 34 (P); -- "In the matter of Haji Abdulla Haji Ismail", 6 Bom 452 (G); -- "Ashabi v. Haji Tyek", 9 Bom 115 (H); -- "Abdul Cadur v. Turner", 9 Bom 158 (I); -- "Mahomed Sidick v. Haji Ahmed", 10 Bom 1 (J); -- "Ahmedbhoy Habibhoy v. Cassumbhoy", 13 Bom 634 (K); -- "Bai Baiji v. Bai Santok", 20 Bom 53 (L); -- Jan Mahomed Abdulla Datu Vs. Datu Jaffar, ; -- "Advocate General of Bombay v. Jimbabai", AIR 1915 Bom 151(N)).

14. In 1847 a question was raised in the Supreme Court of Bombay whether in the case of the Khojas and Cutchi Memons, viz., sets of Mohamedans converted from Hinduism about four centuries ago they retained Hindu Law of succession. Sir Erskine Perry in an elaborate judgment decided that the community could retain the Hindu Law of succession. This decision has been followed in numerous cases in Bombay, both in the Supreme Court and in the High Court and may be considered as thoroughly established.

15. In so far as the Bombay decisions are concerned the leading decisions are by Beaman J. in -- Jan Mahomed Abdulla Datu Vs. Datu Jaffar, " and -- " AIR 1915 Bom 151 (N)". The learned Judge after exhaustively reviewing the entire case law on the subject held that the Khojas and Cutchi Memons are governed by the Hindu Law of succession and inheritance. In Madras the decisions relating to Cutchi Memons and their retention of Hindu usages are -- "Abdurrahim v. Halimabai", AIR 1915 PC 86 (O); -- Siddick Hajee Aboo Bucker Sait Vs. Ebrahim Hajee Aboo Bucker Sait and Others, and -- Abdul Sattar Ismail Vs. Abdul Humid Sait, .

In -- "AIR 1915 PC 86 (O)", the Privy Council held in an appeal from the decree and judgment from East Africa dated 6-3-1914 (per Viscount Haldane) that on their conversion to Mohamedanism the Memons did not adopt the Mohamedan Law as to succession, but retained Hindu Law of succession as a customary law but that after migrating to Mombasa in course of time the custom of Hindu succession had ceased to be generally observed by the Mohamedans and they were following succession by Mahomedan Law and that therefore the law of succession applicable to them was the Mahomedan and not the Hindu law of

succession.

In -- Siddick Hajee Aboo Bucker Sait Vs. Ebrahim Hajee Aboo Bucker Sait and Others, ", Kumaraswami Sastri J. has thoroughly examined the entire case law on the subject. In fact finding that almost all the decisions on the subject had arisen only in Bombay he had a search made amongst the records of the original side of the Madras High Court concerning all suits filed by members of the Khoja or the Cutchi Memons communities. The result of that investigation is mentioned by Kumaraswami Sastri J. as follows:

"I find from the record that there were several suits filed against Cutchi Memons on the footing that they were members of an undivided family governed by the rules applicable to the members of the Hindu joint families and that decrees have been passed on that footing.

In -- "C. S. No. 222 of 1894 (B)", Davies J. referred with approval to the decision in -- "In the matter of Haroon Mahomed", 14 Bom 189 (S). As regards suits for partition, in some of the suits it was not denied that the parties were governed by the Hindu law of joint family and in some suits where it was denied, there was no adjudication owing to parties having compromised the suits. Probates have been applied for, but in no case does it appear that properties admitted to be joint family properties were disposed of or asserted to be by the sons of the testator where such disposal was to their prejudice.

So far as the parties to the present suit are concerned there can be little doubt that till this suit was filed they regulated their affairs on the footing that the Hindu Law of joint family applied. This is borne out by the recitals in the deed of the release dated 10-7-1914, referred to in the plaint. It is alleged by the defendant that it was executed in ignorance of the law governing the parties. It is, however, clear that they and their legal advisers assumed that they were governed by the ordinary Hindu Law.

I am of opinion, that the Hindu Law as to joint family and coparcenary is applicable to Cutchi Memons, and find the preliminary issue in favour of the plaintiff. It will be open to the defendants to prove any special custom varying any particular incidence of the joint family law."

16. In Abdul Sattar Ismail Vs. Abdul Humid Sait, , decided by Sir Lionel Leach C. J. and Lakshmana Rao J. the learned Chief Justice after reviewing the entire case-law on the subject, held:

"It is now firmly established that Cutchi Memons are governed by Hindu Law in matters of succession and inheritance and the right of a Hindu to dispose of his self-acquired property by will is equally firmly established throughout India. As Cutchi Memons are governed by the Hindu Law in matters of inheritance and as the law of wills is part of the law of Inheritance, they must be held to have the same rights as Hindus of disposing of their personal property by will unless there is a custom to the contrary, which has not been proved. In fact there has been

no attempt to prove such a custom. On the other hand, the Bombay High Court has expressly recognised the right of Cutchi Memons to make wills, and this Court has done the same."

This anomalous position recalling the famous dictum of Russell J : that a Khoja or a Cutchi Memon is a living Mahomedan and a dead Hindu has led to discontent among the Khojas and Cutchi Memons themselves. This is pithily pointed out by Kumaraswami Sastri J. in -- Siddick Hajee Aboo Bucker Sait Vs. Ebrahim Hajee Aboo Bucker Sait and Others, " as follows:

"I find it difficult to assume that the Cutchi Memons on their conversion were so enamouredof the Hindu Law of inheritance that they adopted it, but were so dissatisfied with the laws of the joint family that they discarded the rules as to coparcenary and the son's interest in the property of his grandfather. It was only within the last 25 or 30 years that Khojas and Cutchi Memons wanted to free themselves from the yoke of the joint family. As is usual in the Hindu society, those who made money wanted to get rid of this system while those who did not (and they formed the majority) were fully alive to the benefit of the Hindu joint family, and oppose any innovation."

On account, however, of the upsurge of the Pan-Islamic feeling throughout India, the Cutchi Memons Act and the Shariat Act came to be passed.

17. The Legislature stepped in with three acts, viz., the Cutchi Memons Act 46 of 1920 as modified by the Cutchi Memons Amendment Act, 34 of 1923 and the Cutchi Memons Act 10 of 1938 and the Shariat Act of 1937. Prior to 1920 a Cutchi Memon was governed by Hindu Law in matters of succession and inheritance. Under Act 46 of 1920 he had the option to declare himself to be governed by the Mahomedan Law and on his exercising the option not only he but his minor children and their descendants would be governed by the Mahomedan Law in this respect. In this case, there is no evidence that this second defendant made any such declaration and in fact the partition deed of 4-6-1928 recites that the participants thereto were governed by the Hindu Law of inheritance and succession as applicable to Cutchi Memons. Thereafter under the Shariat Act of 1937, a Cutchi Memon was governed by the Mahomedan Law in the matter of intestate succession and as to testate succession he would be subject to that law if he made the necessary declaration u/s 3 of the said Act. Now under the Cutchi Memons Act, 1938, a Cutchi Memon was governed by Mahomedan Law in all matters of succession and inheritance.

18. It is unnecessary, however, in this case, to examine whether by reason of these Acts the appellants should be deemed to be governed by Mahomedan Law in matters of succession and inheritance or whether they should be considered to be governed by Hindu Law because the appellants claimed to be governed by Hindu Law and it was the first defendant who pressed the contention that the appellants were governed by Mahomedan Law and the lower Court proceeded on the footing for the disposal of this suit that plaintiffs and defendants 2 to 4 were

a joint family governed by the ordinary Hindu Law relating to family properties.

In this connection, we are bound to note for the purpose of record that the learned advocate for the first defendant wanted to press also this contention in the lower Court that the plaintiffs and defendants 2 to 4 are not governed by Hindu Law but by Mahomedan Law and canvassed the observations of the learned Subordinate Judge at the end of paragraphs 24 and 25 of his judgment and the finding that he found himself unable to hold that the Shariat Act and Cutchi Memons Act precluded the first plaintiff from invoking the principles of Hindu Law under which he had prior to the enactments of such statutes acquired a right by birth to a share in the plaint properties. Inasmuch as it is sufficient for the disposal of this appeal to examine the contentions of the plaintiffs on the foot that they and defendants 2 to 4 constitute members of a joint Hindu family and they would be governed by the Hindu Law of joint family and coparcenary, we are leaving open the point raised by the learned advocate for the first defendant referred to just now.

19. Therefore we shall proceed to examine the contention of the appellants on the foot that they are governed by Hindu Law in regard to succession and inheritance and that plaintiffs and defendants 2 to 4 constitute a joint Hindu family of which the second defendant was the father and manager. The contention of the plaintiffs and defendants 2 to 4 was that the mortgage deed was not executed by the second defendant for discharge of antecedent debts or for necessity and that it was executed by him as absolute owner of the property mortgaged and that the father was sued as the absolute owner of the property and not in his capacity as the family manager and that therefore both in the suit and in the subsequent execution proceedings the father did not represent the other members of the family and for that reason the court sales were incapable of binding their shares and that the decree-holder purchaser got, by the Court purchase, nothing more than the second defendant's undivided fractional share in the properties sold.

On the other hand, the rejoinder of the first defendant was that even assuming the case of a joint Hindu family, the remedy of the sons and grandson of the second defendant, after the obtaining of a mortgage decree and sale of hypotheca and delivery of possession to the purchaser is to sue for recovery of their shares only by proving that the mortgage debt was contracted for an immoral or illegal purpose and not merely by pleading that it was neither for legal necessity nor for payment of antecedent debts and that the sons riot having set up or even implied that the mortgage debt was contracted for immoral or illegal purposes this suit was bound to fail. The learned Subordinate Judge upheld this contention of the first defendant.

20. The law on the subject of sale of coparcenary property in execution of decree against the father alone was first expounded by their Lordships of the Privy Council in -- "Girdharee Lall v. Kantoo Lall", 14 Beng LR 187 (PC) (T). The judgment in that case was summarized by their Lordships in -- "Suraj Bansi Koer

v. Sheo Pro-shad", 5 Cal 148 (PC) (U), in the following terms :

"That where joint ancestral property has passed out of a joint family, either (1) under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt or (2) under a sale in execution of a decree for the father's debt his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes." Their Lordships of the Privy Council further have pointed out in--"Mt. Nanomi Babuasin v. Modhun Mohun", 13 Cal 21 (PC) (V): "Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

21. Now, a debt contracted by the father for his own personal benefit may be secured by a mortgage of joint family property or it may be unsecured. In either case the creditor may obtain a money decree against the father alone, and may attach and bring to sale the entire joint family property including the sons' interest therein in execution of the decree. The sons being under a pious obligation to pay the father's debt, cannot object to the attachment of their interest in the property on the ground that the debt was not for the benefit of the family. Nor can they object on the ground that they were not parties to the suit in which the decree was passed by reason of their pious duty to pay their father's debt and which makes the entire joint family property liable to be attached and sold in execution of the decree against their father, unless they show that the debt for which the decree was passed was incurred by the father for an immoral or illegal purpose or successfully challenge the existence of the debt on which the decree was passed the entire joint family property will be liable.

