the Legislature has not evinced an intention directly or indirectly of disturbing or destroying existing rights. The provisions which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force, were final, are provisions which touch existing rights *Delhi Cloth and General Mills Co., Ltd.* v. *Income-tax Commissioner, Delhi and another* (1). It seems to me, therefore, that a judgment which had become final by reason of failure on the part of the appellant to obtain a certificate of fitness could not be affected by the provisions of the Act of 1956. The order of the Chief Justice became final and conclusive as soon as he declined to grant a certificate of fitness and the party in whose favour the order was passed came to acquire a vested right which could not be destroyed by subsequent legislation.

For these reasons, I would uphold the preliminary objection raised by Mr. Nehra and dismiss the appeal. There will be no order as to costs.

DULAT, J.—I agree.

B. R. T.

APPELLATE CIVIL

Before D. Falshaw and I, D. Dua, JJ.

MESSRS GHAKI MAL-HUKAM CHAND FIRM HINDU JOINT FAMILY, LUDHIANA AND OTHERS.—*Defendants-Appellants.*

versus

PUNJAB NATIONAL BANK, LTD.,—*Plaintiff-Respondent.*

Regular First Appeal No. 36 of 1950

1959

Feb., 16th

Code of Civil Procedure (Act V of 1908)—Order 30—Rules 1 and 4—Joint Hindu family firm—One member

(1) A.I.R. 1927 P.C. 242

dying—His legal representatives—Whether necessary to be brought on record—Suit against a firm—Nature and effect of—Order 41 Rule 4—Decree against the firm—One of the partners appealing dying and his legal representatives not brought on record within time—Relief to the legal representatives—Whether can be granted—Displaced Persons (Debts Adjustment) Act (LXX of 1951)—Sections 17 and 49—Part-payment of debt made—Whether can be recovered by the debtor.

Held, that Order 30 rule 1 of the Code of Civil Procedure enables the plaintiff to sue, in the name of the firm, any two or more persons who are sought to be held liable as partners and who carry on business in India. This provision has, by rules framed by this High Court, been held to apply to a joint Hindu family firms as well. Rule 4 of Order 30 Civil Procedure Code. deals with the contingency which arises on the death of a partner and provides that where two or more persons have been sued in the name of a firm and any one of such persons dies during the pendency of the suit it is not at all necessary to join the legal representatives of the deceased as a party to the suit. It is thus clear that where a member of a joint Hindu family firm dies during the pendency of a suit, it is not necessary to bring on record his legal representatives.

Held, that the firm as such has no separate existence in the eye of law; it is merely an abbreviated name for the partners of which it consists and it has no separate legal entity like that of a corporation. When a suit is brought against a firm in the name of the firm its effect is precisely as if it has been brought in the names of all the partners and the effect of using the firm's name is merely to bring all the partners before the Court. The procedure as laid down in Order 30, Code of Civil Procedure, is only adopted as a convenient mode for denoting persons constituting the firm and a decree against a firm in its name has the same effect as a decree against all the partners has. The mere fact that the decree against the firm is executable against a person who has appeared in his own name under rules 5 and 6 of Order 30 or who had admitted on the pleadings that he is a partner or who having been individually served as a partner has failed to appear, does

not affect the applicability of the provisions of rule 4 of Order 30 of the Code of Civil Procedure.

Held, that the appellate Court can grant relief to the legal representatives of the deceased appellant although they have not been impleaded within time on the ground that the decree against the legal representatives and other appellants proceeds on grounds common to all under Order 41 rule 4 of the Code of Civil Procedure.

Held, that section 17 of the Displaced Persons (Debts Adjustment) Act, 1951, merely says that in the circumstances contained therein, the creditor shall not be entitled to recover from the debtor the debt for which the pledged property was security. It does not entitle the debtor to recover back payments made by him towards discharge of the debt in full or in part. Indeed, section 49 of the said Act clearly saves all past transactions and it lays down in unequivocal terms that if before the commencement of this Act a displaced debtor has satisfied or discharged any of his liabilities in any manner whatsoever, such transactions shall not be affected by anything contained in this Act.

First Appeal from the decree of the Court of Shri H. D. Loomba, Sub-Judge 1st Class, Ludhiana, dated the 31st day of December, 1949, granting the plaintiff a decree with costs for the recovery of Rs. 62,889-6-5 with interest at 3½ per cent per annum with monthly rests from the date of the suit till realization.

