

(1919) 12 MAD CK 0013
In the Madras High Court

T. Subramania Aiyar and Another

APPELLANT

Vs

Shaw Wallace and Co.

RESPONDENT

Date of Decision : 03-12-1919

Acts Referred:

Contract Act, 1872 — Section 139

Citation : 58 Ind. Cas. 648 : (1920) 12 LW 117 : (1920) 43 MLJ 402

Hon'ble Judges : Ayling, J;Abdur Rahim, J

Bench : Full Bench

Judgement

Abdur Rahim, J.—Messrs. Shaw Wallace and Co. merchants of Madras, sued the defendants--appellants on a surety bond executed on the

11th February 1911 by the 1st defendant the father of defendants 2 and 3, all of them being members of a joint Hindu family. The 1st defendant

who is a Brahmin land-holder of Mayavaram in the District of Tanjore wanted to do tanner's business but for social considerations, he liked to

keep himself in the background and let the business be carried on in the name of a third person. The plaintiff company need on behalf of the tanners

to ship their goods to England for sale charging them a commission on the sale proceeds, and in furtherance of such business they advanced

moneys to tanners in order that they might buy skins and hides and tan them on the understanding that those goods should be sold in the London

market through the plaintiff's agency. They charged interest on such advances and in order to secure their repayment they not only bargained for a

lien on the skins which would be bought from time to time by the tanners but also obtained security on Immovable property of the tanners

themselves and of other persons as sureties.

2. The first venture of the 1st defendant, Subramania Aiyar, was in August 1910. That business was carried on in the name of one Harisankar. It

turned out to be unsuccessful and was closed in 1911. In connection with that business the plaintiff company have obtained a decree by consent

against defendants 1 to 3 for the moneys advanced by them with interest. The business which has given rise to the present claim was started on

11th February 1911 in the name of Visvanatha Aiyar, & Co., the two partners constituting that firm being one Visvanatha Aiyer and the 2nd

defendant.

3. One of the questions raised at the trial was whether the 2nd defendant was not a minor on the 11th February 1911. But it is found by the

Subordinate judge that he was a major and that finding has not been challenged before us. Visvanatha Aiyar was the active partner of that firm and

the 2nd defendant, though a major, had no experience in such business and the tannery was carried on, according to the evidence, entirely by

Visvanatha Aiyar. Visvanatha Aiyar formally closed that business on 26th May 1911 and the plaintiffs' claim, roughly speaking, is for a sum of Rs.

40,000 which was advanced from time to time to Visvanatha Aiyar & Co., under the agreement, Exhibit B, dated 11th February 1911. The

surety-bond which is sought to be enforced in this suit (Exhibit B1) was executed on the same date and as part of the same transaction. Both the

agreement with Visvanatha Aiyar & Co. and the surety-bond executed by the 1st defendant refer to each other.

4. To understand some of the pleas raised in the defence it would be necessary to mention that Visvanatha Aiyar had been carrying on the business

of a tanner by himself before the firm of Visvanatha Aiyar & Co., was formed. He first began dealing with the plaintiffs in September 1909. So far

as it appears from evidence, he obtained advances from them on terms similar to those contained in the agreement of Visvanatha Aiyar & Co. At

the end of 1910 Visvanatha Aiyar's liability arising out of his individual business before the formation of Visvanatha Aiyar & Co., amounted to

about Rs. 47,000. The position therefore when Visvanatha Aiyar & Co., consisting of Visvanatha Aiyar and 2nd deft, was started in 1911 was

this: Harisankar's business in which the 1st defendant was interested had failed and in connection therewith there was a large claim outstanding

against the 1st defendant on the guarantee bond which had been executed by him similar to the one sued upon. The evidence shows that the 1st defendant wanted to set up his son, the 2nd defendant, in the business of a tanner. For that purpose he approached the plaintiffs for recognition and help. But Mr. Menzies who was at that time the representative of the plaintiff firm refused to deal with the 2nd defendant as he was a young man and had no experience in tanning which required considerable skill. He seemed to have recommended Visvanatha Aiyar with whom, as already mentioned, the plaintiffs had had dealings, as a man of considerable skill and experience. The 1st defendant evidently accepted the suggestion with the result that the firm of Visvanatha Aiyar & Co., was started as mentioned above. It may be mentioned that Visvanatha Aiyar, according to the evidence, was known to the 1st defendant as carrying on the business of a tanner at Trichinopoly though they had no dealings with each other previously.

