FULL BENCH

Before Mehar Singh, C.J., D. K. Mahajan, and P. C. Pandit, JJ.

THE HINDUSTAN COMMERCIAL BANK, LTD.,—*Appellant.*

versus

SOHAN LAL AND OTHERS,—*Respondents.*

Letters Patent Appeal No. 217 of 1962

May 9, 1969.

Hindu Law—Father mortgaging joint Hindu family property as surety to secure debt for another person—Decree against the share of the father in such property—Whether can be passed—Personal decree against father for surety debt which is neither illegal nor immoral—Such decree—Whether executable against Hindu joint family property in the hands of sons—Pious Obligation Theory—Whether applicable—Father mortgaging joint Hindu family property as surety to secure debt for his son only—Such mortgage—Whether can be validly created.

Held, (per Full Bench) that in the case of mortgage of the joint Hindu family property by the father as surety to secure debt for other person, no decree can be passed even against the share of the father in the mortgage property. The only decree, that can be passed, is a money decree against the father. Of course, the result of a money decree against the father would be that it will lay open the entier joint family estate in the hands of the sons under the Pious Obligation Theory. This will only happen if the decretal debt is neither illegal nor immoral. **(Para 15)**

Held, that a father incurs a personal liability when he stands surety for the payment of a debt incurred by a third person. The position of a surety and the principal debtor *vis-a-vis* the creditor is identical. The father is under a personal obligation to discharge the suretyship debt which is neither illegal nor immoral. The joint Hindu family property in the hands of sons will be liable to discharge that debt under the Pious Obligation Theory. The surety bond if creats a personal liability on the father to pay the third person's debt; and that debt being neither illegal nor immoral, the joint family estate in the hands of the sons is liable for the payment of the same in view of the pious obligation of the sons to pay their father's debts.

(Paras 16 and 24)

Held, (per Pandit, J.) that a Hindu father can burden the joint family estate by incurring a debt, not tainted with immorality, for his own benefit. He can also create a mortgage by incurring personal liability for a similar kind of debt due from his son, who is also a co-parcener of the joint Hindu family. **(Para 29)**

Case referred by the Division Bench consisting of Hon'ble the Chief Justice Mr. Mehar Singh and the Hon'ble Mr. Justice P. C. Pandit, on 23rd May, 1967, to a Full Bench for decision of an important question of law involved in the case.. The case was finally decided by a Full Bench consisting of Hon'ble the Chief Justice Mr. Mehar Singh, the Hon'ble Mr. Justice D. K. Mahajan, and the Hon'ble Mr. Justice P. C. Pandit on 9th May, 1969.

Letters Patent Appeal under Clause 10 of the Letters Patent from the decree of the Court of the Hon'ble Mr. Justice Tek Chand, dated the 6th day of September, 1961, passed in R.S.A. 612 of 1955.

N. K. SODHI AND Y. R. SACHDEVA, ADVOCATES, for the Appellant.

ROOP CHAND AND D. R. MANCHANDA, ADVOCATES, for the Respondents.

JUDGMENT OF THE FULL BENCH.

MAHAJAN, J.—This case has been referred to a larger Bench by my Lord, the Chief Justice and Pandit, J., to determine, whether or not a Hindu son is bound to discharge his father's debts not incurred for necessity or to discharge his antecedent debts, the same being not raised for illegal or immoral purposes ? The debt in question was incurred by the father by standing surety for one of his sons. It has also been argued that the son is not bound to discharge his father's surety debts by reason of his pious obligation to do so, when the father stands surety for the debts of a stranger. The reference was necessitated because the learned counsel for the appellant as well as the respondents relied on the decision in *Faqir Chand* v. *Sardarni Harnam Kaur* (1). This decision reversed the Full Bench decision of this Court in *Faqir Chand* v. *Sardarni Harnam Kaur* (2).