D. K. MAHAJAN & M. L. JHANGI, for Appellants.

S. L. PURI & G. C. MITTAL, for Respondent.

JUDGMENT

DUA, J.—The Punjab National Bank, Ltd., Plaintiff-respondent brought a suit for the recovery of Rs. 62,869-2-5 against the joint Hindu family, firm Messrs Ghaki Mal-Hukam Chand of Ludhiana through Radha Kishan, Manager. Lala Radha Kishan, Lala Girdhari Lal; Lala Sham Lal, Lala Madan Lal and Lala Jagdish Lal are members of Dua, J.

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the said joint Hindu family and they have also been impleaded as defendants. Defendants No. 3 to 6 are sons of defendant No. 2 (Lala Radha Kishan since deceased). Originally the plaintiff was the Punjab National Bank, Limited, Ludhiana, but later on with the permission of the Court, the plaint was amended and the name of the Punjab National Bank, Ltd., Delhi, was substituted as plaintiff.

The suit was based on a cash credit agreement executed by the defendants at Kasur (now in West Pakistan) on the 18th December, 1945. It was stated in para 8 of the plaint that the defendants borrowed money in question as members of the joint Hindu family in the interest and for the benefit of the joint Hindu family and its business. All the defendants were sought to be made jointly and severally liable for the payment of the amount claimed. On the pleadings of the parties various issues were framed by the trial Court, on 31st December, 1949. The Subordinate Judge, 1st Class, Ludhiana, decreed with costs the plaintiff's claim for Rs. 62,889-2-5, with interest at 3½ per cent per annum with monthly rests from the date of the suit till realisation. Against this judgment and decree the judgment-debtors have preferred the present appeal.

When the case came up for hearing on 12th August, 1958, learned counsel for the respondent raised a preliminary objection on the ground that Shri Radha Kishan, appellant was dead and no legal representative of his had been brought on the record with the result that the appeal had abated. Mr. Daya Kishan Mahajan, learned counsel appearing for the appellants, expressed his ignorance about this matter and wanted time to obtain instructions from his client. I may here state that

the appeal had been filed by Shri N. L. Wadhera, Advocate and Shri Daya Kishan Mahajan was only recently engaged in the case. Mr. Mahajan has since filed an application under Order 22, rules 3 and 10, Order 41, Rule 20, Order 30, rules 1 and 4 and section 151 of the Civil Procedure Code, for bringing on record the widow of Shri Radha Kishan, deceased as appellant along with her sons.

Mr. S. L. Puri, opposes this petition on behalf of the respondent and urges that Radha Kishan died as far back as 7th June, 1955 and his widow has not been brought on the record within the period of limitation prescribed for the purpose with the result that the appeal has abated *in toto*. In support of his arguments he places reliance on section 3 of the Hindu Women's Right to Property Act 1937, and submits that the wife on the death of her husband gets in his estate the same interest as the husband himself had. This section reads as follows:—

> "3. (1) When a Hindu governed by the Dayabhag School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:
>
> Provided that the widow of a pre-deceased son shall inherit in like manner as a son if there is no son surviving of such pre-deceased son, and shall inherit in

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like manner as a son's son if there is surviving a son or son's son of such pre-deceased son:

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a pre-deceased son of a pre-deceased son:

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhag School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided, however, that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, applies."

The counsel's submission is that under this Act a widow becomes an heir and, therefore, a legal representative of her deceased husband; on the death of Shri Radha Kishan, therefore, his widow should, if the appeal is not to abate, have been brought on the record for prosecuting the appeal. He goes a step further and submits that the decree obtained

by the Bank being joint and several, it can be executed against all the legal representatives of the deceased and if even one of the legal representatives has been omitted from being brought on the record the decree as against such legal representative must become final with the result that if such Court were to allow the appeal there would come into existence two inconsistent decrees which would give rise to an anomalous situation. According to the counsel, in order to avoid contradictory and inconsistent decrees being passed, it should be held that the present appeal has abated. In support of this contention he has cited the following authorities: *Awadh Bihari Prasad* v. *Jhaman Mathon and others* (1), *Bishan Narain and another* v. *Om Parkash and others* (2), *K. Balakrishna Patro and others* v. *C. Balu Subudhi and others* (3), and *Province of East Punjab* v. *Ladhu Ram and others* (4).

