ALLAHABAD HIGH COURT

Bankey Lal

Vs.

Durga Prasad

(Mukerji and Bennet, JJ.)

13.04.1931

ORDER

Mukerji and Bennet, JJ.

1. This appeal arises out of insolvency proceedings and under the following circumstances. The f acts will have to be gone into in some detail.

2. The following pedigree will show the relationship that exists between the insolvent and the app ellants.

3. The family was a joint family and possessed a large amount of property. We are told that Bank ey Lal, one of the sons of Lachhman Prasad, was mentally weak, and we do not find him figuring in any of the transactions with which the several applications in insolvency deal. On 30th August 1923, Lachhman Prasad and his sons, other than Bankey Lal, presented a joint application in the insolvency Court to be declared insolvents. Their application was that in spite of doing their best they were unable to pay certain debts, and they were anxious to place their entire property in the hands of the Court for payment of their debts. On 7th September 1923, the four applicants were t old to make independent applications for insolvency. The applicants thereupon presented three ot her applications on 29th September 1923, and the original application was allowed to stand as the application of Lachhman Prasad alone. The first application was numbered as Case No. 43 of 19 23, and the subsequent applications were numbered as 49 to 51 of 1923. Munna Lal's case is No. 49, Jwala Prasad's case is No. 50 and Asharfi Lal's case is No. 51. The four applicants are adjudic ated insolvents on 26th October 1923.

4. Before the separate applications were presented, on 6th September 1923, a suit for partition of the family property was presented by the three sons of Jwala Prasad, who were all minors at the d ata of the suit. An ex parte partition decree was made on 8th October 1923. A final decree was m ade on 13th February 1924. By this decree, the family property was divided up into four lots. On e lot was given to the plaintiffs, another lot was given to Bankey Lal and his sons, Priyanath got a third lot and the rest of the property was allotted jointly to Lachhman Prasad and his three sons, Asharfi Lal, Munna Lal and Jwala Prasad. It is noteworthy that all the persons who were given se parate shares, were all minors except Bankey Lal.

5. The four insolvency cases were consolidated apparently on the principle of the rule in Section 15, Provincial Insolvency Act, and the orders were passed in Case No. 49 of 1923. The receiver s old the properties which had been allotted to the four insolvents, Lachhman Prasad, Asharfi Lal, Munna Lal and Jwala Prasad, and then proceeded to seize the property of the nine appellants, na mely Bankey Lal and his minor sons and the minor sons of Munna Lal and Jwala Prasad. (We m ay note that Asharfii Lal has no son.) Thereupon an objection was filed on behalf of the appellant to the effect that their properties were not liable to be taken in payment of the debts of the insolv ents.

6. As we have said, the family was a joint one, and the joint application that was presented to the Court covered the entire family property and all the debts payable by the family. When the applic ations were separated the original application was left in tact except for this: that the name of the sons of Lachhman Prasad were removed from the heading of the application. In the other applica tions the applicants stated that their property was l/5th in the list of properties submitted in Lachh man Prasad's application and that their debts were l/5th of the debts to be found in the list submitt ed with Lachhman Prasad's application. There can therefore be no doubt that the entire debt was j oint family debt, and the entire property, which the applicants wanted to hand over to the insolve ncy Court, was the joint family property. So far therefore the applicants had no desire to take awa y any portion of the joint family property from the jurisdiction of the Court, for the purpose of sal e, to pay the debts.

7. In some of the debts in this case, the father alone figures as the debtor and in other oases some of the sons carrying on business, namely Asharfi Lal, Munna Lal and Jwala Prasad, figure as the debtors with or without the father as a co-
debtor. All these debts were acknowledged by Lachhman Prasad as his debts and the three sons o f Lachhman Prasad who joined him in the original application for insolvency accepted their liabil ity for the debts. We may therefore take all the debts to be paid by the family as the debts of the f ather Lachhman Prasad.

8. The learned District Judge on the objections of the appellants held that their shares in the famil y property were liable to be sold to pay what was virtually the joint family debt incurred by the fa ther, and he accordingly dismissed the petition of objection.

9. In this Court, it has been contended that after the partition the shares of the appellants were not liable to be taken by the creditors of the family. It was further argued that if the appellants' shares were at all liable to be taken they could be taken by virtue of separate proceedings, but certainly not in the insolvency proceedings. Reliance has been place on a Full Bench case of the Madras H igh Court, In the matter of Balusami ayyar, AIR 1928 Madras 735, in which two learned Judges (the third Judge dissenting) took a view similar to the view contended for on the appellants' behalf .

10. The question that arises for determination is a question of law, and it is:

> If the members of a joint Hindu family governed by the Mitakshara law choose to divide t he family property and to separate without making Any arrangement for the payment of th

e family debts, whether the receiver in insolvency, the head of the family, the father, being declared an insolvent, is entitled to proceed against the shares of the sons and grandsons i n the joint Hindu family property for the purpose of payment of the joint family debts.

11. A Full Bench of five Judges has held in this Court that the insolvency of the father of a joint Hindu family does not release the shares of the joint sons from liability to pay the father's debts a nd the receiver can proceed" against the sons shares by enforcement of the father's right to bring t he family property to sale to pay his own debts, it being always provided that the debts are such a s a pious Hindu son is liable to pay.

12. As for the question whether a partition of the family property made by the father and sons, wi thout providing for the payment of the family debts, would put a stop to the right of the creditor t o proceed against what was once the joint family property has been answered differently by differ ent Benches in this Court. In the case of *Kishan Sarup v. Brijraj Singh1,* one of us was clearly of opinion that the right of the creditor is not extinguished by such partition. The learned Judge who composed with one of us the Bench decided the case on a slightly different point, he being of opi nion that the partition itself was not bona fide one. This case professes to follow the Madras rulin gs in which it was definitely held that the creditor's right to proceed against the family property is not impaired. The Madras High Court upheld their own view in the Full Bench case of *Subrama nia Ayyar v. Sabapathy Aiyar2* The members of the present Bench are agreed that the view taken by one of them in *Kishan Sarup v. Brij Raj Singh* was the proper view to take of the liability of th e sons' shares.

13. In the case of *Ramsaran Das v. Bhagwan Singh3,* two learned Judges held that the creditor co uld not proceed against the divided property. The decision was mainly based on the ground that t he simple money creditor had no charge on the family property. It ignores the principles on whic h son's liability is based. In *Gaya Prasad v. Murlidhar4,* another Bench consisting of two other le arned Judges held that the members of a joint family could deliberately enter into a partition in or der to avoid a creditor of the family proceeding against the shares of the sons and in order to com pel him to confine his remedy against the share of the father alone.