5. The main terms of the agreement between the plaintiffs and Visvanatha Aiyar & Co., described therein as tanners are as follows: The plaintiff company agreed to advance to Visvanatha Aiyar & Co., such sums of money from time to time as they might think fit, with interest at 6 per cent, per annum, but the amount outstanding at any time should not exceed Rs. 50,000 and Visvanatha Aiyar & Co., undertook not to carry on any business other than that contemplated by the agreement; and not to give the skins and hides tanned by them to any person other than the plaintiffs. They further agreed that all the skins and hides purchased by them should be hypothecated to the plaintiff company to secure the moneys advanced by them and Visvanatha Aiyar & Co., should be in the position of trustees with respect to the custody of these goods. It was further provided that the plaintiff company were to be entitled to have a representative of theirs at the tannery with power to look into the books of account of the tannery and to inspect the premises whenever he chose and the salary of such representative was to be debited to the tanners' account. All the amounts to be advanced by the firm were to be used solely for the purchase of skins and hides and tanning material and all such purchases were to be paid for in cash and cash bills showing the prices paid and counter-signed by the persons supplying the goods to be sent to the firm at Madras.

The tanners were not to purchase goods on credit or to pledge their credit for them to their constituents. Each consignment of the tanned skins and hides to the plaintiff company at Madras was to be accompanied by a certificate showing the value and description of the skins and the quantity and value of the stock in the tannery. The certificate was to be signed by the tanners and by the plaintiffs' representative. The tanners are further to deliver to the firm a certificate of stock every week showing the quantity of goods in the tannery and how far the process of tanning has advanced. The plaintiff firm would be entitled to weigh and examine the goods consigned to them and if they thought fit they might make further advances to the tanners for the purchase of fresh skins. If the tanners committed a breach of any of the terms of the agreement the plaintiffs would be entitled without any notice to terminate the agreement and to call in whatever sums were outstanding and to take possession"" of the property and effects of the tanners hypothecated under the agreement and also of the 1st defendant under the terms of the bond referred to. But it is provided that the plaintiff firm shall not be bound to take possession of the properties or exercise any of the powers abovementioned and that the firm shall not be liable to the tanners for anything done by them in the exercise of the powers reserved to them provided the same is done in good faith. In addition to the amounts which the firm might advance to the tanners, the latter themselves were to find certain sums of money, altogether about Rs. 25,000 to be invested in the business and not to withdraw the same without the consent of the plaintiff company. In order to secure the performance of this agreement the tanners deposited the title deeds of certain Immovable property to the value of Rs. 10,000. The 1st defendant by the surety bond (Exhibit B1) of the same date and referred to in ""the agreement guaranteed all payments due to the firm under the agreement up to a limit of one lakh of rupees and agreed to save the firm harmless and to keep the firm indemnified from and against all loss and damage which they might suffer in breach of the terms and conditions of the said agreement by Visvanatha Aiyar and the 2nd defendant or by either of them.

