Messrs Saligram etc., *v.* Commissioner of Income-tax

Kapur J.

question of main purpose of the transaction. In the present case the time factor, as I have shown above, assumes a very great deal of importance. The fact that the partial partition was effected at a time when the income was going up during the period of the war coupled with the fact that by partial partition the manufacturing plant had gone to one set of brothers and the finishing plant and the selling agency to another set of brothers and the fact that wrong explanation was given as being the purpose of the partition are in my opinion sufficient to support the finding given by the Appellate Tribunal.

I would therefore answer the first question in the affirmative and the answer to the second would also be in the affirmative. The assessee should pay the costs of the Commissioner for Excess Profits Tax which I assess at Rs. 300.

SONI, J. I agree.

Supreme Court

CIVIL APPELLATE JURISDICTION

Before Saiyid Fazal Ali and Vivian Bose, JJ.

THE RUBY GENERAL INSURANCE CO. LIMITED,—*Appellant,*

versus

SHRI PEAREY LAL KUMAR AND ANOTHER,—*Respondents.*

Arbitration Act (X of 1940), Section 33—Scope of—What points in dispute between the parties fall to be decided by the arbitrator or by the Court—Test laid down—Practice—Appeal to Supreme Court—Amendment of application under section 33, Arbitration Act, whether to be allowed.

1952

Feb 25th

P got his car insured with the appellant-Company. Clause 7 of the Policy of Insurance provided that all differences "arising out of this policy" would be referred to arbitration and that if the Company disclaimed liability and the matter was not referred to arbitration within 12 months of such disclaimer, the claim would, for all purposes, be deemed to have been abandoned and would not be recoverable. The car was lost and P claimed its value from the Company which disclaimed liability under clause 7 of the policy. P took proceedings for arbitration more than 12 months after final disclaimer by the Company. The Company filed an application under section 33 of the Arbitration

The Ruby General Insurance Co. Limited
v.
Shri Pearey Lal Kumar and another

Saiyid Fazl Ali J.

On appeal by special leave from the judgment, dated the 10th April, 1951, of the High Court of Judicature for the State of Punjab at Simla (Kapur, J.) in Civil Revision No. 286 of 1950, arising out of order, dated the 24th March 1950, of the Court of Subordinate Judge, 1st Class, Delhi, in application under section 33 of the Indian Arbitration Act, X of 1940.

RATTAN LAL CHAWLA, for Appellant.

SOM NATH CHOPRA, for Respondent No. 1.

JUDGMENT

FAZL ALI, J. This is an appeal by special leave against the judgment of the Punjab High Court upholding the decision of a subordinate judge of Delhi relating to a petition filed by the appellant-company under section 33 of the Indian Arbitration Act against the respondents.

The material facts are these. On the 22nd April 1947, the appellant-company insured a car belonging to the first respondent and issued a policy which fully sets out the terms and conditions of the agreement relating to the insurance. The first respondent left his car in a garage at Lahore and came away to India on the 31st July 1947. Subsequently, he learned about the loss of his car, and sent a legal notice, dated the 18th March 1948, through his advocate, Mr A. R. Kapur, to the Head Office of the company at Calcutta, claiming a sum of Rs. 7,000 for the loss of the car. On the 10th April 1948, Mr Kapur received a letter from the Branch Manager of the company's office at Amritsar asking for information regarding certain matters stated in the letter. This information appears to have been supplied on the 30th April 1948. On the 26th May 1948, the company's Branch Manager at Amritsar wrote to the first respondent repudiating the liability of the company for the loss of the car on the ground that the loss was "due to communal riots which were going on in the whole of Punjab" and was not covered by the agreement of insurance. A similar letter was written again by the Branch Manager on the 3rd July 1948, to the first respondent, and another letter was written by one Mr Rattan Lal Chawla representing himself to be counsel for the

company, to Mr A. R. Kapur, on the 1st August 1948. On the 21st November 1949, the first respondent wrote a letter to the Branch Secretary of the Company's office at Calcutta, stating that his claim was valid and nominating Mr. T. C. Chopra, Assistant Manager, Lakshmi Insurance Company, Ltd., Delhi, as arbitrator on his behalf and requesting the company to appoint another person as arbitrator on its behalf. Thereafter, the company presented an application on the 29th December 1949, in the court of the Senior Sub-judge, Delhi, under section 33 of the Indian Arbitration Act, against the first respondent and Mr. T. C. Chopra, the arbitrator, who is the second respondent in this appeal, praying for—

(1) a declaration to the effect that the reference to arbitration and the appointment of respondent No. 2 as sole arbitrator was illegal;

(2) a declaration to the effect that if the respondent No. 2 made any award it would not be binding on the company; and

(3) an injunction restraining the respondents Nos 1 and 2 from taking any proceeding in the matter and the respondent No. 2 from making any award.

Upon this petition, notice was issued to the respondents, and an injunction was issued directing them not to file any award till the date of the next hearing, which was fixed for 31st January 1950. On the 4th February 1950, the first respondent wrote to the second respondent (the arbitrator) that since no arbitrator had been appointed by the company and since the company had refused to appoint any arbitrator, he (Mr Chopra) was to act as the sole arbitrator. On the 6th February 1950, Mr Chopra wrote to inform the Insurance Company that he had been appointed sole arbitrator and asked the company to send the statement of its case and to produce all the evidence on the 14th February 1950. On the 10th February 1950, the insurance company filed a petition before the Subordinate Judge, Delhi, praying that the

Act for a declaration that the reference to arbitration and appointment of sole arbitrator were illegal; award, if any, made by the sole arbitrator, would not be binding on the Company and prayed for an injunction restraining the arbitration proceedings and the making of the award. The grounds alleged were that the arbitration agreement had ceased to be operative, that P must be deemed to have abandoned his claim and could not recover anything in view of clause 7 of the Policy and that the matter was triable by the Court and not by the arbitrator. P controverted the Company's allegations. The trial Court rejected the application and a revision to the High Court against that order was also rejected. In appeal to the Supreme Court it was pleaded that the award that had been made in the meanwhile was invalid and not binding having been pronounced in spite of the order of the Court to the contrary. This plea had not been taken in the original application nor was the application amended in the courts below. Prayer was made to the Supreme Court for the amendment of the application.

Held, that the test to determine whether the points in dispute fell to be decided by the arbitrator or by the Court under section 33 of the Arbitration Act is whether recourse to the contract by which the parties are bound is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction. In the present case both the parties admit the contract and state that they are bound by it. Both the parties also rely on clause 7 of the Policy of Insurance for their respective claims. It is thus clear that difference between the arties is a difference "arising out of the Policy" and the arbitrator had jurisdiction to decide it.

Held further, that as no application for amendment of the petition under section 33 was made in the courts below, the Supreme Court cannot be asked to go into the validity of the award by widening the scope of the original petition. The Supreme Court is always in favour of shortening litigation, but it would be a very unusual step to allow the petition under section 33 to be amended now and to decide a question involving investigation of facts without having the benefit of the judgments of the courts below.

A. M. Mair & Co. v. *Gordhandass-Sagarmull* (1), *Heyman* v. *Darwins, Ltd.* (2), *Macaura* v. *Northern Assurance Co.* (3), *Stebbing's case* (4), and *Woodall* v. *Pearl Assurance Co.* (5), relied upon.

(1) 1950 S. C. R. 792.
(2) (1941) I. A. E. L. R. 337, 343.
(3) 1925 A. C. 619.
(4) (1917) 2 K. B. 433.
(5) (1919) I. K. B. 593.

The Ruby General Insurance Co. Limited
v.
Shri Pearey Lal Kumar and another

Saiyid Fazl Ali J.

respondents be stopped from proceeding further in the matter so that its application under section 33 may not become infructuous. On the 11th February, the Subordinate Judge issued notice to the respondents fixing the 17th February as the date of hearing and passed the following order :

> " Moreover (till) the decision of this application the arbitrator should not give or pronounce his award but should continue the proceedings."

On the 14th February 1950, the second respondent pronounced his award after making a note to the following effect :—

> " Mr G. R. Chopra, the counsel of the defendants, sent a telephonic message at 12 a.m. requesting extension till 1 p.m. I agreed and accordingly I waited for him and the plaintiff with his counsel also waited up to 1 p.m. Nobody turned up on behalf of the defendants. I commenced the proceedings and took the statement of the plaintiff and the documents that he had produced."

He made a further note at the end of the award to this effect :—

> " As after the giving of the award a notice was served upon me not to give the award, I have not sent any formal letter to the parties informing them of the award and its costs. "

On the 24th March 1950, the Subordinate Judge passed an order on the company's application under section 33, dismissing it and holding that the terms of clause 7 of the agreement " were comprehensive enough to include the points of disputes between the parties now and as such triable by the arbitrator and not by the court. " The Subordinate Judge concluded his order by observing :

> " I, therefore, hold that the reference to the arbitration of the differences is perfectly valid and the points raised by the parties to this application with regard to the abandonment of claim and its becoming

irrecoverable are to be decided by the arbitrator."

The judgment of the Subordinate Judge was upheld in revision by the Punjab High Court, and the company has now preferred an appeal to this court by special leave.