In other words, where a money decree has been obtained against the father either on an unsecured debt or on a secured debt where the security has been given up, the sons cannot get rid of the decree even though the debt was not for the benefit of the family or for necessity, unless they can show that the debt was incurred by the father for an immoral or illegal purpose. This they can do either by coming in under Order 21, Rule 53, Civil P. C., or by filing a suit against the decree-holder for a declaration that they are not bound by the decree and for an injunction restraining the decree-holder from selling the entire property: -- "Lakshmadu v. Ramudu", AIR 1939 Mad 867 (W); -- Indar Pal and Another Vs. The Imperial Bank, ; -- " Pandit Mohan Lal Vs. Bala Prasad and Others, ; -- Hanmant Kashinath Joshi Vs. Ganesh Annaji Pujari, ; -- Abdul Jabbar and Others Vs. Emperor, ; -- "Ramrattan v. Basantrai", AIR 1921 Lah 205 (Z2); -- "Karansingh v. Bhup Singh", 27 All 16 (Z3); -- Abdul Karim Vs. Ram Kishore and Others "Sardarilal v. Bharat National Bank", AIR 1931 Lah 716 (Z5) and --"Pirithi

Singh v. Mamchand", AIR 1935 Lah 761 (Z6).

In the case of a mortgage by the father of joint family property, as in the instant case, the creditor may obtain a mortgage decree against the father alone as in the instant case. Where the property is put up for sale in execution of a mortgage decree, no attachment takes place as in the case of a money decree. Therefore, it will be open for the sons only to give public notice to all intending purchasers when the sale is notified by proclamation under Order 21, Rule 66, Civil P. C. that there was in reality no debt owing from the father or the debt for which the decree was passed was contracted by the father for an immoral or illegal purpose. On such notice being given, and the property is purchased after such notice, whether by the decree-holder or a stranger purchaser it does not matter, the sale will be set aside if the sons show in a suit subsequently brought by them that the debt was contracted for an immoral purpose. This the sons can do even before the property is sold by means of a suit which will take the form of a suit against the mortgagee for a declaration that they are not bound by the decree and for an injunction restraining the mortgagee from selling the entire property: -- "5 Cal 143 (U)" and -- "Bhagbut Persad v. Mt. Girja Koer", 15 Cal 717 (Z7). The sons can also file a suit after the sale and delivery of possession of the properties, whether the auction purchaser is the decree-holder or a stranger, for the aforesaid declaration for the recovery of possession with mesne profits.

22. On such a suit being brought, after the mortgage decree against the father and the hypothecated joint family property had been sold as in the instant case, the point for consideration is whether it would be necessary for the sons to establish, as in the case of a suit to set aside a money decree, that the debt for which the decree was passed was for an immoral purpose or would it be enough if the sons merely establish that the mortgage was neither for a legal necessity nor for the payment of an antecedent debt, without showing that the debt was contracted for an immoral or illegal purpose.

23. This point for consideration arises upon the following distinction that while it is the pious duty of a son under the Mitakshara law to pay such debts of his father as were not contracted for immoral purposes, it is also according to Hindu Law a pious duty for a person to pay off his own debts. From these two propositions, it follows that an alienation by a father living jointly with his sons under the Mitakshara law to pay off his antecedent debts, not incurred for immoral purposes, is an alienation by him for the performance of indispensable duties within the meaning of the Mitakshara enjoinders. Consequently, the distinction between unsecured debts and sale of coparcenary property in execution of money decree against the father alone and a voluntary alienation by the father as in the case of a mortgage. In the case of the former on the foot of the doctrine of pious obligation the son cannot get rid of the liability of his share in the coparcenary property unless he can establish that the debt for which the decree was passed was for an immoral purpose.

In the latter case of a voluntary alienation like a mortgage the limitation is that it

can be made only for justifying necessity or for the purpose of raising money in order to satisfy pre-existing debts. Paradoxically enough it would seem that the doctrine is not based on any necessity for the protection of creditors but is rested upon the pious obligation of the sons to see that the father's debts are paid; in consequence the sons' share is placed at the disposal of the father so that he may be able to pay off his debts so as to relieve his sons from their duty. The distinction between an involuntary sale of the father's property for the satisfaction of his own debt and a voluntary alienation by him consists in the limitation that in the latter case the debt must be antecedent to the transfer of the property and not contemporaneous with it: -- "Shanmukam v. Nachu Animal", AIR 1937 Mad 140 (Z8).

24. Accordingly, a mortgage deed executed by a father for his own purposes and not justified by any family necessity is not binding on the sons as a mortgage. The debt, however, as an unsecured debt would attract the pious obligation of the sons. Thus, we arrive at the position now settled that if the mortgage is neither for legal necessity nor for antecedent debt, the mortgage as such is not operative on the sons' interest but the sons are nevertheless under a pious obligation to pay the mortgage debt "qua" debt.

25. But the further legal position that has now got evolved is in such a case if a decree is passed against the father on the mortgage for the sale of the whole of the mortgaged property and the property is sold in execution of the mortgage decree, the sons, though not parties to the mortgage suit would be bound by the sale unless they show that there was no debt owing by the father or that the debt in respect of which the mortgage was executed was incurred by the father to the knowledge of the lender for an immoral or illegal purpose and that in the case of the purchaser not being the decree-holder the former had notice that the debt was so incurred.

26. The decisions on this subject may be arranged under three heads, viz., the decisions preceding -- "Brij Narain v. Mangla Prasad", AIR 1924 PC 50 (Z9), the said decision itself, and the decisions subsequent thereto.

27. Now as early as 1879 we find in -- "5 Cal 148 (U)", their Lordships had laid down two propositions as deduced from the previous decision in -- "1 Ind App 321 (PC) (T)". They were, firstly that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they were able to show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and secondly, that the purchasers at an execution sale, being strangers to the suit, if they have no notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings. It is true that on the facts of that case it was held that the debts

were illegal and immoral and that therefore the son was not bound. But in discussing the law on the point their Lordships reiterated those propositions which were established in -- "1 Ind App 321 (PC) (T)".

28. Thereafter following the decisions in -- "1 Ind App 321 (PC) (T)"; -- "5 Cal 143 (U)" and -- "13 Cal 21 (V)", their Lordships in -- "15 Cal 717 (PC) (Z7)", reaffirmed the same principles. That was also a case of sale having taken place in execution of a mortgage decree, and it was held that where the sons claimed against a purchaser of an ancestral estate under an execution against their father upon a debt contracted by him, it was necessary for the sons to prove that the debt was contracted for immoral purpose, and it was not necessary for the creditor to show that there was a proper enquiry or to prove that the money was borrowed in a case of necessity.

Thereafter in -- "Rai Babu Mahabir Persad v. Rai Markunda Natha Sahai", 17 Ind App 10 (Z10), which was also a case of a mortgage decree and a sale held thereunder, their Lordships followed -- "15 Cal 717 (PC) (Z7)".

29. In the Full Bench decision of the Allahabad High Court in -- Debi Singh v. Jiamam, 25 All 214 (Z11), these decisions of the Privy Council in -- "13 Cal 21(V)"; -- "5 Cal 143 (PC) (U)" and -- "15 Cal 717 (PC)", are referred to. The facts therein were: Property belonging to a joint Hindu family was sold by auction in execution of a decree obtained upon a mortgage of such property executed by the father of the joint family. In the suit the mortgagor Jia Ram's sons were not impleaded as defendants. The hypotheca was purchased by two strangers in the court auction. The names of the purchasers were subsequently recorded in the revenue records as the owners of property. Thereafter the sons of Jia Ram instituted a suit for recovery of proprietary possession of their shares on the ground that the decree and sale were illegal and void as against them. The Full Bench held that it was open to the sons to sue for the recovery of their shares in the property so sold, if they had not been made parties to the suit in which the decree against their father was obtained, provided that the mortgagee had at the time of suit notice of their interest in the property but that suit by the sons must be based upon some ground, which under the Hindu Law would free them from liability as sons in a Hindu joint family to pay their father's debts.

It was further held that a sale once having taken place, the sons cannot succeed in a suit to recover the properties sold upon the sole ground that they were not made parties to the original suit. In this connection, it was urged before the Full Bench that having regard to Section 85 of the Transfer of Property Act the mortgagees having failed to implead in their suit the appellants of whose interest in the mortgaged property they had notice, could only obtain a decree for sale against the interest of Jia Ram and that the decree passed and sale held in execution of their decree must be treated as having no effect upon the interests of the appellants; and that the sale so far as regards the appellants' interest was in fact a nullity and must be treated as such. The Full Bench repelled this argument in the following terms :

"If this argument be well founded there can be no question but that the rulings of their Lordships of the Privy Council to which I have referred met with scant approval from the framers of the Transfer of Property Act. If the appellants had interposed before a sale had taken place and established that the mortgagees had notice of their interests, they could no doubt, under the ruling in -- "Bhawani Prasad v. Kallu", 17 All 537 (Z12) have obtained a declaration from the Court that the decree-holders were not entitled to sell in execution of their decree the appellants' interests in the mortgaged property. They have not done so, however, but have wittingly or unwittingly allowed the joint property to be sold by the Court to strangers whom they now seek to oust from the property with the assistance of the Court. If the purchasers at the sale in execution had purchased the property from Jia Ram and not through the Court, it is clear that the appellants could not upset the sale unless they were in a position to prove that the debt in respect of which the sale was effected was a debt tainted with immorality. The Court has done only what Jia Ram could himself have done. Are the purchasers under the judicial sale to be in a worse position than that which they would have occupied if they had purchased the property from Jia Ram? I think not."

30. The noteworthy Madras decision in this connection is -- "Kandaswami Gounden v. Kuppu Moopan", AIR 1920 Mad 479 (Z13). The facts in that case were: A suit was filed on a mortgage executed by the father. It was neither executed for an antecedent debt nor for any necessary purpose binding on the sons. The father and the sons were impleaded as defendants in the suit. The plaintiff prayed expressly for a decree under Order 34, Rule 6, Civil P. C., against the ancestral property. The sons did not, plead or prove that the debt was illegal or immoral. In appeal it was held that the defendants could not be given a fresh opportunity for the purpose and that the plaintiff was entitled to a decree as prayed for by him under Rule 6 against the father, the first defendant, personally and against the ancestral property of himself and his sons, the other defendants. The learned Judges observed:

"That a conditional decree u/s 90 of the Transfer of Property Act can be passed in the mortgage suit itself, without waiting for the mortgaged property to be sold to ascertain if any balance will be left over, is clear from the observations of the Privy Council in -- "Mst. Jeuna Babu v. Parmeswar Narayan Mahatha", AIR 1918 PC 159 (Z14). We think the same rule will apply under Order, XXXIV, Rule 6. In the present case it is not denied that the present claim against the mortgagor under the mortgage deed is within time and is legally enforceable against him. A conditional personal decree for any balance should therefore have been passed against him in this suit."

31. The Judicial Committee examined the whole subject in -- "AIR 1924 PC 50 (Z9)" and Lord Dunedin laid down the following five propositions:

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

2. If he is the father, and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings 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."