14. The aspect of the case that strikes us as most important is this. To put it by way of a homely il lustration:

> Till yesterday, the family was joint and the creditor of the father could enforce his claim a gainst the whole family property. Today, the father and the sons sit down together and dec ide that they would cut down the credit of the father, not only in future but with retrospecti ve effect, that they would cut down the remedy of the creditor and with that view agree to divide the family property and decide to leave the question of the debts untouched. When the creditor wants to enforce his remedy against the property, the sons tell him that they h ave divided the property, the father has got nothing but, say, a fifth share, and the creditor may proceed against that share if he chooses.

1 AIR 1929 All 726 : (1929) ILR 51 All 932 : 121 Ind. Cas. 257
2 A.I.R. 1928 Mad. 657.
3 AIR 1929 All 775
4 AIR 1927 All 714 : (1928)ILR 50 All 137

15. Is this fair, is this right? An honest division of the family property would involve a division of

the family debts as well. If this be done, no difficulty will arise. But how, on what principle, a mutual arrangement among those, who were only "the debtors" till yesterday could defeat the remedy of the creditor, who is no assenting party to the division of the property? It is true the simple creditor has no charge on the property. But he did lend the money to the father on the credit of the entire family property.

16. When the law-
givers of old decided to give the sons a share in family property, the moment they were born, they realized that this giving of the share to the sons meant the reduction of the credit of the head of the family to the extent of the share of the sons; nay, it was more; for nobody could know when another male member would be born in the house and would further reduce the credit of the head of the family. The law-
givers, therefore, invented the doctrine of pious duty, by which the father's credit and therefore his debts became secure so long as there was any property left in the family. Nay, the old Hindu law was that the sons must pay their father's debt, whether or not they got any property of the father. Under the Hindu notion, all just debts must be paid. If we should now say that the division of the property by the debtors themselves should, for all practical purposes, nullify the debts, shall we not be killing the spirit of the Hindu law.

17. As already indicated, an honest division in the family cannot harm the creditors. All just debts would be divided and instead of a single debtor, there would be so many. The available property would be the same. After a partition of property has taken place, the father's credit would be reduced and thereafter, nobody would lend him money which could not be paid out of the father's share in the property. If anyone did make a larger advance, he would do so at his own risk. But all debts incurred on the credit of the family property must be paid out of the family property.

18. With all respect, we find ourselves in disagreement with the last mentioned two cases and are of opinion that the matter should go for decision before as large a Bench as may be possible, as the matter is very important and affects all the joint Hindu families in the province of Agra who may become subject to the insolvency laws and also their creditor.
19. Another question remains and it is this:

> Supposing it is held by the Full Bench that a creditor may proceed by suit against the sous' shares even after partition to recover what was joint family debts incurred by the lather, can the receiver in insolvency proceedings enforce the father's remedy without recourse to suit?

20. As we have stated at an earlier portion of this judgment, the Full Bench case of the Madras High Court: In the matter of Balusami ayyar (1), has negatived the receiver's right, although the right of a creditor to proceed by suit has been approved. It will be desirable that the Full Bench before whom this case goes should also express an opinion as to the power of the Official receiver to proceed in insolvency proceedings against the separated sons and grandsons' shares, in case it is held by the Full Bench that a creditor has a right to proceed by suit against the sons' shares in the circumstances indicated.

21. We think it desirable to draw the attention of the Fall Bench to the difference in the language

between Section 4, Provincial Insolvency Act, and Section 7, Presidency Towns Insolvency Act, as regards the jurisdiction of the insolvency Court to decide questions of title. This question may have some bearing on the decision to be given, because the Madras case: In the matter of Balusa mi ayyar (1), was dealing with the Presidency Towns Insolvency Act.

22. The questions therefore referred to the Full Bench are as follows:

> 1. If the members of a joint Hindu family governed by the Mitakshara law choose to divid e the family property and to separate without making any arrangement for the payment of the family debts, whether a creditor of the father is entitled to proceed against the separate d shares given to the sons and grandsons of the father, to enforce the payment of the debt, it being taken for granted that the debt is one which it is the pious duty of the sons and gra ndsons to pay?
> 3. Whether in the circumstances mentioned in question No. 1 the receiver in insolvency of the father can proceed in the insolvency proceedings without recourse to a suit against the shares received by the sons and grandsons in the partition (the debt being one which it is t he pious duty of the sons and the grandsons of the insolvent father or grandfather to pay t he same)?
> 4. Whether in the circumstances described in question No. 2 it is open to the receiver in th e case of insolvency of the principal members of the family to seize the property received by the other members of the family not declared insolvent, to pay the family debts?
> 5. When the managing member of a joint Hindu family is adjudicated an insolvent on deb ts contracted as managing member, and other members of the joint Hindu family bring a s uit for partition, subsequent to the application in insolvency, does the decree for partition prevent the receiver from selling property allotted to members of the family other than the insolvent?

23. We direct that the record of the case be laid before the Hon'ble the Chief Justice for the forma tion of the Bench.

Sulaiman, Ag. C.J.

24. Five definite questions have been referred to this Full Bench. They are as follows:

> 1. If the members of a joint Hindu family governed by the Mitakhshara law choose to divi de the family property and to separate without making any arrangement for the payment o f the family debts whether a creditor of the father is entitled to proceed against the separat ed shares given to the sons and grandsons of the father, to enforce the payment of the debt , it being taken for granted that the debt is one which it is the pious duty of the sons and gr andsons to pay?
> 2. Where a simple money debt binding on the entire family remains unpaid and the memb ers of the family entered into a partition without making any provision for the payment of the family debt, whether the creditor may enforce payment of his debt by proceeding agai

nst the properties received by partition by the several members of the family?

3. Whether in the circumstances mentioned in question No. 1 the receiver in insolvency of the father can proceed in the insolvency proceedings without recourse to a suit against the shares received by the sons and grandsons in the partition (the debt being one which it is t he pious duty of the sons and grandsons of the insolvent father or grandfather to pay the s ame)?

4. Whether in the circumstances described in question No. 2 it is open to the receiver in th e case of insolvency of the principal members of the family to seize the property received by the other members of the family not declared insolvent to pay the family debts?