The points that were urged on behalf of the appellant in this appeal are these :—

(1) that the arbitration clause had ceased to be operative and the question as to the existence and validity of the arbitration agreement was triable by the court under section 33 of the Arbitration Act and not by the arbitrator ; and

(2) that the award was invalid and not binding on the appellant, because it was pronounced in spite of the order of the court, dated the 11th February 1950, directing the arbitrator not to pronounce his award.

Clause 7 of the Policy of Insurance runs as follows :—

"All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the arbitrators do not agree of an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meeting and the making of an award shall be a condition precedent to any right of action against the company. If the company shall disclaim liability to the insured for any claim hereunder and such claim shall

The Ruby General Insurance Co. Limited
v.
Shri Pearey Lal Kumar and another

Saiyid Fazl Ali J.

not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

It will be noticed that this clause provides among other things that if the company disclaimed liability to the insured for any claim under the policy and such claim was not within twelve calendar months from the date of such disclaimer referred to arbitration, then the claim should be deemed to have been abandoned and was not recoverable. The case of the company is that it disclaimed liability for the loss of the car on three successive occasions, namely, on the 26th May 1948, the 3rd July 1948, and the 1st August 1948. The first respondent, however, did not take any action in regard to the appointment of an arbitrator until the 21st November 1949, i.e., until more than 12 months after even the last disclaimer by the company. For this reason, the claim put forward by the first respondent must be deemed to have been abandoned, and he cannot recover anything from the company. On the other hand, the case of the first respondent, which is set out in his affidavit, dated the 17th February 1950, is that there was never any valid disclaimer by the company of its liability. The position that he took up was that the Branch Manager of the company had no authority to disclaim the liability, and it could have been disclaimed only by a resolution of the company. Now these being the respective contentions of the parties, the question is whether the point in dispute fell to be decided by the arbitrator or by the court under section 33 of the Arbitration Act. Section 33 is to the following effect :—

"Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall

apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

The question to be decided is whether the point on which the parties are in dispute is a difference " arising out of the policy " in terms of clause 7 of the policy. The test for determining such a question has been laid down in a series of cases and is a simple one. The test is whether recourse to the contract by which the parties are bound is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction. In the present case, both the parties admit the contract and state that they are bound by it. Indeed, the appellant-company, in order to make good its contention, is obliged to rely and does rely on that part of clause 7 of the policy which states that if the company should disclaim liability and the claim be not referred to arbitration within 12 months of such disclaimer, the claim shall be deemed to have been abandoned. Evidently, the company cannot succeed without calling in aid this clause and relying on it. Again, the first respondent does not say that he is not bound by the clause but states that the matter was referred to arbitration before any valid disclaimer was made. The position therefore is that one party relying upon the arbitration clause says that there has been a breach of its terms and the other party, also relying on that clause, says that there has been no breach but on the other hand the requirements of that clause have been fulfilled. Thus, the point in dispute between the parties is one for the decision of which the appellant is compelled to invoke to his aid one of the terms of the insurance agreement. It is thus clear that the difference between the parties is a difference arising out of the policy and the arbitrator had jurisdiction to decide it, the parties having

The Ruby General Insurance Co. Limited
v.
Shri Pearey Lal Kumar and another

Saiyid Fazl Ali J.

made him the sole judge of all differences arising out of the policy.

A large number of cases were cited before us on behalf of the parties, but it is unnecessary to refer to them, since the question which arises in this appeal is a simple one and is covered by the statement of law which is to be found in the decision of this Court in *A. M. Mair & Co.* v. *Gordhandass Sagarmull* (1), and in a series of English authorities, some of which only may be referred to. In *Heyman* v. *Darwins, Ltd.* (2), the law on the subject has been very clearly stated in the following passage :—

> " An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.
>
> If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen " in respect of," or " with regard to," or " under the contract," and an arbitration

(1) 1950 S.C.R. 792.
(2) (1941) 1 A.E.L.R. 337, 343.

clause which uses these, or similar expressions, should be construed accordingly ".

In *Macaura* v. *Northern Assurance Co.* (1), the appellant had insured a large quantity of timber against fire and the greater part of the timber having been destroyed by fire, he sued the Insurance Company to recover the loss but the action was stayed and the matter was referred to arbitration in pursuance of the conditions contained in the policy. The arbitrator held that the claimant had no insurable interest in the goods insured and disallowed the claim. One of the points raised in the case was that the arbitrator had no jurisdiction to decide the matter, but that contention was rejected by Lord Sumner in these words :—

" The defendants do not repudiate the policy or dispute its validity as a contract ; on the contrary, they rely on it and say that according to its terms, express and implied, they are relieved from liability : see *Stebbing's* case (2), *Woodall* v. *Pearl Assurance Co.* (3).....It is a fallacy to say that they assert the policy to be null and void."

In *Stebbing* v. *Liverpool and London and Globe Insurance Company, Limited* (2), to which reference was made by Lord Sumner, the Policy of Insurance contained a clause referring to the decision of an arbitrator " all difference arising out of this policy ". It also contained a recital that the assured had made a proposal and declaration as the basis of the contract, and a clause to the effect that compliance with the conditions indorsed upon the policy should be a condition precedent to any liability on the part of the insurers. One of the conditions provided that if any false declaration should be made or used in support of a claim all benefit under the policy should be forfeited. In answer to a claim by the assured, the insurers alleged that statements in the proposal and declaration were false. When the matter came before the arbitrator, the assured objected that this was not a difference in

(1) 1925 A. C. 619.
(2) (1917) 2 K. B. 433.
(3) (1919) 1 K.B. 593.

The Ruby General Insurance Co. Limited
v.
Shri Pearey Lal Kumar and another

Saiyid Fazl Ali J.

the arbitration and that the arbitrator had no power to determine whether the answers were true or not, or to determine any matters which called in question the validity of the policy. In holding that the arbitrator had jurisdiction to decide the matter, Viscount Reading, C.J., observed as follows :—

> "If the company were seeking to avoid the contract in the true sense they would have to rely upon some matter outside the contract, such as a misrepresentation of some material fact inducing the contract of which the force and effect are not declared by the contract itself. In that case the materiality of the fact and its effect in inducing the contract would have to be tried. In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy. In resisting the claim they are not avoiding the policy but relying on its terms. In my opinion, therefore, the question whether or not the statement is true is a question arising out of the policy."

The main contention put forward on behalf of the appellant is that the points in dispute fall outside the jurisdiction of the arbitrator, firstly because the existence of the arbitration agreement is challenged, and secondly because the sole object of the application under section 33 of the Arbitration Act is to have the effect of the arbitration agreement determined. In our opinion, neither of these objections is sound. How can it be held that the existence of the arbitration agreement is challenged, when both parties admit that the clause in the policy which contains that agreement binds them. It is neither party's case that there is no arbitration agreement in the policy. On the other hand, both parties admit that such agreement exists, and each of them relies on it to support its case. It is true that the appellant contends that the

arbitration agreement has ceased to be applicable, but that contention cannot be sustained without having recourse to the arbitration agreement. It is said that the agreement no longer subsists, but that is very different from saying that the agreement never existed or was void *ab initio* and, therefore, is to be treated as non-existent.

Again, no question of determining the effect of the arbitration agreement arises, because there is no dispute between the parties as to what it means. The language of the arbitration clause is quite clear, and both parties construe it in the same way. The real question between them is whether the first respondent has or has not complied with the conditions of the agreement. But this question does not turn on the effect of the agreement. This is the view which has substantially been taken by the High Court, and in our opinion it is correct.

The second point urged before us is that the award is invalid, since it was made in spite of the court's injunction directing the arbitrator not to pronounce any award. This point, however, does not, in our opinion, fall within the scope of this appeal. The application under section 33 of the Arbitration Act, which is the subject of this appeal, was filed before the award was pronounced. In that application, there is no reference to the award ; nor is there any reference to the circumstances which are now stated to invalidate the award and which happened after the application was filed. The learned counsel for the appellant made an application before us praying for the amendment of the petition under section 33 by introducing certain additional facts and adding a prayer for declaring the award to be invalid, but it was rejected by us. It should be stated that as early as the 24th March, 1950, the subordinate judge in dismissing the appellant's petition under section 33, made the following observations :—

> "During the pendency of the arbitration proceedings the arbitrator pronounced the award . . . . The award has now been filed in the court of S. Mohinder Singh, Sub-Judge,

The Ruby General Insurance Co. Limited
v.
Shri Pearey Lal Kumar and another

Saiyid Fazl Ali J.

1st Class, Delhi. Any objection against the award can be filed there. In this application in which there is no prayer for setting aside the award, which exists, I do not think it proper to decide the question of the validity of the award."

In our opinion, the Subordinate Judge correctly indicated the course which it was open to the appellant in law to adopt for the purpose of questioning the validity of the award, but not having taken that course and not having made any application in the courts below for amending the petition under section 33, the company cannot ask this court to go into the validity of the award by widening the scope of the original petition. This court is always in favour of shortening litigation, but it would be a very unusual step to allow the petition under section 33 to be amended now and to decide a question involving investigation of facts without having the benefit of the judgments of the courts below.