A mere formal antecedency in time where there is no real antecedency in fact is insufficient to make a debt an antecedent debt. But the liability under a mortgage which is not for an antecedent debt will however render a subsequent mortgage or a sale binding upon the sons as the earlier mortgage would be antecedent to the later alienation; -- "AIR 1924 PC 50 (Z9)", approving -- *Arumugham v. Muthu*", AIR 1919 Mad 75 (Z15); -- *Ram Rekha Singh and Others Vs. Ganga Prasad Mukaraddhwaj and Others* "Gopaldas v. Topandas", 16 Lah 624 (Z27); -- "*Satyanarayana v. Satya-narayana Murthi*", AIR 1926 Mad 423 (Z18) and -- *Gauri Shankar Singh and Others Vs. Sheonandan Misra and Others*, . Bo too as the debt of the father is the debt of the son also, it would be an antecedent debt so as to empower the latter to dispose of the joint family property belonging to himself and his sons: -- "AIR 1937 Mad 140 (Z8)". The subsequent decisions reflecting conflicting interpretations of conditions (2) and (3) of the aforesaid Privy Council decision, the attempts to reconcile these conflicts and the present settled position can be conveniently arranged High Courtwar (i) Allahabad (ii) Nagpur (iii) Lahore (iv) Bombay and (v) Sind.

32. The decision of their Lordships of the Privy Council in -- "AIR 1924 PC 50 (Z9)" was interpreted by the Allahabad High Court in -- *Gajadhar Pande and Others Vs. Jadubir Pande and Another* , where the father of a joint Hindu family executed a mortgage of some of the joint ancestral property, the mortgage was, not to pay off any antecedent debt nor for purposes of immorality. In due course the mortgagee sued on his mortgage and obtained a decree and brought the mortgaged property to sale. In that suit the sons were not impleaded. The sons brought a suit for a declaration that the mortgage and the auction sale were not binding on them as the mortgage had not been executed for legal necessity. It was held that the plaintiffs could not succeed without showing that the debt of the father was one tainted with immorality, and that there was no distinction in such cases between a debt secured by a mortgage and an unsecured debt.

The word "debt" as used in proposition No. 2 laid down by their Lordships of the Privy Council in -- "AIR 1924 PC 50 (Z9)" was interpreted to include a mortgage debt. It is, however, significant to note that both the Judges who decided the case against the plaintiffs in *Gajadhar Pande and Others Vs. Jadubir Pande and*

Another specifically pointed out that the plaintiffs in that case were not entitled to have the sale set aside inasmuch as the property had passed out of the family and rights of third parties had come in and inasmuch as the sons could succeed in setting aside the decree and the auction sale only if they could successfully prove that the debt was incurred for an immoral or illegal purpose.

33. The next case which interpreted the rule laid down in --- "AIR 1924 PC 50 (Z9)" is -- Jagdish Prasad and Others Vs. Hoshyar Singh and Another . Therein the Full Bench laid down that if the sons instituted a suit against the mortgagee after the decree but before the sale, challenging the validity of the mortgage, and if in that suit the sons failed to establish that the debt was tainted with immorality and the mortgagee failed to establish legal necessity, and if there was no question of antecedent debt, the sons must succeed although they had failed to prove that the debt was of an immoral character. In such cases, it was stated that the suit was governed by the third and not the second proposition laid down by their Lordships of the Privy Council in -- " AIR 1924 PC 50 (Z9)".

There was a difference of opinion, however, as regards the meaning to be attached to the word "debt". Mukherji and Boys JJ. were of the opinion that the word "debt" mentioned in the second proposition did not contemplate a mortgage debt, while Sulaiman Acting C. J. was of the opinion that "debt" in the second proposition included also a mortgage debt. He, however, held that the second proposition as laid down did not apply to the facts of that case as no auction sale had taken place and the property had not passed out of the family.

34. The same High Court has further considered these propositions in -- Jahan Singh Vs. Dr. Hardat Singh and Another . In this case the facts were: Joint family property was sold in execution of a decree on a mortgage executed by the father, and was purchased by the mortgagee decree-holder. After the sale and its confirmation, but before possession was delivered to the auction purchaser, the son brought a suit for a declaration that the mortgage, on which the decree and sale had taken place, was not binding on the family for want of legal necessity. It was held that the son could not succeed in his suit without proving that the debt was one tainted with immorality. The ratio on which this decision was based is set out as follows:

"A distinction between a private alienation and an auction sale can be easily pointed out. In the case of a private alienation the transferee has plenty of opportunity to make inquiries and satisfy himself as to the necessity for the debt. In the case of an auction sale there is hardly any such opportunity. Furthermore, if a father can voluntarily transfer property in order to pay off his antecedent debt, the Court may also compel him to do the same by means of a compulsory sale. After the sale has taken place under the authority of the Court the matter passes beyond the state of a mere private contract or private transfer and therefore different considerations apply....."

"The next point urged is that inasmuch as delivery of possession had not taken

place when the suit was instituted, that principle does not apply. The contention is that so long as possession has not been delivered the property has not passed out of the family. Now their Lordships have laid down that purchasers at an auction sale, who are strangers, are not bound to make inquiry beyond what appears on the face of the proceeding and that therefore the sons must show that they had notice that the debts had been contracted for immoral or illegal purposes. So far as strangers are concerned it makes no differences whether only the sale has taken place and has been confirmed or whether delivery of possession of property also has been made to them. The protection given to them is based on the principle that they are not bound to make inquiry beyond what appears on the face of the proceedings and that therefore if they had no notice of the illegality or immorality tainting the debt they are protected. It is therefore impossible to draw a distinction that the strangers would not be protected if, although the sale has been confirmed, delivery of possession has not been made when the sons' suit is instituted. It would follow that whether delivery of possession has taken place or not, so long as the property has passed to the auction purchasers by virtue of the sale and its confirmation, they are entitled to protect themselves unless it is established that they had notice.

If, therefore, in the case of auction purchasers who are strangers no distinction can be drawn when possession has not been delivered, it would follow that on the same principle there should be no distinction in the case of an auction purchaser who is not a stranger to the suit."

35. In -- "Chander Deo v. Suraj Bali", AIR 1947 All 184 (Z23) a Division Bench of the Allahabad High Court held as follows:

"The liability of the sons to pay the father's debts arises from the religious obligation to rescue him from the penalties arising from the non-payment of his debts. A debt imposed upon the father by means of a decree of a Court of justice is nonetheless a debt owed by the father. If, is the pious duty of the sons to discharge this liability like any other debt. In a suit upon a debt against the father he represents the sons as far as the factum of the debt is concerned and the judgment against the father itself creates a debt. In the absence of fraud or collusion between the creditor and the father the factum of the debt cannot be questioned by the sons. The decree obtained by the creditor and the sale which follows in execution of the same would undoubtedly be binding on the sons unless the sons establish that the debt contracted by the father was for an immoral purpose. This onus cannot be said to have been discharged by proving a general charge of immorality. There must be proof of direct connection between the debt and the acts of the immorality alleged."

36. The latest decision of the Allahabad High Court is the Pull Bench decision in -- Hira Lal and Others Vs. Puran Chand and Others, . The question before the Pull Bench was whether the word "debt" in the second proposition laid down by their Lordships of the Privy Council in -- "AIR 1924 PC 50 (Z9)", refers only to a simple money debt or also to a debt secured by a mortgage. The reference

became necessary because of the conflict of view on this point between the majority opinion to which expression was given by Mukerji and Boys JJ. in Jagdish Prasad and Others Vs. Hoshyar Singh and Another and the decisions of the Oudh Chief Court represented by -- "Nandlal v. Umrai", AIR 1926 Oudh 321 (Z25). The Full Bench exhaustively reviewed the entire case law on the subject and held that the word "debt" in the second proposition in -- "AIR 1924 PC 50 (Z9)", viz., if the managing member of a joint undivided estate is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose lay the estate open to be taken in execution proceeding upon a decree for payment of that debt covers both simple and mortgage debts.

37. In the Nagpur High Court the entire case law was reviewed in -- "Jainarayana Mulchand v. Sonaji", AIR 1938 Nag 24 (Z26). But the point for decision there was whether in execution of a personal decree passed against the father, the debt being neither illegal nor immoral, the sons' shares could be sold; and it was pointed out that they could be sold though the original decree was one on the basis of a mortgage and was a mortgage decree. It was very clearly laid down that the word "debt" in proposition 2 enunciated by their Lordships of the Privy Council in -- "AIR 1924 PC 50 (Z9)" did include a mortgage debt, but it was further stated that if for recovery of such a debt a personal decree is obtained against the father alone it may be enforced by attachment and sale of the property including the sons' shares as was laid down in -- "AIR 1931 Lah 716 (Z5)".

It was further pointed out that the mere fact that the sons' shares were declared not bound by the mortgage did not make any difference whatsoever inasmuch as the sons' shares were sought to be sold not because there was a mortgage against the shares but because there was a personal decree against the father for payment of the debt and in execution of the decree the sons' shares could be sold under the doctrine of pious obligation. In stating the facts of the case Stone C. J. at the very beginning of the judgment made it quite clear that that was a case which was concerned with the execution of a personal decree passed in a mortgage suit brought against certain fathers and their sons. The mortgage suit was dismissed against the sons and decreed against the fathers only. Liberty for applying for a personal decree for the balance of the amount due on the basis of the decree if the sale proceeds were insufficient was reserved. Paragraph 2 of the judgment very clearly points out that a personal decree was passed in that case on 5-7-1929.

It will thus be seen that -- "AIR. 1938 Nag 24 (Z26)" very clearly lays down that so long as there is no personal decree against the father for a debt, whether it is a mortgage debt or an unsecured debt, the sons are entitled to challenge the mortgage executed by the father on the ground of want of legal necessity; but if a personal decree is passed against the father, and in execution of that decree the sons' shares are sought to be attached and sold the sons cannot resist the sale except on the ground that the debt was incurred for illegal or immoral

purposes.

38. The next decision of the Nagpur High Court relevant for our purpose is -- AIR 1947 69 (Nagpur) , wherein it was held that

"a son who was not a party to a mortgage and was not joined as a party to the mortgage suit is not precluded from challenging the mortgage on the ground of want of legal necessity or antecedent debt, particularly in a case where the property has not yet gone out of the family and is still not sold. He is, therefore, entitled to sue for a declaration that the mortgage is not binding on him as it was not for legal necessity or for the payment of antecedent debt and his share in the joint family property cannot be sold in execution of the mortgage decree in the suit brought against his father alone so long as it is only a mortgage decree and not a personal decree."

