Vriddhachalam Pillai

Vs

Chaldean Syrian Bank Ltd., and Another

Civil Appeal No. 547 of 1961

(P. B. Gajendragadkar, K. Subba Rao, K. N. Wanchoo JJ)

03.12.1963

JUDGMENT

AYYANGAR J. –

This appeal is directed against the judgment of the High Court of Kerala and has been filed on the strength of a certificate of fitness granted by the High Court under Art. 133(1)(a) of the Constitution.

The appeal arises out of a suit filed by the respondent - The Chaldean Syrian Bank Ltd. - which for shortness we shall refer to as the Bank, for the recovery of certain sums due on a mortgage by deposit of title deeds executed by Kalayanasundaram Pillai - the appellant's father who was impleaded as the 1st defendant and is now the 2nd respondent before us.

The mortgage on which the Bank laid this suit was evidenced by Ex. 'E' - a memorandum recording the deposit of title deeds of certain properties in the former princely State of Cochin. The debt for which the said deposit was made was the principal and interest due on two promissory notes for Rs. 50,000 and Rs. 30,000 respectively which were marked as Exs. A & B in the case. It was not in dispute that the property which was the subject of mortgage belonged to the joint family composed of the 1st defendant and his son - the appellant. The appellant was a minor on the date of the suit-transaction and even at the date of the suit. To the suit that it filed the Bank impleaded not merely Kalyanasundaram and his minor son, but the latter's sisters and mother and even the lessees of the mortgaged property. These were defendants 3 to 11. They, however, have dropped out of the proceedings at earlier stages and the only parties to the appeal whose rights we are called on to adjudicate are the Bank and the appellant. The Bank's suit was decreed by the trial court against the father - 1st defendant and there was no appeal against it and that decree is no longer in challenge. The trial Judge however held that the Bank had no right to obtain a mortgage decree against the appellant and his half share in the family property, but on appeal by the Bank, the learned Judges allowed the appeal and modified the decree by passing a mortgage decree against the appellant qua his share as well. It is the correctness of this variation that is questioned in this appeal.

The execution of the promissory notes and the receipt of consideration therefore as recited therein were admitted by the 1st defendant, as also the creation of the security by the deposit of the title deeds of properties and whatever contentions were raised in respect of these matters on behalf of the appellant have now been abandoned. Some point was made on behalf of the appellant regarding the suit debt being avyavaharika, but this also has been found against and given up. The only question that survives is whether the mortgage evidenced by Ex. 'E' is binding on the appellant. Here again it is now common ground, that the debt was a personal borrowing by the father, not for any purpose

binding on the joint family.

A few more facts have to be stated in order that the precise range of the controversy in this appeal might be properly understood. That Kalyanasundaram and the members of his family were permanent residents of Palghat in the then State of Madras, that he with the appellant formed members of an undivided Hindu family and that the properties which were the subject of the mortgage were joint family properties, none of these were in dispute. The family possessed properties not merely in Cochin but also in Palghat.

We shall now proceed to detail the circumstances in which the borrowings which has given rise to this litigation were made. In or about May 1945 Kalyanasundaram entered into a contract with the Government of India for the supply of 100 tons of black pepper and also into further contracts of the same type later in the year. He had apparently no ready cash to implement these contracts and approached the Bank for funds for financing the undertaking. For this purpose he executed three promissory notes in favour of the Bank for a total of Rs. 1,10,000. The promissory notes marked Exhibits A and B for Rs. 50,000 and Rs. 30,000 respectively already referred to, were executed on November 14, 1945 and the debt evidenced by them was secured by a mortgage by deposit of title-deeds of properties in the Cochin State and this is the subject-matter of the proceedings giving rise to this appeal. A few months later, on February 20, 1946 he executed another promissory note which is marked as Ex. 'C' for Rs. 30,000. That also was accompanied by a further deposit of title deeds - which is recorded in Ex. 'F', but that was in part in relation to the family properties in Palghat in the State of Madras. As the amount due under these notes was not repaid at the time promised, the Bank filed the suit out of which the present appeal arises, in the Court of the Subordinate Judge, Chittur, which is in the Cochin State, for a mortgage decree in its favour for the amount of all the three promissory notes with the interest due thereon, though a mortgage decree was sought only against the properties in Cochin which were set out in the Schedule to the plaint.

This suit was filed on June 17, 1948 but before the filing of the suit certain events happened to which it would be convenient to refer at this stage, because they figure largely in the defences that were raised in the suit on behalf of the appellant who was represented by his mother as guardian ad litem. On March 23, 1948 a petition for permission to file a suit in forma pauperis was filed in the court of the Subordinate Judge at Palghat on behalf of the appellant by his uncle as his next friend. To that suit were impleaded as defendants Kalyanasundaram, the father, as well as the mother and as many as 31 other creditors of Kalyanasundaram including the respondent Bank. The relief sought in the suit was the effecting of a Partition of the family properties situated in Palghat and for the delivery of the half-share therein to the minor plaintiff. With this was coupled a prayer for the setting aside of certain decrees which had been obtained by certain of the creditors who were impleaded as defendants, on the ground either that the promissory notes or other documents on which the decrees had been passed were not supported by consideration, or that these debts were tainted with illegality or immorality, the allegation being that the father was leading a reckless and immoral life and was addicted to women. So far as the debt due to the Bank was concerned, the allegation was, though not expressed very clearly, that it was a borrowing for a personal business newly started by the father and would not, therefore, bind the minor's share in the family properties. As already stated, the relief for partition in that suit was confined to the properties at Palghat in Madras. While this application for leave to sue in forma pauperis was pending, a notice was issued on May 27, 1948 through a lawyer purporting to act on behalf of the appellant, addressed to his father, in which the partition of the properties of the family situated in the Cochin State was demanded. This notice was followed, by a deed of partition dated June 3, 1948 by which the properties of the family in the Cochin State were purported to be divided into two equal parts, the

father being directed to pay the debts borrowed by him out of the share allotted to him, the deed reciting an agreement with the father that the minor should be free from any obligation to discharge those debts. The debt due to the Bank which is the subject of the present proceedings, was among those the discharge of which the father undertook under this deed marked as Ex. VI. The deed recited that this debt was a personal debt of the father and was therefore not binding on the son and this was assigned as the reason for the provision made for its discharge by the father without any obligation being laid upon the son in that behalf. One of the questions arising in the appeal is as regards the effect of this partition on the rights of the Bank to realise the moneys due to it from the share allotted to the son in the Cochin properties which were mortgaged under Ex. 'E'.