In the result, the appeal fails and is dismissed with costs.

SUPREME COURT

CIVIL APPELLATE JURISDICTION

Before saiyid Fazl Ali, B. K. Mukherjea and Vivian Bose, JJ.

Civil Appeal No. 57 of 1951

PANNA LAL AND ANOTHER,— *Appellants,*

versus

MST. NARAINI, DECEASED, REPRESENTED BY HARI PARSHAD AND 3 OTHERS AND MST. BASSO,—*Respondents.*

1952

March 7th

Hindu Law—Debts—Liability of son to pay debts of his father—Whether property obtained on partition with the father liable for pre-partition debts in respect of which a decree was passed after the partition against the sons as legal representatives of the father—Method of enforcing liability, whether by a separate suit or in execution proceedings—Code of Civil Procedure (Act V of 1908), Sections 47, 52, 53 and 60—Scope of—Statutory right—Whether can be contracted out without express words.

B. D., the father as manager of joint Hindu family, incurred a debt on the security of certain property of the joint family. Some time later there was partition between the father and the sons and the hypothecated property fell

to the share of the sons who took possession thereof. The creditor filed a suit for a decree against the father and the mortgaged property. The claim to the mortgaged property was later given up and only a personal decree was prayed for. The father died during the pendency of the suit and his sons and widow were brought on the record as his legal representatives. By compromise a simple money decree was passed in favour of the creditor against the estate of B. D., in the possession of his legal representatives. In execution of the decree certain shops which had been obtained by the sons on partition with their father were got attached. The sons objected to the attachment and pleaded that the attached shops being their separate and exclusive properties could not be made liable for the satisfaction of the decree which had to be realized from the estate of B. D. It was held by the Subordinate Judge that the separate properties of the sons obtained by them on partition were liable for the pre-partition debt of their father if it was not immoral and the decree could be executed against such properties under section 53, Civil Procedure Code. On appeal the High Court affirmed the decision of the Subordinate Judge.

In appeal to the Supreme Court it was contended :

(1) That the decree, according to its terms, could be executed only against the properties of B. D., in the hands of his legal representatives which he left at the time of his death and not against the properties of the appellants obtained by them on partition with their father during his lifetime ;

(2) That the decree having been passed after partition the separate properties obtained by the appellants on partition, were not liable for its satisfaction under Hindu Law ; and

(3) That in case any pious obligation of the sons was sought to be enforced, it could be enforced by a separate suit and not in execution proceedings.

Held, that as the decree fulfils the conditions of section 52 (*1*), Civil Procedure Code, it would attract all the incidents which attach by law to a decree of that character. Consequently the decree-holder would be entitled to call in aid the provisions of section 53 of the Code ; and if any property in the hands of the sons other than what they received by inheritance from their father, is liable under the Hindu Law to pay the father's debts, such property could be reached by the decree-holder in execution of the decree by virtue of the provisions of section 53, Civil Procedure Code.

Panna Lal and another
v.
Mst. Naraini, etc.,

Held further, that a son being liable, even after the partition, for the pre-partition debts of his father which are not immoral or illegal and for the payment of which no arrangement was made at the date of the partition, the property obtained by him on partition is liable for the satisfaction of such debts.

Held further, that a decree against the father alone during his life-time cannot possibly be executed against his sons as his legal representatives. The decree against the father after the partition could not be taken to be a decree against the sons and no attachment and sale of the sons' separated shares would be permissible under section 60, Civil Procedure Code, but the position is quite different when the sons are made legal representatives in the suit and the decree is obtained against them as legal representatives. Such a decree can be executed against the sons under section 53, Civil Procedure Code, and the liability of the sons and their separated share of the property will have to be decided by the executing court under section 47, Civil Procedure Code.

Held further, that section 53 of the Civil Procedure Code being only a rule of procedure cannot create or take away any substantive right. It is only when the liability of the sons to pay the debts of their father in certain circumstances exists under the Hindu Law, is the operation of the section attracted and not otherwise. The provisions of this section cannot be extended to a case when the father is still alive.

Held further, that it is certainly possible for the parties to agree among themselves that the decree should be executed only against a particular property and no other; but when any statutory right is sought to be contracted out, it is necessary that express words of exclusion must be used. Exclusion cannot be inferred merely from the fact that the compromise made no reference to such right.

Subramanaya v. *Sabapathi* (1), *Annabat* v. *Shivappa* (2), *Bankey Lal* v. *Durga Prasad* (3), *Jawahar Singh* v. *Parduman* (4), *Raghunandan* v. *Matiram* (5), and *Atul Krishna* v. *Lala Nandanji* (6), relied upon; *Krishnaswami* v. *Ramaswami* (7), *V. P. Venkanna* v. *V. S. Deekshatulu* (8), and dissentient Judgment of Ayyangar, J., in *Subramanaya* v. *Sabapathi* (1), not approved.

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(1) 51 Mad. 361 (F.B.).
(2) 52 Bom. 376.
(3) 53 All. 868 (F.B.).
(4) 14 Lah. 399.
(5) 6 Luck. 497.
(6) 14 Pat. 732 (F.B.).
(7) 22 Mad. 519.
(8) 41 Mad. 136.

On appeal from the judgment, dated the 18th May 1948, of the High Court of Judicature for the State of Punjab at Simla (Khosla and Teja Singh, JJ.) in Letters Patent Appeal No. 189 of 1946, arising out of judgment, dated the 11th February 1946, of the Court of the Senior Sub-Judge, Ambala.

GOPI NATH KUNZRU, for Appellants.

RANG BEHARI LAL, for Respondents.

JUDGMENT

B. K. Mukherjea J

MUKHERJEA, J. This appeal is on behalf of the judgment-debtor in a proceeding for execution of a money decree and it is directed against the judgment of a Letters Patent Bench of the Punjab High Court, dated 18th of May, 1948, by which the learned Judges affirmed, in appeal, a decision of a single judge of that court, dated 29th October 1946. The original order against which the appeal was taken to the High Court was made by the Senior Subordinate Judge, Ambala, in Execution Case No. 18 of 1945, dismissing the objections preferred by the appellants under section 47 of the Civil Procedure Code.

To appreciate the contentions that have been raised in this appeal, it would be necessary to give a short narrative of the material events in their chronological order. On September 30, 1925, Baldev Das, the father of the appellants, who was at that time the manager of a joint Hindu family, consisting of himself and his sons, executed a mortgage bond in favour of Mst Naraini, the original respondent No. 1, and another person named Talok Chand, by which certain movable properties belonging to the joint family were hypothecated to secure a loan of Rs 16,000. On April 16, 1928, the appellants along with a minor brother of theirs named Sumer Chand filed a suit—being Suit No. 23 of 1928—in the Court of the Subordinate Judge of Shahjahanpur against their father Baldev Das for partition of the joint family properties. The suit culminated in a final decree for partition on 20th July 1928, and the joint family properties were divided by metes and bounds and separate possession was taken by the father and the sons. On 29th September 1934, Mst Naraini filed a suit in the Court of

Panna Lal and another
v.
Mst. Naraini, etc.

B. K. Mukherjea J.

the Senior Subordinate Judge, Ambala, against Baldev Das for recovery of a sum of Rs 12,500 only on the basis of the mortage bond referred to above. It was stated in the plaint that the money was borrowed by the defendant as manager of a joint Hindu family and the plaintiff prayed for a decree against the mortgaged property as well as against the joint family. On 18th December 1934, the appellants made an application before the Subordinate Judge under Order 1, Rule 10, and Order 34, Rule 1, Civil Procedure Code, praying that they might be added as parties, defendants to the suit and the points in issue arising therein might be decided in their presence. It was asserted in the petition that Baldev Das was not the manager of a joint family and that the family properties had been partitioned by a decree of the court, as a result of which the properties alleged to be the subject-matter of the mortgage were allotted to the share of the petitioners. In reply to this petition, the plaintiff's counsel stated in court on 7th February 1935, that his client would give up the claim for a mortgage decree against the properties in suit and would be satisfied only with a money decree against Baldev Das personally. The plaint was amended accordingly, deleting all reference to the joint family and abandoning the claim against the mortgaged property. Upon this the appellants withdrew their application for being made parties to the suit and reserved their right to take proper legal action if and when necessary. On April 17, 1935, Baldev Das died and on 2nd September following the appellants as well as their mother, who figures as respondent No. 5 in this appeal, were brought on the record as legal representatives of Baldev Das. On October 9, 1935, the appellants filed a written statement in which a number of pleas were taken in answer to the plaintiff's claim and it was asserted in paragraph 10 of the written statement that Baldev Das dealt in *Badni* or speculative transactions and if any money was due to the plaintiff at all in connection with such transactions, the debt was illegal and immoral and not binding on the family property. On the same day the court recorded an order to the effect that as

the plaintiff had given up her claim for a mortgage decree, the legal representatives of the deceased could not be allowed to raise pleas relating to the validity or otherwise of the mortgage. On 20th November 1935, the parties arrived at a compromise and on the basis of the same, a simple money decree was passed in favour of the plaintiff for the full amount claimed in the suit together with half costs amounting to Rs 425 annas odd against the estate of Baldev Das in the hands of his legal representatives. After certain attempts at execution of this decree which did not prove successful, the present application for execution was filed by the decree-holder on March 13, 1945, in the court of the Senior Subordinate Judge, Ambala, and in accordance with the prayer contained therein, the court directed the attachment of certain immovable properties consisting of a number of shops in possession of the appellants and situated at a place called Abdullapur. On April 23, 1945, the appellants filed objections under section 47, Civil Procedure Code, and they opposed the attachment of the properties substantially on the ground that these properties did not belong to Baldev Das, but were the separate and exclusive properties of the objectors which they obtained on partition with their father long before the decree was passed. It was asserted that these properties could not be made liable for the satisfaction of the decretal dues which had to be realised under the terms of the decree itself from the estate left by Baldev Das.