The facts on which this decision was based were: The sons who were the plaintiffs were not joined as parties to the mortgage suit. A decree was obtained against the father and it had to be assumed that it was obtained against the father as representing the sons, as no copy of the decree was placed on record. The learned Judges presumed from the facts as stated in the pleadings that the decree was in the ordinary form for sale of mortgaged property reserving liberty to apply for a personal decree if on the sale it was found that there was still a balance due. The suit was instituted soon after the passing of the final decree in the mortgage suit and before the property was sold and the plaintiffs in the suit were challenging the mortgage on the basis of which the decree was obtained by the mortgagees, defendants 1 and 2, against the plaintiffs' father. It was proved in the case that there was no legal necessity for alienating the shares of the other coparceners. Whether in that case the defendants would be in a position to obtain a personal decree against the father and then reach the shares of the minor sons or not had been decided as that stage had not yet arrived.

39. The decision of the Lahore High Court on this matter is -- "Joginder Singh v. Punjab and Sindh Bank Ltd., Amrisar", AIR 1939 Lah 585 (Z28). The facts were: The sons of three brothers sued for a declaration that two mortgages, created by their fathers, and the mortgage decree obtained thereon should not affect their reversionary rights as the mortgages were of ancestral property, were without consideration and were not entered into for the benefit of the family. The amended plaint was put in after the mortgage decree had been obtained but before the sale of the mortgaged property. There was no plea that the money was advanced for immoral purposes. The trial Judge dismissed the suit and the plaintiffs appealed to the High Court. It was held by a Division Bench that the suit must be dismissed, as the second proposition of law laid down in -- "AIR 1924 PC 50 (Z9)" included a mortgage debt as well as an unsecured debt; and, as a decree had been obtained on the mortgage, the debt not having been incurred for an immoral purpose, the estate of the family was laid open to be taken in execution proceedings upon the mortgage decree.

This proposition, it was stated, followed either for the reasons given by Dalip Singh J. in -- "Krishna Kishore v. Hemraj", AIR 1928 Lah 815 (Z29) or for the simple reason that the estate is laid open under the second proposition of Lord Dunedin after a decree has been obtained on the footing of the mortgage for payment of a debt which was not immoral and that this meant that the second proposition was self-contained and was not subject to the provisions of the other propositions and that the word "debt" has been used in its wider sense in it and included a mortgage debt.

It was further held that the difference between a mortgage decree and a money decree, as was pointed out in -- "Shivdas v. Kirpal Singh", AIR 1934 Pesh 84 (Z30) was due to the provisions of the adjective law enacted in the CPC and the distinction made by this adjective law in the form of the two decrees had nothing to do with the fundamental principle of Hindu Law that it was the pious obligation of the son to pay the father's debts within the meaning of the texts of Narada and Brihaspati: see Mayne's Hindu Law (11th Edn.), page 416.

40. The Bombay High Court in -- Bharmappa Murdeppa Soppin Vs. Hanmantappa Tippanna Belludi, followed Jagdish Prasad and Others Vs. Hoshyar Singh and Another and dissented from -- "AIR 1939 Lah 585 (Z28)". The facts were: One Tippanna Hanmantappa and his two sons constituted a joint Hindu family. In 1922 Hanamantappa mortgaged the family property to first defendant's father for Rs. 2,000. There was a dispute regarding the mortgaged property and it was referred to arbitration. The arbitrators made an award on which the mortgagee filed a suit No. 840 of 1927 for obtaining a decree. There was an award decree prescribing instalments of payments and for sale of the hypotheca in default of the prescribed terms. In 1934 an application was made to sell the mortgaged property in discharge of the mortgage debt. Thereupon the plaintiffs, sons of the mortgagor Tippanna, filed a suit for a declaration that their Interest in the property in suit was not bound by the mortgage debt created by the father and it was not liable to be sold in execution of the mortgage decree obtained against their father.

It was alleged that the mortgage was not for any legal necessity. The plaintiffs also applied for an injunction to restrain the first defendant mortgagee decree-holder from selling their share in the property. The decree-holder mortgagee contended that the debt incurred by the mortgagor was for legal necessity and hence the decree obtained was binding upon the plaintiffs' share. He further contended that as plaintiff No. 2 was not born at the time of the mortgage or even at the time of the decree he could not get a declaration so far as his share was concerned.

The Subordinate Judge held that the plaintiffs were bound to pay the debt whether incurred for legal necessity or not, under the pious obligation of a Hindu son to pay his father's debt not incurred for immoral purposes. He dismissed the suit. On appeal the learned Assistant Judge held that the mortgage was not for necessity and therefore the decree obtained on that mortgage did not bind the

interest of the plaintiffs and allowed the appeal. In second appeal the High Court held that

"where a mortgage is created, not for necessity, or for payment of an antecedent debt, it binds only the father's interest in the property, and it is only that interest which can be sold under the mortgage decree. But if the debt is not for immoral purposes, the sons are liable, and if a personal decree is obtained against the father, then that decree can be enforced by sale of the sons' interest in the property. There must, however, in my opinion, be a personal decree against the father for payment of the debt and not merely a decree for payment of the debt by sale of the mortgaged property."

41. Sir John Beaumont C. J. as he then was after discussing the decision in -- "AIR 1939 Lah 585 (Z28)" pointed out at pp. 452-453 as follows:

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

In the present case, the decree, as I have pointed out, is not in the form of an ordinary mortgage decree. It does not direct that on sale of the property the mortgagee is to be at liberty to apply for a personal decree for the balance not recovered. What it does say is that "if the entire amount is not satisfied, the plaintiffs to recover from the defendant personally". That may create a personal liability against the father, but it is an unascertained liability Incapable of enforcement against the interest of the son in the property. Until the mortgage decree is carried out, and it is ascertained what the balance is, it is impossible to say for what amount the son's interest in the property is liable.

I think, therefore, the decree in this case is not enforceable against the interest of the son in the property included in the mortgage, though ultimately It is possible that that interest may be rendered liable for the debt secured by the mortgage in proceedings on the personal decree."

42. This decision has been carefully discussed and analysed, if it might be said so with great respect, in a subsequent decision of the Bombay High Court in -- Puttappa Kariyappa Huchappa Bijjur Vs. Banappa Fakirappa Shiggauv, , where the facts are more akin to the facts of the instant case. The plaintiff in that case was a member of the joint family along with his father. That father executed certain mortgages. On the foot of those mortgages a suit was filed by the mortgagee and there was a reference to arbitration. There was an award and a

decree was passed in terms of the award. On default in complying with the terms of the award decree, the mortgaged property was sold in execution and most of it was purchased by the mortgagee decree-holder himself. Some properties were purchased by two strangers. The sale certificate was issued and the decree itself stood satisfied and the property had passed out of the joint family. Thereafter the son filed the suit which was the subject-matter of the appeal and he asked for a partition and possession of his share on the ground that the sales were not justified by legal necessity and that the transactions for which the debts were incurred by his father were also illegal and immoral.

The main defence was that the transactions which were sought to be impeached were justified by legal necessity nor were the father's debts illegal or immoral; that the award decree as well as the auction sale were binding on the son on account of the pious obligation to discharge his father's debts and that the son was not entitled to any relief. Mr. Jahagirdar who appeared for the plaintiff's son relied upon -- Bharmappa Murdeppa Soppin Vs. Hanmantappa Tippanna Belludi, referred to above.

43. Divatia J. who delivered the judgment of the Court pointed out as follows:

"Mr. Jahagirdar has lastly relied on -- "AIR 1843 Bom 451 (Z31)" which I have referred to above. In distinguishing the decision in -- "AIR 1939 Lah 585 (Z28)" from the facts of that case, the learned Chief Justice has observed that the Lahore view under which the son's interest is liable to be sold even though a sale had not taken place had a certain attraction inasmuch as it holds that the father's interest and the son's interest can be sold in one sale instead of two different sales one after the other. A distinction was made between a mortgage decree with the stipulation that if the entire amount was not satisfied, the plaintiff was to recover from the defendant personally, and a mortgage decree directing that on sale of the property the mortgagee was to be at liberty to apply for a personal decree for the balance not recovered and the opinion was expressed that in the former case the son's interest cannot be sold along with the father's. The property was not sold in execution and the rights of the auction purchaser had not therefore arisen. The decision, therefore, does not govern the present case.

But even so, it would appear that the former decision of our High Court in -- "Dattatreya Vishnu V. Vishnu Narayan", 36 Bom 68 (Z33) was not brought to the notice of the court. In that case it was observed following the earlier decisions of the Privy Council as well as of our own High Court that in most cases the practice was to direct a single sale in such circumstances and that such a single sale would not be illegal. It is difficult to say why a decree which directs that the property mortgaged by the father should be sold in execution of the mortgage decree against him and the deficit, if any, to be recovered from him personally should not be regarded by itself as a personal decree against the father for the deficit entitling the decree-holder to sell the son's interest also in one sale. The decree-holder would be at liberty to sell the father's interest in the mortgaged

property and thereafter he would be entitled to sell the remaining property including the son's interest therein because of the personal decree against the father. Instead of having two sales, i.e., the first sale of the father's interest in the mortgaged property and a subsequent sale of the son's interest in the remaining property, there is no reason why the whole of the property cannot be sold in one sale when it is not established that the debt was not binding upon the son.

We are of the opinion that in the present case there is a personal decree against the father, and that therefore the son's interest in the property is bound on account of his pious obligation to discharge the debt. Whether the father's interest should be sold first before selling the son's interest is an academic question as the whole property has been already sold. We therefore hold that the learned Judge below was right in his decision that the son's interest was properly sold in the execution sale."

44. Turning to the only Sind decision which is available in -- "Sugnomal v. Chuchermal", AIR 1939 Sind 297 (Z34), it was held there as follows:

"Where a father has mortgaged joint family property and in execution of the mortgage decree the property is auctioned and the auction sale is completed, the sons who have failed to show that father's debts were for illegal or immoral purpose, cannot successfully challenge the sale which is complete."

45. Thus, to recapitulate, we arrive at this evolution that if a mortgage or a voluntary alienation by the father alone is neither for a legal necessity nor for an antecedent debt, it is not operative on the son's interest as such. The sons are nevertheless under a pious obligation to pay the mortgage debt "qua" debt. But when this mortgage has fructified into a decree against the father alone and the mortgage property has been sold, the sons, though not parties to the mortgage suit, would be bound by the sale unless, they show that there was no debt owing by the father or that the debt in respect of which the mortgage was executed was incurred by the father for an immoral or illegal purpose.

46. If this were to be the correct legal position it would logically follow that the suit is not maintainable because the debt is admitted and there is a distinct admission of the borrowing in para. 7 of the plaint and the sons have never raised any plea whatever that the mortgage transaction was tainted with illegality or immorality.

47. The learned Subordinate Judge has finally found that the Article of Limitation Act applicable to this case is Article 12 and that the suit is barred by time. If the correct legal position regarding the maintainability of such is as set out on the previous paragraph Article 12 is plainly inapplicable.