As against this Mr. Daya Kishan Mahajan has placed his reliance on the provisions of Order 30, rules 1 and 4 of the Code of Civil Procedure. Rule 1 of Order 30 reads as follows:—

> "(1) Any two or more persons claiming or being liable as partners and carrying on business in the States may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners

(1) A.I.R. 1953 Pat. 324
(2) A.I.R. 1952 Punj. 167
(3) A.I.R. 1949 Pat. 184
(4) A.I.R. 1955 Punj. 225

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in such firm, to be furnished and verified in such manner as the Court may direct."

This provision enables the plaintiff to sue, in the name of the firm, any two or more persons who are sought to be held liable as partners and who carry on business in India. This provision has, by rules framed by this High Court, been held to apply to a joint Hindu family firms as well. Rule 4 of Order 30, Civil Procedure Code, deals with the contingency which arises on the death of a partner. It reads thus:—

> "4. Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit."

It is thus obvious that where two or more persons have been sued in the name of a firm and anyone of such persons dies during the pendency of the suit it is not at all necessary to join the legal representatives of the deceased as a party to the suit.

In the present case, the plaintiff-Bank in para 2 of the plaint clearly stated that firm of Messrs Ghaki Mal-Hukam Chand was a joint Hindu family firm and defendant No. 2 was its Manager and defendants 3 to 6 were its members. In para 8 of the plaint it was pleaded that the defendants had borrowed money in question as members of the joint Hindu family

in the interest and for the benefit of the joint Hindu family and its business. Thus all the defendants were jointly and severally liable for its payment. Para 2 of the plaint was admitted in the written statement to be correct. Similarly in reply to para 8 of the plaint it was admitted that the defendants were members of a joint Hindu family. Only one written statement was filed by the joint Hindu family firm through shri Radha Kishan, Manager of the firm and all the other members of the firm also signed it. In *Mahadu Kashiba Varnekar* v. *Gajarabai Shankar Varnekar* (1), it was observed that provisions of Order 30, Code of Civil Procedure, were applicable to appeals in the same way in which they were applicable to suits. This proposition is in fact not being disputed. Shri Daya Kishan Mahajan has also cited *Hari Singh* v. *Firm Karam Chand-Kanshi Ram* (2), *Bal Kissen Das Daga and others* v. *Kanhya Lal* (3), *Madan Theatres, Ltd.* v. *Ram Kissen Kapoor and another* (4), *Firm Nand Gopal-Om Parkash through Banarsi Das* v. *Firm Mehnga Mal-Kishori Lal* (5), and *Chaudhri Atma Ram and others* v. *Mian Umar Ali* (6), for the proposition that where two or more persons sue or are sued in the name of the firm then on the death of one of the partners it is not necessary to bring on record his legal representatives. The proposition laid down in these authorities can hardly be controverted and in fact it has not been controverted on behalf of the respondents.

At this stage I may deal with the authorities on which the learned counsel for the respondent has placed reliance. *Awadh Bihari Parsad's case* (7), did not deal with the joint Hindu family firm.

(1) I.L.R. 1954 Bom. 885
(2) A.I.R. 1927 Lah. 115
(3) 21 I.C. 509
(4) A.I.R. 1943 Cal. 172
(5) A.I.R. 1940 Lah, 425
(6) A.I.R. 1940 Lah. 256
(7) A.I.R. 1953 Pat. 324

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In that case only individual members of the joint Hindu family were proceeded against and naturally no question of the applicability of Order 30, rule 4 of the Code of Civil Procedure could possibly arise. In *Bishan Narain's case* (1), again there was no question of any firm suing or being sued under Order 30 of the Code of Civil Procedure. This was a case where a member of a joint Hindu family had died and his widow and son were held to be his legal representatives. *K. Balakrishna Patro's case* (2), was also not a case even of joint Hindu family members. In this case the decree—joint and several—was passed against some defendants and naturally in those circumstances on the death of one of them his legal representatives should have been brought on the record. In *the Province of East Punjab* v. *Ladhu Ram and others* (3), also there was no question of joint Hindu family firm suing or being sued as such. In this case it was laid down that if there is a possibility of there being two inconsistent decrees, then an appeal should be held to abate. With this proposition of law there cannot possibly be any quarrel and in fact I am in respectful agreement with it.