After hearing the parties and the evidence adduced by them the Subordinate Judge came to the conclusion that there was in fact a partition between Baldev Das and his sons in the year 1928 and as a result of the same, the properties, which were attached at the instance of the decree-holder, were allotted to the share of the sons. The decree sought to be executed was obtained after the partition, but it was in respect of a debt which was contracted by the father prior to it. It was held in these circumstances that the separate share of the sons which they obtained on partition was liable under the Hindu Law for

Panna Lal and another
v.
Mst. Naraini etc

B. K. Mukherjea J.

the pre-partition debt of their father if it was not immoral, and under section 53 of the Civil Procedure Code the decree-holder was entitled to execute the decree against such properties. As no point was raised by the objectors in their petition alleging that the debt covered by the decree was tainted with immorality, the objections under section 47, C. P. Code, were dismissed. The objectors thereupon took an appeal to the High Court of East Punjab which was heard by Rahman, J., sitting singly. The learned Judge dismissed the appeal and affimed the decision of the Subordinate Judge. A further appeal taken to a Division Bench under the Letters Patent was also dismissed and it is the propriety of the judgment of the Letters Patent Bench that has been challenged before us in this appeal.

Mr Kunzru appearing for the appellants put forward a three-fold contention in support of the appeal. He contended in the first place that under the terms of the compromise decree the decree holder could proceed only against the properties of Baldev Das in the hands of his legal representatives and no property belonging to the appellants could be made liable for the satisfaction of the decree. The second contention put forward is that as the decree in the present case was obtained after partition of the joint family property between the father and his sons, the separate property of the sons obtained on partition was not liable under Hindu Law for the debt of the father. It is urged last of all that in any event if there was any pious obligation on the part of the sons to pay the father's debt incurred before partition, such obligation could be enforced against the sons, only in a properly constituted suit and not by way of execution of a decree obtained in a suit which was brought against the father alone during his lifetime and to which the sons were made parties only as legal representatives after the father's death.

As regards the first point, the determination of the question raised by Mr Kunzru depends upon the

construction to be put upon the terms of the compromise decree. The operative portion of the decree as drawn up by the court stands as follows :

> " It is ordered that the parties having compromised, a decree in accordance with the terms of the compromise be and the same is hereby passed in favour of the plaintiff against the estate of Baldev Das, deceased, in possession of his legal representatives. It is also ordered that the defendants do also pay Rs 425-7-0, half costs of the suit. "

There was no petition of compromise filed by the parties and made part of the decree, but there are on the record two statements, one made by Pannalal, the appellant No. 1, on behalf of himself and his mother and the other by Lala Haraprasad, the special agent of the plaintiff, setting out terms of the compromise. The terms are worded much in the same manner as in the decree itself and are to the effect that decree for the amount in suit together with half costs would be awarded against the property of Baldev Das, deceased. It is argued by Mr Kunzru that the expression "estate of Baldev Das, deceased" occurring in the decree must mean and refer to the property belonging to Baldev Das at the date of his death and could not include any property which the sons obtained on partition with their father during the father's lifetime and in respect of which the latter possessed no interest at the time of his death. Stress is laid by the learned counsel in this connection on the fact that when the appellants were brought on the record as legal representatives of their deceased father in the mortgage suit they specifically asserted in their written statement that there was a partition between them and their father long before the date of the suit as a result of which the hypothecated properties were alloted to them. Upon that the plaintiff definitely abandoned her claim to a mortgage decree or to any relief against the joint family and agreed finally to have a money decree executable against the personal assets of Baldev Das in the hands of his heirs. In these circumstances, it is urged that if it was the intention

Panna Lal and another
v.
Mst. Naraini, etc.,

B. K. Mukherjea J.

of the parties that the decree-holder would be entitled to proceed against the separate property of the sons, nothing could have been easier than to insert a provision to that effect in the compromise decree. There is undoubtedly apparent force in this contention but there is another aspect of the question which requires consideration. The terms of the decree that was passed in this suit, though based on the consent of the parties, are precisely the same as are contemplated by section 52(1) of the Civil Procedure Code. It was a decree for money passed against the legal representatives of a deceased debtor and it provided expressly that the decretal amount was to be realised out of the estate of the deceased in the hands of the legal representatives. It is argued on behalf of the respondent, and we think rightly, that as the decree fulfils the conditions of section 52(1) of the Civil Procedure Code, it would attract all the incidents which attach by law to a decree of that character. Consequently the decree-holder would be entitled to call in aid the provision of section 53 of the Code; and if any property in the hands of the sons, other than what they received by inheritance from their father, is liable under the Hindu Law to pay the father's debts, such property could be reached by the decree-holder in execution of the decree by virtue of the provisions of section 53 of the C. P. Code. Whether the property which the sons obtained on partition during the lifetime of the father is liable for a debt covered by a decree passed after partition and whether section 53 has at all any application to a case of this character are questions which we have to determine in connection with the second and the third points raised by appellants. Section 53, Civil Procedure Code, it is admitted, being only a rule of procedure cannot create or take away any substantive right. It is only when the liability of the sons to pay the debts of their father in certain circumstances exists under the Hindu Law, is the operation of the section attracted and not otherwise. The only other question that can possibly arise by reason of the decree being compromise decree is, whether the parties themselves have, by agreement, excluded the operation of section 53,

Civil Procedure Code. It is certainly possible for the parties to agree among themselves that the decree should be executed only against a particular property and no other, but when any statutory right is sought to be contracted out, it is necessary that express words of exclusion must be used. Exclusion cannot be inferred merely from the fact that the compromise made no reference to such right. As nothing was said in the compromise decree in the present case about the right of the decree-holder to avail herself of other provisions of the Code which might be available to her in law, we cannot say that the plaintiff has by agreement expressly given up those rights. The first point, therefore, by itself is of no assistance to the appellants.

We now come to the other two points raised by Mr Kunzru and as they are inter-connected they can conveniently be taken up together. These points involve consideration of the somewhat vexed question relating to the liability of a son under the Hindu Law other than that of the Dayabhag school to pay the debts of his father, provided they are not tainted with immorality. In the opinion of the Hindu Smriti writers, debt is not merely a legal obligation, but non-payment of debt is a sin, the consequences of which follow the debtor even after his death. A text (1), which is attributed to Brihaspathi, lays down:

> "He who having received a sum lent or the like does not repay it to the owner, will be born hereafter in the creditor's house a slave, a servant, a woman or a quadruped."

There are other texts which say that a person in debt goes to hell. Hindu Law givers therefore imposed a pious duty on the descendants of a man including his son, grandson and great grandson to pay off the debts of their ancestor and relieve him of the after-death torments consequent on non-payment. In the original texts a difference has been made in regard to the obligation resting upon sons, grandsons and great grandsons in this respect. The son is bound to

(1) *Vide* Colebrooke's Digest I, 228.

Panna Lal and another
v.
Mst. Naraini, etc.,

B. K. Mukherjea J.

discharge the ancestral debt as if it was his own, together with interest and irrespective of any assets that he might have received. The liability of the grandson is much the same except that he has not to pay any interest; but in regard to the great grandson the liability arises only if he received assets from his ancestor. It is now settled by judicial decisions that there is no difference as between son, grandson and great grandson so far as the obligation to pay the debts of the ancestor is concerned; but none of them has any personal liability in the matter irrespective of receiving any assets (1). The position, therefore, is that the son is not personally liable for the debt of his father even if the debt was not incurred for an immoral purpose and the obligation is limited to the assets received by him in his share of the joint family property or to his interest in such property and it does not attach to his self-acquisitions. The duty being religious or moral, it ceases to exist if the debt is tainted with immorality or vice. According to the text writers, this obligation arises normally on the death of the father; but even during the father's lifetime the son is obliged to pay his father's debts in certain exceptional circumstances, e.g. when the father is afflicted with disease or has become insane or too old or has been away from his country for a long time or has suffered civil death by becoming an anchorite (2). It can now be taken to be fairly well settled that the pious liability of the son to pay the debts of his father exists whether the father is alive or dead (3). Thus it is open to the father, during his lifetime, to effect a transfer of any joint family property including the interests of his sons in the same to pay off an antecedent debt not incurred for family necessity or benefit, provided it is not tainted with immorality. It is equally open to the creditor to obtain a decree against the father and in execution of the same put up to sale not merely the father's but also the son's interest in the joint estate. The creditor can make the sons parties to such suit and

(1) *Vide* Masitullah *v.* Damodar Prasad, 53 I.A. 204.
(3) *Vide* Mayne's Hindu Law, 11th edition, p. 408.
(2) *Vide* Brij Narain *v.* Mangla Prasad, 51 I.A. 129.

obtain an adjudication from the court that the debt was a proper debt payable by the sons. But even if the sons are not made parties, they cannot resist the sale unless they succeed in establishing that the debts were contracted for immoral purposes. These propositions can be said to be well recognised and reasonable beyond the region of controversy (1). All of them, however, have reference to the period when the estate remains joint and there is existence of coparcenership between the father and the son. There is no question that so long as the family remains undivided the father is entitled to alienate, for satisfying his own personal debts not tainted with immorality, the whole of the ancestral estate. A creditor is also entitled to proceed against the entire estate for recovery of a debt taken by the father. The position is somewhat altered when there is a disruption of the joint family by a partition between the father and the sons. The question then arises, whether the sons remain liable for the debt of the father even after the family is divided; and can the creditor proceed against the shares that the sons obtain on partition for realization of his dues either by way of a suit or in execution of a decree obtained against the father alone? It must be admitted that the law on the subject as developed by judicial decisions has not been always consistent or uniform and the pronouncements of some of the Judges betray a lack of agreement in their approach to the various questions involved in working out the law.