Reverting to the proceedings giving rise to this appeal, to the mortgage suit filed by the Bank several defences were raised on behalf of the appellant. It is not necessary to set out all of them but it would be sufficient if those which have a bearing on the points urged before us are mentioned. Before dealing with the controversial issues we may state that there were a few to which it is sufficient to make a passing reference. There was a formal denial of the truth and validity of the promissory notes and the passing of consideration thereunder and also about the sufficiency or admissibility of the memorandum Ex. 'E' to create a mortgage by deposit of title deeds. These do not appear to have been seriously pressed and have been found in favour of the plaintiff-bank. There was also an issue that the suit-debt was tainted with illegality and immorality, but on the facts it was such an untenable plea that it was easily found against.

Issue no. 2 ran :

> "Whether the trade mentioned in the plaint was a new trade started by the 1st defendant or an ancestral trade and are not the debts contracted by the father - the 1st defendant - for purposes of the trade binding on defendant no. 2 even if the said trade be not ancestral ?"

This issue, at least the first part of it has been found in favour of the appellant that the trade viz., the supply of black pepper to the Government was a new trade started by the 1st defendant and was not an ancestral trade and that finding has not been disturbed by the High Court and being a concurrent finding on a question of fact was not naturally challenged before us. Closely related to this is issue no. 14 which ran :

> "Are the debts sued on incurred for family necessity and binding upon the 2nd defendant ?"

The learned trial Judge recorded a finding that the debts sued on were not incurred for family necessity nor for the benefit of the family. These findings also which were not varied by the High Court were not questioned before us. Incidentally it should be mentioned that the learned trial Judge found, when dealing with issue no. 9 which was a general issue relating to the binding character of the debt on the appellant, that the mortgage was not for securing an antecedent debt, but this finding was reversed by the High Court, the learned Judges holding that to the extent of Rs. 59,000 the mortgage loan went in discharge of antecedent debts and we shall have occasion to deal with this matter in detail later in this judgment.

The 13th issue ran :

> "Is the partition set up by the defendants true and bona fide and binding upon the

family ?"

This was answered in the affirmative and in favour of the appellant by the learned trial Judge but that finding has been reversed and the partition has been found not to be bona fide by the High Court and that is one of the points in controversy in the appeal before us. Issue no. 10 was in these terms :

> "Are the Defendants Cochin domiciles ? Are they not governed by the law of the Indian Union being permanent residents of the Indian Union ?"

An issue in this form arose because of the different views entertained of the Hindu law as regards the scope of the pious obligation of a son to discharge the debts of the father which are not illegal or immoral. In the view of Hindu lawyers the repayment of a debt was conceived of not merely as a legal obligation which had been undertaken when the debt was incurred but non-repayment was considered a sin. The duty of relieving the debtor from this sin was fastened on his male descendents to the third degree. The duty being thus religious, it was held not attracted if in its nature it was illegal, or immoral i.e., avyavaharika. Whatever might have been the extent of the son's liability according to the Hindu law givers, under the Mitakshara law as administered in all the States, the liability of the son, grandson, great grand son etc., was not treated as a personal liability but as dependent on his becoming entitled to family assets and that it extended to the entirety of his interest therein, but no more.

The authorities to which it is wholly unnecessary to refer, have firmly established the following and the position is not in doubt :

> (1) A father can by incurring a debt, even though the same be not for any purpose necessary or beneficial to the family so long as it is not for illegal or immoral purposes, lay the entire joint family property including the interests of his sons open to be taken in execution proceedings upon a decree for the payment of that debt.
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> (2) The father can, so long as the family continues undivided alienate the entirety of the family property for the discharge of his antecedent personal debts subject to their not being illegal or immoral.

In other words, the power of the father to alienate for satisfying his debts, is co-extensive with the right of the creditors to obtain satisfaction out of family property including the share of the sons in such property.

> (3) Where a father purports to burden the estate by a mortgage for purposes not necessary and beneficial to the family, the mortgage qua mortgage would not be binding on the sons unless the same was for the discharge of an antecedent debt. Where there is no antecedency, a mortgage by the father would stand in the same position as an out and out sale by the father of family property for a purpose not binding on the family under which he receives the sale price which is utilised for his personal needs.

It need hardly be added that after the joint status of the family is disrupted by a partition, the father has no right to deal with the family property by sale or mortgage even to discharge an antecedent debt, nor is the son under any legal or moral obligation to discharge the post-partition debts of the father.

(4) Antecedent debt in this context means a debt antecedent in fact as well as in time, i.e., the debt must be truly independent and not part of the mortgage which is impeached, In other words, the prior debt must be independent of the debt for which the mortgage is created and the two transactions must be dissociated in fact so that they cannot be regarded as part of the same transaction.

The latest of the rulings of the Privy Council in which the law as stated above was expounded is reported as Brij Narain v. Mangla Prasad [51 I.A. 129.] and this Court in Panna Lal v. Smt. Naraini [[1952] S.C.R. 544.] has expressly approved and adopted the same.

In Cochin and Travancore, however, the law was understood somewhat differently. Both the High Courts of Cochin and Travancore when these States were under princely rule, held, following what they considered as the logical result of certain earlier decisions of the Privy Council, that a mortgage executed by a father, notwithstanding that the debt secured thereby be not incurred for family necessity or benefit but were purely personal, would be binding against the joint family property in the hands of the son even if the debt be not antecedent to the creation of the mortgage on the doctrine of the latter's pious obligation to discharge them. This was on the principle enunciated by Bashyam Ayyangar in Chidambara Mudaliar v. Kootha Perumal [I.L.R. 27 Mad. 326.] (a decision, however, subsequently overruled by a Full Bench of the Madras High Court in Venkataramayya v. Venkataramana [I.L.R. 29 Mad 200.] on the ground that it was inconsistent with several earlier rulings of the Privy Council) that it was difficult to make any distinction between a mortgage created for the discharge of an antecedent debt and a mortgage created for a debt then incurred, for in either case the debt not being avyavaharika is binding upon the son and the enforcement of the security exonerates the son from the burden of the father's debt.