5. When the managing member of a joint Hindu family is adjudicated an insolvent on deb ts contracted as managing member, and other members of the joint Hindu family bring a s uit for partition, subsequent to the application in insolvency, does the decree for partition prevent the receiver from selling property allotted to members of the family other than the insolvent?

25. The facts are set forth fully in the order of reference. They may be stated briefly as follows:

Lachman Prasad had four sons, Ban-
key Lal, Asharfi Lal, Munna Lal and Jwala Prasad. Three of these, other than Asharfi Lal, have sons. There were a large number of debts due on mortgage deeds, bonds, and promis sory notes. These had been executed by Lachman Prasad and three of his sons, other than Bankey Lal, but all of them had not joined in all the deeds. On 30th August 1923 Lachma n Prasad and his three sons, other than Bankey Lal, applied to be adjudicated insolvents. On a technical objection being raised that there should be separate applications, three mor e applications were filed by the three sons on 29th September 1923.

26. A week after the filing of the original application, namely on 6th September 1923, a suit for p artition of the joint family property was filed on behalf of the minor sons of Jwala Prasad. There was no contest and a preliminary decree for partition was passed ex parte on 8th October 1923. A final decree was passed on 13th February 1924. Four lots were prepared, one going to Bankey L al and his sons, another to the son of Munna Lal, another to the son of Jwala Prasad and the fourt h lot was given to the members who had been the applicants for insolvency, namely, Lachman Pr asad and his three sons Asharfi Lal, Munna Lal and Jwala Prasad.

27. The receiver first sold the property allotted to the four insolvents, but it proved insufficient to pay up the debts. He then proceeded to seize the property of the other members of the family. Th ey objected that in consequence of the partition their shares were not liable. Their objections wer e disallowed by both the Courts below and they appealed to the High Court. The questions of law arising in this appeal have been referred to us.

28. In order to answer the first question it is necessary to bear in mind certain well-
established principles of Hindu law. If the debt is contracted by the father, then, whether he is the manager or not, the Courts below have recognized that there is a pious obligation on his sons to p

ay the debt, even though the debt is a separate debt taken by the. father for his own personal purp ose. There is however no such liability if the debt is tainted with illegality or immorality.

29. The authoritative pronouncement by their Lordships of the Privy Council in the leading case of *Brij Narain v. Man-*
gala Prasad5 has now settled it finally that in a joint Hindu family governed by the Mitakshara la w and consisting of a father and his sons, the whole family property is liable to be seized by the f ather's creditors, whether secured or unsecured, whether the money was borrowed by the father f or his own use or for the benefit of the family, whether the father is alive or dead and whether the sons are minors or adults.

30. The position of the sons when they have separated from their father and taken away their shar es of the family property by partition is in some respects different. As regards debts which have b een incurred by the father before the partition took place and had been for family necessity or be nefit, the liability continues on all the members even after the separation. The reason is obvious. These debts had been incurred by the manager for the benefit of all and. his capacity was analogo us to that of 'an agent. All the other members were therefore principal debtors, but their liability was not personal and was confined to the joint property that may be available. They cannot put a n end to their liability by a private partition of the property among themselves, to which of course the simple money creditor would not be a party. Their separate properties are however safe. If th ese debts were secured or property had been transferred in payment of such family debts such ali enation would stand.

31. Secured debts incurred by the father where there was no family necessity or benefit stand on t he same footing as the unsecured separate debts of the father. The liability of the sons for the pay ment of such debts cannot rest on the power of the manager to bind the family. It must rest solely on the pious obligation of the sons to pay their father's debts. The Courts in India have consistent ly held that the separated sons are not liable to pay debts incurred by their father, subsequent to th e partition, even though they still retain shares in the family property.

32. There is no direct Privy Council case applicable to the liability of a separated son for the pay ment of his father's preparation debts. The cases of *Girdhari Lall v. Kantoo Lal6 Suraj Bansi Koe r v. Sheo Prasad Singh7* and *Nanomi Babuasin v. Madun Mohan8* are all cases of our own High Court which have a bearing on this question, and I shall refer to them later. There has been a cons iderable diversity of opinion in the other High Courts and a recent Full Bench of the Madras Hig h Court has overruled some of its previous cases. I shall discuss this judgment later. There is equa lly a difference of opinion between Patna and Oudh. It is thus clear that if authority were needed for the support of either view there is plenty available.

33. Obviously when a fresh point under the Hindu law arises and one is not bound by any previo us authority, the inclination is not to restrict the liability if such exists under the strict Hindu law, and not to extend it if it does not exist under that law. But a great deal of difficulty is created by r eason of the fact that the law as developed by judicial pronouncements is not exactly identical wit h the strict Hindu law. Bat long series of these decisions are binding upon us and lay down what may be called the Judge-made Hindu law.

5 A.I.R. 1924 P.C. 50 7[1880] 5 Cal. 148
6[1374] 1 I. A. 231, 8[1886] 13 Cal. 21

34. As observed by their Lordships of the Privy Council in the leading case of *Brij Narain v. Man*

gla Prasad9 two seemingly conflicting principles have been allowed to develop. One is the rule t hat the manager cannot burden the estate for his own purpose, and the other is the obligation of t he son to discharge his father's debts based on the doctrine of the pious duty, perhaps reflecting a remnant of the older law under which the son had no interest during the father's lifetime.

35. Their Lordships of the Privy Council again pointed out in *Masit Ullah v. Damodar Prasad10* that the Hindu lawyers made a difference in the obligations resting upon sons, grandsons and gre at grandsons. The son was bound to discharge the ancestral debts as his own, principal and intere st, whether he received any assets or not from the father. The grandsons had to discharge the debt without interest and the great-
grandson's liability arose only if he received any assets from the ancestors. The British Indian Co urts have held that the son and the grandson are not liable for any debt unless they receive assets, and that the obligation of each of them, son and grandson, are co-extensive. The rule ex-
tends equally to great grandsons.

36. A reference to the Mitakshara, part. 1, Ch. 6, Section 3, would indicate how there has been a departure from the strict Hindu law.

