Manibhai and Others

Vs

Hemraj and Others

Civil Appeal No. 380(N) of 1980

(K. N Singh, N. M. Kalsiwal JJ)

21.03.1990

JUDGMENT

KALSIWAL, J. -

1. This civil appeal by special leave has been filed by the defendants Manibhai Dhyaneshwar, and Waman Rao Narayan Rao aggrieved against the judgment and decree of Bombay High Court dated November 20, 1979.

2. Briefly stated the facts are that one Vithoba had two sons Beni Ram and Maroti. A Partition took place on July 14, 1947 by a registered document between Vithoba, his son Beni Ram and two grandsons of pre-deceased son Maroti. In accordance with the above partition Beni Ram got agricultural lands survey Nos. 1, 3, 18 and 19 measuring 11.69 acres, 00.06 acres, 4.48 acres and 8.40 acres respectively, situate in Village Kharbi Tehsil and district Nagpur. Apart from the above agricultural lands Beni Ram also got a house No. 83 situate in Telipura, Itwari, Nagpur. After receiving the above properties in partition Beni Ram along with his two minor sons Hemraj and Ramdass executed a deed of conditional sale on April 22, 1948 (Ex. 48) of their properties in favour of Narayan Dass for a sum of Rs. 5500. Thereafter, by a reconveyance deed (Ex. 48) dated February 11, 1953 Beni Ram, Hemraj and Ramdass got the properties reconveyed in their favour by Narayan Dass. On the same day i.e. February 11, 1953 Beni Ram and his four minor sons executed a sale deed. (Ex. 40) of house property and agricultural land survey Nos. 3 and 18 in favour of Manibhai, the brother of Narayan Dass for a consideration of Rs. 5500. By another sale deed (Ex. 41) of the same date Beni Ram and his four minor sons sold 10.69 acres of land out of survey No. 1 in favour of Vithal and his brother Vishwanath for a sum of Rs. 5345. Beni Ram and his minor sons then by sale deed (Ex. 61) sold the remaining one acre of land of survey No. 1 and 8.40 acres of survey No. 19 for a sum of Rs. 3000 on July 19, 1954 in favour of the above mentioned Vithal and Vishwanath. Manibhai subsequently sold the house property in favour of Wamman Rao Narayan Rao, Bhujang Rao, Yadav Rao, Namdeo and Nago Rao.

3. Six sons of Beni Ram along with their mother Sona Bai filed a suit on February 10, 1965 against Manibhai (defendant 1), Vithal and Vishwanath (defendants 2 and 3), Waman Rao, Narayan Rao, Bhujang Rao, Yadav Rao, Namdeo and Nago Rao (defendants 4 to 8) and Beni Ram (defendant 9) for a decree for possession of the agricultural lands and house which came in their share as members of Joint Hindu Family. The case of the plaintiffs as set out in the plaint was that Beni Ram, father of the plaintiffs 1 to 6 and husband of the plaintiff 7 was a person given to heavy drinking and gambling and a satoria. Due to all these vices he used to spend away everything whatever he used to earn in his business of grain dalali. The business of grain dalali did not require any capital. In the partition of ancestral properties made on July 14, 1947 Beni Ram was allotted the properties as

given in para 3 of the plaint, and details of which have also been mentioned above. It was further alleged in the plaint that the entire properties allotted to the share of Beni Ram in the aforesaid family partition were ancestral and the plaintiff had acquired an interest in such properties by birth.

4. According to the plaintiffs all these alienation in favour of the defendants were illegal and invalid and were not binding on them. Plaintiffs further alleged that none of these sales were for any legal necessity or for the benefit of the estate or for the benefit of the minors. The sales were not for preserving or recovering any part of the estate of the plaintiffs. None of defendants 1, 2, and 3 made any reasonable, proper or bona fide enquiries as to the existence of any necessity before entering into the aforesaid transactions with defendant 9. The plaintiffs further stated that the sale proceeds were not applied for the benefit of the minors or their estate by defendant 9 and were squandered by him on his vices.

5. It was further alleged in the plaint that defendant 1 sold a portion of the house to defendant 4 to 7 vide sale deed dated August 9, 1956 and the remaining portion of the same house was sold to defendant 8. Plaintiffs thus submitted that the defendants 4 to 8 very well knew about defendant 9's way of life. They also knew that defendant 9 is a gambler and drunkard and satoria and that he spent everything on these vices. The plaintiffs thus submitted that the sales in favour of defendants 4 to 8 was also illegal, invalid and inoperative in law since their vendor had no valid title in them. The plaintiffs in the above circumstances alleged that they were entitled to share in the joint family properties. The plaintiffs called upon the defendants to deliver possession along with mesne profits by their notice dated October 28, 1964. The defendants received the notice but did not deliver possession and mesne profits and hence suit was filed for possession and mesne profits amounting to Rs. 11,470.