It would thus appear that the contention advanced by the learned counsel for the appellant on the applicability of Order 30, rule 4 to the facts of the present case has force and must be allowed.

Mr. Daya Kishan Mahajan next urged that the decree of the Court below has proceeded on grounds common to all the judgment-debtors and it was open to anyone of the defendants to appeal from the whole decree and to pray to the appellate Court for the reversal of the decree as against all the defendants. The provisions of Order 41, rule 4 of the Code of Civil Procedure do clearly confer

(1) A.I.R. 1952 Punj. 167
(2) A.I.R. 1949 Pat. 184
(3) A.I.R. 1955 Punj. 225

this right on one of the several defendants against whom a decree is passed which proceeds on grounds common to all. The learned counsel has also referred us to *Dhando Khando* v. *Warman Balwani and another* (1), *Kehr Singh* v. *Emperor* (2), *Chuni Lal Tulsiram* v. *Amin Chand and another* (3), and *Mt. Krishna Dei* v. *Governor-General in Council and others* (4). These decision undoubtedly support the learned counsel. He also quoted *Mst. Parwati Kuer* v. *M. L. Kehtan* (5), in which the effect of the provisions of Order 41, rules 4 and 33, Code of Civil Procedure, has been considered and it has been held that one of the defendants can file an appeal without even impleading the other defendants and if the appeal proceeds on grounds common to all the defendants then the appellate Court can exercise the power of varying the decree in favour of even non-appealing defendants though they are not even parties to the appeal.

Mr. S. L. Puri on behalf of the respondents has on the other hand contended that the provisions of Order 41, rule 4 are subject to those of Order 22, rule 3. In support of this contention he has relied on *Chuni Lal Tulsiram* v. *Amin Chand and another* (3), *Gurditta Mal and others* v. *Muhammad Khan and others* (6), and *Khodadad Mundegar and another* v. *Bai Jerbai and others* (7).

Chuni Lal Tulsiram's case (3), deals with entirely different facts. In that case the suit was filed against some defendants individually and not in the name of the firm nor does it seem to have been shown in that case that interests of the defendants were common. The provisions of Order 30,

(1) A.I.R. 1945 Bom. 126
(2) A.I.R. 1933 Lah. 933
(3) A.I.R. 1933 Lah. 356
(4) A.I.R. 1950 All. 1
(5) I.L.R. 1956 Pat. 449 (F.B.)
(6) 90 I.C. 41
(7) I.L.R. 1938 Bom. 64

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Code of Civil Procedure, were not utilised in filing the suit. On these facts the Court held that rule 4 of Order 30, was inapplicable. I do not think this decision is of any help to the respondents. The case of *Gurditta Mal and others* (1), is also of no help to the respondents. In that case the appeal in the court came up for hearing on the 7tn February, 1925, when a preliminary objection was raised to the effect that respondents Nos, 16 and 28 having died and their legal representatives having not been brought on the record within the period of limitation the appeal had abated. The learned Judges passed the following order:—

> "It is shown by the affidavit of Muhammad Khan, which is not contested that this appeal has abated against Musammat Jalal Bibi and Muhammad Akram, the former being shown to have died in 1922. Mr. Nanak Chand asks for an adjournment to enable him to apply for an order setting aside the abatement. Fresh date to be given, i.e., the 3rd March, conditional on payment of Rs. 50 costs by the appellant to respondents."

On the 2nd of March, 1925, the appellant's counsel instead of applying for setting aside abatement contested the correctness of the order of the Division Bench, dated the 17th February, 1925, on the ground that no abatement had taken place at all inasmuch as the legal representatives of the deceased respondents were already on the record and that it was not necessary to make a formal application for substitution of their names on the record in their character of the legal representatives of the deceased. When the appeal came up for hearing on the 17th of March, 1925, the Bench hearing the case held that it was not open to the counsel for the

(1) 90 I.C. 41

appellants to question the correctness of the order, dated the 7th February, 1925. Their Lordships also proceeded to observe that an application was necessary to bring on record the legal representatives of the deceased notwithstanding that they were already on tne record in a different capacity. Whether or not this last observation represents the correct position in law need not be decided in the present case though I, on my part, am not prepared as at present advised and without considering the question more fully, to subscribe to this view. Further this decision does not wholly apply to the provisions of Order 30, Code of Civil Procedure, and is therefore, not of much help to the learned counsel for the respondents.