37. The son's moral obligation to pay his father's debts was based on his religious duty to save his father's soul from unhappiness in the next world. It followed as a logical consequence that the du ty would arise when the father died and his soul was in jeopardy; or if the father was stricken by disease, or became insane, too old or had been away from the country for a long time, which peri od was fixed at 20 years, his sons should pay his debts. Again there was no pious obligation to pa y the debts while the sons were minors. On the other hand, the obligation was absolute and wholl y irrespective of any assets being received. It is also clear that this pious obligation existed both b efore and after the partition. It is doubtful whether there was any text authorizing an alienation in lieu of antecedent debts, as distinct from legal necessity or pressure. It is also doubtful whether th e mere unequivocal expression of an intention to separate automatically brought about a complet e separation in the joint status of the family. But judicial pronouncements have formulated certain principles of Hindu law in the light of commentaries and of the principles of justice, equity and g ood conscience.

38. The first principle is that the civil liability of a son based on his pious obligation is limited to t he assets received by him in share of the joint family property or to his interest in the joint family property. The second is that this liability is not dependent on the majority of the minor sons. The third is that this pious obligation exists, no matter whether the father is alive or dead, and that the liability accrues immediately and the son is not entitled to wait for the lapse of a long interval of t ime. The liability is confined to the debts incurred previous to partition and does not extend to th ose incurred subsequently. A mere unequivocal expression of the intention to separate when com municated to the other members of the family brings about a legal separation, and a father is entit led to alienate joint family property in lieu of his own antecedent debts even though there may be no actual pressure at the time.

9 at p. 102 (of 46 All.)

10 A.I.R. 1926 P.C. 105

39. In the case before us, where the fathers are alive, the sons are minors, and they have also rece ived assets as a result of the partition, it is to be seen whether it would be a departure from the Hi ndu law as recognized by the Courts if the doctrine of pious obligation ware to be made applicabl

e to the separated sons who have taken away a part of the family property without paying their fa ther's debts.

40. It would be convenient to examine the reasons advanced for and against the son's liability in t he recent Madras Fall Bench case of *Subramania Ayyar v. Sabnapathi Ayyar*.

41. Waller, J., remarked that he could see no reason why a partition should exempt a son's share f rom the 'liability for a preparation debt for which it was liable be-
fore the partition. The creditor advanced money to the father on the credit of the joint family prop erty. Why should ho be deprived of all but a fraction of his security by a transaction to which he was not a party and of which he was not aware.

42. With great respect, this is conceding that a simple debt creates no charge and yet applying all the incidents of a charge to it. Similarly, the learned Judge remarked:

> I conceded that it does not attach to post-
> partition debts, but, I am unable to see why a partition should have the effect of detaching it from preparation debts.

43. Such an argument implies that there is a charge or a lien on the property.

44. Jackson, J., observed:

> A creditor may well say, I took the risk such as it was, of an alienation for family necessit y, but I never expected to be confronted with a partition, undertaken voluntarily and under no necessity, which has resulted in my debtor having only a fraction of the assets previou sly available.

45. But was there necessarily any reasonable expectation? The father might him- -
self have transferred his property which could not be followed by the simple money creditor, and similarly the separated son can transfer it before it is attached. The creditor has nothing to compla in in the one case more than in the other.

46. Similarly, Ayyangar, J., thought that it is difficult to see on what principle the creditor would l ose that right simply because subsequently the father and the sons effected the partition among th emselves. The learned Judge has, on p. 416 however referred to the Hindu law texts prescribing t hat the debts of the father should be paid at the time of the partition and only what is left should b e divided. I shall take up this question in detail later on.

47. On the other hand, Ayyar, J., proceeded on the supposition that it was not a pious obligation o f the Hindu son to pay his father's debt, but rather the power of the father to sell the family proper ty in payment of his debts, which should be made the basis of the liability. The learned Judge con cluded:

> though the father's power of alienation and the creditor's right to proceed against the son's

share are both based on the pious obligation of the son, still on a partition, what is put an e nd to is only the right of the father to alienate and not the right of the creditor.

48. The reply may be that the Hindu law texts based the liability on the pious obligation itself and not on the father's power to sell the son's share, and that their Lordships of the Privy Council als o in all their pronouncements have put the liability on the same basis.

49. Coutts-
Trotter, C.J., agreed generally with the reasons given by Ayyangar, J., and only added that the do ctrine of pious obligation is an illogical relic of antiquity unsuited to any but a primitive and patri archal society and therefore we must apply it within the limits made binding upon us by decision s, and further agreed that a father has power to alienate or charge any part of the property in lieu of his debts and the creditor's right is nothing but a right to exercise such power over the property .

50. I may, without meaning any disrespect, say that similar lines of reasoning have been adopted in the cases of the other High Courts which have been brought to our notice. As they are not bind ing upon us it is not necessary to discuss them in detail.

51. It seems to me that the true solution of the difficulty can be found if we consider the rights of a Hindu son to claim a partition of the joint property.

52. In none of the cases that have been cited before us there was any attempt made to base the lia bility on the nature of the partition itself. There was a brief reference to this matter in the judgme nt of Ayyar, J., at p. 416 of the Madras judgment quoted above. It has always been conceded that a collusive and fraudulent partition, whether it is private or by means of a decree of Court carried out With the intent to defraud, defeat or delay creditors, is not binding on such creditors; and that the son's liability Continues for the father's simple debts even after such partition so long as any part of the family property remains in their hands. It has also been stated that a mala fide partition is not effective. But attention has not been focused on the question what is a bona fide partition.

53. Sometimes it has been assumed that as soon as the separation in status takes place, either by a very clear and unambiguous expression of an intention to separate communicated to the other m embers or otherwise, the sons not only become owners-in-
common holding their legal shares in the gross assets but their liability to pay their father's debts also ceases. It has been assumed that it is the right of a separating member to take away his legal share in the gross assets of the family ignoring the simple money debts that may be due from the father. Even if the intention of the family be to give away shares to sons in order to enable them t o defeat the claim of the simple money creditors of the father, it has been held at least in one case that the partition is effective to destroy the claims of such creditors. This position is utterly unten able.

54. A bona fide partition can only mean a Partition which is not only fair with regard to the share s of the members of the family, but is bona fide as regards the creditors also. For the partition to b e bona fide either all the existing debts of the father, which are not tainted with illegality or immo rality, should be discharged before the division of the property takes place or at any rate adequate

arrangements for their payment should be made. This may be done by dividing the assets as well as the liability among all the members, or by allotting sufficient property to the father in the first instance to satisfy all his debts, together with interest, which his creditors can claim within a reas onable time, and then giving him his legal share in the remainder on a par with his sons.

55. If the family sits down to divide up the gross assets without making any arrangement for the payment of the outstanding debts it is obviously ignoring the claims of the creditors. Such a partit ion cannot but be a mala fide one.