(2) In order to resolve this controversy and to provide the necessary background, it will be necessary to state the relevant facts. Mohan Lal was the sole proprietor of Messrs Gagoomal Mohanlal and Company (hereinafter referred to as the Firm). This Firm had dealings with the Hindustan Commercial Bank Limited, Amritsar (hereinafter referred to as the Bank). The Bank had given cash credit facilities to the Firm to the extent of Rs. 85,000. On 26th January, 1945, Gogoomal, father of Mohanlal, gave a letter of guarantee to the Bank for "the payment of all moneys which are now or shall, at any time, hereafter, during the continuance of this guarantee, be due from the Principal to you on the general balance of the said account with you and of all other Bank's charges and all costs and expenses which you may incur in enforcing or obtaining

(1) A.I.R. 1967 S.C. 727.
(2) A.I.R. 1961 S.C. 138.

payment of any such outstandings." The guarantee was a continuing guarantee and the only other clauses, that need be noticed in the same, are clauses 7 and 8, which are reproduced below:—

> "7. And I/We further agree that the amount hereby guaranteed shall be due and payable to you on demand after notice requiring payment of the same shall have been delivered or sent through the post by registered letter addressed to me/us at my/our respective last known places of abode or business or at my/our registered address.
>
> 8. This guarantee shall bind my/our respective heirs, executors and administrators and shall be enforceable by you and your assignees."

On the same day, Gagoomal deposited with the Bank title-deeds relating to certain immovable properties thereby creating an equitable mortgage *vis-a-vis* those properties in favour of the Bank to secure the payment of any money due to the Bank from the Firm under the cash credit account. A sum of Rs. 47,208-11-3 was due to the Bank under this account. A demand for this amount was made both from the principal-debtor and the surety. The demand was not met.

(3) In May, 1948, the Bank filed a suit to recover the aforesaid amount against Gogoomal and the Firm on the basis of the equitable mortgage. A preliminary decree was passed in favour of the Bank on the 26th of January, 1949. The amount sued for was made recoverable by the sale of the mortgaged properties in terms of Order 34, rule 4 of the Code of Civil Procedure. It was also provided that if the defendants did not pay the decretal amount by the 25th of April, 1949, the mortgaged property or a sufficient part thereof would be sold by auction. And if the sale proceeds were not sufficient to meet the obligation, it would be open to the Bank to apply for a personal decree against the defendants. The preliminary decree was made final on the 18th of August, 1949. The Bank then made an application for execution of the final decree.

(4) This led to the present suit by another son of Gagoomal namely Sohanlal, for a declaration that the property sought to be

sold in execution of the Bank's decree on the basis of the equitable mortgage was the joint Hindu family property of the plaintiff and his father Gagoomal; and consequently the mortgage decree was not binding on him; and the property was not liable to sale in execution of that decree. A permanent injunction was also prayed for restraining the Bank from getting the property in dispute sold. It was alleged that Mohanlal was the sole proprietor of the Firm and the letter of guarantee executed by Gagoomal in favour of the Bank was not for the benefit of the joint Hindu family or for legal necessity.

(5) The suit was contested by the Bank which pleaded that the property in dispute was neither ancestral nor formed part of the joint Hindu family property. It was also alleged that the Firm was a joint Hindu family firm and the money received under the cash credit account was utilized to clear the debts of the Firm. It was further averred that the plaintiff was under a pious obligation to pay the debts of his father even if the debts were not incurred by the father for the benefit of the joint Hindu family, particularly when the debts had not been raised for an immoral or an illegal purpose. On the pleadings of the parties, the following issues were framed:—

"(1) Whether the property in dispute is ancestral joint Hindu family property *qua* the plaintiff ?

(2) Whether the plaintiff is not bound by the decree passed against defendant No. 2, dated 26th January, 1949, and made final on 18th August, 1949?

(3) Whether the debt on the basis of which the said decree was passed against defendant No. 2, was immoral or illegal and not binding upon the plaintiff?

(4) Whether the present suit is not maintainable in the present for without getting the decree set aside ?"

(6) The trial Court held that the property in dispute was joint Hindu family property; that the plaintiff was not bound by the decree passed in favour of the Bank on the basis of the equitable mortgage; that the mortgage debt had not been incurred for illegal or immoral purposes and that the present suit was maintainable in the form in which it had been brought without getting the decree set aside.