As regards debts contracted by the father after partition, there is no dispute that the sons are not liable for such debts. The share which the father receives on partition and which after his death comes to his sons, may certainly, at the hands of the latter, be available to the creditors of the father, but the shares allotted on partition to the sons can never be made liable for the post-partition debts of the father (2).

(1) *Vide* Girdharee Lall v. Kantoo Lall, 1 I.A. 321; Maddan Thakoor *v.* Kantoo Lall, 1 I.A. 333; Suraj Bunsi *v.* Sheo Prasad, 6 I.A. 88; Brij Narain *v.* Mangla Prasad, 51 I.A. 129.

(2) *Vide* Mayne's Hindu Law, 11th Edition, 430.

Panna Lal and another
v.
Mst. Naraini, etc.,

B. K. Mukherjea J.

The question that is material for our present purpose is, whether the sons can be made liable for an unsecured debt of the father incurred before partition, in respect to which the creditor filed his suit and obtained decree after the partition took place. On this point admittedly there is divergence of judicial opinion, though the majority of decided cases are in favour of the view that the separated share of a son remains liable even after partition for the prepartition debts of the father which are not illegal or immoral (1). The reason given in support of this view by different Judges are not the same and on the other side there are pronouncements of certain learned Judges, though few in number, expressing the view that once a partition takes place, the obligation of the sons to discharge the debts of their father comes to an end(2).

The minority view proceeds upon the footing that the pious obligation of the son is only to his father and corresponding to this obligation of the son the father has a right to alienate the entire joint property including the son's interest therein for satisfaction of an antecedent debt not contracted for immoral purposes. What the creditor can do is to avail himself of this right of the father and work it out either by suit or execution proceedings; in other words, the remedy of a father's simple contract creditor during the father's lifetime rests entirely on the right of the father himself to alienate the entire family property for satisfaction of his personal debts. The father loses this right as soon as partition takes place and after that, the creditor cannot occupy a better position or be allowed to assert rights which the father himself could not possess.

(1) *Vide* Subramanya *v.* Sabapathi, 51 Mad. 361 (F.B.); Annabat *v.* Shivappa, 52 Bom. 376; Jawahar Singh *v.* Parduman, 14 Lah. 399; Atul Krishna *v.* Lala Nandanji, 14 Pat. 732 (F.B.); Bankey Lal *v.* Durga Prasad, 53 All 868 (F.B.); Raghunandan *v.* Matiram, 6 Luck. 497 (F.B.).

(2) *Vide* Krishnaswami *v.* Ramaswami, 22 Mad. 519; V. P. Venkanna *v.* V. S. Deekshatulu, 41 Mad. 136; *Vide* also the dissentient judgment of Ayyangar, J., in Subramanya *v.* Sabapathi, 51 Mad. 361 (F.B.).

The reasoning in support of the other view which has been accepted in the majority of the decided cases is thus expressed by Waller, J., in his judgment in the Madras Full Bench case (1).

> "On principle, I can see no reason why a partition should exempt a son's share from liability for a pre-partition debt for which it was liable before partition. The creditor advances money to the father on the credit of the joint family property. Why should he be deprived of all but a fraction of his *security* by a transaction to which he was not a party and of which he was not aware? And what becomes of the son's pious obligation? It was binding as regards the particular debt before partition; does it cease to apply to that debt simply because there has been a partition"?

The first part of the observation of the learned Judges does not impress us very much. An unsecured creditor, who has lent money to the father, does not acquire any lien or charge over the family property, and no question of his security being diminished at all arises. In spite of his having borrowed money the father remains entitled to alienate the property and a mere expectation of the creditor, however reasonable it may be, cannot be guaranteed by law so long as he does not take steps necessary in law to give him adequate protection. The extent of the pious obligation referred to in the latter part of the observation of the learned Judge certainly requires careful consideration. We do not think that it is quite correct to say that the creditor's claim is based entirely upon the father's power of dealing with the son's interest in the joint estate. The father's right of alienating the family property for payment of his just debts may be one of the consequences of the pious obligation which the Hindu Law imposes upon the sons or one of the means of enforcing it, but it is certainly not the measure of the entire obligation. As we have said already, according

(1) *Vide* Subramanya *v.* Sabapathi, 51 Mad. 361 at 369 (F.B.).

Panna Lal and another v. Mst. Naraini, etc.,

B. K. Mukherjea J.

to the strict Hindu theory, the obligation of the sons to pay the father's debts normally arises when the father is dead, disabled or unheard of for a long time. No question of alienation of the family property by the father arises in these events; although it is precisely under these circumstances that the son is obliged to discharge the debts of his father. As was said by Sulaiman, A. C. J., in the case of *Bankey Lal* v. *Durga Prasad* (1):

> "The Hindu Law texts based the liability on the pious obligation itself and not on the father's power to sell the son's share."

It is thus necessary to see what exactly is the extent of the obligation which is recognised by the Hindu texts writers in regard to the payment by the son of the pre-partition debts of his father. Almost all the relevant texts on this point are to be found collected in the judgment of Sulaiman, A. C. J., and Mukerji, J., in the Allahabad Full Bench case referred to above. A text of Narada recites (2):

> "What is left after the discharge of the father's obligation and after the payment of the father's debts shall be divided by the brothers so that the father may not remain a debtor."

Katyan also says (3):

> "The sons shall pay off the debts and the gifts promised by the father and divide the remaining among themselves."

There is a further passage in Manu (4):

"After due division of the paternal estate if any debt or estate of the father be found out let the brothers equally divide the same among themselves."

According to Yagnavalka (5):

"The sons should divide the wealth and the debts equally."

(1) 53 All. 868 at 876 (F.B.).
(2) Narada, 13, 32.
(3) Hindu Law in its Sources by Dr. Ganga Naht Jha, Vol I, p. 202, quotation No. 211.
(4) Chap. 9, *v.* 218.
(5) J. C. Ghosh's Hindu Law, Vol. II, page 342.

It is true that the partition contemplated in these passages is one after the death of the father, but whenever the partition might take place, the view of the Hindu law givers undoubtedly is that the binding debts on the family property would have to be satisfied or provided for before the coparceners can divide the property. In *Sat Narain* v. *Das* (1), Judicial Committee pointed out that when the family estate is divided, it is necessary to take account of both the assets and the debts for which the undivided estate is liable. It was argued in that case on behalf of the appellants that the pious obligation of the sons was an obligation not to object to the alienation of the joint estate by the father for his antecedent debts unless they were immoral or illegal, but these debts were not a liability on the joint estate for which provision was required to be made before partition. This contention did not find favour with the Judicial Committee and in their opinion, as they expressed in the judgment, the right thing to do was to make provision for discharge of such liability when there was partition of the joint estate. If there is no such provision, " the debts are to be paid severally by all the sons according to their shares of inheritance ", as enjoined by Vishnu (2). In our opinion, this is the proper view to take regarding the liability of the sons under Hindu Law for the pre-partition debts of the father. The sons are liable to pay these debts even after partition unless there was an arrangement for payment of these debts, at the time when the partition took place. This is substantially the view taken by the Allahabad High Court in the Full Bench case referred to above and it seems to us to be perfectly in accord with the principles of equity and justice.

The question now comes as to what is meant by an arrangement for payment of debts. The expressions " *bona fide* " and " *mala fide* " partition seem to have been frequently used in this connection in

(1) 63 I.A. 384.

(2) Vishnu, Chap. 6, verse 36.

Panna Lal and another v. Mst. Narain, etc.