56. It has sometimes been thought that a Hindu son has an absolute power not only to claim a sep aration but also to get his legal share in the gross family assets without paying off the debts due b y the father in the first instance. Judged from the point of view of the Hindu law such an assumpt ion is a pure misconception.

57. Dr. Ganga Nath Jha, in his learned treatise on the " Hindu Law in its sources," Vol. 1, p. 202, onwards has quoted at one convenient place texts from ancient Hindu sacred books dealing with t he liability of the son to pay his father's debts.

> What is left after the discharge of the father's debts shall be divided by the brothers, so tha t the father may not remain a debtor; (Narad, 13, 32, vide, also Jolly's Translation. edited by Maxmuller Ch. 13, para. 32, p. 94).

58. Dr. Jha has quoted a text of Katyayana and translated it as the sons shall pay off the debts and the gifts promised by the father and divide the remainder among themselves (Katyayana).

59. It may be noted here that perhaps owing to a defective manuscript this text was incompletely translated by Cole-
brooke in his "Digest of the Hindu law" Book 5, Ch. 6, Section 1, para. 369, p. 479, as After deli vering what is due as a friendly gift promised by the father, let the remainder be divided among t he heirs.

60. Apparently the Sanskrit word corresponding to the word " debts " had either been left out in t he manuscript by mistake or was omitted in the translation. Colebrooke quotes another text of Ka tyayana in para. 368 of the same chapter, p. 478:

> On a partition by coheirs, all the wealth left by their father, or by his father and what they themselves have acquired by their joint efforts, shall be divided among them.

61. There are other texts from Katyayana also quoted by Dr. Jha. On p. 206 of his treatise we hav e another text:

> On the father's death, so long as his debts remain unpaid, the sons receive his property, the son who inherits his property on his death shall pay the debts: Katyayana in Smriti-Chandrika.

62. Some of these texts are also discussed in Smriti chandrika, Ch. 2, Section 2 para. 5, p. 342 in Ghose's Hindu law, Vol. 2.

63. It is therefore quite clear that the conception of the Hindu law was that the debts of the father should be discharged before the division of the property took place.

64. It has been contended on behalf of the sons that these texts relate to the division of the, father's self-
acquired properties only and not to the ancestral property. But the division of assets in the Hindu law books is not on any distinction of self-
acquired and ancestral property of the father but on the basis of partitions in the lifetime of the fat her and after his death. There is nothing to suggest that the obligation to pay the father's debts bef ore the division of the remaining assets is confined to his self-
acquired property only and does not extend to the ancestral or joint family property in his hands. As the obligation was general, it would obviously apply to both classes of property when the part ition of the joint family property takes place. As a matter of fact other texts of Katyayana quoted on p. 202 of Dr. Jha's book show that all binding debts have to be cleared when there is a partitio n by the co-parceners.

65. As suggested by their Lordships of the Privy Council in *Brij Narain v. Mangla Prasad* (at p. 102 of 46 All.) under the older laws of Manu, the son had no interest during the father's lifetime, perhaps he could not claim a partition, except in exceptional circumstances during the lifetime of his father. But it is quite clear that all the debts of the father had to be paid off or at any rate provi ded for before the estate was divided amongst the sons. So the case of the sons dividing the famil y property with the avowed object of defeating the claims of the creditors and making no provisi on for the payment of their debts is wholly repugnant to the Hindu conception of the son's rights and liabilities. A partition which is effected without providing for the payment of all the just debts , other than those which are tainted with illegality or immorality, no matter whether they be joint debts of the family or the separate debts of the father, is not a bona fide partition recognized unde r the Hindu law. It would therefore follow that if the gross assets only have been partitioned and e ither the private debts have not been discharged or no arrangement has been made for their paym ent by leaving sufficient property in the hands of the father, over and above! his legal share in the net assets, the liability of the sons cannot come to an end merely because there has been a separa tion in the joint status of the family. The father can insist on the payment of all his debts before th e actual division of the property. His right is not extinguished automatically by a mere legal separ ation. It follows that the creditors' remedy continues even after his legal separation and till the act ual division, and if the division takes place in utter disregard of their right the partition is not a bo na fide one and is not binding upon them.

66. On the other hand, if at the time of the partition there is an honest division of the net assets on ly, after making full provision for the payment of all the just debts of the father it seems difficult t o hold that the sons have not discharged their pious obligation. There are three ways in which a p roper arrangement can be made. The debts may be actually paid off, in which case no further trou ble would arise. Similarly if the father's share is more than sufficient to pay off all his debts, no di fficulty will be left. The debts may also be divided among the sons by a mutual contract. The liab ility to pay the debts may then perhaps be enforced in equity only against the son who has undert aken to pay it. It would be doubtful whether the simple money creditor has any civil right based o

n the pious obligation of the son which he can enforce. If property is sufficient to pay off the just debts (principal and interest) of the father in addition to his legal share in the remaining assets an d the division is only of the net assets, the sons have obviously discharged their pious obligation t o pay his debts. If the father does not thereafter pay his debts and by transfer puts the property ou t of the reach of his creditors, there is a breach of obligation on his part committed subsequent to the partition. I do not sea on what valid ground the creditor can enforce the pious obligation of th e sons twice over by proceeding against the property which they have received out of the net asse ts only.

67. No Hindu text has been brought to our notice which enjoins upon the sons the duty to dischar ge the pious obligation twice over. If the sons have provided for the payment, it ought to be as go od as their actual discharge. There being no charge or lien on account of the simple debts, it woul d be against all principles of equity, justice and good conscience, and certainly not authorized by any known Hindu text, if the sons were to be called upon to pay the debts a second time.

68. Coming to the cases of our own High Court, the first is *Gaya Prasad v. Murli Dhar*. The Ben ch hold that the separation of the family put an end to the creditor's right to recover his debt from the share of the separated son if the partition took place before attachment, even though it was wi th the express object of avoiding attachment and even if it had the effect of defeating or delaying the attachment. It was remarked that the mere fact that the object of the son was to save the joint family property from the hands of the creditors of the father would not render the partition voida ble. In, view of the reasons given above I would say, with great respect, that this case did not lay down the correct law. Sons cannot professedly partition the gross assets and refuse to pay the fath er's debts.