6. The case of the plaintiffs is that they advanced Rs. 10,000 on the 13th February, Rs. 15,000 on the 21st February, again Rs. 10,000 on the 3rd

April and Rs. 5,000 on 19th May 1911 to Visvanatha Aiyar & Co. It was argued that as a matter of fact the advances were not made to

Visvanatha Aiyar & Co., but to Visvanatha Aiyar individually. The evidence, however, is clear and conclusive. The counterfoils of the cheques

issued by the plaintiffs and the entries in the ledger of the National Bank, the promissory-notes which were executed for each advance and the

correspondence which took place at the time all leave no room for doubt that the advances were made to Visvanatha Aiyar & Co, It is also clearly

proved that goods were purchased from time to time by Visvanatha Aiyar & Co. of the value of about Rs. 34,000 or Rs. 35,000 altogether. The

first cash bill dated 26th February is for goods of the value of Rs. 3,625, the second cash bill dated 20th March is for goods of the value of Rs.

3,834, three cash bills of the date of 2nd May for goods of the value of about Rs. 18,000 and one cash bill of the 17th May for goods of the value

of Rs. 8,750. It may be taken as a proved fact that the bulk of these goods never reached the plaintiff firm at Madras. They were clandestinely

removed from the tannery at Trichinopoly at the instance apparently of Visvanatha Aiyar after the business was stopped, some time in the first or

second week of June. It appears that only 1,300 loose skins were all that was found in the tannery.

7. Under the 9th issue the appellants tried to make out that they were not liable under the surety bond inasmuch as it was obtained by

misrepresentation and suppression of material facts relating to the position of Visvanatha Aiyar and the state of his financial dealings with the

plaintiffs. It was alleged that in February 1911 Visvanatha Aiyar was unable to meet his liability to the plaintiff which then amounted to nearly Rs.

50,000 and that the plaintiffs in order to realise this amount induced the 1st defendant, to start a tannery with his son, the 2nd defendant, and

Visvanatha Aiyar as partners and to stand guarantor with respect to dealings of the partnership with the plaintiff firm. One of the suggestions in this

connection was that Visvanatha Aiyar had no goods in stock on his individual account although his liability amounted to Rs. 50,000. But this

suggestion is clearly without foundation as the evidence shows without doubt that at the end of 1910 Visvanatha Aiyar's stock belonging to his

own individual business was of the value of Rs. 42,000. It was argued that these goods were not his and should be taken to belong to Visvanatha

Aiyar & Co. The only basis for this argument seems to be the fact that those goods were not sent on to Madras at once but were consigned to the

plaintiff firm in different consignments from January to May 1911. It would appear that in March and April Visvanatha Aiyar was unable to devote much time to his business owing to illness and also because of the death of one Pattammal to whose husband's estate he was entitled to succeed as reversioner. The whole matter is dealt with in the judgment of the learned trial Judge in paragraphs 50 to 58 and the evidence to which he refers amply bears out the conclusion that Visvanatha Aiyar had the quantity of goods mentioned in Exhibit FFFF-10 at the end of January 1911 amounting in value, to about Rs. 42,000 and that in addition to this the security of landed property given by Visvanatha Aiyar available to the plaintiffs. It could not therefore be said that Visvanatha Aiyar was in any sense insolvent or unable to meet his liabilities to the plaintiffs or that the plaintiffs had any reasons for apprehending that Visvanatha Aiyar would not be able to repay the advances in due course.

8. That there were separate accounts with respect to the dealings between the plaintiffs on the one hand and Visvanatha Aiyar and Co., and

Visvanatha Aiyar individually on the other is amply clear from the evidence. Exhibit II which is a letter written by the plaintiffs to Visvanatha Aiyar

on the 18th February 1911 and in which they point out to him the advisability of restricting his operations as he had been suffering loss and losing

money, itself mentions the amount owed by him in his individual account separately from what was owed by Subramania Aiyar, the 1st defendant

under the new agreement. Exhibit DD-DD, which is a letter written by Visvanatha Aiyar to the plaintiffs mentions the " new " account, that is the

account of Visvanatha Aiyar and Co, as distinct from his individual account ""and the account of Harisanker. It was not until 14th July 1911, long

after Visvanatha Aiyar and Co.'s business was closed, and when the 1st defendant was sailed upon by the plaintiffs to make good the loss, that we

find him making any suggestion that Visvanatha Aiyar had no stock of his own in December. This allegation was instantly repudiated by the

plaintiffs as untrue; they pointed out that the plaintiffs had distinct proof that at the time of the agreement Visvanatha Aiyar had in his tannery stock

of goods the value of which would cover the advances outstanding against him. But there is no reason for doubting the correctness of Mr.