6. Defendant 1, Manibhai denied the allegations made in the plaint. He denied that defendant 9 was a person giving to heavy drinking and gambling and satoria. He also denied that defendant 9 used to spend away everything whatever he used to earn in the business of grain dalali. It was denied that the business of grain dalali does not require any capital. It was alleged the defendant 9 was the sole owner and in possession of the properties described in para 3 of the plaint but it was denied that defendant 9 acquired the same under the partition deed. The plaintiffs were thus required to be put strict proof of the same.

7. Defendant 1 was also alleged that he had purchased the properties by registered sale deed dated February 11, 1953 from defendant 9 and plaintiffs 1 to 4 for a valuable consideration of Rs. 5500 and plaintiffs 5 and 6 were not born till then. The sale of the property was for the legal necessity and for the benefit of the plaintiffs. It was further submitted that even if the property was found to be ancestral one defendant 9 had power to sell the said properties being a manager of the joint family, on behalf of the plaintiffs also. Defendant 9 had executed a mortgage by conditional sale on April 22, 1948 in favour of one Narayan Dass s/o Kalidas Patel for a total consideration of Rs. 5500, mortgaging thereby all the properties mentioned in para 3(A) and (B) of the plaint. It had been further alleged that the answering defendant 1 purchased properties described in para 3-A(ii) and (iv) and para 3-B out of the said properties for a consideration of Rs. 5500 which was the market value of the said properties. On February 11, 1953 the defendant paid Rs. 500 towards the earnest money and the balance of Rs. 5000 was paid on the same day before the Sub-Register. Defendant 9 paid this very amount to Shri Narayan Dass to obtain deed of reconveyance. Thus the consideration paid by this defendant for the purchase of the property mentioned above has in fact been applied to make payment to Shri Narayan Dass to get all those properties released and to obtain the deed of reconveyance from him. The sale deed in favour of defendant 1 was, therefore, in fact for legal

necessity i.e. to save a larger and valuable property from being lost to the family and/or also for payment of the antecedent debts of defendant 9 and further defendant 9 saved for himself and the plaintiffs, the fields mentioned in para 3(A)(i) and (iii) of the plaint which subsequently defendant 9 and the plaintiffs sold to defendants 2 and 3 by two registered sold deeds dated February 11, 1953 and July 19, 1954 for Rs. 5345 and Rs. 3000 respectively. Thus the plaintiffs for an advantage of Rs. 8345 by getting the properties from the original mortgagee Narayan Dass. It was thus submitted that though the sale deed dated February 11, 1953 executed by defendant 9 did not recite all these facts, yet the sale deed in favour of defendant 1 was in fact for legal necessity and for discharging the antecedent debts of defendant. In the alternative it was submitted that if the business of grain dalali was found to be an ancestral one then in that event also the property sold to defendant 1 was for legal necessity and for the benefit of the plaintiffs. The suit brought by the plaintiffs was bogus and untenable in law to the knowledge of the plaintiffs and was liable to be dismissed with compensatory costs.

8. It was also submitted that the suit for possession and mesne profits as framed was not maintainable. In the sale deeds dated February 11, 1953, defendant 9 is alleged to be the karta of the plaintiffs' family and the plaintiffs 1 to 4 were also parties to both the sale deeds in favour of defendant 1 as well as in favour of defendants 2 and 3. Plaintiffs 5 and 6 were not born till then and plaintiff 7 had no title or his interest in the property. Thus unless those sale deeds or transfers were not cancelled or set aside, the plaintiffs could not seek possession of the properties. It was further submitted that plaintiffs 1 to 6, who were sons of defendant 9 were under obligation to discharge their father's debt. The present transfers were for discharging the father's debt due to Narayan Dass and hence the plaintiffs were bound by the transfers. The plaintiffs had no cause of action for seeking cancellation of the sale deed dated February 11, 1953. The present suit was barred by a time as the claim for relief of cancellation of the sale deed dated February 11, 1953 was also barred on expiry of three years from the date of sale deed.

9. Defendants 2 and 3 filed a joint written statement and apart form denial of defendant 9 being a gambler, drunkard or satoria it was alleged that they had purchased agricultural field from defendant 9 who sold the same for legal necessity and for valuable consideration and for the benefit of the minors. It was also made to preserve the estate and to make the repayment of the loans by defendant 9. Hence the sales made in their favour were binding on the plaintiffs. The plaintiff have filed the present suit in collusion with defendant 9 with ulterior and mala fide intention.

10. Defendants 4 to 8 filed a joint written statement and took almost a similar stand as taken by defendant 1. These defendants further pleaded that they had purchased the suit house some time in the year 1956, with the knowledge of plaintiffs 1 and 2 and defendant 9. After the purchase of the house the defendants demolished the old structure and constructed the whole house from foundation, at a cost of about Rs. 25,000. Plaintiffs 1 and 2 as also defendant 9 were in the full know of the fact of demolition of old house and new construction. They did not at any time raise any objection or claim to the house and allowed the defendants to carry out the work. They did not any time show or commit any act to raise any doubt in the minds of defendants regarding their title to the house in suit. Thus defendants 4 to 8 in good faith and having full belief in their own title to the suit house, spent more than Rs. 25,000 on the house and the plaintiffs and defendant 9 allowed the defendants to carry out the work even though they had full knowledge of the said construction work and were thus now estopped from denying the title of defendants to the suit house. The plaintiffs and defendant 9 having acquiesced in the above acts of the defendants could not now file the suit and challenge the title of the defendants. It was also alleged that defendant 9 was heavily indebted and had in fact executed a conditional sale deed in favour of Narayan Dass son of Kalidas

for a consideration of Rs. 5500. It was in order to redeem these properties that defendant 9 sold the property and utilised the money received as a consideration of the sale deed towards the satisfaction of those debts. Thus the impugned sale deeds were executed for good and valuable consideration for payment of antecedent debts and cannot be challenged by the plaintiffs.