It would, therefore, be seen that if it were found that the debt to the bank was not incurred for purposes necessary or beneficial to the family, the question whether the Hindu law rule applicable was the one as understood and applied in Cochin or that expounded in Brij Narain [51 I.A. 129.] would assume great importance, and for the ascertainment of the particular law which applied, the place of domicile of the family would have relevance.

The learned Subordinate Judge found that the family of the father - 1st defendant - was a resident of and domiciled in Palghat and that therefore would not be governed by the rule of Hindu law as understood and applied by the High Courts of Travancore and Cochin. The learned Judges of the High Court while affirming the finding that the defendants were domiciled in and resident of Palghat and were not even residents of Cochin, were still of the opinion that as the properties which were the subject of the mortgage were in Cochin, the Cochin view of the Hindu law was applicable to determine the rights of the parties on the basis of that interpretation of the law being the lex situs and applying that law came to the conclusionm that even if the mortgage - Ex. 'E' was concurrent with and part of the same transaction as the debts which it secured, the mortgage was binding on the appellant's share in the family property. It was on this line of reasoning that the learned Judges held that even though of the mortgage debt under Ex. E, only Rs. 59,000 was found by them as having been utilised for discharging the antecedent debts of the father, still the Bank was entitled to a mortgage decree against the share of the appellant to the extent of the entire mortgage money. This was one of the points which was canvassed before us, which we shall deal with in its proper place.

Pausing here and before setting out the points urged before us by the appellant, there is one matter that has to be mentioned merely for the purpose of clarification. As already stated, the suit as originally filed was for the recovery of the debt due under all the three promissory notes - Exs. A, B

& C and the interest accrued thereon which totalled over Rs. 1,27,000 though the property against which the mortgage decree was sought was confined to the Cochin property which was covered by the memorandum of deposit - Ex. E. The learned Sub-Judge, however, held that the suit in so far as the debt under the pronote Ex. C for which properties in Palghat were given as security could not be sued for in his Court and disallowed the Bank's claim to that extent. That portion of the decree has become final and was not challenged by the Bank on appeal. It might be mentioned that the Bank is stated to have subsequently filed a suit for that sum in the court in Palghat and has obtained a decree thereon. We are setting out these matters for pointing out that the appeal is practically confined to the binding character of the mortgage - Ex. E in so for as it secured the repayment of the debts evidenced by Exs. A & B.

Learned counsel for the appellant urged the following contentions in support of the appeal :

> (1) The finding by the High Court that the partition of the family properties effected between the appellant and his father was not bona fide was not justified on the admitted facts and was based on erroneous reasoning.
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> (2) The learned Judges erred in holding that the Hindu Law as understood and applied by the Courts in the previous Cochin State could determine the liability of the appellant who was a resident of Palghat.
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> (3) The learned Judges erred in their finding that the mortgage evidenced by Ex. 'E' was to any extent for the discharge of antecedent debts.

The first question that falls for decision and on which the learned Judges of the High Court differed from the trial Judge was in relation to the nature of the partition which was evidenced by the registered instrument marked Ex. VI - whether it was such as could be termed bona fide and satisfied the requirements of a partition which would preclude the creditor of the father from having recourse to the share of the family property in the hands of the son.

Before we deal with the facts relevant to that matter we consider it would be convenient to focus attention on the real points for determination in that context and for that purpose we shall extract a passage from the judgment of this Court in Pannalal v. Mst. Naraini [[1952] S.C.R. 544.] where this is dealt with. Mukherjea, J. explained the law on the point in these terms :

> "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..... 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 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 ..... 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 be 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 creditor in the circumstances of a particular case. Afterall 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."

There are one or two observations which it is necessary to make before applying the law as here laid down to the facts of the present case. In the first place we are here concerned primarily with the rights of the Bank as a secured creditor to proceed against the security, ignoring the partition. To such a situation the law as explained in the judgment in Pannalal's case [[1952] S.C.R. 544.] would not have immediate relevance, for Mukherjea J. was dealing with the rights of an unsecured creditor of the father to proceed against the shares of the sons after a partition. In other words, the nature and bona fides of the partition and the right of the creditor to proceed against the share allotted to the son in such partition would arise for consideration only if the Bank were unable to establish that the mortgage was as such not binding on the son. This was the situation of the Bank when the learned trial Judge found that the mortgage was not binding on the appellant's share in the family property. If, however, the mortgage were binding on the son either because it was created to raise money for purposes binding on the family as necessary or beneficial therefor or was executed in order to discharge an antecedent debt of the father, the bona fides of the partition and the allotment of property to the sons cannot affect the rights of the secured creditor to proceed against the properties allotted to the son which are the subject of mortgage. In the present appeal, in view of the conclusion we have reached, for reasons which we shall discuss later in the judgment, that the mortgage under Ex. 'E' was for securing the repayment of an antecedent debt, the bona fides of the partition would not have a crucial significance. Since however the question of the reality or the binding nature of the partition would arise in the event of the mortgaged property being found in sufficient to discharge the decree and the creditor or the decree holder thereafter seeks to proceed against properties allotted to the share of the appellant which were not included in the mortgage, we have thought it necessary and proper to examine it.

Proceeding them to deal with the matter, we must first observe that the onus of proving that the

partition arrangement is fair and bona fide in the sense explained by this Court in Panna Lal's case [[1952] S.C.R. 544.] was upon the appellant, and that the approach of the learned trial Judge to the question is vitiated by casting the burden of proving that the arrangement was mala fide on the creditor Bank. And for this reason. At the moment the liability was incurred by the father the creditor had a right to proceed against the entirety of the joint family estate including the share of the son since, the debt not being avyavaharika, the son was under a pious obligation to discharge it out of family property. Subsequent thereto a partition takes place by which the share of the son in the property is separated and vested in him, free from the rights and powers of the father. It is the plea of the son that by reason of an arrangement which he has entered into or which has been entered into on his behalf, he has discharged himself from liability to the creditor an arrangement to which the creditor is not a party but which under the law is binding on the creditor provided the arrangement fulfils certain conditions. From this it would seem to follow logically that the onus would be upon the son to establish that the nature of the arrangement under the partition was such, as made proper and adequate provision for the discharge of the debt, for that is the basis upon which his own discharge from liability depends. The learned trial Judge framed an issue regarding the partition being fair and bona fides and binding on the Bank but the entire discussion on the facts relating to it proceeded on the footing that the onus was upon the Bank to establish that the partition was mala fide.