The next authority *Khodadad Mundegar and another* (1), is Single Bench decision on the original side of the Bombay High Court. In this case also the same view was taken as in *Gurditta Mal's case* (2), though decisions to the contrary by the Lahore High Court in *Gopal Das* v. *Mul Chand* (3), *Sardar Shah* v. *Mst. Sardar Begam* (4), and *Atma Ram* v. *Banku Mal* (5), were noticed and distinguished. In the reported cases, however, again there was no question of the applicability of the provisions of Order 30, Code of Civil Procedure. This suit was for dissolution of partnership and for accounts thereof, and on the death of one of the parties to the suit his legal representatives had not been brought on the record within the period of limitation and the suit was held to abate.

It is obvious that these authorities do not lend any support to the point raised by the learned counsel for respondent.

(1) I.L.R. 1938 Bom. 64
(2) 90 I.C. 41
(3) I.L.R. 7 Lah. 339
(4) I.L.R. 10 Lah. 531
(5) I.L.R. 11 Lah. 598

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Mr. Puri has further contended that the plaintiff-Bank had filed the suit not only against the joint Hindu family firm but it had also prayed for a joint and several decree against all the members of the firm as well. He submits that since the decree against Shri Radha Kishan has also been passed in his own individual capacity, on his death all his heirs and legal representatives should have been brought on the record; the estate of the deceased, so the counsel argues, could not be considered effectively represented even if one of such heirs or legal representatives had not been brought on the record.

I do not agree with this contention. The suit in the present case was filed against the joint Hindu family firm through its Manager or *karta,* Shri Radha Kishan; it is true that Shri Radha Kishan as well as his four sons as members of the joint Hindu family firm were also made parties. The suit was, however, based on the dealings which the defendants as members of the joint Hindu family firm had with the plaintiff-Bank and these dealings were expressly asserted in the plaint to be in the interest and for the benefit of the joint Hindu family and its business. If the provisions of Order 30, Civil Procedure Code, are applicable to joint Hindu family firm, as they in the present case are by virtue of the rules framed by this Court, then in my opinion according to rule 4 of this Order on the death of one of the partners it is not at all necessary for the heirs and successors of the deceased to be brought on the record. The firm as such has no separate existence in the eye of law; it is merely an abbreviated name for the partners of which it consists and it has no separate legal entity like that of a corporation. When a suit is brought against a firm in the name of the firm its effect is precisely as if it had been brought in the names of

all the partners and the effect of using the firm's name is merely to bring all the partners before the Court. The procedure as laid down in Order 30, Code of Civil Procedure, is only adopted as a convenient mode for denoting persons constituting the firm and a decree against a firm in its name has the same effect as a decree against all the partners has. The mere fact that the decree against the firm is executable against a persoen who has appeared in his own name under rules 5 and 6 of Order 30 or who has admitted on the pleadings that he is a partner or who having been individually served as a partner has failed to appear, does not in my opinion affect the applicability of the provisions of rule 4 of Order 30. It would thus appear that the mere fact that a decree in question can be executed against the legal representatives of Shri Radha Kishan (on which question it is not necessary to express any opinion in the present case) I do not think this factor would in any way disentitle the appellant-firm from pressing into service the provisions of Order 30, rule 4 of the Code of Civil Procedure. It may, at this stage; be stated that according to Hindu Law on the death of Shri Radha Kishan, his eldest son automatically became manager or *karta* of the joint Hindu family firm. In fact this legal position is also not being controverted by the learned counsel for the respondent.

Although the decision on this point alone is sufficient to overrule the objection raised on behalf of the respondents, I am also inclined to agree with the contention of the learned counsel for the appellant on the construction placed by him on Order 41, rule 4, Civil Procedure Code. It is clearly open to this Court to grant relief to the widow of Shri Radha Kishan, deceased although she has not been impleaded within time on the ground that the

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decree against her and against her sons proceeds on grounds common to all of them.