Menzies' statement that he was not in a fix as to his getting back the money advanced to Visvanatha Aiyar at the time of Exhibit B and that he was

not anxious on that account as there was stock from which he could realize the money. There were in addition to the consignments which he had

sent home and which were awaiting sale in London on behalf of Visvanatha Aiyar. It may be taken for granted that Mr. Menzies recommended

Visvanatha Aiyar as an experienced tanner but it does not necessarily follow that he was under any obligation to disclose to the 1st defendant the

state of accounts between him and Visvanatha Aiyar with respect to the latter's individual business. On this point therefore the finding of the

learned Subordinate Judge must be upheld.

9. Issue 6 raises the question whether Visvanatha Aiyar and Co. carried on any business at all under the agreement. The evidence on this point is,

abundant and clear that business was carried on by the firm until about the end of May 1911. It may be noticed here that this contention of the

defendants is scarcely consistent with the contention that Visvanatha Aiyar had no stock on his individual account and that all the goods were

purchased with the moneys advanced to Visvanatha Aiyar and Co.

10. The question which requires more careful consideration is whether the 1st defendant should be held to have been absolved from liability under

the guarantee bond owing to the conduct of the plaintiffs in not insisting on a strict observance on the part of Visvanatha Aiyar and Co. of these

conditions of the agreement which, if properly carried out by Visvanatha Aiyar and Co., would have ensured the plaintiffs having in their control

and disposition goods sufficient to cover the advances made by them to Visvanatha Aiyar and Co. The plaintiffs are charged with gross negligence

of a character implying connivance on their part at the fraud committed by Visvanatha Aiyar in not buying goods to the full value of the advances

made to Visvanatha Aiyar and Co. and in making away with the goods which were in stock in the tannery of that firm. It is argued that under the

agreement the plaintiffs should have seen that cash bills were forthcoming for goods of the value of each advance within reasonable time and no

further advances should have been made until the previous advance was fully accounted for, that they ought further to have insisted on weekly

certificates being sent on regularly to their office in Madras and that as soon as the plaintiffs in May 1911 had reasons to suspect that Visvanatha

Aiyar was not acting in accordance with the terms of the agreement and was not

behaving properly they ought to have taken possession of the tannery as provided by the agreement. The plaintiffs it is suggested had reasons of their own for not acting with proper vigilance; that in fact they allowed Visvanatha Aiyar to draw money from time to time on behalf of Visvanatha Aiyar and Co., without caring to see that the moneys were utilised in purchasing skins and that it was in fact their negligence which enabled Visvanatha Aiyar to make away with the stock. The motive for such conduct on the part of the plaintiffs is alleged to be that they expected through the help of Visvanatha Aiyar to secure the skins in the tannery of his relation Pattammal which were pledged to the South Indian Export Company, a rival firm engaged in similar business. A very lengthy argument has been addressed to us on this point and we have come to the conclusion that having regard to the nature of the business the plaintiffs cannot be held to have been guilty of any negligence in their dealings with Visvanatha Aiyar. [His Lordship next deals with the evidence at length.]