The next error of the learned trial Judge lay in ignoring the circumstance that the partition did not make provision for the discharge of the entirety of the debts of the father, nor did it take into account all the properties of the family. The partition was all the properties of the family. The partition was evidenced by a registered instrument dated June 3, 1948. The first feature of this deed is that though the family had properties both at Palghat in the then State of Madras, as well as in the Cochin State, the partition deed which has been marked as Ex. VI dealt only with the properties in Cochin. These properties were divided into two parts which were stated to be equal in value and they were allotted respectively to the father and the minor son. It contained a recital that the father acknowledged that the debts incurred by him were for his own personal purposes and were not binding on the son and that as a consequence of this state of affairs the debt due to the Bank was directed to be discharged by the father - a direction to which he expressed his agreement. The learned trial Judge found that the total property at Cochin was fetching an income of about 18 to 19 thousand rupees a year and computing the market value of the property on that basis considered that it made ample provision for the discharge of the debt due to the Bank. But he paid no attention to the fact that besides the debts for the discharge of which provision was made in Ex. VI, the father had incurred several debts to creditors in Palghat and which the son was under a pious obligation to repay but to this we shall revert after setting out the grounds on which the learned Judges of the High Court based their finding.

As stated earlier, the learned Judges of the High Court reversed the finding of the learned trial Judge on this point. Briefly stated their reasons were two fold : (1) That the partition was brought about in order to forestall the action of the creditors of the father, who sought to proceed against the family properties and so the transaction bore the stamp of mala fides. We have already referred to the suit in forma paupereis filed at the Sub-Court, Palghat for the partition of the Palghat properties. In that plaint, and this also has already been adverted to, a large number of debts were set out and in regard to some of them the plaintiff claimed the relief of having them set aside on the ground that they were incurred for illegal or immoral purposes and so were not binding on him. The allegations in that plaint, therefore, made it clear that there were a number of creditors who had filed suits against the father and that he was heavily pressed for discharging them. It was in that situation that the suit in Palghat was filed. And it was when things were in this state that the partition of the Cochin

properties was brought about. This necessarily showed that the partition was not bona fide. (2) In the deed of partition - Ex. VI there is a recital that the debt due to the Bank was not binding on the appellant. There was thus a repudiation of liability on the part of the son and the learned Judges held that such a repudiation would by itself negative the partition being bona fide and binding on the creditor. Learned counsel for the appellant submitted that of the two reasons assigned by the learned Judges for their conclusion that the partition was not bona fide the first was insufficient and the second irrelevant and immaterial. As regards the first ground, he urged that at the most, it would occasion greater scrutiny and provided that, as found by the learned trial Judge, the properties allotted to the share of the father were fairly sufficient for the discharge of the debts binding on the son, the circumstances relied on would not per se render the arrangement mala fide. Regarding the 2nd ground, he pointed out that the fact that the father took over the liability for the reason that the debt was not binding on the son, was a matter of legitimate arrangement inter se between the coparceners and would have no bearing on the fairness or bona fides of the partition which was concerned really with ascertaining whether the property set apart for the father was or was not sufficient for the discharge of the indebtedness which he undertook. We see considerable force in the submission of the learned counsel, particularly with the criticism of the second of the above reasons. The recital as to the character of the debt as against the son is a recital in a document to which the father and the son are parties and if between them the son repudiates the debt as binding on him, that is no reason by itself for holding the partition to be mala fide.

We agree that the real question for consideration in such cases is whether sufficient property has been set apart for the share of the father to enable him to discharge the debts which he has undertaken to discharge. Examined from this point of view we are clearly of the opinion that the partition deed - Ex. VI does not satisfy this test. In the first place, we agree with the learned Counsel for the respondent in his criticism that the learned trial Judge had really no basis in the evidence for recording his finding as regards the income from the property. That finding was based not on any evidence adduced directed to that point but by taking into account certain statements made to the Bank by Kalyanasundaram at the time the loan was raised. As a matter of fact the 1st defendant in his cross examination stated :

> "The properties partitioned and allotted to me (under Ex. 6) will fetch a pattom of 2,000 and odd (paras of paddy). I have got debt to the extent of Rs. 80,000. It is the debt under Exs. A & B. I have to pay other amounts to the bank. I have to pay a debt of about Rs. 2,00,000 to the bank. In addition to that I have also got other debts to the extent of more than rupees one lakh. The decrees obtained against me will come to more than Rs. 50,000 - 60,000. They are decrees obtained against me."

This would disclose two infirmities in the appellant's case : (1) No provision was admittedly made under Ex. VI for the payment of all the debts of the father and there were considerably more debts payable by him than those for which provision was made for the discharge out of properties allotted to him. (2) There was no acceptable evidence regarding the value of the properties in Palghat and therefore one cannot proceed on the basis that the share of the father in the Palghat properties would be sufficient to discharge the debts not provided for under Ex. VI. Learned counsel for the appellant faintly suggested that for considering the bona fides of the partition under Ex. VI only the debts incurred in Cochin and on which suits could be laid in Cochin should be considered but this is obviously incorrect because even assuming that in regard to each one of those debts, a suit could not be instituted in the Courts in the Cochin State, undoubtedly the decrees obtained in the Madras State could be transferred for execution to Cochin and vice versa. In these circumstances, unless the entirety of the debts payable by the father were taken into account and sufficient and adequate

provision made for the discharge of these debts from and out of the share allotted to the father - either his original share or any added assets to enable him to do so - the partition cannot be held to be bona fide within the meaning of the decisions. We therefore agree with the High Court, though not for the same reasons, in itsfinding that the partition under Ex. VI is not such as to be binding against the Bank.