(7) An appeal was preferred to the Senior Subordinate Judge by tht Bank against the trial Court's decision. The learned Judge confirmed the findings of the trial Court; but remanded the case after framing the following additional issue :—

> "Whether the mortgage in dispute was effected for legal necessity or for the benefit of the joint family or for payment of an antecedent debt ?"

The remand order was challenged in appeal by the Bank; but without success. The trial Court, after remand, held that the mortgage in dispute was not effected or legal necessity or for the benefit of Joint Hindu family or for payment of an antecedent debt of the father. It was also held that the plaintiff was not bound by the mortgage decree. The result, therefore, was that the plaintiff's suit was decreed.

(8) The Bank preferred an appeal against this decision to the Senior Subordinate Judge, Amritsar. The learned Senior Subordinate Judge found that Gagoomal was the *Karta* of the joint Hindu family consisting of himself and his sons. (Gagoomal had three sons, namely, Sohanlal, Mohanlal and Madanlal and one daughter, Mst. Vidya Wati). The mortgage decree was against Gagoomal and Mohanlal. Mohanlal was the sole proprietor of the Firm with which Gagoomal had no concern. Gagoomal had stood surety for the payment of the debt due from his son, Mohanlal. The mortgage decree did not create any personal liability so far as Gagoomal was concerned, inasmuch as no personal decree had been obtained by the Bank so far. That the mortgage debt had not been raised for legal necessity or for the benefit of the joint Hindu family of Gagoomal and his sons or for the payment of any antecedent debts of Gagoomal and was, therefore, of no consequence. In the result, the Bank's appeal was dismissed.

(9) The Bank then preferred the present second appeal to this Court. During the pendency of the second appeal, Gagoomal died on 23rd December, 1959. His legal representatives, namely, his sons and the daughter were impleaded. The appeal was then heard by Tek Chand, J. The learned Judge held that where the father incurred an obligation as a surety not against the debt incurred by him, but by a third person, such a debt was *avyavaharika* in the sense of "a debt for a cause repugnant to good morals". In this view of the matter, the learned Judge dismissed the appeal.

(10) It may be observed that the learned Judge held, after referring to certain texts of Hindu law, that there was no room for doubts as to the liability of the sons for suretyship debts incurred by their father undertaking payment of money lent. This observation was made with reference to the decisions in *Sitaramayya* v. *Venkatrammana* (3); *Tukarambhat* v. *Garam Mulchand Gujar* (4); *Kottapalli Lakshminarayana* v. *Kanuparti Hanumantha Rao* (5) and the *Maharaja of Benaras* v. *Ram Kumar Misir* (6). However, the learned Judge sought to distinguish the present case from the rule laid down in the above authorities on the basis of the decision of the Privy Council in *Kesar Chand and others* v. *Uttamchand and others* (7). As the debt for which the father stood surety was not raised by him but by the Firm; it was held that *qua* such a debt; the sons were under no pious obligation to discharge the same. Thus, it follows that if the debt had been the debt of the father, the sons would be under a pious obligation to discharge the same.

(11) Against the decision of the learned Single Judge, an appeal under Clause 10 of the Letters Patent was preferred to this Court. This appeal came up before my Lord, the Chief Justice and Pandit J., and was referred by them for decision by a larger Bench. That is how, the matter has been placed before us.

(12) In order to resolve the controversy, three questions have to be determined, namely :—

(1) Whether a father necessarily incurs a personal obligation when he stands surety to guarantee the payment of a debt ?

(2) Whether the son is under a pious obligation to pay his father's surety debt when the debt is not actually due from him ?

and (3) Whether a mortgage of the joint Hindu family property by the father to secure such a debt render the property liable to sale in the hands of the sons in execution of the mortgage decree ?

(3) I.L.R. 11 Mad. 373.
(4) I.L.R. 23 Bom. 454.
(5) I.L.R. 58 Mad. 375.
(6) I.L.R. 26 All. 611.
(7) A.I.R. 1945 P.C. 91.