Mr. Daya Kishan Mahajan has also contended that by enacting the Hindu Women's Right to Property Act all that has happened is that the widow has been placed almost at par with her sons as heirs of the deceased. She does not become a member of the coparcenary but merely becomes like her sons a member of the joint Hindu family. If the joint Hindu family firm has properly filed the appeal, I think the widow of Shri Radha Kishan deceased should also be deemed to have been one of the appellants, like other members of the joint Hindu family firm, who are no others than her sons in the present case.

For all these reasons, I am of the view that the appeal has not abated. I would in the circumstances allow the application for bringing on record the widow of Shri Radha Kihsan, deceased.

On merits the question raised is a very short and simple one. The learned counsel for the appellants claims relief under section 17 of the Displaced Persons (Debts Adjustment) Act. He has referred to paras 5 and 6 of the plaint wherein it is stated that on different occassions the defendants pledged with the plaintiff-Bank agricultural commodities as security and such goods were lying in the godowns of the plaintiff-Bank to which the plaintiff's sealed locks were fastened and which goods were looted in communal disturbances. He has also referred to para 3 of the plaint where the plaintiff admits that the defendants had their business in Kasur, district Lahore, and that owing to Kasur having gone to Pakistan, defendants had closed their business there and for the last one

year they had been residing at Ludhiana. A reference has also been made by the counsel to the evidence of Sham Lal, P.W. 9 Godown-Keeper of the Bank and to the statement of Shri Girdhari Lal, defendant, D.W. 12 for the purpose of showing that defendants were all displaced persons.

Displaced Persons (Debts Adjustment) Act, came into force in the Punjab, on the 10th of December, 1951. The present suit was filed in November, 1948, and the judgment was given on the 31st December, 1949. It has; however, been held in a number of decisions in this Court that the provisions of section 17 of the Displaced Persons (Debts Adjustment) Act, are retrospective in operation and relief, under this Act can be claimed on appeal to this Hon'ble Court even though this Act was not in force when the suit was filed or even the suit was decided. The appeal being a rehearing this Court can and should grant relief on appeal to the parties who are entitled to it under section 17 of the said Act.

Mr. Puri, the learned counsel for the respondent, however, does not admit that the appellants are displaced debtors and as such entitled to relief under section 17 of the above Act. In order to do full justice between the parties and to finally dispose of the appeal it is necessary that the parties should be given an opportunity to lead evidence on the point raised. In these circumstances I consider it to be fair, just and proper to call for a report from the trial court on the question, whether or not the appellants are 'displaced debtors' within the meaning of section 17 read with section 2, subsection (9) of the Displaced Persons (Debts Adjustment) Act 70 of 1951. The parties are entitled to lead whatever evidence they consider proper

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on this question before the lower Court. I, therefore, direct the trial court to record whatever evidence the parties desire to produce on the question stated above and submit to this Court the record of the case with its own opinion. The parties have been directed to appear before the Court below on 27th October, 1958, when the Court would give them a date for further proceedings. The report should be submitted by the lower Court within three months from today.

Falshaw, J.

FALSHAW, J.—I agree.

Dua, J.

DUA, J.—This order may be read in continuation of our order, dated 23rd of September, 1958, by which, in view of the Displaced Persons (Debts Adjustment) Act (No. LXX of 1951), which had come into force in the Punjab on 10th of December, 1951, we called for a report from the trial Court on the question, whether or not the appellants are "displaced debtors" within the meaning of section 17 read with section 2(9) of the Displaced Persons (Debts Adjustment) Act No. LXX of 1951. The learned Subordinate Judge has submitted his report after recording evidence led by the parties, and has found all the members of the plaintiff firm to be displaced debtors. The Punjab National Bank. Ltd., respondent has preferred objections against this report and we have heard Mr. S. L. Puri in support of them. He has submitted in the first instance that an application under the Displaced Persons (Debts Adjustment) Act filed on behalf of the debtors-appellants is pending before the Tribunal and since the question of the present appellants being displaced debtors is pending adjudication before the Tribunal since 1952, the subordinate Court or for the matter of that any civil