11. Trial court after considering the oral and documentary evidence led by the parties held that defendant 9 Beni Ram after getting the ancestral share in the properties in 1947 remained joint with his sons i.e. the plaintiff. It was also found that the properties in the question were ancestral and as such the plaintiffs had acquired interest in it by birth. The trial court further held that Beni Ram, defendant 9 was not indulging in any vices at the time he first mortgaged the properties by conditional sale vide Ex. 48. The sale initially was for the satisfaction of the antecedent debt due on mortgage (Ex. 48). The trial court further held that it was legal cause and the purchaser were armed with proper grounds to purchase the property. This being so, the contention of the plaintiffs, that these sales finally were for no legal necessity or for the benefit of the minors of their estate etc., fell to the ground. Similarly, their contention that defendant 9 was given to drinking and all other such bad habits, and it was known to defendant 1 and 3 also, did not stand proved. The trial court also held that it was proved that defendant 9 was a broker and he needed cash capital of Rs. 4000 to Rs. 5000 for his business even as a broker. The evidence also satisfactory proved that defendant 9 had a grain shop. The trial court thus arrived at the conclusion that the plaintiffs had failed to prove their allegation that defendant 1 to 3 wanted these properties somehow or the other and that they managed to get the sales executed in their favour from defendant 9 without enquiry about the legal necessity to sell. The trial court also found proved that defendants 4 to 8 had spent Rs. 25,000 on the reconstruction of the house within the knowledge of plaintiffs 1 and 2, after his purchase from defendant 1 and still none had objected against it. Plaintiffs 1 and 2 and defendant 9 were estopped from challenging the title of defendants 4 to 8. In view of the findings recorded as mentioned above the trial court dismissed the suit filed by the plaintiffs.

12. The plaintiffs aggrieved against the judgment and decree of the trial court filed an appeal before the Bombay High Court. An argument was raised on behalf of the plaintiffs before the High Court that Manibhai and Narayan Dass ran a family firm of which they were owners and the execution of the conditional sale deed, reconveyance deed and the subsequent sale deed of the same day were nothing but a device and were really part of one and the same transaction. The transaction were not independent of each other in the true sense of the term. If the original transaction of April 22, 1948 of conditional sale deed with Narayan Dass was not a valid alienation and thus not binding upon the coparceners, minor sons Beni Ram, then subsequent transactions for the payment of the debt or liability due under that alienation also cannot be supported. The relationship between Narayan Dass and Manibhai on the one hand and Beni Ram on the other hand appeared to be that of confidence from the nature of evidence given by Narayan Bhai and Manibhai. Beni Ram seem to have faith in the two brothers which they apparently used to their advantage.

13. The High Court considered the above arguments and observed that in Ex. 48 the reasons for alienation of the property had been given by Beni Ram as for the purpose of carrying out business and for household purpose. The defendants further did not stick to this reason of alienation in the sale deed and gave evidence to show that it was with this amount that Beni Ram started new business. As to what was the evidence of any kind whatsoever led to show of any enquiry having been antecedent debt. There was no antecedent debt referred to all in Ex. 48 which was the commencement of the transaction. The High Court then considered Ex. 49 which was a reconveyance deed by which Rs. 5500 were repaid by Beni Ram to Narayan Dass. The High Court then took into consideration Exs. 40, 41 and 42(61) and arrived at the conclusion that there was no

antecedent debt nor any legal necessity not the money was needed for any joint family or ancestral business in order to make these alienations valid. After analysing the oral evidence, the High Court recorded the finding that even assuming that Beni Ram started a grain shop, it was admitted by the defendants that his former business was of brokerage in grain. For a grain broker business no capital was necessary or required. For the purpose of a grain shop, which was an entirely different business, experience in salesmanship and dealing in grains as well as the purchase of grain wholesale or retail would be necessary. It would involve an outlay of capital and would be under the circumstances a new business. The High Court then examined the question as to whether a father can by starting a new venture expose the family ancestral property to be taken and burden it therewith and alienate for that purpose.

14. The High Court placed reliance on the following dictum laid down by Privy Council in Benares Bank Limited v. Hari Narain (59 IA 300 : AIR 1932 PC 182) :

> "The manager of a Joint Hindu Family whether governed by the Mitakshara of the Dayabhaga, has no authority to impose upon a minor member the risk and liability of a new business started by him; that the manager is father of the minor makes no difference."