11. The view we take of the facts therefore is that the defendants have failed to prove that the plaintiff company were negligent in their dealing with Visvanatha Aiyar & Co., much less that they connived at Visvanatha Aiyar violating the terms of the contract between the plaintiffs and Visvanatha Aiyar and Co., or misappropriating the moneys advanced on the goods belonging to Visvanatha Aiyar and Co. It might be that the plaintiffs would have acted more in accordance with the letter of the contract, Exhibit B, if after making the initial advance they had refused to make any further advances unless and until they received cash bills showing that the moneys already advanced had been utilised in the purchase of skins and the skins so purchased were in the tannery or were consigned to them and that the weekly certificate was regularly forwarded to Madras. But the contract with Visvanatha Aiyar and Co., left it to the discretion of the plaintiffs, as already pointed out, to make such advances within the limits laid down and at such times as they chose. They were, not bound to insist on seeing that goods of the value of the advances already made were in stock before making any further advance and it is more than doubtful that any such strict procedure would have been conducive to the advancement of the business. Further in fact goods almost of the entire value of the advances made to Visvanatha Aiyar & Co., were purchased

and were in the tannery undergoing different processes of tanning and it has been already shown that their clandestine removal from the tannery of

Visvanatha Aiyar & Co., could not be attributed to any appreciable negligence or want of vigilance on the part of the plaintiffs. A careful

consideration of the facts as they happened and brought to the knowledge of the plaintiffs does not suggest that they acted otherwise than as

prudent men of business or deviated from the ordinary and customary mode of dealing with tanners.

12. That being our conclusion on the evidence none of the provisions of the Contract Act and the rulings relied on on behalf of the appellants as to

the circumstances in which a surety will be absolved from his obligation owing to the negligence of the creditor in dealing with the principal debtor

has any application. We fail to find that the plaintiffs in this case did any act inconsistent with any rights of the 1st defendant or omitted to do any

act which their duty towards the 1st defendant required them to do within the meaning of Section 139 of the Contract Act.

13. The well-known case of *Wulf v. Jay* (1872) L.R. 7. Q.B. C 756 was relied on by the appellants. There the plaintiffs might have entered and

taken possession of the plants and fixtures upon the interest not being paid at the time when it became due. Instead of doing this, however, they

allowed the mortgagors to remain in possession when they saw that the bankruptcy was impending and imminent. "" Cockburn, C.J., says that he

had no doubt that their intention was, that, being creditors ultra the amount thus secured, the goods in question should be available as assets under

the bankruptcy, while they had the security of the defendant to come upon in order to get paid the debt of 300 £½ secured by the bill of sale.

Then he refers to the cases cited in Story's Equity Jurisprudence which establish the proposition that "" where a debt is secured by a surety it is the

business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that

security property available."" In this case there was no negligence or wilful default on the part of the plaintiffs in not taking possession of the tannery

before they actually did so. The case of *Waits v. Shuttleworth* (1860) 5 H.& N 235 : 157 E.R. 1171 lays down the proposition embodied in

Section 139 of the Contract Act already quoted. There the surety was held to be discharged as the plaintiff being under a duty towards him to

insure the fittings had omitted to do so. Pollock, C.B., points out that "the rights of a surety depend rather on principles of equity than upon the actual contract; that there may be quasi-contract; but that the right of the surety arises out of the equitable relation of the parties." Lord Brougham in *Mactaggart v. Watson* (1885) 3 C&F 525 : 6 E.R. 1534 laid down the law in these words "while at law the surety in a bond is not at all discharged even by a long neglect of the obligee to demand payment or account from the principal--nay, when the latter has become insolvent during the time thus suffered to elapse, as was decided in the *Trent Navigation Company v. Hardy* (1808) 10 Eas 34 the Courts of Equity have never, to my knowledge, given a discharge to the surety merely on the ground of the creditor, the obligee, not having called on the debtor so early as he ought, or not having given early notice of his failure or non-payment to the surety." Then he observes "It is, however, undeniable that the Courts of Equity will look narrowly to everything in the conduct of the obligee which has a direct tendency to wrong the surety and injure his rights and equities, and will, as Lord Loughborough said in *Rees v. Berrington* (1795) 2 Ves. Jun. 540 lay hold of such errors to release him. The error, however, in the present case arises in supposing that any want of care on the commissioners' side, in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety's equities, or diminution of his rights at law." Further on he says "All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the party taking the security has, by his conduct, either prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done," or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened." The present case does not fall within the rule here enunciated. The case of *Mayor etc., of Durham v. Fowler* (1889) 22 Q.B.D. 394 also lays down clearly that mere laches of the obligee or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond is not sufficient of itself to relieve a surety, supposing that any such laches has been proved, which in this case, as was shown, has not been. Vice Chancellor Page Wood, in *Dawson v. Lawes* (1854) Kay. 280 : 69 E.R. 119 where it was