48. Article 12 applies only to suits to set aside sales referred to therein. A sale can be set aside by a person only when it can be said that it is binding on him unless and until it is set aside. This Article will not apply therefore to cases where

the plaintiff would not be bound by the sale even if it were not set aside. In other words, the application of the Article depends upon the fact whether the sale impeached is a void or voidable sale. A sale which in its inception is null and void, is legally of no force and therefore it cannot be set aside but can only be declared to be void; and Article 12 is inapplicable to such a case. As observed by the Privy Council there is a wide difference between setting aside a sale and holding that the plaintiff's rights are not affected by it. A suit to obtain a declaration in respect of a void sale that it is inoperative as regards plaintiff is not within Article 12. On the other hand where a court sale has to be set aside and cannot be considered as a nullity, the case would fall within Article 12 of the Limitation Act; -- "Venkata Narsiah v. Subbamma", 4 Mad 178 (Z35) ; -- "Sadagopa v. Jamuna Bai", 5 Mad 54 (Z36); -- "Haji v. Atharaman", 7 Mad 512 (Z37), (where Karnavan is not sued in a representative capacity, a suit, by the other members to set aside the sale is not governed by this Article as the sale is not binding on them); -- "Nila Kandan v. Thandamma", 9 Mad 460 (Z38); -- "Narasimha Naidu v. Rama-sami", 18 Mad 478 (Z39); -- "Kadar Hussain v. Hussain Saheb", 20 Mad 118 (Z40); -- "AIR 1939 Mad 867 (W), (if the sale is held to be void against the plaintiff, this Article cannot be permitted to stand in his way) ; -- "Satyanarayana v. Ramineedi Rayalamma" AIR 1043 Mad 501 (Z41); -- "Nemmayya Shetty Vs. Nagaraja Shetty and Others, and -- Vajapayajula Venkateswarlu and Another Vs. Regadimilli Veeraswami and Others, .

49. The plaintiff in a case where the sale is not binding on him can get a declaration that his interests are not affected by the sale and even if he sues to set aside such a sale it will be regarded as being in effect for such a declaration. Such a suit for declaration is not governed by this Article of the Limitation Act: -- Ram Ganu Ghadge Vs. Hari Sambhu Ghadge, Banarsi Das Vs. Mt. Bhawani Kuer and Others, ; -- Nehal Khan Vs. Felu Dome and Others, and -- Fazlar Rahim Vs. Khorsed Alam and Others, . In such a case the plaintiff can ignore the sale and where he is dispossessed by the purchaser he may bring a suit for possession disregarding the sale altogether and his suit would be governed by Article 142 or some other Article and not by Article 12; -- "Khairajmal v. Diam", 32 Cal 296 (PC) (Z48); -- "An-nanda Pershad v. Prasannamoys Dasi", 34 Cal 711 (PC) (Z49) and -- AIR 1935 139 (Privy Council) .

50. On these principles it follows that when a suit is brought by a Hindu son for setting aside a sale of his share in the family property in Court auction in execution of a money decree against his father, it is governed by Article 12 even though the son was not a party to the said decree inasmuch as the sale is not void but merely voidable and the plaintiff cannot recover his share without setting aside the execution sale, e.g., on the ground that the debt for which his share was sold was incurred by his father for illegal or immoral purposes. An auction sale of family property covers not only the father's share but the son's share as well and unless the son challenges the sale within the period allowed by law, the sale would become unassailable : -- Narayana Naicken Vs.

Venkataswami Naicken and Others, .

51. But where the father has alienated ancestral property, a Hindu son governed by the Mitakshara law who seeks to set aside that alienation will be governed by Article 126. The Legislature has provided by Article 126 for the perfection of the title of an alienee from the father when a Hindu son who wants to take advantage of the ante-quoted Mitakshara Law seeks to set aside such an alienation -- *Murajalli Munia Goundan Vs. Ramasami Chetti and Others*, per Sadasiva Aiyar J.:

"The expression "ancestral" in Article 126 must be construed in the ordinary sense in which the word is interpreted in Hindu law."

It is well settled that the word "alienation" in Article 126 includes a mortgage as well as a sale: -- "*Chokhey Singh v. Hardeo Singh*", AIR 1921 Oudh 196 (Z53). Under Article 126 the fact which starts limitation running is the ouster of the father and son from the actual enjoyment of the property transferred. Therefore, in the case of a simple mortgage by the father there is no necessity for the son to take any action. He can wait till the mortgagee seeks to enforce the mortgage and then plead his own right in answer to it.

52. This Article 126, however, on its very wording is inapplicable to an involuntary alienation, e.g., in execution of decree: -- "*Issuriddutt Singh v. Ibrahim*", 8 Cal 653 (Z54). In such a case the residuary Article 144 will be applicable and the period of limitation will be 12 years from the starting point viz., when the possession of the defendant becomes adverse to the plaintiff.

53. Thus it will be seen that the question of the maintainability of the suit and the Article of limitation applicable are interdependent and whether Article 12 or Article 142 or Article 144 applies will follow only on our accepting the legal position set out in paragraph above.

54. It will be seen from the discussion of the case-law on the subject that so far as Madras is concerned, the position reached in regard to mortgages executed by the father alone, neither for an antecedent debt nor for legal necessity, is that as set out in -- "*AIR 1920 Mad 479 (Z13)*". corresponding to the position reached by *Beaumont C. J.* in -- *Bharmappa Murdeppa Soppin Vs. Hanmantappa Tippanna Belludi*, " and has not proceeded further to the extent reached in --- *Puttappa Kariyappa Huchappa Bijjur Vs. Banappa Fakirappa Shiggauv*, ", wherein on facts practically identical to the instant case before us the conclusion has been reached that when the mortgage has fructified into a decree against the father alone and the mortgaged property has been sold the sons though not parties to the mortgage suit would be bound by the sale unless they show that there was no debt owing by the father or that the debt in respect of which the mortgage was executed was incurred by the father for an immoral or illegal purpose. On account of the importance of this matter, we desire that this point should be decided authoritatively by a Full Bench so that subordinate Courts may not be confused by differing Bench decisions.

55. We therefore refer the following three questions to the Full Bench:

"1. Whether a mortgage decree for sale simpli-citer, without any personal liability, obtained against a father alone on a mortgage of the joint family property created by him for a purpose not binding on the family, is binding on the son's share by the application of the principle of pious obligation;

2. Whether a sale held of the joint family property in execution of such a decree is binding on the son's share; and

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

The papers will be placed before my Lord the Chief Justice for such appropriate action as he deems fit.

(In pursuance to the aforesaid Order the appeal coming on for hearing before the Full Bench, the Court expressed the following) :

OPINION

Subba Rao, J.

56. The following three questions have been referred to the Full Bench by a Divisional Bench of this Court of which I was a member.

(i) Whether a mortgage decree for sale simpli-citer, without any personal liability, obtained against a father alone on a mortgage of the joint family property created by him for a purpose not binding on the family is binding on the son's share by the application of the principle of pious obligation.

(ii) Whether a sale held of the joint family property in execution of such a decree is binding on the son's share and

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

57. The relevant and short statement of facts which led up to this reference may be stated: Hajee Abdul Rahiman, the second defendant in the suit, obtained in a partition effected with the other shares Items 2 to 7 and 9 to 11 of the plaint schedule. Subsequently he acquired Items 1 and 8 from his brother Hajee Muhammad Ibrahim Sait. On 5-12-1929, the second defendant executed a mortgage deed hypothecating Items 1 to 9 for a sum of Rs. 1,50,000 in favour of the first defendant company, the Provident Investment Co., Ltd., Bombay. As the mortgage amount was not paid, the company filed O. S. No. 1442 of 1932 on the original side of the Bombay High Court and obtained a preliminary decree for sale on 16-11-32. In due course, final decree for sale was passed on 11-7-1933. During the execution proceedings, in order to prevent the sale and to gain time, the second defendant offered two more items, Items 10 and 11 of the plaint schedule as collateral security. The High Court, by a consent order dated 30-8-1934, accepted the arrangement and adjourned the sale. But as the decree

amount was not paid within the extended time, the items mortgaged as well as the two items given as additional security were brought to sale. The decree-holder became the auction purchaser. The sale of Items 1 to 9 was confirmed on 22-11-1935. and that of Item 10 was confirmed on 26-6-1936. The auction purchaser took delivery in April 1935. Thereafter, the company sold the 9th item to third parties. As the sale proceeds were insufficient to discharge the decree amount, on 16-3-1937 a personal decree was passed against the second defendant for the balance.

58. Abdul Hamid Sait, a son of the second defendant and his son Adam Sait, minor represented by his father, filed O. S. No. 17 of 1946 on the file of the Court of the Subordinate Judge of Ootacamund in "forma pauperis" for a declaration that the decree in O. S. No. 1442 of 1932 on the file of the High Court, Bombay, and the sale held in execution thereof were not binding on them, for possession of the properties, for mesne profits and for other incidental reliefs. The learned Subordinate Judge dismissed the suit. The plaintiffs preferred A. S. No. 619 of 1948 to this Court "in forma pauperis". It may also be mentioned at this stage that the reference was made on the assumption that Hindu law governs the parties. It is also admitted that the mortgage executed by the second defendant was neither for necessity nor for the benefit of the joint family estate. It is not disputed that the entire mortgaged property was sold in execution of the mortgage decree for sale.

59. On the aforesaid facts and the admissions made by the parties, the aforesaid three questions were formulated for decision. The first two points may be taken up together. The learned counsel for the appellants contended that the mortgage deed executed by the second defendant for purposes not binding on the joint family estate was illegal and, therefore, the decree obtained on the foot of that mortgage and the sale held in execution thereof were equally bad and not binding on the other members of the family as the mortgage decree and the sale held were only the mode of working out of the rights conferred under the mortgage deed. The learned counsel for the respondents countered this argument by stating that though a decree was obtained on the foot of the mortgage, it involved also a debt of the father and as the family property was sold through Court to discharge that debt, the son cannot question the sale except by alleging and proving that the debt was incurred for illegal and immoral purposes. He would further argue that a personal liability was created under the mortgage decree and, therefore, the sale held to discharge the personal liability was binding on the plaintiffs.

60. To give an adequate answer to the first two questions referred, it would be convenient to notice the settled law on the question of the son's liability to discharge the father's debts in a joint family governed by Mitakshara, to consider the conflict of decisions, if any, on any particular aspect and to evolve a satisfactory solution to steer clear of the conflict. At the outset, therefore, it would be necessary to ascertain the scope of the son's liability under Hindu Law

based on the principle of pious obligation and the manner of its enforcement. But it would be pedantic and indeed futile to trace its origin to Hindu Law texts as the doctrine has been changed beyond recognition by case law. What was a pious duty on the part of the son to pay his father's debts has gradually crystallised into a legal liability of the joint estate of the father and the sons.

The leading cases forming the land-marks on the subject illustrate the progressive development of law. "1 Ind App 321 (PC) (T)" is the first decision where their Lordships of the Privy Council treated the obligation of a son to pay his father's debts, unless contracted for immoral purposes, as affording in itself a sufficient answer to a suit brought by a son either to impeach the sales by a private contract for the purpose of raising money in order to satisfy pre-existing debts or to recover property sold in execution of a decree of Court.

A later decision of the Privy Council, -- "5 Cal 148 (U)", understood the earlier decision as laying down the following two propositions: (i) that where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt or a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted and (ii) that purchasers in an execution sale, being strangers to the suit, if they have no notice that the debts were so contracted, are not bound to make an enquiry beyond what appears on the face of the proceedings.