15. The High Court thus observed that in the present case the father had started new business with the alienation of the property and he had no right to impose the risk and liability upon the minor members. If the business which Beni Ram, therefore, started were a new business and which he had no right to start so as to expose the interest of the minor coparceners in the family property, then Ex. 48 cannot be supported on the ground either of legal necessity or benefit to the estate. The High Court further observed that if Ex. 48, therefore, was a transaction which the father was not entitled to enter and expose the family property to the risk then Ex. 48 fell and could not be held to be a valid and binding transaction; then the transaction of February 11, 1953, first of a reconveyance and then of a sale, evidenced by Exs. 49 and 40 also must fall and cannot be supported. The evidence went to show that Beni Ram has confined in Manibhai and Narayan Dass. The reconveyance in favour of Narayan Dass and the immediate sale in favour of Manibhai on the same day was a mere device to support the transaction of sale Ex. 40 in favour of Manibhai by a repayment of alleged antecedent debt. The High Court held that they had no hesitation in thinking that if the alleged antecedent debt itself was an invalid transaction, was not an independent transaction but was a part of the same transaction, was not an independent transaction but was a part of the same transaction, then merely because it was separated in point of time it would not support the alienation in favour of Manibhai. The High Court also referred to the five propositions laid down in Raja Brij Narain Rai v. Mangla Prasad Rai (AIR 1924 PC 50 : 51 IA 129) and held that so far they were concerned the fourth proposition was relevant which was to the following effect : (AIR p. 56)

> "Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached."

16. It was then held that applying the proposition laid down it was to be found out whether the transaction which was impeached, was a truly independent transaction and the debt discharged thereby was a truly independent antecedent debt whether it was or it was not a part of the same transaction. According to the High Court apart from the fact that the alienation dated April 22, 1948 was not supportable and was invalid, the transaction was nothing but a mere device to clothe the debt due under Ex. 48 with the antecedent character, when Ex. 40 on February 11, 1953 was executed. The transaction Ex. 40 must stand or fall along with the liability said to have been

incurred under Ex. 48. Thus in the view taken of Ex. 48 and the liability incurred thereunder, Ex. 40 must also fall therewith.

17. As regards Exs. 41 and 42(61) the High Court observed that whatever little justification there was to sustain the transaction under Ex. 40 even that did not hold good and was not available for the alienations under Exs. 41 and 42. There was not even a semblance of antecedent debt existing or due from Beni Ram on February 11, 1953 after the alleged liability under the conditional sale deed was discharged, so as to alienate survey No. 1 or subsequently in 1954 the remaining portion of surveys Nos. 1 and 19. After recording the above findings the High Court observed that the present suit was brought by the minors who had sixth/seven share in the joint family properties and had brought the suit for the purpose of possession alleging that the alienations effected by defendant 9 thereafter were not binding upon them. In such a case, the only consequence would be that the share of defendant 9 will go to the alienees. But in such a suit the coparceners whose shares were not affected were entitled to possession and the alienees were not entitled to joint possession with them. The alienees were not entitled to inclined and so advised a suit for working out their share in the family property. In such a suit, the entire family properties shall be brought in and the share of the alienor coparcener worked out. Thus the plaintiffs having succeeded, the alienees defendants 1 to 3 can be relegated to their right and work out their rights in a separate suit than making an order for joint possession. Consequently the High Court allowed the appeal, set aside and reversed the judgment and decree passed by the trial court, and instead a decree was passed in favour of plaintiffs 1 to 6 for possession of the properties in suit.

18. As regards, the mense profits was held that the plaintiffs had not led any evidence and as such relief for mesne profits was denied. The plaintiffs were further held entitled to future mesne profits from the date of suit under Order XX Rule 12 CPC.

19. Manibhai, defendant 1 Dhyaneshwar s/o of Vithal as legal representative of defendant 2 and Waman Rao, Narayan Rao, defendant 3 have filed this appeal against the judgment of the High Court.

20 We have heard learned counsel for the parties at length and have thoroughly perused the record. The properties having come in the hands of Beni Ram after partition being ancestral and the plaintiffs having share as members of coparcenary were no longer in dispute before us. The findings that the plaintiffs had not been able to prove that their father Beni Ram was a drunkard, gambler and satoria and the alienations made by him were not invalid on that account was also not challenged before us. It may be mentioned at the outset that the very approach of the High Court in considering transaction Ex. 48 dated April 22, 1948 as well as all the other transaction of February 11, 1953 being part of the same transaction, is not correct. It is necessary to examine each transaction independently and then to arrive at a conclusion whether such a transaction or alienation can be held to be a valid or not. The High Court also committed an error in examining the transaction as if the same were without consideration and on that account treating the transactions invalid, though no such plea was raised by the plaintiffs even in the plaint. The alienations were challenged by the plaintiffs only on the ground of being without legal necessity and not for the benefit of the estate and further tainted with immorality on the ground of their father Beni Ram indulging in the vices of drinking, gambling and satoria.