We shall next deal with the second point which relates to the reasoning on the strength of which the learned Judges of the High Court granted a decree to the bank for the entire sum of Rs. 80,000 and odd covered by the two promissory notes 'A' & 'B' notwithstanding their finding that only Rs. 50,000 and add out of the loan of Rs. 80,000 went towards the discharge of antecedent debts. We should add that we are reserving for later consideration the correctness of the grounds for holding that to the extent of Rs. 59,000 the mortgage was for discharge of antecedent debts which is the subject matter of the third of the points raised by the Appellant.

Their reasoning may be set out in their own words :

> "When the plaint transactions took place British India and Cochin State were independent sovereign states and according to Private International law it is the law of the situs of the property that should govern contracts relating to it."

On this principle they applied the Hindu Law as administered in Cochin State to determine the rights of the creditor and under that law even a mortgage which was contemporaneous with the debt would be binding on the sons, provided the same was not illegal or immoral, though the debt was not for a purpose binding on the family either by way of necessity or benefit. On this basis they held that the bank was entitled to a mortgage decree for the entire sum even though Rs. 20,000 and add of it was held not to be for the discharge of any antecedent debt. Learned counsel for the appellant challenged the correctness of this reasoning and the application of the rule of the lex situs to a case like the present. We agree that the learned Judges were not right in the view they expressed about the applicability of this rule of Private International Law. The rule that they applied to determine the rights to immovable property in Cochin was not any statutory law which was binding on parties who had dealings in regard to land in that State in which event their reasoning was unexceptional. Taking the Cochin State itself, the power of a person to dispose of property or to encumber it would have depended upon whether he was a Hindu or a Muslim or a Christian and in each case the right of the owner to dispose of the property would depend upon his Personal Law as modified by any statute applicable to that community to which he belonged. There was in the matter of dispositions of the type we have to deal with in this case, no lex situs which could be applied irrespective of a personal law governing the owner. By way of example, let us take the case of a testamentary power of disposition over innovable property in that State. If the owner were a Christian he might be entitled to dispose of property to the full extent. If he were a Muslim, there would be a limitation on such a power based upon the rules of Muslim Law applicable to him subject, of course, to any statutory modifications thereof. In the case of a Hindu, his power to dispose of by will would depend upon whether the property was self-acquired or joint and whether he was a member of a Joint Hindu Family - the existence of coparceners and the like. The Cochin law itself, therefore, recognised that Hindu Law was a Personal Law and that the rights of dealing with property flowed from the Personal Law of the owner. It is hardly necessary to cite authority for the position that Hindu Law is a Personal Law. The matter might be further illustrated by another example. Even among the Hindus, there are persons governed by the Dayabhaga system of Hindu Law. If such a one acquired property in Cochin it could not be that the Dayabhaga not being prevalent in Cochin some system of law - not the Dayabhaga but either the Mitakshara or some other system - would

apply in the absence of course of some valid statutory provision to determine either the rights to property or its devolution. The reasoning of the learned Judges, therefore, proceeds upon a basic wrong assumption that the Mitakshara law as understood and administered in Cochin State was some sort of lex situs which would apply to determine the rights of parties whatever might be their Personal Law i.e., Hindus following either the Mitakshara as understood elsewhere or governed by some system other than the Mitakshara or not being Hindus governed by some other system of law. As stated in Mayne's Hindu, Law [Mayne's Hindu Law, 11th Edn. para 56.] though in a slightly different context :

> "Prima facie any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu Law recognised in that province..... This law is not merely a local law, it becomes a personal law and a part of the status of every family which is governed by it..... In this respect the rule seems an exception to the usual principle, that the lex loci governs matters relating to land, and that the law of the domicil governs personal relations. The same rule as above would apply to any family which, by local usage, had acquired any special custom of succession, or the like, peculiar to itself, though differing from that either of its original, or acquired, domicil. The reason is that in India there is no lex loci, every person being governed by the law of his personal status."

In the present case on the concurrent finding of the two courts that the family of the defendants were permanent residents of and domiciled in Palghat it would follow that the binding character of the father's alienation by way of mortgage quoad the son had to be judged in the light of the principles laid down from very early times by the Privy Council and accepted by the Full Bench decisions of the Madras High Court and finally authoritatively expounded in Brij Narain v. Mangla Prasad [51 I.A. 129.] which has received the approval of this Court. When the Bank dealt with the 1st defendant, it must be taken to have contracted with him on the basis of such a law being applicable to the transaction, so that there is no question of hardship arising from the application of the British Indian Law to determine the scope of the father's powers.

This leads us to the third and last point urged in the appeal as regards whether and to what extent the debt under the mortgage evidence by Ex. 'E' went towards the discharge of the antecedent debts of the father for it is only for such amount that the Bank can claim a mortgage decree against the share of the appellant in the family properties.

Before examining the facts in relation thereto, it is necessary to narrate briefly the manner in which the attention of the Courts were directed to this point. In its plaint the Bank averred that the debt was incurred for a family purpose, it being stated to be in connection with a family business. This was denied and it is now common ground that the debt was incurred merely for the starting of a new business by the father and was not for any ancestral family business. So far as the plaint went, the Bank had no case that the debt secured by the mortgage was one binding on the family as being for a necessary purpose. Also in terms there was no plea that the mortgage was binding on the son's share by reason of the debt being for the discharge of the antecedent indebtedness of the father. The defence on behalf of the appellant was threefold : Besides the usual formal denial of the mortgage not being supported by consideration, the contentions raised were : (1) That the mortgage debt was not binding on the appellant's share of the family properties for the reason that the debt was not incurred for purposes which in law were either necessary or binding on the family, and (2) that the debts were tainted with illegality or immorality. The findings which were recorded on these three defences were concurrent and are no longer in controversy. It was found that the mortgage was fully