In the latter case, the facts were: the father of the plaintiffs executed in favour of the defendant a mortgage deed hypothecating the entire joint family estate for a sum of Rs. 13,000. The mortgagee obtained a decree for sale of the mortgage properties. During the execution of the decree the mortgagor died and his sons were brought on record. The sons as minors represented by their mother raised objection to the execution of the decree but that was overruled & the properties were sold and purchased by third parties. The minor sons filed a suit for declaration of their rights and for an injunction restraining the purchasers from taking possession of the property. The Judicial Committee held that under the sale only the interest of the father was conveyed to the purchasers. In dealing with the contentions of the parties, their Lordships considered in detail the principles of Hindu law, which are the foundation of the plaintiffs' claim and the rights which flow from them. They accepted the principle laid down in -- "1 Ind App 321 (PC) (T)", that the sons cannot recover property sold in execution of a decree against the father unless they show that the debts were contracted by the father for immoral purposes and that the purchasers had notice that they were so contracted, though on the facts of the case, they held that what was purchased was only the share of the father.

61. The Privy Council again in -- "13 Cal 31 (V)" had to consider the scope of the right of a son to question the sale of a joint estate made by the father or a sale

held in execution of a decree obtained against him alone. There one Girdhari Singh gave a lease of the joint family property to one Mr. Conis as part of an arrangement under which Girdhar took a loan of Rs. 45,000. After the death of Mr. Collis, Girdhar dispossessed his wife Mrs. Collis. She filed a suit for mesne profits and, in execution thereof, a portion of the family ancestral land was brought to sale and was purchased by the respondent. The sons of Girdhar instituted a suit for setting aside the sale and for recovery of possession. Alternatively, they contended that only the share of Girdhar passed under the sale to the purchasers. The Judicial Committee held that the sale of the family estate was binding on the plaintiffs. Their Lordships observed at p. 35:

"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint family estate, their Lordships think that there is now no conflict of authority."

The decision of the Judicial Committee in -- "Sahu Ram Chandra v. Bhup Singh", AIR 1917 PC 61 (Z55), wherein their Lordships, while recognising the principles laid down in the earlier decisions, made some observations in regard to the character of an antecedent debt, introduced some confusion in the law but the later decision of the Privy Council in -- "AIR 1924 PC 50 (Z9)" clarified the position.

62. The Privy Council in the later case, after reviewing the law on the subject, laid down their conclusions in the form of propositions, which though they authoritatively settled the law in some respects, gave rise to further doubts and difficulties in other directions. The facts in that case were one Sitaram granted a mortgage for Rs. 11,000 in favour of two persons. The mortgage was secured on ancestral and joint family property. At the time of the mortgage, he had two minor sons. In 1912 the mortgagee brought a suit on a mortgage and obtained a decree. In 1913 the minors represented by their mother brought a suit for a declaration that the mortgage was not binding on them and that the decree granted in so far as they were concerned, was null and void. The mortgage in that case was executed in order to pay off two prior mortgages on the same property. The Privy Council held that the mortgage in question was raised in order to pay an antecedent debt viz., the two older mortgages and, consequently, it was binding on the estate. After restating the law on the undoubted right of a manager to bind joint family estate for the necessity of the family, they proceeded to make the following observations in respect of the theory of pious obligation at p. 54:

"But then there comes in the further doctrine that debt has been contracted by the father and the pious obligation incumbent on the son to see his father's debts paid prevents him from asserting that the family estate, so far as his interest is concerned, is not liable to purge that debt. It may become liable by

being taken in execution on the back of a decree obtained against the father, or it might become liable by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought."

They noticed the conflict of the two principles viz., the general rule of Mitakshara law that a manager cannot burden the estate for his own purposes and the obligation of the son to discharge his father's debts based on the doctrine of pious duty and suggested that the term antecedent debt represents a more or less desperate attempt to reconcile the conflicting principles but in view of the principle of "stare decisis", they refused to unsettle what had been settled by a long course of decisions. To clarify the position and presumably to prevent further argument based on Hindu Law texts, they laid down their conclusions in 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 reversioners 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 rather, who contracted the debt or burdens the estate, is alive or dead."

63. The Privy council reiterated the principle in a subsequent decision, -- AIR 1925 264 (Privy Council) . They held that the earlier mortgages executed by the father, not being for immoral and illegal purposes, can sustain a sale of the family property by the father on the ground that the mortgages were antecedent debts. In -- "AIR 1920 Mad 479 (Z13)", a Divisional Bench of this Court gave a conditional decree against the sons under Order 34, Rule 6, C. P. C., to the effect that if the sale proceeds of the father's share of the property were found to be insufficient, the mortgagee was entitled to recover the amount due to him against the mortgagor personally and against the ancestral properties of himself and his sons. They pointed out the principle at p. 480:

"It was held that the pious obligation of the sons did arise during the father's lifetime and that the debt involved in a mortgage was an antecedent debt which attracted the pious obligation of the sons to pay, even though the mortgage as a transfer of an interest in joint ancestral property failed."

The learned Judges made a composite decree.

64. From the aforesaid discussion of the cases, the settled law on the subject

may be summarised. The theory of pious obligation, which had its roots in the texts of Brihaspathi and Narada and which was originally a religious and moral duty of the son to save the soul of his father from perdition, has developed step by step till it has imposed a liability on the entire family property to meet the said obligation. Though in its origin, the son was bound to discharge the debts not only from his joint family property but also from his self-acquisitions, the later development of the law confined it only to the family assets in his hands. For the application of that principle, a distinction is made between simple debts and secured debts. For the simple debt of the father, the son's share in joint family property is liable, provided the debt was not incurred for immoral or illegal purposes. The father has power to alienate the joint estate for discharging his debts. A creditor may realise his debt by enforcing it in a court of law and bringing the joint family estate including the son's share to sale through court. He may enforce his right, against his sons during the father's lifetime or even after his death. He may implead the sons in a suit against the father and obtain a decree and execute the decree against the entire joint family estate.

He may file a suit against the father alone, and, in execution of the decree obtained against him, sell either the father's share in the family property or the entire family estate including the son's share. In the latter case, the son may intervene in execution proceedings or question the sale by a collateral proceeding on the ground that the debt, which fructified into a decree, was incurred by the father for illegal or immoral purposes.

But in the case of a mortgage, different considerations arise. Though under Hindu Law as laid down in texts, there was no distinction between a secured debt and an unsecured debt, it is now firmly established that a mortgage is an alienation and that the considerations applicable to an alienation will equally apply to the case of a mortgage. If so, a manager of a joint Hindu family can mortgage joint family estate for necessity or for the benefit of the estate. So too in the case of the father he can execute a mortgage of the property of the joint family consisting of himself and his sons for necessity and for the benefit of the family. But in the case of the father, this restriction of his right would lead to the anomaly of placing a simple creditor in a more advantageous position than a secured creditor, for, in the case of a simple debt, the father could alienate the joint family property or a creditor can enforce it through court and bring the family property to sale, whereas in the case of a mortgage, the mortgage could not be binding on the family, unless it was executed for necessity or for the benefit of estate. Presumably to avoid this anomaly, it has been held by decided cases that the debt, involved in a mortgage can sustain the validity of a subsequent mortgage or a sale. An earlier mortgage debt, therefore, is held to be "an antecedent debt" enough in law to sustain a subsequent mortgage or a sale.

Logically, there cannot be a distinction in principle even if a decree is passed on the mortgage as it is certainly an antecedent debt and the father can alienate

family property to discharge that decree for the decree by its own force creates a debt against him. See -- Reddi Krishnan Naidu and Others Vs. Chintala Somi Naidu and Others, . It cannot also be disputed that if a creditor gives up his mortgage interest and obtains a money decree against the father, or, if after exhausting the mortgage property, he obtains a personal decree against the joint estate, the Joint family estate can be brought to sale and the purchase can be impugned only on the ground available to the purchaser in execution of a money decree.

There ends the field of agreement and thereafter emerges the domain of conflict. But in a case where the entire joint family property including the son's share is sola in execution of a mortgage decree for sale there is divergence of opinion. But an the Courts agree that the son's share can be sold in execution of a personal decree passed in a mortgage action whether the mortgage decree itself is a composite decree or whether a personal decree is made after the mortgage properties are exhausted in execution of the mortgage decree. But there is no such agreement in the case of a sale of the family property in execution of a mortgage decree for sale, some cases holding that such a sale is not binding on the sons, while others deciding that on principle there is no distinction between such a sale and a sale in execution of a personal decree, for, in either case, the son's share is sold to discharge the antecedent debt of the father. There is no direct authority of the Madras High Court on this question.

65. In Gajadhar Pande and Others Vs. Jadubir Pande and Another , a Divisional Bench of the Allahabad High Court considered a similar question. The question in that case was whether the son can seek to set aside the sale Of his interest in joint family property in execution of a mortgage decree for sale against his father without alleging and establishing that the debt was incurred for illegal and immoral purposes. The learned Judges ruled that the same principle applicable to a sale in execution of a money decree would apply even in the case of a mortgage decree. They based their decision on the second proposition laid down in -- " AIR 1924 PC 50 (29). Sulaiman J. observed:

"It is obvious that if the word "debt" in this proposition includes both a mortgage debt and a simple money debt, the appellants' contention cannot prevail, because the father, having incurred the mortgage debt in question, which was not for an immoral purpose, did lay the estate open to be taken in execution of the mortgage decree passed for the payment of that debt."

The learned Judge proceeded to say:

"I am, therefore, clearly of opinion that it is not open to the present plaintiffs to have the decree, the auction sale and the subsequent transfer set aside, specially when rights of a third party have come in, without establishing that the secured debt had been tainted with illegality or immorality."

But in Jagdish Prasad and Others Vs. Hoshyar Singh and Another , two of the learned Judges of the Full Bench made observations, which ran counter to those

made in --" AIR 1925 AH 180 (Z20)". But, in that case, the suit was filed by the sons challenging the validity of the mortgage before a sale could take place. Therefore, that decision, though it may have a bearing on the first question referred, is not of any relevance in regard to the second question raised. The learned Judges' conclusion was that, as the mortgagee failed to establish the legal necessity for the loan, the mortgage decree against the sons was illegal. Mukerji J. and Boys J. were of the view that the word "debt" in the second proposition in -- "AIR 1924 PC 50 (Z9)" did not contemplate a mortgage but only an unsecured debt, whereas Sulaiman Ag. C. J. would hold that the word "debt" in the second proposition included a mortgage debt but that proposition did not apply to the case as no auction sale had taken place and the property had not yet passed out of the family.

I agree with the conclusion arrived at by the learned Judges that the mortgage decree was not binding on the sons. But that is because the mortgage decree can only be equated to the mortgage. Though the mortgage executed by the father is not binding on the share of the son in the joint family estate, it can be treated as an antecedent debt to sustain an alienation made by the father. So too if the mortgage decree "qua mortgage decree may not be binding on the son, with reference to a court Bale effected to discharge the decree, it may constitute an antecedent debt to sustain it. If there is an anomaly in the latter case, there is also an anomaly in the former one.