Court should not decide the said question. The counsel submits that it is not only wrong in principle, but it is likely to result in confusion, if two Tribunals were to hold enquiry into the same question in independent proceedings between the same parties. He has drawn our attention to section 15 of Act No. LXX of 1951, for the purpose of showing the scheme of the Act and the intention of the Legislature which according to the counsel, suggests that proceedings in all civil Courts pending at the date of the application made to the Tribunal under section 5 or section 11(2) of the Act should be stayed and the records of all such proceedings excepting those of appeals, reviews or revisions should be transferred to the Tribunal and consolidated. In my opinion, there is no substance in this objection. Section 15(a) of the Act itself exempts the proceedings, by way of appeal or review or revisions, against decrees or orders passed against a displaced debtor. The proceedings pending in this Court, or those before the Subordinate Judge, for the purpose of sending to this Court a report on a question, referred to it by this Court, would obviously be exempt, with the result that section 15 in terms would be inapplicable to the present case. This apart, Mr. D. K. Mahajan, on behalf of the appellants, has stated that the application made by this clients to the Tribunal is under section 21 of the Displaced Persons (Debts Adjustment) Act for the purpose merely of getting the decree passed in this case revised so as to bring it in accord with the provisions of the said Act. Section 15 of the Act would on this ground also, be inapplicable as its provisions are only attracted if and when the Tribunal is approached under sections 5 or 11 of the Act. It has been held by this Court that relief under section 17 of Act No. LXX of 1951, can be granted to the displaced debtors by the civil Courts, which

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means that the appellants can obtain relief under the said section from this Court in these proceedings. If this be so, then I can hardly see any ground for withholding our hands and directing the question in dispute to be decided by the Tribunal. It is relevant to note that under section 40 of the said Act any final decree or order passed by the Tribunal is appealable to this Court and if that be so, then it is only fit and proper that this Court should finally determine the rights of the parties in the present proceedings. As the decree of the Court below in this appeal was passed before the enforcement of the Displaced Persons (Debts Adjustment) Act, the appellants seem to have approached the Tribunal, for revision of the impugned decree, by way of abundant caution.

Mr. Puri has next contended that Shri Madan Lal, one of the members of the appellants' family, used to live in Ludhiana since before the partition of the country and that, he having not come in the witness box in support of the plea of his being a displaced debtor, an adverse inference against him should be drawn and he should be held not to be a displaced debtor. The counsel contends that best evidence must always be produced and a party who has personal knowledge of relevant facts or facts in issue must put himself in the witness box in support of his own case and submit himself to the cross-examination by his adversary. I agree with the proposition of law advanced by the counsel. As held in *Bishan Das* v. *Gurbakhsh Singh and another* (1), failure of party, coming forward with a case, to give evidence on matters within his knowledge, ought to be a weighty factor, when the value of the case put forward on his behalf is appraised. To the same effect is *Puran Das Chela* v.

(1) A.I.R. 1934 Lah. 63(2)

Kartar Singh and others (1). Mr. D. K. Mahajan has, on the other hand, contended that if the Bank wanted Shri Madan Lal to appear as a witness it could have summoned him as such. In my view, Mr. Mahajan is not right when he says that it was for the Bank to summon Shri Madan Lal if he was to be required to be produced as a witness. Lord Shaw, while delivering the judgment of the Judicial Committee of the Privy Council in *Sardar Gurbakhsh Singh* v. *Gurdial Singh and another* (2), laid down that the practice of not calling the party as witness with a view to force the other party to call him, and so suffer the discomfiture of having him treated as his (the other party's) own witness is a bad and degrading practice. The following earlier observation of the Board in *Lal Kunwar* v. *Chiranji Lal* (3), calling such practice "a vicious practice, unworthy of high-tone or reputable system of advocacy" was also quoted with approval. In my opinion, Shri Madan Lal should have been put in the witness box by the appellant-firm. However, since Girdhari Lal has gone into the witness box on behalf of the appellants' joint Hindu family and has been examined in great detail, on the facts and circumstances of the present case there is hardly any ground for raising a strong presumption against Shri Madan Lal. It appears to me that the appellants used permanently to reside in Pakistan where they had their principal place both of residence and business. We have also on the record a letter written by Shri Yodh Raj, ex-General Manager of the Punjab National Bank, Ltd., addressed to Shri Madan Lal on his Kasur address