(13) Before I proceed to determine these questions, it will be proper to set down the matters which are beyond the pale of controversy and on which there is no dispute in the present appeal. Those matters are:—(1) That the debt for the payment of which the surety bond was executed by the father was not incurred by him. The debt was incurred by the Firm. (2) There was no antecedent debt of the father to secure which the equitable mortgage was executed. (3) There was in fact, no legal necessity for the father to incur this personal liability. (4) That the debt, which was raised by the Firm, was neither illegal nor immoral. (5) That the property mortgaged was the joint Hindu family property of the father and the sons.

(14) I propose, in the first instance, to take the last question. So far as the mortgage debt is concerned, the position is this: The mortgage was by deposit of title-deeds and by reason of section 96 of the Transfer of Property Act, the provisions applicable to a simple mortgage also supply to the mortgage by deposit of title deeds. It is not disputed and indeed it could not be that when a mortgage is created by deposit of title-deeds, the mortgagor incurs a personal liability to pay the debt in case the mortgage security is insufficient to meet the same. Therefore, the mortgage by the deposit of title-deeds gave the mortgagee the right to pursue the property mortgaged and in addition, to recover the debt personally or from the other property of the mortgagor in case the mortgaged security was insufficient to meet the mortgage debt. In view of the finding of the Courts below, that the mortgage debt was not incurred by the father to discharge an antecedent debt due from him and also that the mortgage debt was not raised for any necessity of the joint Hindu family property would not be liable under the mortgage for the payment of the mortgage debt. In *Brij Narain* v. *Mangla Prasad and others* (8), their Lordships of the Privy Council laid down five propositions. But, for our purposes, the following three are relevant:—

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

(8) A.I.R. 1924 P.C. 50—51 I.A. 129.

(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."

In the present case, the third proposition will apply. The mortgage being not for an antecedent debt or for legal necessity, the joint estate of the father and the sons will not be bound by it. Their Lordships of the Supreme Court in *Faqir Chand* v. *Sardarni Harnam Kaur* (1), while dealing with the above three propositions, at page 731, observed that :—

"* * * The second and third propositions lay down the special rules applicable when the managing member is the father, and deals specially with his power to mortgage the estate for payment of his antecedent debt. Reading the first and the third propositions together, it will appear that a father who is also the manager of the family has no power to mortgage the estate except for legal necessity or for payment of an antecedent debt."

Therefore, the mortgage as such confers no right on the mortgagee to put the mortgaged property to sale.

(15) It may be mentioned that in Punjab, where the same rule, as prevails in Uttar Pradesh, is applicable, namely, that no coparcener can mortgage even his own interest in the coparcenary property without the consent of the others coparcener, with the result that the mortgage does not bind even the mortgagor's share in the property. See in this connection para 269 of Mulla's Hindu Law, Thirteenth Edition and the decision in *The Benares Bank Ltd.* v. *Hari Narain and others*, (9). Thus, in the present case, no mortgage decree could have been passed even for the sale of the father's interest in the mortgaged property. The only decree, that could be passed, is a money decree against the father. Of course, the result of a money decree against the father would be that it will

(9) A.I.R. 1932 P.C. 182.

lay open the entire joint family estate in the hands of the sons under the Pious Obligation Theory. This will only happen if the decretal debt is neither illegal nor immoral.

(16) I now propose to deal with the second question. So far as this question is concerned, after consideration of the entire legal position, I am of the considered view that a father incurs a personal liability when he stands surety for the payment of a debt incurred by a third person. The position of a surety and the principal debtor *vis-a-vis* the creditor is identical. In this connection, reference may be made to section 128 of the Contract Act which provides that 'the liability of the suerty is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract'. Thus the final position, that emerges in the present case, is that the father was under a personal obligation to discharge the suertyship debt which was neither illegal nor immoral. A mortgage decree had been obtained against the father *qua* this debt. A personal decree had yet to be passed which is nothing but a mere formality ; and it would be so in the present case, when the mortgage is invalid. The suretyship debt has not been incurred by the father either for an illegal or for an immoral purpose. Therefore, the joint Hindu family property in the hands of the sons will be liable to discharge that debt under the Pious Obligation Theory. 'There is no doubt that the *Mitakshara* treats such an obligation as 'a debt' incurred by the surety on account of his having become a surety'. See the observation of Sulaiman J., as he then was, in *Chakhan Lal and others* v. *Kanhaiyalal and others*, (10). The argument of Mr. Roop Chand, learned counsel for the respondent, that, in fact, no debt was incurred by the surety inasmuch as he took no money himself under the letter of guarantee is fully answered by the observations of Sulaiman J. quoted below from *Chakhan Lal's case* :—