21. Mulla in "Principles of Hindu Law" (15th edn.) in paragraph 295 has dealt with the question of sale or mortgage of coparcenary property for payment of antecedent debt as under :

> "The father of a Joint Hindu Family may sell or mortgage the joint family property including the son's interest therein to discharge a debt contracted by him for his own personal benefit, and such alienation binds the sons, provided - (a) the debt was antecedent to the alienation, and (b) it was not incurred for an immoral purpose.
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> The validity of an alienation made to discharge an antecedent debt rests upon the pious duty of the sons to discharge his father's debt not tainted with immorality. The more circumstance, however, of a pious obligation does not validate the alienation. To validate an alienation as to bind the son, there must also be an antecedent debt. Generally, there is no question of legal necessity is such a case. 'Antecedent debt' means antecedent in fact as well as in time, that is to say, that the debt must truly independent of and not part of the transaction impeached. A borrowing made on the occasion of the grant of a mortgage is not an antecedent debt.
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> To constitute a debt an "antecedent" debt it is not necessary that the prior and subsequent creditors should be different persons. All that is necessary is that the two transactions must be dissociated in time as well as in fact."

22. It is thus clear that where the sons are joint with their father, and debts have been contracted by the father even for his own personal benefit, the sons are liable to pay the debts provided they were not incurred for an immoral or illegal purpose and such debts were antecedent to the alienations impugned.

23. The liability to pay the debts contracted by the father, for his own benefit, arises from an obligation or religion and piety which is placed upon the sons under the Mitakshara law to discharge the father's debt, where the debts are not tainted with immorality. In any event an alienation by the manager of the Joint Hindu Family even without legal necessity and not tainted with immorality but for his personal benefit would be voidable and not void.

24. Now, we shall examine all the transaction which took place on February 11, 1953. So far as Ex. 49 dated February 11, 1953 is concerned, it is reconveyance deed by which an amount of Rs. 5500 was alleged to have been returned to Narayan Dass and the possession of the properties mentioned in the conditional sale deed dated April 22, 1948 were handed back to Beni Ram. This transaction was admittedly for the benefit of to only Beni Ram but other members of his family including the plaintiffs. Another document executed on February 11, 1953 is Ex 40 by which Beni Ram and his four sons sold the house property and agricultural land of survey Nos. 3 and 18 in favour of Manibhai. The consideration of this sale deed is Rs. 55000 and it was this amount which was repaid to Narayan Dass for getting the reconveyance deed Ex. 49. Narayan Dass being the brother of Manibhai, it can be understood that no amount in fact may have reached the hands of Beni Ram by these two transactions of Ex. 49 and Ex. 40, but it becomes clear that the reconveyance deed Ex. 49 could have been executed only when Rs. 5500 were returned to Narayan Dass and this amount could have only come by executing a sale deed Ex. 40 in favour of Manibhai. If we look at the matter from another angle, it is abundantly clear that on April 22, 1958 when conditional sale deed was executed by Beni Ram on his own behalf and two minor sons, he was paid Rs. 5500 by Narayan Dass. This is not the case of the plaintiffs that Ex 48 was without consideration or that Beni Ram did not receive Rs. 5500 when it transaction took place. We accept the finding of the High Court that this amount of Rs. 5500 was taken by Beni Ram of his business i.e. for his own personal benefit and not for any legal necessity or benefit of the joint family. Even then the sale transaction Ex. 40 dated February 11, 1953 for a consideration of Rs. 5500 in respect of house No. 82 and agricultural lands

Nos. 3 and 18 is valid as such transaction was made for payment of an antecedent debt of Rs. 5500 which was taken by Beni Ram on April 22, 1948. Neither plaintiffs nor Beni Ram have come forward with the case that for reconveyance deed Ex. 49 the amount of Rs. 5500 was repaid to Narayan Dass in any other manner except the transaction Ex. 40 dated February 11, 1953. The transaction Ex. 40 dated February 11, 1953 is valid and binding on the plaintiffs as it was made in order to pay the antecedent debt of Beni Ram taken on April 22, 1948 and getting the reconveyance of the property vide Ex. 49.

25. In Raja Brij Narain v. Mangla Prasad case (AIR 1924 PC 50 : 51 IA 129) it has been laid down that antecedent debt means "antecedent in fact as well as in time i.e. to say, that the debt must be truly independent and not part of the transaction impeached."

26. Applying the above dictum also to the facts of the case in hand before us, it is clear that the amount of Rs. 5500 taken by Beni Ram by way of transaction dated April 22, 1948 was antecedent in fact as well as in time of the transaction of February 11, 1953 which have been impeached by the plaintiff. By no stretch of imagination the transaction of April 22, 1948 can be said to be a part of the transaction impeached. It makes no difference if Manibhai was the bother of Narayan Dass and the consideration paid by Manibhai of the transaction Ex. 40 may have gone to Narayan Dass for getting the reconveyance deed Ex. 49 or may have come back to Manibhai himself as Manibhai and Narayan Dass were running some business jointly in a shop from where this money may have come. Even if for argument's sake we may accept the contention of Mr. R. K. Garg learned counsel for the plaintiffs that no money actually came in the hands of Beni Ram while executing Ex. 49 and Ex. 40 on February 11, 1953, it will not make any difference inasmuch as Beni Ram was required to return the amount of Rs. 5500 taken by him of April 22, 1948 and transactions. Ex. 49 and Ex. 40 were truly independent transactions to pay the antecedent debt of April 22, 1948. The High Court has unnecessarily imputed the allegation of collusion on the defendants to hold their transactions invalid. There could not have been any collusion unless Beni Ram, father of the plaintiffs may have joined hands with the defendants from the very beginning i.e. April 22, 1948 when he took an amount of Rs. 5500 as a consideration for executing a conditional sale deed. There is nothing on record to infer such conduct on the part of defendants; on the other hand conduct of Beni Ram shows that he is all out in superheating his sons and to save the joint family property and to get the alienations declared invalid. The trial Court and the High Court both have recorded a finding against the plaintiffs that Beni Ram was not indulged in the vices of gambling, drinking and satta, and alienations were not valid on that account.