69. The second case is *Ram Saran Das v. Bhagwan Singh11,* decided by a Bench of which I was a member. The invalidity of the partition was not challenged in appeal before us. Nor was it sugg ested that it was not a bona fide partition. Relying upon *Gaya Prasad v. Murli Dhar*, it was held t hat the effect of a partition between the sons and their father is to exempt their individual shares a cquired on partition from liability to attachment in execution a money decree against the father. A s the bona fide nature of the partition was assumed in it, the case is no authority for the propositio n that the same rule would apply to a mala fide partition where there is no proper arrangement for the payment of the father's debts.

70. The third case is *Ajudhia Prasad v. Data Ram12,* decided by Young, J. and myself. In that cas e the family consisted of the grandfather, who was the manager, the father and his sons. In, execu tion of a simple money decree against the father alone his share was sold at auction. When an obj ection had been raised by the grandsons it was expressly stated by the decree-
holder that he had only put up for sale the rights and interests of the father, with which the object ors had no concern. We distinctly held that the rights and interests of the father alone had been so ld and the combined interest of the father and the grandsons had not been sold. This finding was quite sufficient for the dismissal of the appeal. We however went on to observe, which was in the nature of an obiter dictum that as the father was not the manager the case did not come within the scope of any of the

11 AIR 1929 All 775
12 AIR 1931 All 131

propositions laid down by their Lordships of the
Privy Council in B*rij Narain v. Mangla Prasad*. We thought that in principle it seamed to follow that, in the absence of any express authority to the contrary, the interest of the minor grand sons could not be held liable for the personal debt of the father when the grandfather was alive an d was the manager. I must confess that on a reconsideration I now think that this observation was incorrect. My learned brother Young, J., concurs in this view.

71. The propositions laid down by their Lordships of the Privy Council relate to joint families an d cannot be considered as giving an exhaustive list so as to exclude the liability of a separated so n.

72. The answer to the second question is. simple. As regards debts incurred by a manager of a fa mily, whether he be the father or not, which are required for family necessity or for family benefi t, they are contracted on behalf of all the members who are represented by the manager in their d ealings with the outside world. It cannot be doubted that the entire joint family property is liable f or such debts.

> After separation the family members shall pay the family debt in proportion to their share in the inheritance (Vishnu) : vide Dr. Jha's book p. 216.

73. On the other hand it is equally clear that the other members of the family not being his sons a re not bound by his separate debts which are taken by him for his personal purposes.

74. Coming to the third and fourth questions which have been referred to us, it has been held by a Fall Bench of this Court in *Anand Prakash v. Narain Das Dori Lal13,* that where the father, who was the manager of the joint family owning ancestral property, was alone declared insolvent, his minor sons were under an obligation to discharge his debts, if not tainted with illegality or immor ality that although the interests of the sons in the joint estate did not vest in the receiver upon the father's insolvency it was open to the receiver in insolvency to seize the sons' shares and sell the s ame in order to satisfy their father's debts. The decision was based substantially on the ground tha t in view of the pious obligation, the father had power to sell his son's interest also and that such power was " property " within the meaning of Section 23, Provincial Insolvency Act. The learned Judges distinguished the case of *Sat Narayan v. Behari Lal14,* and affirmed the view previously expressed by Mukerji, J., and myself in *Om Prakash v. Moti Ram15*

75. Where the partition has not been a bona fide one in the sense referred to above, that is where t he gross assets have been divided without making arrangement for the payment of the (father's de bts, the liability of the sons to pay those debts continues as before. The father's right to insist on t he payment of his debts before the actual division of the property has not been extinguished inas much as the pious obligation of the sons has not

13 AIR 1931 All 162 : (1931) ILR 53 All 239 15 A.I.R. 1926 All
14 AIR 1925 PC 18 : 84 Ind. Cas. 883 : 1925-21-LW 375

been discharged. If the father is declared insolvent, the (receiver who takes his plane should have the right to enforce the same remedy.

76. The question whether this right can be enforced in the insolvency Court or by a separate suit,

is purely a matter of procedure and not of substantive law.

77. Section 4, Provincial Insolvency Act, 1920, gives to the insolvency Court full power to decid e " all questions whether of title or priority or of any nature whatsoever. " Section 59 of the Act e njoins upon the receiver the duty of realizing the property of the debtor and distributing the divid ends among the creditors entitled thereto by selling all or any part of the property of the insolvent . Simple money creditors cannot sue the insolvent separately, but must realize their debts through the insolvency Court. They have to prove their debts, but the realization of the assets and their di stribution are to be done by the receiver. There is therefore no reason why the receiver should be compelled to go outside the insolvency Court and file a separate regular suit to enforce the paym ent of the creditor's debts out of the shares in the joint property, which have been taken by the sep arated sons, without making arrangement for their payment.

78. Lastly we coma to the fifth question. It is clear that where a manager of the family has taken debts which are family debts, that is, debts taken for family necessity or benefit, they are debts in curred on behalf of all the members, and they are all liable to pay the same. On the other hand, if the managing member has incurred debts for his own purpose then the members other than his o wn sons and grandsons are not at all liable to pay the same out of their shares received on partitio n. If the debts had been contracted by the managing member and are family debts, then the insolv ency of the manager would vest in the receiver the right to seize the property allotted to various members by partition without making provision for the joint debts.

79. As pointed out above the Full Bench in *Anand Prakash v. Narain* held that the power of the f ather to sell the family property in payment of his own debts was "property" within the meaning of Section 28, Provincial Insolvency Act, and therefore vested in the receiver. The soundness of t his decision is not in question before us.

80. The original Hindu texts, though laying down that the debts of the father must be paid before the division of the property, do not in express terms say that the father has the power to alienate f amily property in payment of his debts. But such power has been implied, and has now been held by the Full Bench to "property."

81. In the case of debts incurred for family necessity by the manager, the latter has been given po wer by texts. There is the text of Brihaspati that the managing members of a joint family can mak e a mortgage, sale, or a gift of joint immovable property 'during a time of distress, for the support of the family and for religious purposes." Dr. Jha in his book on p. 218 has quoted a text of Katy ayana:

> Debts incurred by the family members, for the maintenance of the family...all these debts should be regarded as 'incurred under distressing circumstance' and shall be paid by the he ad of the family.

82. The manager is not merely an agent of the other members of the family some of whom may b e minors newly born, but is also a joint owner. So long as the family is undivided his interest exte nds over the whole of the joint property and he has no defined share in it. He has power to alienat e joint property to pay off joint debts of the family. When the manager has power to transfer the f amily property for payment of just debts of the family, I fail to see why in the case of the manage

r his power to sell should also not be "property" so as to vest in the receiver.