> "* * The last point to consider is the liability of the sons of Balak Ram. The learned advocate for these sons has strongly contended that there was no legal necessity for Balak Ram to charge the family property and that if there was no actual debt due from him he was not entitled to hypothecate joint family property and

(10) (1929) 27 Allahabad Law Journal 199.

accordingly there is neither a debt due from Balak Ram and his sons nor is there any valid charge created on the family property. That it is open to a father to undertake liability as a surety for the payment of a debt due by another person cannot be disputed. The contention, however, is that there is no such liability in respect of debt which is not already due but which is promised to be advanced subsequently. In the *Mitakshara* there is a seperate section in chapter 6 devoted to the obligations of sureties. Suretyship is described as being of three classes, viz., for appearance, for confidence and for payment. It is expressly provided that on failure of a suretyship for payment the sons have to pay the amount. The commentary on the original text of Yajnavalkya is clearer still for it expressly lays down that where a person promises to pay the amount in case the principal debtor does not pay, the sons are liable to pay it. The contention that the text and the commentary refer only to a case where the amount has been previously paid and exists as a debt was repelled by this High Court in the case of the *Maharaja of Benares* v. *Ram Kumar Misser* (6). That case was followed by the Calcutta High Court in the case of *Rasik Lal Mandal* v. *Singheswar Rai*, (11). The same view has been accepted in Madras. There can therefore be no doubt that the undertaking given by Balak Ram to pay the debt due to the plaintiffs in case Chakhan Lal failed to pay the amount was a liability which was binding not only on Balak Ram but also on his sons. * * *"

(17) So far as the first question is concerned, the position can be two-fold. The father can offer the joint Hindu family property as security for the debt without incurring a personal liability. See the decision in *Kesar Chand and others* v. *Uttam Chand and others*. (12). He can also offer the joint Hindu family property as security and in addition, incur a personal liability. So far as the present case is concerned, apart from the personal liability of the father under the mortgage, the father incurred a personal liability under

(11) I.L.R. 39 Cal. 843.
(12) A.I.R. 1945 P.C. 91=72 I.A. 165.

the letter of guarantee. The terms of the letter of guarantee are very clear and there can be no manner of doubt that the father would be personally liable for the surety debt particularly when the same is neither illegal nor immoral.

(18) It is not necessary to refer to various cases cited at the bar because all the propositions, which I have stated above, are clear and the apparent conflict of judicial authorities is the result of the application of the various legal propositions to the facts of a given case.

(19) The stage is now set to consider the decision of the Supreme Court in *Faqir Chand* v. *Sardarni Harnam Kaur* (1), and that of the privy Council in *Kesar Chand's and others* v. *Uttam Chand and others* (12), on which the learned Single Judge has relied to hold that the surety debt in the instant case is *avyavaharika* in the sense of 'a debt for a cause repugnant to good morals'.

(20) Their Lordships of the Supreme Court in *Faqir Chand's Case* have laid down the following propositions :—

(1) That the sons have no right to restrain the execution of the decree obtained by the mortgagee against the father, or the sale of the property in execution of that decree, where the mortgage is of the property of the joint family consisting of himself and his sons for payment of his debt when the mortgage is not for legal necessity or payment of an antecedent debt, unless they show that the mortgage debt was incurred for illegal or immoral purpose ;

(2) That the liability of the son under the Pious Obligation extends to the joint family property in his hands;