27. Hemraj PW 1, one of the plaintiffs have appeared in the witness box but he nowhere stated that Ex. 48 was illegal in any manner. On the contrary he stated that his father had said to him that he had taken loans and had to pay the same. These loans were taken from Narayan Dass Sale deed conditional dated April 22, 1948 was shown and he admitted that it contained his father's signature on it. Narayan Dass has appeared as DW 1 and he clearly stated that he knew defendant 9 and he had loaned to him Rs. 5500 for his grain business vide Ex. 48. It was conditional sale dated April 22, 1948. He further paid him back the money of Rs. 5500 as received from Manibhai and deposited Rs. 3745 on February 11, 1953 out of the consideration received from Vithoba. In further cross-examination he stated that the account showed that on February 10, 1953 Rs. 5500 were credited in it as paid by Manibhai on behalf of Beni Ram. This was the consideration of Manibhai's purchase of the property from Beni Ram. It was pertinent to mention that even the High Court in its judgment observed as under :

> "As we pointed out Ex. 48 itself is the first alienation and there is no debt with is

antecedent to February 28, 1948 which can support Ex. 48. though Ex. 40 dated February 11, 1953, can be said to be an alienation for the purpose of discharging a debt or liability due under Ex. 48, as we shall presently show if the liability created or incurred under Ex. 48 is not binding upon the minor coparcener and sons of Beni Ram then Ex. 48 also will not be binding upon them."

28. The High Court further observed in this regard as under :

> "In the present case, as we have pointed out it is with the alienation of the property that the father has started a new business, which he had no right to impose the risk and liability upon the minor members. If the business which Beni Ram, therefore, started were a new business and which he had no right to start so as to expose the interest of the minor coparceners in the family property, then we do not see how Ex. 48 can be supported on the ground either of legal necessity or benefit to the estate. If Ex. 48, therefore, is a transaction which the father was not entitled to enter into and expose the family property to the risk, then we think that Ex. 48 fails and cannot be held to be a valid and binding transaction upon the alienates then the transaction of February 11, 1953, first of reconveyance and then of a sale, evidenced by Exs. 49 and 40 also must fail and cannot be supported".

29. The above observations made by the High Court clearly go to show that the High Court was considering the validity of the transaction of Ex. 48 itself on the touchstone of its binding nature on the basis of any legal necessity or for the benefit of the estate of the joint family. The High Court in this regard committed a clear error in assuming and treating the transaction of April 22, 1948 as a part and parcel of transactions of February 11, 1953. As a matter of fact the transactions of Ex. 49 and Ex. 40 dated February 11, 1953 were independent but rather to pay the antecedent debt of April 22, 1948.

30. Mr. Garg learned counsel for the plaintiff-respondent contended that the transaction of conditional sale deed dated April 22, 1948 was void for want of legal necessity inasmuch as starting of a new business by Beni Ram did not constitute legal necessity. It was also contended that in any case after the execution of reconveyance deed Ex. 49 there was no antecedent debt that may have survived. The reconveyance deed Ex. 49 does not mention receipt of money from the vendee for repayment of the any antecedent debt Ex. 40 sale deed in favour of Manibhai was subsequent to reconveyance deed Ex. 49 and the alleged payment by the vendee before the Registrar do not constitute payment for any independent antecedent debt which in fact and in reality existed on February 11, 1953. Strong reliance is placed on Benares Bank Limited v. Hari Narain (59 IA 300 : AIR 1932 PC 182).

31. We do not find any force in the above contention of Mr. Garg. We have already discussed in detail that the conditional sale deed Ex. 48 dated April 22, 1948 was not void even if the amount was taken by Beni Ram for his personal benefit of starting a new business of grain. It was an independent transaction both in fact as well as in time to the subsequent transaction of February 11, 1953. The transaction of reconveyance deed dated February 11, 1953 vide Ex. 49 was for the benefit of not only Beni Ram but for the entire family including the plaintiffs. There were no consideration for this reconveyance of the property except the transaction of sale made in favour of Manibhai on February 11, 1953 vide Ex. 40. Thus sale deed Ex. 40 was perfectly valid was made in order to pay the antecedent debt of Ex. 48.