B. K. Mukherjea J.

various decided cases. The use of such expressions far from being useful does not unoften lead to error and confusion. If by *mala fide* partition is meant a partition the object of which is to delay and defeat the creditors who have claims upon the joint family property, obviously this would be a fraudulent transaction not binding in law and it would be open to the creditors to avoid it by appropriate means. So also a mere colourable partition not meant to operate between the parties can be ignored and the creditor can enforce his remedies as if the parties still continued to be joint. But a partition need not be *mala fide* in the sense that the dominant intention of the parties was to defeat the claims of the creditors; if it makes no arrangement or provision for the payment of the just debts payable out of the joint family property, the liability of the sons for payment of the pre-partition debts of the father will still remain. We desire only to point out that an arrangement for payment of debts does not necessarily imply that a separate fund should be set apart for payment of these debts before the net assets are divided, or that some additional property must be given to the father over and above his legitimate share sufficient to meet the demands of his creditors. Whether there is a proper arrangement for payment of the debts or not, would have to be decided on the facts and circumstances of each individual case. We can conceive of cases where the property allotted to the father in his own legitimate share was considered more than enough for his own necessities, and he undertook to pay off all his personal debts and release the sons from their obligation in respect thereof. That may also be considered to be a proper arrangement for payment of the creditors in the circumstances of a particular case. After all the primary liability to pay his debts is upon the father himself and the sons should not be made liable if the property in the hands of the father is more than adequate for the purpose. If the arrangement made at the time of partition is reasonable and proper, an unsecured creditor cannot have any reason to complain. The fact that he is no party to such arrangement is in our

opinion, immaterial. Of course, if the transaction is fraudulent or is not meant to be operative, it could be ignored or set aside; but otherwise it is the duty of unsecured creditor to be on his guard lest any family property over which he has no charge or lien is diminished for purposes of realization of his dues.

Thus in our opinion, a son is liable, even after partition for the pre-partition debts of his father which are not immoral or illegal and for the payment of which no arrangement was made at the date of the partition. The question now is, how is this liability to be enforced by the creditor, either during the lifetime of the father or after his death? It has been held in a large number of cases (1)—all of which recognise the liability of the son to pay the pre-partition debts of the father—that a decree against the father alone obtained after partition in respect of such debt cannot be executed against the property that is allotted to the son on partition. They concur in holding that a separate and independent suit must be instituted against the sons before their shares can be reached. The principles underlying these decisions seem to us to be quite sound. After a partition takes place, the father can no longer represent the family and a decree obtained against him alone, cannot be binding on the separated sons. In the second place, the power exercisable by the father of selling the interests of the sons for satisfaction of his personal debts comes to an end with partition. As the separated share of the sons cannot be said to belong to the father nor has he any disposing power over it or its profits which he can exercise for his benefit, the provision of section 60 of the Civil Procedure Code would operate as a bar to the attachment and sale of any such property in execution of a decree against the father. The position

(1) Vide Kameswararmma *v.* Venkatasubba, 38 Mad. 1120; Subramanaya *v.* Sabapathi. 51 Mad. 361; Thirumala Muthu *v.* Subramania, A.I.R. 1937 Mad. 458; Surajmal *v.* Motiram, 1939 Bom. 658; Atul Krishna *v.* Lala Nandanji, 14 Pat. 732; Govindram *v.* Nathulal, I.L.R. 1938 Nag. 10.

Panna Lal and another
v.
Mst. Naraini. etc

B. K. Mukherjea J.

has been correctly stated by the Nagpur High Court (1) in the following passages :

> "To say a son is under a pious obligation to pay certain debts is one thing; to say his property can be taken in execution is another. In our view, property can only be attached and sold in execution if it falls within the kind of property that can be attached and sold. What that is, is found by looking at section 60. When one looks at section 60 one finds that the property in question should either belong to the judgment-debtor or he should have a disposing power over it. After partition, the share that goes to the son does not belong to the father and the father has no disposing power over it. Therefore such property does not fall within section 60.....It by no means follows that a son cannot be made liable. He could be made liable for his father's debts if he had become a surety; he can be made liable under the pious obligation rule. In neither of the cases put, could his liability take the form of having his property seized in execution and sold without any prior proceedings brought against him, leaving him to raise the question whether his liability as surety or under the pious obligation rule precluded him from claiming in execution."

It is not disputed that the provision of section 53 of the Civil Procedure Code cannot be extended to a case when the father is still alive.

We now come to the last and the most controversial point in the case, namely, whether a decree passed against the separated sons as legal representatives of a deceased debtor in respect of a debt incurred before partition can be executed against the shares obtained by such sons at the partition? As has been said already the shares of the separated sons

(1) Jainarayan *v.* Sonaji, A.I.R. 1938 Nag. 24 at 29.

in the family property may be made liable for pre-partition debts, provided they are not tainted with immorality and no arrangement for payment of such debts was made at the time of the partition. The question, however, is whether this can be done in execution proceedings or a separate suit has to be brought for this purpose. Mr Kunzru argues that what could not be done during the lifetime of the father in execution of a decree against him cannot possibly be done after his death simply because the father died during the pendency of the suit and the sons were made parties defendants not in their own right but as representatives of their deceased father. It is pointed out that the appellants in the present case were not allowed to raise any plea which could not have been raised by their father and they never had any opportunity to show that they were under Hindu Law not liable for these debts. It is undoubtedly true that no liability can be enforced against the sons unless they are given an opportunity to show that they are not liable for debts under Hindu Law; but this opportunity can certainly be given to them in execution proceedings as well. A decree against a father alone during his lifetime cannot possibly be executed against his sons as his legal representatives. As we have said already, the decree against the father after the partition could not be taken to be a decree against the sons and no attachment and sale of the sons' separated shares would be permissible under section 60, Civil Procedure Code. The position, however, would be materially different if the sons are made parties to the suit as legal representatives of their father and a decree is passed against them limited to the assets of the deceased defendant in their hands. A proceeding for execution of such a decree would attract the operation of section 47 of the Civil Procedure Code under which all questions relating to execution, discharge and satisfaction of the decree between the parties to the suit in which the decree was passed or their representatives would have to be decided in execution proceedings and not by a separate suit. Section 52 (1), Civil Procedure Code, provides that when a decree is against the legal

Panna Lal and another
v.
Mst. Naraini, etc.

B. K. Mukherjea J.

representatives of a dead person and is one for recovery of money out of the properties of the deceased, it may be executed by attachment and sale of any such property. Then comes section 53 which lays down that "for purposes of section 50 and section 52 property in the hands of a son or other descendants which is liable under Hindu Law for payment of the debt of a deceased ancestor in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative." It is to be noted that before the Civil Procedure Code of 1908 came into force, there was a conflict of opinion as to whether the liability of a Hindu son to pay his father's debts could or could not be enforced in execution proceedings. Under the Hindu Law an undivided son or other descendant who succeeds to the joint property on the death of his father or other ancestor does so by right of survivorship and not as heir. In the old Code the term "legal representative" was not defined and the question arose as to whether the son could be regarded as a legal representative of his father in regard to properties which he got by survivorship on the father's death and whether a decree against the father could be enforced in excution against the son or a separate suit would have to be instituted for that purpose. It was held by the Madras and the Allahabad High Courts that the liability could not be enforced in execution proceedings, whereas the Calcutta and the Bombay High Courts held otherwise. Section 53 in a sense gives legislative sanction to the view taken by the Calcutta and the Bombay High Courts. One reason for introducing this section may have been or undoubtedly was to enable the decree-holder to proceed in execution against the property that vested in the son by survivorship after the death of the father against whom the decree was obtained; but the section has been worded in such a comprehensive manner that it is wide enough to include all cases where a son is in possession of ancestral property which is liable under the Hindu Law to pay the debts of his father; and either the decree has been made

against the son as legal representative of the father or the original decree being against the father, it is put into execution against the son as his legal representative under section 50 of the Civil Procedure Code. In both these sets of circumstances the son is deemed by a fiction of law to be the legal representative of the deceased debtor in respect of the property which is in his hands and which is liable under the Hindu Law to pay the debts of the father, although as a matter of fact he obtained the property not as a legal representative of the father at all.

As we have said already, section 53 of the Civil Procedure Code being a rule of procedure does not and cannot alter any principle of substantive law and it does not enlarge or curtail in any manner the obligation which exists under Hindu Law regarding the liability of the son to pay his father's debts. It, however, lays down the procedure to be followed in cases coming under this section and if the son is bound under Hindu Law to pay the father's debts from any ancestral property in his hands--and the section is not limited to property obtained by survivorship alone—the remedy of the decree-holder against such property lies in the execution proceedings and not by way of a separate suit. The son would certainly be at liberty to show that the property in his hands is for certain reasons not liable to pay the debts of his father and all these questions would have to be decided by the executing court under section 47, Civil Procedure Code. This seems to us to be the true scope and the meaning of section 53, Civil Procedure Code. In our opinion the correct view on this point was taken by Wort, J., in his dissenting judgment in the Full Bench case of *Atul Krishna* v. *Lala Nandanji* (1) decided by the Patna High Court. The majority decision in that case upon which stress is laid by Mr Kunzru overlooks the point that section 47, Civil Procedure Code, could have no application when the decree against the father is sought to be executed against the sons during his lifetime and consequently the liability of the latter must have to be established in an independent proceeding.

(1) 14 Pat. 732.

Panna Lal and another
v.
Mst. Naraini, etc.