(3) The second proposition laid down in *Brij Narain's case* is founded upon the pious obligation of a son to pay the debt contracted by the father for his own benefit and not for any immoral or illegal purpose. By incurring the debt, the father enables the creditors to sell the property in execution of a decree against him for payment of the debt. The son is under a pious obligation to pay all debts of the father whether secured or unsecured ;

(4) That the second proposition in *Brij Narain's case* applies not only to an antecedent debt but also to a mortgage debt which the father is personally liable to pay ;

(5) Even where the mortgage is not for legal necessity or for payment of an antecedent debt, the creditor can, in execution of a mortgage decree or the realization of a debt which the father is personally liable to pay, sell the estate without obtaining a personal decree against him. After the sale has taken place, the son is bound by the sale, unless he shows that the debt was non-existent or tainted with immorality or illegality ;

and (6) That the third proposition in *Brij Narain's case* does apply where the joint family consists of father and sons. A father, who is also the manager of the family, has no power to mortgage his estate except for legal necessity or for payment of an antecedent debt. The decree against the father does not, of its own force, create a mortgage binding on the sons' interest. The security of the creditor is not enlarged by the passing of the decree. In spite of the passing of the preliminary or final decree for sale against the father, the mortgage will not, as before, bind the sons' interest in the property and the sons will be entitled to ask for a declaration that their interest has not been alienated either by the mortgage or by the decree.

(21) Applying the above propositions to the facts of the present case, it is clear that though the mortgage is not binding on the sons' interest and the sons can prove this fact when in execution of the mortgage decree, their interest in the property is sought to be attached, nonetheless the property will be liable to sale in execution of that decree unless the sons can show that the mortgage debt was either illegal or immoral. There can be no doubt that the debt, in fact, did exist because the father had taken the liability to pay the debt of a third person ; and on the basis of that liability, a money decree against the father could follow ; and so also a mortgage decree. In my opinion, the decision of the Supreme Court in *Faqir Chand's case* concludes the present appeal.

(22) The only question left to be determined is, whether the surety debt in the present case can be termed as '*avyavaharika*'? The learned Single Judge has held it to be so on the basis of the decision of the Privy Council in *Kesar Chand's case.* The learned Single Judge has held that a father can contract a suretyship debt and thus lay open the joint family estate liable for its payment in case the debt is neither illegal nor immoral. But in spite of this finding, the learned Single Judge went further and on the basis of the following observation in *Kesar Chand's case,* held to the contrary :—

> "** ** For these reasons, their Lordships hold that as it is not shown that Uttam Chand has made himself personally liable for the amount that remained due to the decree-holder there was no debt due from him, and it follows, therefore, that the unsecured property in question cannot be validly sold in enforcement of the security bond. The same is the position with regard to the secured property also. To make the ancestral property liable, there must in reality be a debt due by the father. In the present case, the security bond was executed not for the payment of any debt due by Uttrm Chand, but for payment of a debt which was due from third parties. Unless there was a debt due by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property. "

These observations will only apply where there is no personal liability of the father for the debt contracted by him personally or by standing surety for the debt contracted by a third person. These cannot be read in an isolated fashion and divorced from the facts of the case which were before their Lordships of the Privy Council. The view, I have taken of the matter, finds support from the decision of the Bombay High Court in *Lingbhat Tippanbhat Joshi and others* v. *Parappa Mallappa Ganiger and others,* (13) wherein Bhagwati J., (as he then was), observed as follows :—

> " * * The whole question, in our opinion, turns on the terms of the surety bond. If under the terms of the surety bond the father has rendered himself personally

(13) A.I.R. 1951 Bom. 1.