32. So far as Benares Bank Limited v. Hari Narain case (59 IA 300 : AIR 1932 PC 182) is concerned, it did not lay down any proposition against the conclusion arrived at by us. In the above case the appellant-Bank had instituted a suit against the members of Joint Hindu Family governed by the Mitakshara Law to recover the balance due on and mortgage of joint family property to secure an advance of Rs. 28,000. The mortgage deed was executed by Jagdish Narain and Raghubir Narain each on behalf of his minor sons; the adult sons of Jagdish Narain were also joined in the deed. The deed recited that the advanced was required to pay off two earliest mortgages and to carry on the mortgagor's business. Only the respondents, who were minors at the date of the mortgage, appeared to defend the suit. The trial Judge passed a preliminary decree for sale for the sum claimed. On appeal the High Court of Allahabad held that the mortgage was valid only as to Rs. 18,000 which sum had been used to discharge antecedents debts. As to the remaining sum of Rs. 10,000 they found it had not been proved that the alleged debt of Rs. 6342 existed, and that the business for the purpose of which the balance of Rs. 3658 had been applied was not ancestral business, and that, therefore there was no authority to bind the minor members in respect of it. On further appeal their Lordships of the Privy Council held that the mortgage as regards the item of Rs. 6342 must be deemed to have been made for the payment of an antecedent debt of Jagdish Narain and Raghubir, and it was, therefor, binding upon their sons. As regards the item of Rs. 3658 their Lordships found that this amount was borrowed for the Thika business. Their Lordships after examining the evidence in this regard held that the business was started by Jagdish Narain and Raghubir Narain as managers of the family. A business, therefore, cannot be said to be ancestral so as to render the minors' interest in the joint family property liable for the debt. Their Lordships did not agree with the argument that a business started by a father as manager, even if new, must be regarded as ancestral. Thus it was held that the mortgage as to Rs. 3658 being neither for a necessity recognised by the law nor for the payment of an antecedent debt was wholly invalid under the Mitakshara law, as applied in United Provinces and it did not pass the share even of the alienating coparceners. Thus in the above case their Lordships considered the mortgage as not binding only to the extent of Rs. 3658 which amount was given by the bank by the transaction in dispute itself. In the case in hand before us the facts are entirely different and as we have already observed, an amount of Rs. 5500 was taken by Beni Ram in 1948 and if the same was paid back by transaction Ex. 40 dated February 11, 1953, then it would certainly be a valid transaction for making the payment of an antecedent debt.

33. In Irukulapati Venkateswara Rao v. Vemuri Ammayya (AIR 1939 Mad 561 : (1939) 1 MLJ 493) it was held as under : (AIR p. 563)

> "On the above finding Ex. A would prima facie be binding on defendant 2's share as well. But it has been contended on his behalf that as the debts of defendant 1 were incurred by him in connection with a trade started by himself, when trade was not the normal occupation of the family, the debts must be held to be avyavaharika debts and as such not binding on the son. The learned counsel for the appellant submitted that his contention was opposed to the decision in Nidavolu Atchutaramayya v. Ratanjee Bhootaji (ILR (1926) 49 Mad 211 : AIR 1926 Mad 323); but he argued that it is supported by the decision of the Privy Council in Benares Bank Limited v. Hari Narain (59 IA 300 : AIR 1932 PC 182). We find nothing in Benares Bank Limited v. Hari Narain (59 IA 300 : AIR 1932 PC 182) that supports this argument. Their Lordships there decided only the question of the binding character of the mortgage as such on the footing that moneys had been borrowed contemporaneously with the mortgage for the purpose of carrying on a trade started by the father. They declined to deal with the question of the son's liability for the debt under the pious obligation

> doctrine, on the ground that the question had not been raised in the court in India."

34. A bench of three Judges of the Supreme Court in Luhar Amrit Lal Nagji v. Doshi Jayantilal Jethalal (AIR 1960 SC 964 : (1960) 3 SCR 842) has already held that the doctrine of pious obligation under which sons are held liable to discharge their father's debts is based only on religious considerations. This doctrine inevitably postulates that the fathers debts must be vyavaharik. If the debts are not vyavaharik or are vyavaharik the doctrine of pious obligation cannot be invoked.

35. Their Lordships quoted with approval the five propositions laid down by the Privy Council in the case of Brij Narain v. Mangla Prasad (AIR 1924 PC 50 : 51 IA 129). Dealing with Suraj Koer case (Suraj Bunsi Koer v. Sheo Persad Singh, 6 IA 88 (PC) : ILR 5 Cal 148) they observed as under : (AIR p. 970)

> "We have carefully considered this matter and we are not disposed to answer this question in favour of the appellants. First foremost in cases of this character the principle of stare decisis must inevitable come into operation. For a number of years transactions as to immovable property belonging to Hindu families have taken place and titles passed in favour of alienees on the understanding that the propositions of law laid down by the Privy Council in the case of Suraj Koer (Suraj Bunsi Koer v. Sheo Persad Singh, 6 IA 88 (PC) : ILR 5 Cal 148), correctly represent the true position under Hindu law in that behalf. It would, we think, be inexpedient to reopen this question after such a long lapse of time."