supported by consideration, that the debt was not incurred for any necessary or beneficial purpose of the family and lastly that the purpose for which the debt was incurred was neither illegal nor immoral. In this context it should be remembered that the suit was filed by the bank on June 17, 1948 before Cochin became part of the Indian Union. At that date there could be no doubt that if the Courts at Cochin applied the Hindu Law as understood by the High Court of that State disregarding the circumstance arising from the domicile of the mortgagors, the question whether the debt secured by the mortgage was or was not for discharging an earlier antecedent indebtedness of the father was immaterial and nothing more was needed for the plaintiff to succeed in obtaining a mortgage decree as against the entire family property including the son's share therein than a finding by the Court that the debt was to illegal or immoral. In fact, even the allegation in the Bank's plaint that the debt was for the purpose of financing a family trade was superfluous, and the negativing of its averment in that regard would not have affected its rights in any manner. In the circumstances, the Bank could not be seriously blamed if it considered that the question whether there was not an antecedent debt which the mortgage under Ex. E discharged was not relevant at all and made no averment asserting such a fact. Accordingly no attention was apparently paid by either party to this question. By the date, however, of the arguments before the learned trial Judge the princely State of Cochin had acceded to the Indian Union and had become a Part 'B' State under the Constitution. Founding himself on this circumstance as also the fact that the defendants were permanent residents of and domiciled at Palghat learned counsel for the appellant submitted to the trial Judge that the Hindu Law as understood and expounded in Brij Narain v. Mangla Prasad [51 I.A. 129.] would apply to determine the rights of the parties to the transaction and if that law were applied, on the finding that there had been a partition in the family which was stated to be fair under which a proper provision had been made for the discharge of the debts of the father, coupled with the finding that debts under Exs. A & B were not incurred for a family trade or for a purpose binding upon the family, the mortgagee was not entitled to a decree against the security under Ex. 'E' which could not extend to the share allotted to the appellant under the partition - Ex. VI. The learned trial Judge made an incidental finding, or more correctly an observation which it must be taken to be on the state of the pleadings, that the debts evidenced by Exs. A & B did not go to discharge any antecedent liability of the father. When the matter went up in appeal before the High Court the learned Judges considered that even if Brij Narain v. Mangla Prasad [51 I.A. 129.] was applied and even if the finding that there had been no ancestral trade and that the debt had not been incurred for a family purpose were accepted, there would still be need to ascertain whether there was any antecedent debt__ of the father which had been discharged by the execution of the promissory notes Exs. A and B and the mortgage deed Ex. E. For this purpose they called for a finding from the Subordinate Judge under O. XLI. r. 25, Civil Procedure Code and having regard to the state of the pleadings and the evidence they raised a specific issue on that point and directed the Subordinate Judge to afford the parties a further opportunity of adducing such evidence as they desired on the matter. The Subordinate Judge accordingly heard further evidence and recorded a specific finding that the debts under Exs. A and B were not for the purpose of discharging any antecedent debts which could really be termed to be independent transactions. The appeal was thereafter heard and the learned Judges, after considering this finding, dissented from the view there expressed and held that out of the Rs. 80,000 which were the principal amounts covered by the two promissory notes - Exs. A & B, there was an antecedent debt to the extent of Rs. 59,000 and odd. Though on this finding, if the decision in Brij Narain v. Mangla Prasad [51 I.A. 129.] were applied, the bank would have been entitled to a mortgage decree only in respect of the principal sum of Rs. 59,000 anodd and to a personal decree for the balance to be recovered out of the share of the appellant in the family property on the finding that the partition - Ex. VI was not bona fide and therefore not impeding the rights of the creditor, they, nevertheless proceeded to grant a decree to the Bank for the entire sum due on the two promissory notes - Exs. A

and B for the reason that they considered that the law applicable to determine the rights of the Bank was not the Mitakshara law as understood and explained in Brij Narain's Case [51 I.A. 129.] but the law as was understood and applied in the decisions of the High Court of Cochin prior to the Constitution. We have already dealt with the correctness of the view of the High Court on this point.

What we are here concerned with is the finding by the learned Judges of the High Court that out of the sum of Rs. 80,000 covered by Exs. A and B a sum of Rs. 59,000 and odd really went in discharge of an antecedent debt and that to that extent, even applying the law as understood in what was formerly British India, the Bank would have the right to a mortgage decree as against the appellant. The learned counsel for the appellant has strenuously contended that this finding of the High Court is wrong and that the entire transaction by which the father obtained finances for implementing the pepper contract with the Government of India was one single and entire transaction and that it was not capable of being split up, as the learned Judges of the High Court had done in order to record a finding of antecedency for a part of the suit - mortgage debt. On the other hand, the learned counsel for the respondent has submitted to us that not only were the learned Judges of the High Court right in holding that Rs. 59,000 and odd was an antecedent debt but that the learned Judges should have gone further and held that the entire sum of Rs. 80,000 covered by Exs. A and B was for the discharge of antecedent debts.

This question of fact was the principal matter of contest before us. We shall start by briefly summarising the transactions between the 1st defendant-father and the Bank. The first defendant entered into a contract with the Government of India for the supply to them of 2000 Cwts. of pepper in or about May 7, 1945. The total cost of the supply was Rs. 1,37,000. He entered into similar contracts later in October and November 1945 and under these the value of the goods to be supplied was respectively Rs. 1,23,000 and Rs. 3,63,000. Even for implementing the first contract of May 1945, the first defendant apparently had need to borrow. An application for a loan was made on or about the 4th or 5th of June 1945 and then the 1st defendant sent the documents of title that he held in respect of his properties in Cochin and desired accommodation by way of an over-draft for Rs. 50,000 from the Bank. The letter by the 1st defendant to the Bank is not on the record but it is seen that these documents were sent to the legal Advisor of the Bank on June 6, 1945 and the latter was directed to scrutinise them and inform the Bank whether the documents were complete. They were returned on the same day with a note stating that the Bank should satisfy itself whehter the particulars set out in the letter were true and if this were so the amount could be paid on a mortgage by deposit of title deed. This letter of the Legal Adviser as well as the request of the 1st defendant was circulated to the directors of the plaintiff-bank and the loan asked for was sanctioned by the President of the Bank on June 11, 1945 and the same was passed by the directors on the same day with a limit up to Rs. 50,000. But this was to be on a mortgage of the Cochin properties. However even before the request for the overdraft was circulated to the directors and their sanction obtained, the officers of the Bank, apparently acting on the instructions of the Secretary gave him loans to the extent of Rs. 45,000. A loan of Rs. 30,000 on a promissory note carrying interest at 6 1/4% was granted on June 6, 1945 and two days later on a further promissory note Rs. 15,000 was lent. The sum of Rs. 45,000 and interest thereon was carried to the debit of what is termed as a No. 1 account at the Palghat branch of the Bank which was an overdraft account with a limit of Rs. 50,000. It should be noticed that the creation of the mortgage was long after this. Apparently, this overdraft account was opened under the directions of the Bank's head office at Trichur by a letter dated June 18, 1945 (referred to in the opening entry) carrying out the directions of the President of the Bank dated June 11, 1945 to which reference has already been made. The amount due on the two promissory notes with interest due up to June 19, 1945 came to Rs. 45,054/11/- and this was the debit with which the account opened. Subsequently there were operations in this account eitherway

i.e., both by way of payment in, as well as of withdrawal from this account and on November 14, 1945 the date of the promissory notes Exs. A & B the amount due under this account was Rs. 50726/15/4. We shall be referring to how this account was squared on November 20, 1945 after referring to the history of the No. 2 overdraft account of the 1st defendant with the Bank.