(1) A.I.R. 1934 Lah. 398
(2) A.I.R. 1927 P.C. 230
(3) I.L.R. 32 All. 104

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which is admittedly in Pakistan. In this connection it would not be out of place to refer to para 3 of the plaint where it is stated by the plaintiff-respondent Bank that defendants (defendant No. 5 is Shri Madan Lal) had their business at Kasur, district Lahore, and that owing to Kasur going to Pakistan the defendants had now closed their business there and for the last one year had been residing at Ludhiana where they had their business and property previously too. It is no doubt correct that when this suit was filed, Displaced Persons (Debts Adjustment) Act had not been enacted and, therefore, the question of their residence, etc., at Kasur or at Ludhiana was hardly of any importance, but then this circumstance cannot detract from the value of the express assertion contained in the plaint, particularly when this assertion has been verified to be true to the knowledge of the General Manager and *mukhtiar-i-am* of the Bank. Mr. Puri has not seriously assailed the report of the Subordinate Judge on any other ground. He has, however, raised one more point. He has contended that on 25th of May, 1951, a sum of Rs. 10,000 had been paid by the appellants to the Bank towards the debt in question before the Displaced Persons (Debts Adjustment) Act was brought on the statute book. He submits that the present order should not be construed so as to entitle the appellants to claim a refund of this amount by way of restitution. In my view, no question of restitution so far as this sum of Rs. 10,000 is concerned arises in the present case. Section 17, under which the relief is being granted to the appellants, on the ground that their debt was secured by the pledge of movable property, merely says that in the circumstances contained therein, the creditor shall not be entitled to recover from the debtor the debt for which the pledged property was security. It does not entitle the debtor to

recover back payments made by him towards discharge of the debt in full or in part. Indeed, section 49 of the said Act clearly saves all past transactions and it lays down in unequivocal terms that if before the commencement of this Act a displaced debtor has satisfied or discharged any of his liabilities in any manner whatsoever, such transactions shall not be affected by anything contained in this Act. In fact, Mr. D. K. Mahajan did not contend that the order of this Court in the present appeal would entitle his clients to claim restitution of the sum of Rs. 10,000 voluntarily paid by the appellants to the Bank in discharge of the amount validly and legitimately due to the Bank at the time of the payment. Indeed, Mr. Mahajan actually offered to withdraw his petition filed in the Tribunal under section 21 of the Act as the relief due to the appellants under the said Act was being granted by us in these proceedings, and that application has become infructuous. Had it not been so, we would perhaps have felt hesitant in permitting the new plea based on section 17 of the Displaced Persons (Debts Adjustment) Act to be raised at the appellate stage, when this plea involved an investigation into a question of fact, namely, whether or not the members of the appellant-firm are displaced debtors. Such additional pleas are allowed at the appellate stage only to promote the cause of justice and if the plea is likely to prejudicially affect the opposite party then the appellate Court may in its discretion legitimately refuse a new plea of fact to be raised.

In view of the findings given by us in our judgment, dated 23rd of September, 1958, and for the reasons given above in the present judgment, the appeal is allowed and the suit of the plaintiff dismissed but this dismissal would not affect the receipt of the sum of Rs. 10,000 by the Punjab

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National Bank, Ltd., on 25th of May, 1951, before the enforcement of the Displaced Persons (Debts Adjustment) Act. Since the appellants have succeeded exclusively on the basis of the additional evidence led in support of the new plea provided by Act No. LXX of 1951, the parties are directed to bear their own costs throughout.

Dua, J.
Falshaw, J.

FALSHAW, J.—I agree.

B. R. T.

APPELLATE CIVIL

Before K. L. Gosain and A. N. Grover, JJ.

BASANT SINGH AND ANOTHER,—*Appellants.*

versus

TIRLOKI NATH AND OTHERS,—*Respondents.*

1959

Execution First Appeal No. 2-P of 1952

Feb., 24th

Code of Civil Procedure (Act V of 1908)—Section 47—Objections to the validity of the decree—Whether and when can be entertained by the executing court—Suit filed in a competent court transferred to a court not competent to try it—Effect of:

Held, that an executing court cannot go behind the decree and the jurisdiction of the Court executing a decree must be determined with reference to and is circumscribed by the directions contained in the decree. An executing Court cannot obviously question the legality or correctness of the decree because of the simple reason that a proceeding to enforce a judgment is collateral to the judgment itself and, therefore, no enquiry into its regularity or validity can be permitted in such a proceeding, The executing Court is bound to execute the decree in spite of the fact that the decree is contrary to law or is erroneous on facts. If, however, what purports to be a decree has been passed by a Court not duly constituted in accordance with law such an adjudication is not a decree at all in the eye of