83. The question whether the remedy of the receiver to proceed against the joint property is in the insolvency proceedings or by a separate suit being purely a matter of procedure and not of subst antive Hindu law, the principle enunciated in the Full Bench case of Anand Prakash (12) applies with equal force to the insolvency of the manager so far as the payment of family debts is concer ned. If that case lays down the law correctly, there cannot be a different answer in the case of a m anager so far as family debts are concerned.

84. It follows that if after his insolvency a partition takes place without making provision for the payment of the family debts it would not, as discussed above, be a bona fide partition at all, and will not be binding on the receiver. Such a mala fide partition cannot destroy the right to pay off t he family debts which has become vested in the receiver. On the other hand, his insolvency after separation would vest no such right in the receiver.

85. Under Section 4, Provincial Insolvency Act,, the Court has ample jurisdiction to decide again st the other members whether particular debts are such as are binding on the family. Of course, th e burden of proving that the debts are of such a nature will always be on the receiver, and the Co urt will have to try the issue as if in a regular civil suit after properly impleading the other membe rs. If the issue is likely to be of a complicated nature, the Court has discretion under Section 4 to direct the receiver to proceed by a regular suit.

86. Therefore my answers to the first four questions are in the affirmative and to the fifth questio n in the negative.

Mukerji, J.

87. (After stating facts as given in the order of reference and the question referred his Lordship pr oceeded). The principle question is question 1, and there is a divergence of judicial opinion on it. The Madras opinion has now undergone a change and the majority of the Judges in a Full Bench case have definitely answered the question in the affirmative see *Subramaniya Ayyar v. Sabapath y Ayyar*. In Bombay a Division Bench has taken the same view in *Annabhat v. Shivappa16,* and a Full Bench decision in Oudh, *Raghu Nandan Prasad v. Moti Ram17* has also answered the quest ion in the affirmative. A Patna case, following the older Madras cases which are now to be treate d as overruled, has accepted the old view as it-
prevailed in Madras, and has answered the question in the negative. In the Allahabad High Court the opinion was divided, the majority of the cases answering in the negative, and this has necessit ated a reference to the Full Bench.

16 AIR 1928 Bom 232 : (1928) 30 BOM LR 539 : ILR 1928 52 Bom 376 : 110 Ind. Cas. 269

17 A.I.R. 1929 Oudh p. 406 (F.B)

88. In this state of divided opinion among the highest Courts in India and there being no direct au thority of the Privy Council bearing on the point it is open, to us to examine the point raised inde pendently and with reference to the texts of the Hindu law itself.

89. The peculiarity of Hindu law, as interpreted by the author of the Mitakshara, is this: that while on the one hand a son and grandson is allowed to acquire a share in the ancestral property jointly with the father and grandfather, they are laid under an obligation to pay the debt of the father and

grandfather. The question therefore that arises is whether this liability to pay the debt is in any way dependent on the character of the estate acquired by the son and grandson by birth. In the case of the self-
acquired property of the father or grandfather the law is the same as prevails in probably the rest of the world, namely, the heir is liable for the debt of the deceased to the extent of the property inherited by him. Under the Mitakshara law, however in the case of ancestral property or in the case of a joint family property, the acquisition of right is not by inheritance but by birth and, therefore ordinarily there can be no question of any liability arising owing to the assets of a deceased person. A deceased person in such cases leaves no assets whatsoever.

90. If we closely examine the entire scheme of the Mitakashara law, we shall be able to understand what was really meant and how the conflicting interests of the father and grandfather have been reconciled with the interests of son and grandson.

91. So far as a debt is incurred for the benefit of the joint family, the liability of the whole family is there, irrespective of who may be the person who incurred the debt. Indeed the texts have gone even so far as to allow a liability to arise even where a servant has contracted a debt, in the interest of his master's family. For Manu says in Ch. 8, Sloka 167:

> Should even a servant effect a transaction for the sake of the family, the master, whether in his own country or abroad, should not repudiate it.

92. The doctrine of legal necessity is well known and it authorizes, according to the text on which the doctrine is based, a single member of a joint Hindu family to transfer the family property. This doctrine is based on a text of Brihaspati as quoted by Ratnakara and has been translated as follows:

> Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family and especially for pious purposes.

93. The text is also quoted in the Mitakshara. Again the sage Yajnyavalkya, in Ch. 2 Sloka 46 says:

> Any debt contracted in a joint family for the maintenance of the members thereof should be repaid by the head of the family. On his death or on his departure to a foreign country the member who inherited the property must repay it.

94. The question of joint family debt, therefore stands entirely on a different footing.
95. Now to go back to the apparent conflict between the interests of the father and grandfather on the one hand and son and grandson on the other, it appears that the liability to pay the debts of the father or grandfather has not been made dependent on the receipt of assets from the father or grandfather. It has been often stated that under the old Hindu law, the liability to pay the father's debt did not depend on whether or not the son or grandson had received any assets of the. father or grandfather. This is stated by the author of the Mitak-
shara in his commentary in Part 1 Ch. 6, Section 3, para. 14. Indeed, the liability of the son or gra

ndson to pay the debt of the father or grandfather, in a joint family could not, from the very natur e of the holding of the family estate, be made to depend on the assets of the father or grandfather. There can be no assets of father or grandfather, unless he is separated from the rest of the family and then it would be a case of " self-
acquired "property and Dot a case of joint family property. I shall presently quote texts of undoub ted authority to support the view of the author of the Mitakshara, but, at present, I would point ou t that the author of the Mitakshara treats the question of debt as a thing entirely apart from the qu estions of the constitution of the family, the nature of the property and inheritance. In Oh. 1 Secti ons 1 to 6, of the Vijnaneswar (the author of the Mitakshara) deals with the nature of property, th e question of inheritance, and the nature of joint family property. Then he deals with cases of pur e inheritance and other matters. Lastly, he comes to treat of "debts payable by whom and when." It will thus be noted that, under his scheme, the question of debt is a question which is entirely in dependent of the nature of the property or how the property is held by the several members of the family.