66. In Jahan Singh Vs. Dr. Hardat Singh and Another , another Bench decision Sulaiman C. J. and Rachhpal Singh J. followed the decision in -- " AIR 1924 PC 50 (Z9)" and explained the scope of the Pull Bench as follows at pp. 249, 250:

"But in the Pull Bench case the suit was instituted by the sons soon after the mortgage decree had been obtained and before any auction sale took place. The Lucknow Court had held that even where only a decree had been obtained the sons must show immorality or illegality. All the Judges constituting the Pull Bench held tha: this was not so and that the transferee must show legal necessity if the auction sale had not taken place. All other observations made as to what would be the position if an auction sale had taken place were no more than obiter dicta, and, therefore, although they are entitled to great, weight, they are not binding upon us."

67. Another Full Bench of the same High Court in Hira Lal and Others Vs. Puran Chand and Others, in a considered judgment accepted the view expressed by Sulaiman C. J. in Gajadhar Pande and Others Vs. Jadubir Pande and Another and in Jagdish Prasad and Others Vs. Hoshyar Singh and Another . After giving a historic retrospect of the theory of pious obligation and after considering the decisions on the subject, they came to the conclusion that the word "debt" in the second proposition laid down by the Judicial Committee in -- "AIR 1924 PC 50 (Z9)" includes both a simple debt and a mortgage debt. In that case, the suit was filed before the properties were sold in execution of the decree and the prayer was for a declaration that the decree was void. The question referred to

the Full Bench was whether the word "debt" in the second proposition of their Lordships of the Privy Council in -- "AIR 1924 PC 50 (Z9)" refers only to a simple money debt or also to a debt secured by a mortgage. They gave the answer as aforesaid but the report does not disclose what was the final decision of the Court after the reference was answered.

68. The Nagpur High Court in AIR 1947 69 (Nagpur) ", had to consider the question whether the Joint family property can be sold in execution of a mortgage decree in a suit brought against the father alone. It may be mentioned that in that case also, the sale was not held and the suit was instituted before the sale. The learned Judges held that the said mortgage decree was not binding on the sons as the mortgage was not for necessity. But they took care to point out in that case that the property had not yet gone out of the family and was still not sold.

The Bombay High Court in -- Bharmappa Murdeppa Soppin Vs. Hanmantappa Tippanna Belludi, ", ruled that where a mortgage is created not for necessity or for the payment of an antecedent debt, it binds only the father's interest in the property and it is only that interest, which may be sold in a mortgage decree. But if a personal decree is obtained against the father, then that decree can be enforced by sale of the son's interest in the property. It may be noticed that in that case the suit was instituted prior to the sale and, therefore, the second question referred to us did not arise for consideration there.

69. In -- "AIR 1939 Lah 585 CZ28)", the sons of a Hindu father sued for a declaration that the mortgages effected by their father and the decree obtained thereon should not affect their reversionary rights as the mortgages were of ancestral property. The suit was dismissed on the basis of the second proposition in -- "AIR 1924 PC 50 (Z9)" that the word "debt" includes a mortgage debt as well as an unsecured debt. They gave an additional reason that as the decree contained a provision for a personal decree, if the final decree was not satisfied by sale of the mortgage property, that would enable the mortgagee decree-holder to execute the decree against the sons shares also.

70. The decisions relied upon by the learned counsel for the appellants, viz., -- "Deendayal Lal v. Jugdeep Narain", 4 Ind App 247 (PC) (Z58) ; --"Pursid Narain v. Honooman Sahay", 5 Cal 845 (259) and -- "Luchmun Dass v. Giridhur Chowdhury", 5 Cal 855 (Z60), have no bearing on the question raised, for in those cases no question of pious obligation was raised or could be raised and indeed the only question argued and decided was what was the interest that was sold in execution of the decree made therein. It is true that in -- "4 Ind App 247 (PC) (Z57)", the decree in execution whereof the property was sold was a mortgage decree against the father and the property was purchased by the decree-holder. The son filed a suit for a declaration that, according to Mitakshara law, the joint estate of himself and his father could not be taken or sold in execution for the debt of the latter. The Judicial Committee held that what was sold was only the father's share and confirmed the sale to that extent. No question of pious

obligation was raised or argued, presumably for the simple reason that at that time, it was understood that the son's liability would arise only after the father's death.

71. So too in -- "5 Cal 845 (Z59)". There, on mortgages executed by the father alone, decrees were obtained and in execution of those decrees, the right, title and interest in the ancestral property were sold and purchased by the mortgagee. In a suit by the widow and the two sons to recover their shares in the property from the representatives of the mortgagee, it was held that as no necessity was proved, only the father's share passed under the sale to the purchaser. Here also no question of any alienation for an antecedent debt was raised or decided.

72. The law on the subject may now be summarised. A mortgage decree is a debt within the meaning of the second proposition laid down by the Judicial Committee in -- "AIR 1924 PC 50 (Z9)", viz., that if he is the father and the reversioners are the sons he may by incurring a debt, so long as it is not for an immoral purpose lay the estate open to be taken in execution proceedings upon a decree for payment of the debt. The decisions do not speak in one voice on the interpretation of the word "debt". But the majority and the finally, established view is that the word "debt" includes both the mortgage debt as well as a money debt. But the conflict still subsists on the question whether that proposition would apply to a case where the joint family property was not sold in execution of the decree.

73. It is true that the word "debt" is comprehensive enough to take in both a simple debt and a mortgage debt for even in the latter case, a debt is involved in the mortgage. But the said interpretation does not afford an adequate answer to the question whether the mortgage decree against the father "qua" mortgage decree is binding on the son's interest in the family property. The proposition in terms applies to a case only where the estate is taken in execution proceeding upon such a decree. But I cannot agree with the learned Judges, who held that the mortgage decree "qua" mortgage decree would be binding on the interests of the son in joint family property, for by so holding,. I would be effacing the distinction between a mortgage and an alienation in discharge of that mortgage. By the merger of the mortgage in a mortgage decree, the characteristics of the mortgage are not lost. If the mortgage is not binding on the sons for the reason that it was not for necessity or was not in discharge of an antecedent debt, the same infirmities would continue to attach to the mortgage decree. I would therefore, confine the operation of the second proposition only to a case where joint family property is sold in execution of a decree, whether it is a mortgage decree or a simple decree. So construing, I further hold that by reason of that express proposition -- it is not now open to us to go behind it -- the son cannot question the sale held in execution of a mortgage decree unless he alleges and proves that the debt involved in the mortgage was incurred for illegal and immoral purposes.

74. But I would like to support my conclusion on a more rational basis. The aforesaid discussion discloses that there was unanimity of opinion on the question that a private conveyance by the father to discharge an antecedent debt is valid, whether the debt fructified into a mortgage decree or not. It would be a clear and logical extension of that principle to hold that what the father can do, a creditor can enforce through Court. If the private alienation by the father is sustained by the antecedent mortgage decree, the Court sale is equally supported by the said decree.

75. It is said that the Court exercises only the father's power and, therefore, it cannot sell the joint family estate when the father refuses to exercise that power. To appreciate this argument and to afford a satisfactory answer to it, it would, be convenient at this stage to consider some of the relevant decisions, which throw considerable light on the source of the Court's power .in selling the interest of the son in execution of a decree obtained against the father. In -- Pannalal and Another Vs. Mst. Naraini and Others, , the Supreme Court made some pertinent observations in answering the argument that a creditor's claim is entirely based upon the father's power of dealing with his sons interest. Their Lordships observed at p. 175 as follows:

"We do not think that it is quite correct to say that the creditor's claim is based entirely upon the father's power of dealing with the son's interest in the joint estate. The father's right of alienating the family property for payment of his Just debts may be one of the consequences of the pious obligation, which the Hindu law imposes upon the sons or one of the means of enforcing it, but it is certainly not the measure of the entire obligation. As we have said already according to the strict Hindu theory, the obligation of the sons to pay the father's debts normally arises when the father is dead, disabled or unheard of for a long time. No question of alienation of the family property by the father arises in these events; although it is precisely under these circumstances that the son is obliged to discharge the debts of his father. As was said by Sulaiman Ag. C. J. in the case of -- Bankey Lal and Others Vs. Durga Prasad and Others , the Hindu Law texts based the liability on the pious obligation itself and not on the father's power to sell the son's share."

76. Observations much to the same effect were made by the Supreme Court again in -- Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, , their Lordships stated that

"it is a special liability created on purely religious grounds and can be enforced only against the sons of the father and no other coparcener. The liability therefore has its basis entirely on the relationship between the father and the son."

The learned Judges proceeded to state:

"It cannot be laid down as proposition oE law that the creditor's power of proceeding against the son's share in the joint estate for recovery of the debt

due by the father is co-extensive with the father's power of disposal over such interestIf the creditor's rights are deemed to be based exclusively upon the father's power of disposition over the son's interest, such rights must necessarily come to an end as soon as the father dies, or there is a partition between him and his sons. It is settled law that even after partition the sons could be made liable for the prepartition debts of the father if there was no proper arrangement for the payment of such debts at the time when the partition was effected, although the father could have no longer any right of alienation in regard to the separated shares of the sons."

77. In -- "25 All 214 (211)", a Full Bench of the Allahabad High Court equated the power of the father to sell with that of the Court to sell the son's interest. At p. 221, the learned Judges observed :

"It is indisputable that an alienation of ancestral property by a father in order to satisfy debts, which are not tainted with immorality, is binding on his sons and it is also clear that what the father could himself have done, the Court is empowered to do for him at the instance of a creditor."

78. The Judicial Committee in -- "13 Cal 21 (PC) (V)", brought out the same idea by stating that if the father's debt was of a nature to support a sale of the entirety of the joint estate, he might legally have sold it without a suit or the creditor might legally procure a sale of it by a suit. The same idea" has been felicitously expressed by Sulaiman C. J. in Jahan Singh Vs. Dr. Hardat Singh and Another , when he said that if a father can voluntarily trans-fer property in order to pay off his antecedent debt, the Court may also compel him to do the same by means of a compulsory sale.

79. From the aforesaid decisions, it is apparent that the creditor's right to proceed against the son's interest in joint family property, for the debt of the father is not co-extensive with the power of the father to alienate the property to discharge the said debt. There is an essential distinction between the substantive rights of a creditor and the procedure by which that right can be enforced. By a long course of decisions, the liability of the son's share to the debt of the father, which is not vitiated by illegality or immorality, is firmly established. The liability to the creditor can be discharged by the father by alienating the property to him in the exercise of his power to do so. But nothing in law prevents the creditor from enforcing the substantive rights by instituting a suit against both the father and the son and obtaining a decree against them both, in which case there is no occasion for the exercise of the power by the father or in his stead by the Court

But when the creditor chooses to obtain a decree only against the father and seeks to bring the entire family property to sale, the Court by selling the property does only what the father could have done. The power of the Court to sell is co-extensive with the power of the father to sell. The existence and continuance of the power of the father and not the exercise of it by him enables the Court to sell the properties in his stead. If he exercises the power to sell, no

question of the Court selling the property would arise and indeed the Court's intervention becomes necessary only when a father refuses or neglects to exercise that power. The Court's power to sell comes to an end when the father's power ceases. This is illustrated in the class of cases where the father's power comes to an end either because of the partition in the family or because of the insolvency of the father.