liable, be it an ordinary personal bond or even a mortgage or a pledge imparting personal liability for the deficit if any on the realisation of the security, the sons are certainly liable to pay the father's personal debt incurred in this manner to the extent of their right, title and interest in the joint family properties. If it is a pure personal bond, the question can never arise of the nature which has been mooted before us. If it is a mortgage bond or a pledge, as and by way of security, even there the question would have to be considered whether in the event of a deficit arising on the realisation of the mortgage or the pledge by the creditor there would remain over a personal liability of the father to the extent of the deficit if any. If the surety bond was of the nature which obtained before their Lordships of the Privy Council in *Kesar Chand* v. *Uttam Chand* (12), there would be no question of the sons being liable to pay the father's debt by reason of the pious obligation because there would be no debt due by the father. In those cases, however, where, the father has rendered himself personally liable even in the case of a mortgage bond or of hypothecation or pledge of goods to pay the balance over or the deficit, if any, after the realisation of the security the sons obligation to pay the father's debt by reason of the pious obligation would arise and the debt to the extent that it has not been satisfied by the realisation of the security would be recoverable by the creditor from the father as well as the sons out of the joint family properties inclusive of the sons' share, right, title and interest therein. This being the true position in law, the observations of their Lordships of the Privy Council in *Kesar Chand* v. *Uttam Chand* (12), do not make any departure from the true position as it had been enuniciated before 1945 and the observations of our appeal Court in *Rudragouda's case*, S.A. No. 645 of 1945 dated 3rd April, 1947. also are to the same effect. This position in law was enunciated by our appeal Court as early as 1898 in the decision which is reported in *Tukarambhat* v. *Gangaram*, (4), where it was held that the ancestral property in the hands of the sons was liable for the father's debt incurred as a surety. No change has been made in

this position which has obtained ever since by the observations of their Lordships of the Privy Council in *Kesar Chand* v. *Uttam Chand* (12), and the position continues to be as it has been 'enunciated herebefore and has been understood all along at the Bench as well as the bar.
* * * * * "

I am in respectful agreement with the above observations. I cannot reconcile myself with the contention of Mr. Roop Chand, learned counsel for the respondent, that the rule is different where the father has stood surety for the payment of a third person's debt. If that was so, there was no need for their Lordships of the Privy Council to determine the question, whether under the terms of that particular bond, the father was personally liable or not. In fact, the main decision of the Privy Council related to the determination of the question whether the bond in question created a personal obligation, so far as the father was concerned, to pay the third party's debt. The decision of the High Court of Lahore, from which the appeal went to the Privy Council, had held that the bond did create a personal liability. I am, therefore, not prepared to accept the contention of Mr. Roop Chand, and read the Privy Council's judgment in a manner different from that in which it was read by the Bombay High Court.

23. The other decision relied upon by Mr. Roop Chand in support of his contention is that of the Orissa High Court in *Dandapani Panda* v. *D.F.O. Ghumsur and others* (14). This decision has no application because on the facts of that case, it was held that what was guaranteed under the surety bond was the personal honesty of the third person and there could be no manner of doubt that according to the rules laid down in the *Mitakshara*, the liability under such a bond would definitely be *'avvavaharika'*.

24. After considering the matter carefully, I am clear in my mind that the surety bond in question created a personal liability on the father to pay the third person's debt; and that debt being neither illegal nor immoral, the joint family estate in the hands of the sons is liable for the payment of the same in view of the pious obligation of the sons to pay their father's debts.

(14) A.I.R. 1956 Orissa 144.

25. I would accordingly allow this appeal; set aside the judgments and the decrees of the learned Judge, the District Judge and that of the trial Court and dismiss the plaintiffs' suit. In the circumstances of the case, the parties will bear their own costs throughout.

Mehar Singh, C.J.—I agree.