B. K. Mukherjea J.

In cases coming under sections 50 and 52 of the Civil Procedure Code on the other hand the decree would be capable of being executed against the sons as legal representatives of their father and it would only be a matter of procedure whether or not these questions should be allowed to be raised by the sons in execution proceedings under section 47, Civil Procedure Code.

It remains only to consider what order should be passed in this case having regard to the principles of law discussed above. The High Court, in our opinion, was quite right in holding that the question of liability of the property obtained by the appellants in their share on partition with their father, for the decretal dues is to be determined in the execution proceeding itself and not by a separate suit. It is not disputed before us that the debt which is covered by the decree in the present case is a pre-partition debt. The sons, therefore, would be liable to pay the decretal amount, provided the debt was not immoral or illegal and no arrangement was made for payment of this debt at the time when the partition took place. Neither of these questions has been investigated by the courts below. As regards the immorality of the debts, it is observed by the High Court that the point was not specifically taken in the objections of the appellants under section 47, Civil Procedure Code. The validity of the partition again was challenged in a way by the decree-holder in his reply to the objections of the appellants, but the courts below did not advert to the real point that requires consideration in such cases. The partition was not held to be invalid as being a fraud on the debtor but the question was not adverted to or considered whether it made any proper arrangement for payment of the just debts of the father. In our opinion, the case should be reheard by the trial judge and both the points referred to above should be properly investigated. The appellants did raise a point regarding their non-liability for the decretal debt, in the suit itself when they were brought on the record as legal representatives after the death of their father. The court, however, did not allow them to raise or substantiate this plea

inasmuch as they were held incompetent to put forward any defence which the father himself could not have taken. Having regard to the conflicting judicial decisions on the subject, the appellants cannot properly be blamed for not raising this point again in the execution proceedings. We think that they should now be given an opportunity to do so. The result is that we set aside the judgments of the courts below and direct that the case should be heard *de novo* by the Subordinate Judge and that the appellants should be given an opportunity to put in a fresh petition of objection under section 47 of the Civil Procedure Code raising such points as they are competent to raise. The decree-holder would have the right to reply to the same. The court shall, after hearing such evidence as the parties might choose to adduce, decide first of all whether the property attached is the ancestral property of the appellants and is liable to pay the just debts of their father. It will consider in this connection whether the debts are illegal or immoral and as such not payable by the sons. If this question is answered in favour of the appellants, obviously the execution petition will have to be dismissed. If on the other hand it is found that the sons are liable for this debt, the other question for consideration would be whether there was any proper arrangement made at the time of the partition for payment of the debts of the father. The court below will decide these questions in the light of the principles which we have indicated above and will dispose of the case in accordance with law. In the event of the appellants being held liable for payment of the decretal debt, it would be open to the executing court to make an order that the decree-holder should in the first instance proceed against the separate property of the father which was allotted to him on partition and which after his death devolved upon the sons ; and only if such property is not sufficient for satisfaction of the decree, then the decree could be executed for the balance against the ancestral property in the hands of the appellants. There will be no order for costs up to this stage. Further costs will follow the result.

SUPREME COURT

Before Saiyid Fazal Ali and Vivian Bose, JJ.

LACHHMAN SINGH AND TWO OTHERS,—*Appellants,*

versus

THE STATE,—*Respondent.*

Criminal Appeal No. 22 of 1950

Supreme Court—Criminal Appeal—Function of Court —Re-assessment of evidence on a point of fact—Rule stated.

1952

March 21st

Held, that it is not the function of the Supreme Court to re-assess evidence and an argument on a point of fact which did not prevail with the Courts below cannot avail the appellants in the Supreme Court.

On appeal from the judgment and order, dated the 29th June 1950, of the High Court of Judicature for the State of Punjab (I) at Simla, (Weston, C.J., and Khosla, J.) in Criminal Appeal No. 432 of 1949, arising out of the judgment, dated the 5th August 1949, of the Court of the Additional Sessions Judge, Amritsar, in Sessions trial No. 7 of 1949 and case No. 8 of 1949.

JAI GOPAL SETHI, for Appellant.

GOPAL SINGH, for Respondent.

JUDGMENT

Saiyid Fazl Ali J.

The Judgment of the Court was delivered by—

FAZL ALI, J. The three appellants were tried by Additional Sessions Judge at Amritsar and found guilty of having murdered two persons, named Darshan Singh and Achhar Singh, and sentenced to transportation for life. The High Court of Punjab upheld their conviction and sentence and granted them a certificate under Article 134 (1) (c) of the Constitution that the case is a fit one for appeal to this Court. Hence this appeal.

The facts of the case may be briefly stated as follows. On the evening of the 16th December 1948, a little before sunset, Achhar Singh, one of the murdered persons, went to the house of one Inder Singh in Village Dalam for getting paddy husked. Achhar Singh's brother, Darshan Singh, who was working as a driver at Amritsar, came to Dalam from Amritsar the same evening, and, on coming to know from his father that Achhar Singh had gone to Inder Singh's house, he also went there. While the two brothers were returning home, they were attacked by the three

appellants and two of their relatives in a lane adjoining Inder Singh's house. The five assailants, who were armed with deadly weapons, inflicted a number of injuries on the two victims, as a result of which they died then and there. After the murder, the appellants and their companions tied the two dead bodies in two *kheses* (wrappers) and took them to Village Saleempura, where two other persons, named Ajaib Singh and Banta Singh, joined them, and the dead bodies after being dismembered were thrown into a stream known as Sakinala at a place about five miles from Village Dalam. Bela Singh, father of the deceased persons, who was one of the persons who claims to have witnessed the occurrence, did not leave the village at night on account of fear, but he started about two hours before sunrise on the next morning and lodged the first information report at 10 a.m. at the nearest police station. A police officer arrived in Village Dalam shortly afterwards, and, after investigation, a charge-sheet was submitted against seven persons including the present appellants. At the trial, five of the accused were charged with offences under section 302 read with section 149 and under section 201 read with section 149 of the Indian Penal Code, and the remaining two accused were charged with the offence under section 201 read with section 149 of that Code. The learned Judge, who tried the accused, convicted the appellants and two other persons under section 302 read with section 149 of the Penal Code and sentenced them to transportation for life, and convicted Ajaib Singh under section 201 read with section 149 and sentenced him to three years' R.I. Banta Singh, accused, was acquitted. On appeal, the Punjab High Court upheld the conviction of the present appellants and acquitted the remaining three persons.

Before proceeding to discuss the evidence in the case, it is necessary to refer to what has been described as the motive for the murder. It appears that in June 1947, Natha Singh, father of the third appellant, Swaran Singh, was murdered, and Darshan Singh and Achhar Singh, the two murdered persons in the case before us, and their third brother, Sulakhan Singh,

Lachhman Singh and two others
v.
The State

Saiyid Fazl Ali J.

were charged with the murder of that person. As result of the trial, Darshan Singh was acquitted ar Achhar Singh was sentenced to 1½ years' R.I., whi Sulakhan Singh was sentenced to 7 years' R.I. Th Judgment of the Sessions Judge in that case was de vered shortly before the date of the present occu rence, and it is common ground that Achhar Sing had been released on bail by the appellate court ar was at large at that time. It is said that the appe lants and their relatives felt aggrieved by the acqui tal of Darshan Singh and by the light sentence pa sed on Achhar Singh, and therefore committed th murder in a spirit of frustration and revenge. It wa conceded before us by the learned counsel for th appellants that the facts stated above constituted strong motive for the murder, but he als contended that they constituted an equal strong motive for the appellants being falsely implica ed in case the murder was committed, as was suggeste by him, in circumstances under which the murde could not be seen or identified. It therefore becom necessary to set out the evidence adduced by the pr secution in support of the murder.

The evidence led by the prosecution may be divi ed under two main heads :—(1) Direct evidence, ar (2) Circumstantial evidence. The direct eviden consists of the testimony of four eye-witnesse namely, Bela Singh, father of the deceased, wh claims to have gone to the scene of occurrence on hea ing an outcry and to have witnessed the murderou assault on his sons; Inder Singh and his wife, M Taro, to whom the murdered persons had gone fo getting paddy husked and who lived in a house a joining the lane where the murder took place; ar Gurcharan Singh, a resident of a different villag who states that he saw the occurrence when he wa going towards Village Dhadar on a cycle.

The circumstantial evidence in the case, on whic the High Court has relied, may be briefly summari ed as follows :—

(1) The second appellant, Massa Singh, wh was arrested on the 18th December 1948, was wea ing a pyjama stained with human blood.

(2) The third appellant, Swaran Singh, who was arrested on the 18th December 1948, took the police on the 19th December to his haveli which was locked, and on opening it two *kheses* (wrappers) which were stained with human blood were recovered.

(3) Swaran Singh pointed out a spot on the way to Sakinala, where the two dead bodies were placed for a short time while they were being taken to Sakinala, and the police scrapped blood-stained earth from that spot. He also led the police to the bank of Sakinala and pointed out the trunk of the body of Darshan Singh which was lying in the *nala*.

(4) Lachhman Singh, who was arrested on the 28th December 1948, pointed out a dilapidated *khola* near Sakinala where 3 spears, one *kirpan* and a *datar*, all stained with human blood, were recovered.