As I have already stated, the cessation of the father's power and the consequent inability of the Court to enforce it only relates to the province of adjective law and the rights of the creditor can be enforced in a properly framed suit. Further, if the argument of the learned counsel for the appellants is sound, the Court cannot sell the share of the son even in execution of a decree for money against the father, if the father refuses to exercise that power. It has been held in innumerable cases that the Court can sell the entire property in execution of such a decree. It would follow from what I have stated above that as the sale of the family property by the Court discharged the antecedent decree debt, the plaintiffs cannot question the same except by alleging and proving that the debt was incurred for illegal and immoral purposes, which they have not attempted to do in this case.

80. The learned counsel for the appellants contends that the sale in execution of a mortgage decree is only a step in enforcing the mortgage debt and, therefore, it cannot be treated as an alienation to discharge an antecedent decree debt. This argument ignores the distinction between the enforceability of the mortgage decree "qua" mortgage decree and the right of a son to question the sale after the property was sold. After the sale was held, the debt of the father involved in the mortgage decree is satisfied in full or in part. Thereafter, no question of the enforceability of the mortgage decree arises but only the right of the son to get the sale set aside on specified grounds, viz., immorality and illegality of the debt.

81. The learned Counsel for the respondents advanced a further argument, viz., that the mortgage decree is also a personal decree and therefore apart from other considerations, the sale held in execution of the personal decree is binding on the sons, unless they can prove that the debt was vitiated by immorality or illegality. This argument is sought to be sustained on a construction of the provisions of Order 34, Civil P. C. and the form prescribed for decrees in a mortgage action. The material provisions relied upon are Order 34, Rule 4, which runs thus:

"In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in Clauses (a), (b) and (c) (i) of sub-rule (1) of Rule 2 and further directing that in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold."

and Clause (b) of Order 34, Rule 2, Sub-rule (1), which is as follows:

"In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a

preliminary decree (b) declaring the amount due at that date and (c) directing (i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under Clause (a)....."

Clause 2 of Form 5-A:

"And it is hereby ordered and decreed as follows :

(i) that the defendant do pay into Court on or before the day of or any later date upto which time for payment may be extended by the Court, the said sum of Rs.....

(ii) that on such payment and on payment thereafter before such date as the Court may fix or such amount as the Court may adjudge due in respect of such costs....."

82. Relying upon the words "if the defendant pays into Court the amount so found" in B. 4 of Order 34 read with Rule 2 (i) and the very explicit words in the form "the defendant do pay into Court", it is contended that the said words impose a personal liability on the mortgagor. I find it rather difficult to accept this argument. A preliminary mortgage decree declares the amount due and gives an opportunity to the judgment-debtor to deposit in Court the amount so declared within a specified time; in default it authorises the decree-holder to apply for a sale. This is in no sense a personal decree. It cannot be executed against the person of the judgment-debtor or against his properties other than those mortgaged. The only executable decree is the final decree for sale of the mortgaged property or the personal decree that may be passed under Order 34, Rule 6, Civil P. C.

Under that rule, where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff the Court on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance. If there was already a personal decree, Rule 6 becomes redundant. A personal decree can, therefore, only be passed under Rule 6 unless the mortgagee gave up his mortgage right and obtained a money decree in the suit itself. That a personal decree as understood in law is not intended to be passed under the provisions of Order 34, Rule 4 read with Rule 2 or the form prescribed under the Code is apparent from the fact that even if the personal liability was barred by limitation, the same form would be adopted. I cannot, therefore, hold that under Order 34, Rule 4, a Court is authorised to pass a personal decree.

Ex. D. 4 is the preliminary decree dated 16-11-1932 passed in the suit. Under that decree, the amount due under the mortgage was declared and the period of redemption was fixed. In default, the mortgagees were authorised to apply for a decree absolute for sale of the properties described in the schedule with liberty

to apply for a personal decree against the defendant for the amount of the balance in the event of the net sale proceeds proving insufficient to satisfy in full the aforesaid amount and interest and costs. The preliminary decree made in the case, therefore, involves four parts (i) declaration of the amount due (ii) the period of redemption (iii) liberty to apply for a decree for sale and (iv) liberty to apply for a personal decree. If really the preliminary decree involved a personal decree, it would not have given liberty to apply for a personal decree. The decree was only in terms of the provisions of the CPC and was not intended or as a matter of fact purported to have made any personal decree in the case. At the same time, the provisions of the Civil Procedure Code, the form prescribed thereunder and the manner in which the preliminary decree was drafted show that the mortgage decree involved a debt and the sale was only a mode of realising that debt. This takes us back again to the conclusion already arrived at by me viz., that the court sale is binding on the plaintiffs as it was held to discharge an antecedent decree debt.

83. The next question is whether the suit was barred by limitation. The sale of items 1 to 9 and 11 was confirmed on 22-11-1935 and that of item 10 was confirmed on 26-6-1936. The auction purchaser took delivery of possession of these properties in April 1936. O. S. No. 17 of 1946 was filed on 19-11-1945, i.e.. 9 years and 7 months after dispossession. The learned counsel for the respondent contended that the suit was barred by limitation under Article 12 of the Limitation Act. Article 12 of the Limitation Act reads:

"To set aside any of the following sales

(a) sale in execution One-year when the sale is con- of a decree of a civil tinned or would otherwise have Court. become final and conclusive had no such suit been brought."

The terms of the Article itself indicate that it applies only to a case where the Court sale is required to be set aside before the plaintiff can ask for any relief in respect of the property covered by that sale. This article was the subject of judicial scrutiny by the Full Bench in -- "20 Mad 118 (Z40)". There the plaintiff's paternal uncle Dada Miyya owned half an inam land and plaintiff's father owned the other half. Dada Miyya mortgaged his half to defendant's father in 1870. The defendants' father obtained a decree upon this mortgage and the property mortgaged was ordered to be sold. The sale took place in November 1881, but, by some mistake, the whole land was sold instead of Dada Miyya's half share. The defendants' father purchased the land and was put in possession. The plaintiff brought the suit on the 25th of November 1892 to recover possession of his half share. The question was whether the suit was barred under Article 12 (a) of the II Schedule of the Limitation Act. The Full Bench ruled in a short judgment that the sale could not affect the title of the plaintiff and, therefore, it was not necessary for him to have the sale set aside. This is a direct authority, therefore, for the position that a suit by a person, who was not a party to the suit or the sale proceedings to recover possession of his property, which was erroneously

sold as the property or another person is not governed by Article 12 (a) of the Limitation Act.

84. In the present case, the question of limitation arises only if the contention of the appellants is correct on facts and sound in law. The facts that may be assumed for the purpose of this argument are: The suit was not filed against the father in a representative capacity; the mortgage was not for necessity or for the benefit of the family estate; the mortgage decree is only against the father and in law the Court had no power to sell the son's share in execution of a mortgage decree against the father. On those facts the position is analogous to that in -- "20 Mad 118. (Z40)". The property of A (son), who was not a party to the suit or the execution or the execution proceedings, was sold as the property of B (father) in execution of a decree against the father. As the son was not a party to the decree or to the sale proceedings and as the Court had no power in law to sell the son's property in execution of the decree, there was no need for the son to seek to set aside the sale. The cause of action accrued to him only when he was dispossessed. He would, therefore, be entitled to file a suit for recovery of possession within 12 years from the date he was dispossessed.

85. Reliance was placed by the learned counsel for the respondents on the decision of a Divisional Bench of this Court in -- *Narayana Naicken Vs. Venkataswami Naicken and Others*, ". There, the plaintiff and the 2nd defendant were the sons of the first defendant and they together with the first defendant constituted a joint Hindu family. In execution of the money decree obtained against the first defendant, some items belonging to the joint family were sold and were purchased by the third defendant, who took delivery of them. Neither the plaintiff nor the second defendant was a party to the suit in which the said money decree against the first defendant was obtained. The plaintiff instituted the suit for a declaration that the money decree obtained against the first defendant and the proceedings in execution thereof were not binding upon him and for possession. The learned Judges held that the plaintiff could not get possession without getting the court sale set aside and that under Article 12 of the Limitation Act, the said relief was barred by limitation.

It is not necessary for me in this case to express my view on the correctness of this decision on the facts of that case. But that decision has no bearing on the facts of this case as the court had power to sell the share of the son in execution of a money decree obtained against the father, though under certain circumstances, viz., when the debt was incurred for illegal or immoral purposes, the son had the right to seek to set aside the sale. As it was a voidable sale, the learned Judges held that the sale was valid till set aside and as the relief for setting it aside was barred by limitation, the relief for possession could not be given. But in the instant case, as I have already stated, the question of limitation falls to be considered on the assumption that the court had no power to sell the son's share in execution of the mortgage decree against the father and the position is, therefore, analogous to that of a sale of his property in execution of a

decree against another.

86. For the aforesaid reasons, I answer the first question in the negative, the second question in the affirmative and on the third question I hold that Article 12 (a) of the Limitation Act has no application to the facts of this case and that the suit for possession is in time.

JUDGMENT OF THE DIVISION BENCH (SUBBA RAO AND RAMASWAMI JJ. 26th MARCH 1954)

Subba Rao, J.

87. This appeal comes on before us again after reference to the Full Bench was answered. Mr. Sankara Aiyar, the learned counsel for the appellant seeks now to raise two more points, which, if raised, on the last occasion, would have made the reference to the Full Bench unnecessary. The two points now raised are (1) the High Court at Bombay had no jurisdiction to try the suit inasmuch as the second defendant was living outside its territorial limits and the properties too were not situate within the Bombay Presidency, and the Decrees and Orders Validating Act 5 of 1936 which enacted that no decree passed or order made by any of the High Court of Bengal, Madras or Bombay, in exercise of its ordinary original civil jurisdiction under Clause 12 of the Letters Patent shall be called in question in any proceedings before any other Court, on the ground that the High Court passing the decree or making the order had no Jurisdiction to pass or make such decree or order was "ultra vires" and (2) what was brought to sale and sold and purchased in execution of the decree was only the interests of the father. Neither in the pleadings nor in the Court below the contention that the said Act was "ultra vires" was raised. Mr. Jagannadhayyar who appeared at the time, when we referred the case to a Full Bench, did not also press that point before us. If he did so and if we agreed with him. we would not have made the reference. It is neither fair to the other side nor to the Court that such a point should be allowed to be raised at this stage.

88. The second point is raised before us for the first time. It was not specifically pleaded in the pleadings, and no issue was raised. The judgment does not disclose that any such point was put before the learned Judge. Mr. Jagannadhayyar also did not press this point before us. We could not obviously allow him to raise this point either. It is not disputed that if the principles laid down by the Full Bench are followed, the judgment of the lower Court, will be correct. Following the Full Bench decision we dismiss the appeal with costs of this appeal here and before the Full Bench. The appellants will pay the court-fee due to the Government.