PANDIT, J.—The five propositions laid down by the Privy Council in *Brij Narain* v. *Mangla Prasad* (8), have been the subject matter of a number of judicial decisions in this country. Before the judgment of the Supreme Court in *Faqir Chand* v. *Sardarni Harnam Kaur* (1), this Court was of the view that in the second proposition, the word "debt" covered not only a simple money debt, but a mortage debt as well and that the sons could succeed only if they could show that the debt was contracted for an illegal or immoral purpose. The Allahabad High Court, however, had taken a contrary view and was of the opinion that the word "debt" referred only to a simple "money debt" and further that the mortgage by the father could be upheld only if it was made either for legal necessity or for an antecedent debt. The Supreme Court in *Faqir Chand's* case has now made it quite clear that the second proposition applies not only to an unsecured debt but also to a mortgage debt, which the father is personally liable to pay. If the mortgage created by the father is neither for legal necessity nor for an antecendent debt, then under the third proposition the mortgage as such would not be binding on his son's interest in the joint family property, but nevertheless he would, under the pious obligation theory, be liable to pay the mortgage debt *qua debt*. It was said in certain decided cases, that in order to avail of the second proposition, the creditor had to obtain a *money decree* against the father for the payment of the debt. In *Faqir Chand's* case, the Supreme Court has settled this point as well by observing that if a mortgage decree against the father directs the sale of the property for the payment of his debt, the creditor may sell the property in execution of that decree. They further observed that even where the mortgage is not for legal necessity or for payment of an antecedent debt, the creditor can, in execution of a mortgage decree for the realisation of a debt which the father is personally liable to repay, sell the estate without obtaining a personal decree against him. It is also held that if there is a just debt owing by the father, it is open to the creditor to realise the debt by

the sale of the property in execution of the mortgage decree. The son has no right to interfere with the execution of the decree or with the sale of the property in excecution proseedings, unless he can show that the debt for which the property is sold is either non-existent or is tainted with immorality or illegality.

27. In the instant case, the father stood surety for his son and for that purpose he wrote a letter of guarantee and also created an equitable mortgage by the deposit of title deeds relating to the joint family property. Both under the terms of the letter of guarantee and the conditions of mortgage, he had made himself personally liable for the payment of the loan. Consequently, the debt due to the bank would be considered to be his debt. Such a debt cannot in law be called immoral. Immoral debts are specified in para 298 of Mulla's Principles of Hindu Law (13th Edition) and a debt of this kind is not mentioned there. The learned Single Judge had mainly relied on the Privy Council ruling in *Kesar Chand and others* v. *Uttam Chand and others* (7), for holding this debt to be *Avyavharika* (immoral). That ruling has not been, if I may say so with respect, correctly interpreted by the learned Judge. There it was held that where the security bond was executed by a Hindu father not for the payment of any debt due by him, but for the payment of a debt which was due from third parties, the doctrine of pious obligation of the sons to pay their father's debt could not make the transaction binding on the ancestral property. These observations were made by their Lordships after interpreting the terms of the security bond in that case and holding that no personal liability for the debt had been undertaken by the father and, consequently, no debt was due by him for which the security bond was executed. In the present case, as I have already said, the father had undertaken personal liability for the debt due from his son, both under the letter of guarantee and the mortage created by him.

28. It was argued by the learned counsel for the respondent that in *Faqir Chand's case,* the learned Judges had held that in a case where a father mortgaged some property of a joint family consisting of himself and his sons for payment of his debt, but the mortgage was neither for legel necessity nor for payment of his

antecendent debt and the mortgagee had obtained a decree against the father for sale of the property, but the sale had not yet taken place, the sons had no right to restrain the execution of the decree for sale of the property in execution proceedings without showing either that there was no debt which the father was personally liable to repay or that the debt had been incurred for an illegal or immoral purpose. Even after holding that, the learned Judges went into the question of the legal necessity for the mortgage, because, according to them, in the absence of a finding on that question, the appeal could not be completely disposed of. They were of the view that the son was entitled to impeach the mortgage of a joint family property made neither for legal necessity nor for payment of an antecedent debt and that remedy was available to him even after the mortgagee had obtained a decree against the father on the mortgage, since that decree did not of its own force create a mortgage binding on the son's interest. According to them, from the reading of the first and third propositions together, it would appear that a father who was also the manager of the family had no power to mortgage the estate except for legal necessity or for payment of an antecedent debt.

29. Even if this contention is correct, I am of the view that the mortgage effected by the father in the instant case also was for legal necessity. If the father can burden the joint family estate by incurring a debt, not tainted with immorality, for his own benefit, I see no difference in principle as to why he cannot create a mortgage by incurring personal liability for a similar kind of debt due from his son, who is also a coparcener of the joint Hindu family.

30. With these observations, I also agree that the appeal be accepted and the parties be left to bear their own costs throughout

R.N.M.

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