The 1st defendant made a second application for a loan on October 8, 1945 to the Bank for overdraft accommodation up to a limit of Rs. 3,00,000. The security that he offered for the fresh advance that he required was the contracts entered into by the Government of India which he said would be pledged with the Bank and he suggested that the advances might be made to him on the security of the Inspection Notes of the goods that he would be supplying to Government. He also promised that the receipt for Rs. 50,000 which had either been or would be deposited with the Government of India as security for the due fulfilment of the contract, would be pledged with them, so that they would be in a position to obtain payment of that sum from the Government themselves. The Bank, however, demanded that in addition to pledging the amounts which would be received from the Government under the contract, the 1st defendant should also create a mortgage by deposit of title deeds of properties in Palghat for the loan that he desired. The proposal by the 1st defendant was considered at a meeting of the Board of Directors of the plaintiff-bank and it was resolved to give him additional overdraft facility to the extent of Rs. 60,000 which was split into two parts (1) Rs. 30,000 on the security of properties at Palghat in regard to which a mortgage was to be created by deposit of title deeds, and (2) a further sum of Rs. 30,000 to be advanced by an increase in the overdraft limit of Rs. 50,000 on the Cochin properties. This resolution was passed on November 4, 1945. But even before this resolution was passed and obviously in anticipation of the decision of the Directors the overdraft account No. 2 of the 1st defendant with the Bank at Palghat was opened on October 24, 1945 with a limit of Rs. 30,000. It would be seen that Exs. A & B were executed on November 19, 1945 and the deposit of title deeds and the memordandum in connection therewith was also on the same date. Between the 24th October 1945 and the 11th of November the 1st defendant had operated on this No. 2 account both by payment in, as well as by withdrawing from it and as a result of these transactions the amount owed by him to the bank on the 19th November 1945 was a sum of Rs. 59,952/12/5. The position on November 19, 1945 when the loan under Exs. A & B was raised and the mortgage Ex. E was executed was therefore this. Under the No. 1 account the 1st defendant owed the Bank Rs. 50,726/15/4. On the No. 2 account the amount due to the Bank was Rs. 59952/12/5. It was with this state of the account that Exs. A & B were executed and the loan of Rs. 80,000 secured by the suit mortgage was raised. This sum of Rs. 80,000 was made available to the 1st defendant, not by the Bank itself adjusting the newly granted loan against the amounts due up to that date and keeping the Rs. 29,000 odd that would still have remained due to it as an unsecured debt due from him. On the other hand, the head office of the Bank at Trichur handed over to the 1st defendant a draft for Rs. 80,000 made out in favour of the 1st defendant on its branch at Palghat. That the draft was handed over to the 1st defendant is admitted. It was handed over at a time when so far as the previous indebtedness was concerned, the bank held no security though there might have been a promise to create one. This draft was taken by the 1st defendant to Palghat and was paid by him into his No. 2 account which therefore became reduced from a debit of Rs. 59,952 and odd to a credit of over Rs. 20,000. It was on this feature and this operation on the account that the learned Judges of the High Court relied on for their conclusion that the Rs. 59,000 odd was an antecedent debt which was discharged by the draft of Rs. 80,000 handed over by the Bank when Exs. A & B were executed. It now remains to narrate how the No. 1 account under which the 1st defendant was a debtor to the extent of Rs. 50,726 and odd became discharged. The 1st defendant drew a cheque in his own name on November 20, 1945 from his No. 2 account in which he had an overdraft limit to the extent of Rs. 50,000 and paid this cheque into his No. 1

account. There was a small balance of Rs. 726/15/4 due which was paid in cash and that account was closed on November 20, 1945. On these facts the question now for consideration is whether this loan of Rs. 80,000 is or is not sufficiently dissociated from the liability of the 1st defendant under the No. 1 and No. 2 accounts which existed before that date, for admittedly the entire sum was utilised to discharge the debt remaining due to the Bank on November 20, 1945.

Learned counsel for the appellant raised a sort of preliminary objection that the learned Judges of the High Court having categorically found that there was an antecedent debt which was discharged by the suit-mortgage loan only to the extent of Rs. 59,000 and odd and there being no appeal by the Bank against the finding that the balance of the Rs. 80,000 had not gone in discharge of an antecedent debt, the respondent was precluded from putting forward a contention that the entire sum of Rs. 80,000 covered by Exs. A & B went for the discharge of antecedent debts. We do not see any substance in this objection, because the respondent is entitled to canvass the correctness of findings against it in order to support the decree that has been passed against the appellant.