36. It was further observed in the above case : (AIR p. 970)

> "It is also well known that, in dealing with questions of Hindu law, the Privy Council introduced considerations of justice, equity and good conscience and the interpretation of the relevant texts sometimes was influenced by these considerations. In fact, the principles about the binding character of the antecedent debts of the father and the provisions about the enquiry to be made by the creditor have all been introduced on considerations of equity and fair play. When the Privy Council laid down the two propositions in the case of Suraj Bunsi Koer (Suraj Bunsi Koer v. Sheo Persad Singh, 6 IA 88 (PC) : ILR 5 Cal 148) what was really intended was to protect the bona fide alienees against frivolous or collusive claims made by the debtors' sons challenging the transactions. Since the said propositions have been laid down with the object of doing justice to the claims of bona fide alienees, we do not see any justification for disturbing this well established position on academic considerations disturbing this well established position on academic considerations which may perhaps arise if we are to look for guidance to the ancient texts today. In our opinion, if there are any anomalies in the administration of this branch of Hindu Law their solution lies with the legislature and not with the courts. What the commentators attempted to do in the past can now be effectively achieved by the adoption of the legislative process. Therefore, we are not prepared to accede to the appellants' argument that we should attempt to decide the point raised by them purely in the light of ancient Sanskrit texts."

37. In Venkatesh Dhonddev Deshpande v. Sou. Kusum Dattatraya Kulkarni ((1979) 1 SCC 98 : (1979) 1 SCR 955), this Court clearly laid down as under : (SCC. 108, para 14)

> "Assuming we are not right in holding that the debts was for the benefit of the estate of the joint family and, therefore, a joint family debt, and assuming that Mr. Bal is right in contending that it was the personal debt of the father's debt yet the doctrine of pious obligation of the son to play the father's debt would still permit the creditor to bring the whole joint family property to auction for recovery of such debts. Where the sons are joint with their father and debts have been contracted by the father provided for his personal benefit, the sons are liable to pay the debts provided they were not incurred for an illegal or immoral purpose. This liability to pay the debt has been described as pious obligation of the son to pay the father's debt not tainted with illegality or immorality. It was once believed that the liability of the son to pay the debts contracted by the father, though for his own benefit, arises from an obligation of religion and piety which is placed upon the sons under the Mitakshara law to discharge the fathers debts where the debts are not tainted with immorality, yet in courses of time this liability has passed into the realm of law."

38. Thus we also hold that even if any loan is taken by the father for his personal benefit which is found as vyavaharik debt and not vyavaharik, the sons are liable to discharge their father's debt under the doctrine of pious obligation and in this view of the matter if any alienation of the joint family property is subsequently made to discharge such antecedent debt or loan of the father, such alienation would be binding on the sons.

39. Now, so far as the house property is concerned, the same was subsequently sold by Manibhai to defendants 4 to 8. The defendants 4 to 8 demolished the house and by spending an amount of Rs. 25,000 constructed a new house much before the filing of the present suit. The issue No. 10 was framed in this regard and the trial court gave a categorical finding that the defendants 4-8 had proved that they had spent Rs. 25,000 on the reconstruction of the house within knowledge of plaintiffs 1 and 2 after his purchase from defendant 1 and still none had objected or noticed them against it. In this view plaintiffs 1 and 2 and defendant 9 would be estopped from challenging the title of defendants 4 to 8 now. The High Court also did not set aside the above finding and as such we uphold the finding of the trial court in this regard.

40. Now, so far as the transactions Ex. 41 and Ex. 49, 42(61) are concerned, they stand on a different footing altogether. By Ex. 41 part of agricultural field survey No. 1 measuring 10.69 acres had been sold by Beni Ram and his four sons to Vishwanath and Vithal Rao for a sum of Rs. 5345. By another transaction vide Ex. 42(61) Beni Ram and his sons sold one acre of agricultural land of survey No. 1 and 8.40 acres of survey No. 19 in favour of Vithal Rao and Vishwanath for a sum of Rs. 3000 on July 19, 1954. The High Court in this regard has recorded a clear finding that the aforesaid alienations were made neither for any legal necessity nor for the benefit of the estate not for payment of any antecedent debt. We have also gone through the evidence in this regard and we are fully convinced that the aforesaid transaction had no connection with Ex. 48 or to pay any other antecedent and we agree with the finding of the High Court in this regard.

41. The net result of the above discussion is that this appeal is allowed in part. The judgment and decree passed by the High Court is set aside to the extent of granting a decree from possession of the house property and agricultural lands survey Nos. 3 and 18 sold in favour of Manibhai vide Exs. 40 dated February 11, 1953 and the suit with regard to these properties is dismissed. The rest of the judgment and decree of the High Court in respect of agricultural lands survey Nos. 1 and 19 which were alienated in favour of Vithal Rao and Vishwanath, defendants 2 and 3 vide Exs 41 and 42(61) is maintained and the suit of the plaintiffs for possession with regard to these properties stands

decreed.

42. In the facts and circumstances of the case, the parties shall bear their won costs.

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