sought to enforce the bond of the sureties given to the Registrars of the Court for the proper performance of the duties of an official assignee in

bankruptcy, held, following *Mactaggart v. Watson* (1835) 3 C & F 525 that in such cases the negligence in order to discharge the sureties must

amount to connivance at the official assignee's getting the fund into his hands improperly or must be so gross as to be equivalent to a wilful shutting

of the eyes to the fraud which he was about to commit. No such case has been made out here. Much reliance was placed by the learned Vakil for

the appellants on the case of *Mayor, etc., of Kingston-Upon-Hull v. Harding* (1892) 2 Q.B. 494. I do not see how anything said in that case will

help to discharge the 1st defendant in the present case from liability as surety. The ruling is that a surety for a contractor is not discharged from

liability although his position has been altered by the conduct of the employer where that conduct has been caused by a fraudulent act or omission

of the contractor against which the surety has, by the contract of suretyship, guaranteed the employer. Lord Esher, M.R., observes ""It seems

impossible to say that according to any doctrine of the law of suretyship a surety is released by something which happens in consequence of that

which amounts to a fraudulent breach of contract against which the surety has guaranteed the party with whom he has contracted."" At page 508

Bowen, L.J., observes ""I can understand that, where the omission of the employer to do something deprives the surety of a right under the

contract, or of the power to insist on its exercise, such an omission really affects a right belonging to the surety and so alters his position as to avoid

the relation of suretyship."" That has no application to what happened in this case. Further on he says "" The doctrine of law on this subject

established in the case of *Mactaggart v. Watson* (1835) 3 C & F 525 and probably before that case, and expounded by subsequent authorities,

particularly in the case of *Dawson v. Lawes* (1854) Kay 280 and other cases referred to in *Mayor of Durham v. Fowler* (1889) 22 Q.B.D. 394 is

this : mere omission on the part of the employer, mere passive acquiescence in acts which are improper on the part of the employee will not release

the surety, If there be an omission to do some act which the employer has contracted with the surety to do, or to preserve some security to the

benefit of which the surety is entitled, the case is different. There the omission would be one inconsistent with the relation between the surety and

the person with whom he has contracted to be surety.

14. The law as expounded in the above cases which is the law applicable in India does not help the appellants in any way. It must therefore be held

that they are not released from their liability under the bond by reason of any act or omission on the part of the plaintiffs.

15. [His Lordship next considered the evidence in the case and found that the defendants were entitled to an additional credit of Rs. 4,143-7-0].

16. The last question which remains to be considered relates to the liability of the 2nd and 3rd defendants. The 2nd defendant was a major at the

time of the contract, Exhibit B, which refers to the guarantee bond, Exhibit B1, as already mentioned executed by his father; and it must be taken

that he consented to and authorised the giving of the guarantee by which the entire family property was made security for the due performance of

the contract by Visvanatha Aiyar & Co., Mr. Mayne in his Hindu Law, 7th Edn. paragraph 344, correctly lays down that ""any want of capacity on

the part of the father to alienate the family property may be supplied by the consent of the coparceners. Such consent may either be express or

implied from their conduct at or after the time of the transaction."" That is sufficient to dispose of the 2nd defendant's objection.