The learned Sessions Judge, who heard the evidence, seems to have been impressed by the evidence of the eye-witnesses, and he has summed up his conclusion in these words :—

> "This evidence was so consistent, so reliable, and of such nature that in my opinion it is definitely established that the five accused Lachhman Singh, Katha Singh, Massa Singh, Charan Singh, and Swaran Singh are proved to have actually murdered both Darshan Singh and Achhar Singh. This fact is further proved from subsequent events as deposed by P.W. 8 Bahadur Singh and P.W. 9 Gian Singh and P.W. 11 Bhagwan Singh. These witnesses had witnessed the various recoveries in this case which were made at the instance of all the accused.

The learned Judges of the High Court, though they repelled most of the criticisms levelled against the witnesses, ultimately came to the conclusion that "in all the circumstances (of the case) it would be proper not to rely upon the oral evidence implicating particular accused unless there is some circumstantial evidence to support it". Having laid down this standard,

Lachhman Singh and two others
v.
The State

Saiyid Fazl Ali J.

they examined the circumstantial evidence against each of the accused persons and upheld the conviction of the three appellants on the ground that the circumstantial evidence, to which reference has been made, was sufficient corroboration of the oral evidence.

The case of the appellants was argued at great length by Mr Sethi, who appeared for them, and everything that could possibly be said in their favour was urged by him with great force and clarity. Proceeding, however, upon the principles laid down by this Court circumscribing the scope of a criminal appeal after the case has been sifted by the trial court and the High Court, it seems to us that the question involved in the present appeal is short and simple one. According to our reading of the judgment of the High Court, the learned Judges who dealt with the case did not condemn the oral evidence outright, but, as a matter of prudence and caution, they decided not to convict an accused person unless there were some circumstances to lend support to the evidence of the eye witnesses with regard to him. It is quite clear on reading the judgment that the corroboration which the learned Judges required to satisfy themselves was not that kind of corroboration which one requires in the case of the evidence of an approver or an accomplice, but corroboration by some circumstance which would lend assurance to the evidence before them and satisfy them that the particular accused persons were really concerned in the murder of the deceased. Judged by this standard, which it was open to them to prescribe, it seems to us that the case of each of the appellants clearly fell within the rule which they had laid down for their guidance.

The comment of the learned counsel for the appellants with regard to the blood-stained *pyjama,* which was recovered from Massa Singh, was firstly, that it was not possible to gather from the evidence the extent of the blood-stains, and secondly, that it would be highly improbable that this accused person would be so reckless as to continue to wear a blood-stained *pyjama* after having perpetrated the crime. This criticism has been considered by the courts below, and

Lachhman Singh and two others
v.
The State

Saiyid Fazl Ali J.

from a person accused of an offence, it cannot be said to be rediscovered in consequence of information received from another accused person. It was urged before us that the prosecution was bound to adduce evidence to prove as to which of the three accused gave the information first. The Head Constable, who recorded the statements of the three accused has not stated which of them gave the information first to him; but Bahadur Singh, one of the witnesses who attested the recovery memos, was specifically asked in cross-examination about it and stated: "I cannot say from whom information was got first". In the circumstances, it was contended that since it cannot be ascertained which of the accused first gave the information, the alleged discoveries cannot be proved against any of the accused persons. It seems to us that if the evidence adduced by the prosecution is found to be open to suspicion and it appears that the police have deliberately attributed similar confessional statements relating to facts discovered to different accused persons, in order to create evidence against all of them, the case undoubtedly demands a most cautious approach. But, as to what should be the rule when there is clear and unimpeachable evidence as to independent and authentic statements of the nature referred to in section 27 of the Evidence Act, having been made by several accused persons, either simultaneously or otherwise, all that we wish to say is that as at present advised we are inclined to think that some of the cases relied upon by the learned counsel for the appellants have perhaps gone farther than is warranted by the language of section 27, and it may be that on a suitable occasion in future those cases may have to be reviewed. For the purpose of this appeal, however, it is sufficient to state that even if the argument put forward on behalf of the appellants, which apparently found favour with the High Court, is correct, the discoveries made at the instance of Swaran Singh cannot be ruled out of consideration. It may be that several of the accused gave information to the police that the dead bodies could be recovered in the Sakinala, which is a stream running over several miles, but such an indefinite information

could not lead to any discovery unless the accused followed it up by conducting the police to the actual spot where parts of the two bodies were recovered. From the evidence of the Head Constable as well as that of Bahadur Singh, it is quite clear that Swaran Singh led the police via Salimpura to a particular spot on Sakinala, and it was at his instance that blood-stained earth was recovered from a place outside the village, and he also pointed out the trunk of the body of Darshan Singh. The learned Judges of the High Court were satisfied, as appears from their judgment, that his was "the initial pointing out" and therefore the case was covered even by the rule which, according to the counsel for the appellants, is the rule to be applied in the present case.

The learned counsel for the appellants pointed out that the doctor who performed the post-mortem examination of the corpses, found partially digested rice in the stomach of the two deceased persons, and he urged that from this it would be inferred that the occurrence must have taken place sometime at night after the deceased persons had taken their evening meals together. This argument again raises a question of fact which the High Court has not omitted to consider. It may, however, be stated that a reference to books on medical jurisprudence shows that there are many factors affecting one's digestion, and cases were cited before us in which rice was not fully digested even though considerable time had elapsed since the last meal was taken. There are also no data before us to show when the two deceased persons took their last meal, and what article of food, if any, was taken by them along with rice. The finding of the doctor, therefore, does not necessarily affect the prosecution case as to the time of occurrence.

It was also contended that there being no charge under section 302 read with section 34 of the Indian Penal Code, the conviction of the appellants under section 302 read with section 149 could not have been altered by the High Court to one under section 302

it does not appear to us to be of such a nature as to affect the conclusion arrived at by them. As to the recovery of blood-stained weapons at the instance of Lachhman Singh, it was urged that the entire evidence with regard to this recovery should be discarded, as the police invesigation in the case was not a straightforward one, but was conducted in such a way as to raise suspicion that the police were deliberately trying to create some evidence of recovery against each of the accused persons. It is sufficient to say that it is not the function of this court to reassess evidence and an argument on a point of fact which did not prevail with the courts below cannot avail the appellants in this court. The comment against the discoveries made at the instance of Swaran Singh was that they are not admissible in evidence under section 27 of the Indian Evidence Act which provides—

> "When any fact is deposed to as discovered in consequence of information received from a person accused of an offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

The main facts which it is necessary to state to understand the argument on this point, may be summed up as follows :—

According to the prosecution, all the three accused, namely, Katha Singh, Massa Singh and Swaran Singh, were interrogated by the police on the morning of the 19th December 1948, and they made certain statements which were duly recorded by the police. In these statements, it was disclosed that the dead bodies were thrown in the Sakinala. Thereafter, the police party with the three accused went to Sakinala where each of them pointed out a place where different parts of the dead bodies were discovered.

The learned counsel for the appellants cited a number of rulings in which section 27 has been construed to mean that it is only the information which is first given that is admissible and once a fact has been discovered in consequence of information received

Lachhman Singh and two others
v.
The State

Saiyid Fazl Ali J.

read with section 34, upon the acquital of the remaining accused persons. The facts of the case are, however, such that the accused could have been charged alternatively either under section 302 read with section 149 or under section 302 read with section 34. The point has, therefore, no force.

In our opinion, there is no ground for interfering with the judgment of the courts below, and we accordingly dismiss this appeal and uphold the conviction and sentence of the appellants. We, however, wish to endorse the opinion of the High Court that having regard to the gruesome nature of the crime, the sentence imposed by the Additional Sessions Judge was inappropriate and his reasons for imposing the lighter penalty are wholly inadequate.

547 HC—600—21-10-52—CP and S., Punjab Simla.

THE

INDIAN LAW REPORTS

PUNJAB SERIES

REVISIONAL CIVIL

Before Falshaw, J.

MESSRS ASSOCIATED PICTURES, LTD.,—*Defendant-Petitioner.*

versus

1951

June 21st

THE NATIONAL STUDIOS LTD., (IN VOLUNTARY LIQUIDATION),—*Plaintiff-Respondent.*

Civil Revision Case No. 624 of 1950.

Code of Civil Procedure (V of 1908), Order 33, rule 1—Limited company whether a "person" within the meaning of Order 33, rule 1—General Clauses Act (X of 1897)—Section 3, clause 39 (now 42)—Whether intended to be of universal application—Whether a limited company incorporated under the Companies Act can sue in forma pauperis.

Held, that word "person" in Order 33 is used in the sense of an individual person, and does not include a limited company incorporated under the Companies Act. The provisions of section 3, clause 39 (now 42) of the General Clauses Act are not intended to be of universal application in view of the opening words of section 3 of the Act.

Petition under section 44 of Act 9 of 1919 and section 115, Civil Procedure Code, for revision of the order of Shri Des Raj Pahwa, Commercial Sub-Judge, Delhi, dated the 3rd August 1950, ordering that the application be registered as a suit and written statement be filed on the 4th October 1950.

S. L. PURI, for Petitioner.

I. D. DUA, for Respondent.