Coming now to the merits of the controversy, the matter may be viewed thus. We are now concerned with the question whether Rs. 80,000 which were borrowed under Exs. A & B and in respect of which a crossed draft for that sum made in favour of the 1st defendant was handed over to him went in discharge of antecedent debts. If the previously existing debt on 14.11.1945 of over Rs. 1,09,000 being the total of the amount due under the No. 1 and 2 accounts was one owed to a third party and that debt had in part been discharged by a demand draft issued on the execution of Exs. A & B and the creation of a mortgage by virtue of Ex. E, there could be no doubt that it would be an antecedent debt. That, however, was not the case but the original indebtedness was to the Bank itself and that was discharged by the suit-loan from the Bank. Learned counsel for the appellant laid great stress on the fact that the entirety of the transactions which resulted in the grant of an overdraft facility of Rs. 1,10,000 covered by Exs. A, B & C should be viewed as a single and entire transaction commencing from the grant of the loans on June 6, 1945 in anticipation of security being furnished, right up to the date when the suit-promissory notes were executed and the mortgages by deposit of title deeds was created. We are, unable to accept this submission in its entirety. It is, no doubt, true that the transaction with the Bank, so far as the debtor was concerned, was one by which he obtained a loan for financing the implementation of his contract with the Government of India for the supply of black pepper but that by itself would not be sufficient to negative such a financing being composed of independent transactions, though directed to the same end. Learned counsel for the appellant did not deny that this was possible nor did he contest the position that if there was a real dissociation in fact, the circumstance that the creditor was the same or that the several loans that were made, were for fulfiling the same purpose of the borrower would not be themselves detract from there being real antecedency for a later borrowing. It is, therefore, essentially a question of fact and the matter has to be viewed with reference (a) to the nature of the transactions, and (b) the intention of the parties, and (c) the inferences to be reasonably drawn from the form which the parties adopted for putting through their intention. It is in the context of these considerations that we are inclined to hold that there was a real and factual antecedency between the loan of Rs. 80,000 for which the draft was given on November 16, 1945 and the previously existing indebtedness of Rs. 1,09,000 and odd in the overdrafts account No. 1 and 2 of the 1st defendant to the Bank which was discharged thereby. On November 16, 1945 when the draft was handed over there was admittedly a debt of over Rs. 1,09,000 due from the 1st defendant to the Bank. Though there had been an agreement that the title deeds of the 1st defendant's Cochin properties would be deposited with the Bank as security, the same had not yet been done and the loan therefore still continued to be a loan on the personal security of the debtor. At that date this bank draft for Rs. 80,000 was handed over to the debtor for the purpose of discharging the previous loans due to the

Bank. Learned counsel might be right in saying that the previous loan of Rs. 1,09,000 and odd might have been granted in anticipation of the execution of the mortgage and the final determination of the amount of the overdraft that should be permitted to the 1st defendant but that does not by itself conclude the matter. The learned trial Judge negatived the plea of the respondent that the Rs. 80,000 went in discharge of an antecedent liability to the Bank by reason of the evidence of the Secretary of the Bank in which he stated that this sum of Rs. 80,000 was adjusted towards the earlier debt - a statement which was repeated by the 1st defendant himself as P.W. 3. Learned counsel for the appellant drew our attention to this portion of the evidence and repeated the same arguments. In our opinion, however, this statement or this manner of describing how the draft was utilised does not by itself militate against this loan of Rs. 80,000 discharging an antecedent debt. Factually that the loan of Rs. 80,000 was adjusted by the Bank towards the 1st defendant's indebtedness is not correct, though it is possible that if the transaction took that form the submission on behalf of the appellant would have greated force and substance. That however, was not the form which the transaction took, and we cannot but assume that the form reflected the intention of the parties. If instead of handing over a demand draft to the 1st defendant, which has actually happened, the Bank had credited the amount to the 1st defendant in his overdraft account then there would have been an unity between the transaction which started on June 6, 1945 and which culminated in the execution of the two promissory notes - Exs. A and B and the security for the repayment thereof - Ex. E so as to render all of them a single transaction, but that was not the method adopted by the creditor or the debtor. When a fresh loan of Rs. 80,000 was granted under Exs. A & B and a bank draft for that amount was handed over, it was done without taking into account the pre-existing liability for Rs. 1,09,000 and odd owed by the 1st defendant to the Bank, so that when the draft was handed over there was a total liability of Rs. 1,89,000 payable by the 1st defendant to the Bank. If the appellant's father had failed to credit the demand draft into his No. 2 overdraft account which it was undoubtedly within his power to do, his total indebtedness would have been Rs. 1,89,000. He however paid the draft into his No. 2 account so that the total indebtedness to the Bank on the two accounts became Rs. 1,09,000. From the No. 2 account a sum of Rs. 5,000 he drew to discharge a liability of Rs. 50,000 under the No. 1 and No. 2 accounts were fully discharged and Rs. 29,000 became thereafter outside the security created under Ex. E by the 1st defendant in favour of the Bank. In the circumstances we consider that the entire loan of Rs. 80,000 went in discharge of antecedent debts though the same was owned by the 1st defendant to the same creditor.

Before concluding it is necessary to refer to a variation which the High Court made as regards the amount recoverable from the properties of the family in Cochin. This was because of the construction and effect of Ex. J which was the memorandum which evidenced the deposit of the title deeds of the Palghat properties and which was executed on April 23, 1946. Under Ex. J the property mortgaged was not merely the properties in Palghat but the equity of redemption of the Cochin properties which had been the subject of mortgage under Ex. F for Rs. 80,000. In other words, Ex. E created also a second mortgage on the Cochin properties. On a construction of Ex. J. the High Court held that the 1st mortgage of the Palghat properties was limited to the excess over Rs. 30,000 in the overdraft account. It allowed from this that the Bank could recover from the Chittur properties that excess and this was found to be, looking into the debits of the account of the 1st defendant, to amount to Rs. 3,792/2/1. The learned Judges the High Court, therefore, granted in addition to the amounts covered by Exs. A and B a decree for Rs. 3792/2/1 recoverable from the Cochin properties. In view of the fact that a suit had already been instituted in the Palghat Sub-Court for the entirety of the amount due to the extent of Rs. 30,000 and interest due under Ex. C & F, the learned judges added in their judgment a reservation which was incorporated in the decree that was drawn up in these terms :

> "If in the suit instituted by the plaintiff in the Palghat Sub-court the plaintiff obtains a decree for the whole amount due under Ex. C and realises the same, the plaintiff will not be entitled to ignore the decree in this case in respect of the above sum Rs. 3,792/2/1 and interest thereon".

Learned counsel for the appellant faintly suggested that the learned Judges were in error in passing a decree for this further sum of Rs. 3792/2/1 in this suit. It is, however, unnecessary for us to go into the merits as to whether the learned Judges were right in the construction of Ex. J and the legal results flowing therefrom as we are satisfied that the appellant is not entitled to raise this point. This was not one of the points raised in the grounds of appeal to this Court when an application was made for the grant of a certificate of fitness, nor is this objection to the decree to be found in the statement of the case filed. In the circumstances, we need not say no more about it.

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

Appeal dismissed.

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