17. The 3rd defendant, however, was a minor at the date of the transaction and if he is to be held liable at all it must be on the ground of a Hindu

son's obligation to pay his father's debt if that debt was not incurred for immoral or illegal purposes. For, as found by the learned Subordinate

Judge, there could have been no family necessity for the execution of the surety bond, Exhibit B1, pledging the family property nor could the

guaranteeing of the tanning business be a legitimate family purpose. The contention on behalf of the appellants is that a Hindu son's pious obligation

to pay his father's debts does not arise so long as the father is alive inasmuch as he may in his own life-time discharge such debts or may leave

assets sufficient to meet his liabilities. This proposition is based on a passage in the judgment of Lord Shaw in a recent Privy Council decision in

Sahu Ram Chandra v. Bhup Singh ILR (1917) All. 437. It is not contended that under the Hindu Law as was applied in this Presidency or

elsewhere before this judgment of the Privy Council a Hindu son's obligation to pay his father's debts not incurred for illegal or immoral purposes

did not arise until after his death. In fact no such contention could be put forward in face of the state of the rulings of the Courts. It is not necessary

to go through all the cases on the subject and it will be sufficient to mention some of the leading decisions including those of the Privy Council which

left no room for doubt on the point. Here it must be mentioned that it is not a mortgage decree that is sought against the 3rd defendant's share but

that he is sought to be made liable only to the extent of his share in the joint family property.

18. In Sami Aiyangar v. Ponnammal ILR (1897) Mad. 28 both the father and son were sued on a hypothecation bond executed by the father and

it was held that as regards the liability of the son's share for the debt of the father as a mere money claim there could be no question since it was

found that the mortgage was for consideration and was not illegal or immoral. And both the learned Judges held the alienation to be bad inasmuch

as it was not made for an antecedent debt. In Ramasami Nadan v. Ulaganatha Goundan ILR (1898) Mad. 40 a Full Bench of this Court also held

that in a suit against the father and son the son's share in the family property would be liable for the debt incurred by the father not being for any

illegal or immoral purpose. Subramania Ayyar, J., delivering the leading judgment of the case, both upon a review of the original authorities and

also of the rulings of the Courts says ""Be this as it may, it is impossible to hold that under the law, as it stands established by the repeated decisions

of the ultimate Court of Appeal, that a creditor suing a Hindu for his personal debt is not entitled to include, as defendants in the suit, the debtor's

sons."" In Chidambara Mudaliar v. Koothaperumal ILR (1903) Mad. 326 also the same view of the law was accepted as established by a uniform

course of decisions. The learned Judges, however, laid down that there was no distinction in principle between a mortgage given for an antecedent

debt and a mortgage given for a debt then incurred. On the latter point, this decision has been overruled by a Full Bench in Venkataramanaya

Pantulu v. Venkataramana Doss Pantulu ILR (1905) Mad. 200.

19. In Calcutta the law seems to have been the same; see Luchman Doss v. Giridhur Chowdhry ILR (1880) Cal. 855 Kishun Pershad Chowdhry

v. Tipan Pershad Singh ILR (1907) Cal. 735 and also in Allahabad--see Karan Singh v. Bhup Singh ILR (1900) All. 16 Chandradeo Singh v.

Mata Prasad ILR (1909) All 176 (which contains the judgment of Stanley, C.J., relied on by the Privy Council in the case of Sahu Ram Chandra

v. Bhup Singh ILR (1917) All 437 in which it is stated that a son may be successfully sued for the debts of his father as he is under an obligation to

discharge his debts provided that the suit be not barred by limitation and that the decree passed in such a suit may be enforced in execution by the

sale of the ancestral property of the family.

20. The rulings of the Judicial Committee on the point is also to the same effect as pointed out in the various cases referred to. I need mention only

the case reported in Nanomi Babuasin v. Modun Mohun ILR (1885) Cal. 21 where their Lordships laid down that if the father's debt, not having

been contracted for an immoral purpose, is such as to support the sale of the entirety of the joint estate, either he may sell the latter without suit or

the creditor may obtain a sale of it by suit; but the joint sons, not being parties to the execution proceedings or to the sale are not precluded from

having a question as to the nature of the debt tried in a suit of their own; a right which will, however, avail them nothing unless it is shown that the

debt is one which will not justify a sale of the joint estate.

21. Now coming to the case in Sahu Ram Chandra v. Bhup Singh ILR (1917) All. 437 : 33 M.L.J. 14 the point for consideration before their

Lordships was as to what was an antecedent debt within the meaning of Hindu Law which would justify a father in alienating the family property.

There the only decree that could be obtained was on the basis of a mortgage; the plaintiffs claim for repayment of the money as simple debt had

been barred long ago as pointed out by the Judicial Committee. The point they had to settle was whether the plaintiff under the circumstances was

entitled to a mortgage decree. They first of all state the general principles of Hindu Law, namely, , that a gift," sale or mortgage by one co-parcener

except with the consent, either express or implied, of all the other co-parceners, is invalid but that the manager and the head of the family could

alienate the family property for reasons of necessity. To these principles they point out there is one exception, namely, alienation by a Hindu father,

of the family property in order to discharge an antecedent debt of his own. But it was further argued by the appellant (the respondents were not

represented by counsel before their Lordships) that even a mortgage not

executed either for family necessity or for an antecedent debt, could be upheld on the basis of pious obligation of a son to pay his father's debt if the money which was borrowed on the mortgage was not obtained for an illegal or immoral purpose. In dealing with that argument they made the following observation which has given rise to so much difficulty in our Courts:

While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they and their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his father's death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing.

In our opinion the last sentence shows that Their Lordships did not mean to lay down that so long as the father was alive the son could not be sued along with the father for a debt which was incurred by the father but not for any illegal or immoral purpose. All that the passage seeks to meet is the argument that the father was entitled during his life-time to dispose of the property of the family not for any family purpose nor to discharge any antecedent debt. It must be observed that if Their Lordships wanted to lay down the law as to the liability of the son to pay a father's debt by

virtue of pious obligation differently from what had been so well established in India supported by their own previous decisions they would have expressed themselves clearly to that effect. On the other hand there is not even an allusion to any of the rulings on the question or to the state of the

law as understood hitherto. A similar interpretation was placed on this decision by another Bench of this Court in *Peda Venkanna v. Sreenivasa*

Deekshatulu ILR (1917) Mad 136 : 33 M.L.J 519 and the same view has prevailed in the Bombay High Court in *Hanmant Kashinath v. Ganesh*

Annaji ILR (1918) Bom. 612. In *Sripat Singh Dugar v. Prodyot Kumar Tagore* ILR (1916) Cal. 524 in execution of a mortgage-decree against

the father the whole of the family property was held by the Privy Council to be

liable to be sold if the debt was found not to have been incurred for an immoral purpose and in *Jogi Das v. Ganga Ram* (1917) M.W.N. 739. Their Lordships referring to the case of *Sahu Ram Chandra v. Bhup Singh* ILR (1917) Mad. 136 : 33 M.L.J. 519 regard it as only laying down the proposition that the family property cannot be alienated except for necessity or for the payment of an antecedent debt quite distinct from the debt incurred for the mortgage itself, and that the sons of the mortgagor are not bound by any such alienation by reason of pious obligation to pay their father's debt and not that their shares in the family property would not be liable for a simple money-decree if the debt was not incurred for an immoral purpose.

22. In the result we confirm the judgment of the learned Subordinate Judge and dismiss the appeal with costs except that the decree will be modified by giving credit to the defenddants for Rs. 5,975 instead of the amount allowed by the Subordinate Judge. The defendants will be allowed four months from this date for payment of the decree amount.

Ayling, J.

23. I agree, and have nothing to add.