96. As is well known, the Mitakshara is a commentary on the Smiriti of Yajnyavalkya. It will ther efore be interesting to know that the sage himself says on the question of father's debt. I have alre ady-
quoted a text, being from Yajnyavalkya, which deals with joint family debt. After this sloka, in th e 47th sloka Yajnyavalkya points out that a woman is not bound to pay a debt contracted by her h usband on her sons or her father unless it is contracted for the maintenance of the family. In the 4 8th sloka, the sage deals with the cases in. which a son is not bound to pay a father's or grandfath er's debt. This sloka is the basis of the doctrine by which a son or grandson is not made liable to p ay an ancestral debt which is tainted with immorality. Sloka No. 49 deals with the debts incurred by women who are members of a certain profession and among whom the women take as much part in the profession of the family as the men themselves. It is there laid down that where such women contract debts the husbands are also liable to liquidate them. In Sloka No. 50 the sage dea ls with the case of a debt contracted by a woman either alone or with her husband and, he lays do wn that in such a case the woman must repay the debt. Next comes the Sloka 51 (the most import ant text bearing on the question before us). It may be translated as follows:

> If the father or the grandfather be long absent in a distant country, be dead or be suffering from an incurable disease the debt contracted by either must be repaid by the son or the gr andson; in case of denial the claim must be established by evidence.

97. We thus see that the payment of the debt of the father or grandfather is not made dependent o n receipt or acquisition of any assets. The sons and the grandsons are to pay where the father or t he grandfather is unable to pay.
98. On the basis of this text it has been sometimes urged that the liability of a son or grandson to pay the debt of the father or grandfather does not arise till the father or grandfather has died. This is true in one sense and is untrue in the sense in which the doctrine is often sought to be utilized.

99. A father or grandfather, so long as he is alive, is bound to pay his own debt and if he is unable to pay the debt from his own earnings or from the profits of the joint family property, he is entitl ed to pay it out of the whole joint family property and this for the simple reason that the son and grandson must pay the debt where it is left unpaid. As I have already said, the question of debt, s

o far as the father or grandfather is concerned, is treated as a matter which has no concern with th e nature of the family property, that is to say, whether it is self-
acquired property or ancestral property. There being a debt in existence, it is to be paid by the fat her or grandfather and where either from absence or from disease or other incapacity he is unable to pay, the son and the grandson must pay the same. For the payment of his own debts a father o r grandfather is the absolute master of the entire family property and no question of payment of t he debt by the son or grandson in the lifetime of the father or grandfather can ever arise in the cir cumstances.

100. On this point, it would be interesting to recall the doctrine of antecedent debts. It is well-
established law that a father or grandfather is entitled to sell the entire family property including t he interests of his sons and grandsons to pay his own debts where such debts are not tainted with immorality. It has been often said, but quite incorrectly, that the doctrine of antecedent debt is a c reation of the Privy Council and has no basis in the Hindu law itself. Nothing could be more wro ng than this. Hindu law was a living law when the British took up the administration of justice in the country. To ascertain the Hindu law, pundits or persons versed in that law were employed to e xpound the tenets and the doctrines, and it was because the Courts were advised and correctly so, that a father or grandfather in his lifetime could pay his own debts out of the entire property avai lable, that the doctrine of antecedent debts came to be acted upon by British Indian Courts. It cou ld not have been a pure invention on the part of High Courts or the Privy Council.

101. To go back then to the question of the liability of the son and grandson to pay the debt of the father or grandfather, that liability is absolute and arose only when the father or grandfather faile d himself to pay the debts. This failure would arise in spite of family property being available, on ly when the father or grandfather died or went abroad and was not likely to return shortly. It will be remembered that in the days when these doctrines were laid down, the Hindu was a migrating race and the prohibitions against crossing the "black seas" had not been imposed. If then the fathe r, or grandfather was entitled to dispose of the entire property in which the son or grandson had a n interest by their very birth, in order to pay his own debts, it would follow that a partition of the family property could take place only when there were no debts of the father or grandfather left t o be repaid. So long as there was a debt to be repaid, the father or grandfather would insist on pa ying the same before a partition took place. As the father or grandfather had an absolute right to p ay his debt, no son or grandson could possibly object to the repayment of the debts before effecti ng a partition. A perusal of the texts of Smriti dealing with debts will show that under the Hindu l aw, the nonpayment of: a just debt was regarded as a very heinous sin. We should therefore not at all be surprised if we find that a partition of the family property was directed to be effected only after the payment of the ancestral debts.

102. A very valuable book has recently been published by the able and learned Vice-
Chancellor of the Allahabad University, Dr. Mahamahopadhaya Ganganath Jha, under the name of 'Hindu Law in its Sources.' The learned author has compiled the various rules of Hindu law on several questions, and among others on the question of payment of debts. I shall freely quote fro m this book as quotations are all supported by reference to the original texts where they are still a vailable, and by reference to the books where the texts were quoted in the cases where the origina l texts are no longer available.

103. At p. 202 of the book, quotation No. 210 is from the Smriti of Narada and has been translate d as follows:

> What is left after the discharge of the father's obligations after the payment of father's debt s shall be divided by the brothers; so that the father may not remain a debtor: Institutes of Narada, Ch. 13, Sloka 32.

104. Dr. Jolly's translation of the same sloka runs as follows:

> What remains of the paternal inheritance ever and above the father's obligations and after payment of his debts may be divided by the brethren so that their father continue not a de btor.

105. In Dr. Jha's book p. 202, quotation No. 211 is from Katyayana. The translation is as follows:

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

106. Colebrook, in his translation, of what appears to be the same text, has omitted the word "rin am" or debts: vide Cole-brooke's Digest, Book 5 text No. 369, Vol. 5, page 479.

107. If the gifts promised by the father take precedence over partition, the debts of the father hav e stronger claim to precedence. There can therefore be no doubt that in translating the text Cole- brook omitted the word "debt" either from inadvertence or because the text that was supplied to h im for translation was incomplete.

108. The quotations No. 212 and 213 at p. 302 of Dr. Jha's book all go to show that the correct ru le is to pay the debts of. the father or grandfather before dividing the family property. At p. 204, Dr. Jha quotes another text from Katyayana and translates the same as follows:

109. Quotation No. 219:

> Even when the father is alive if be is stricken by disease or has gone away from the countr y, his son shall pay the debts after 20 years.

110. The fixing of time limit of 20 years is meant to see if the father is returning home or recover s. The idea is that the father is to pay the debts, but where he is unable to pay the same, the sons must pay. Manu in Ch. 9, Sloka 218, lays down:

> After due division of the paternal estate if any debt or estate of the father be found out let t he brothers equally divide the same among themselves:" Translation by Monmathanath S hastri, M.A., published for the Society for the Resuscitation of the Indian Literature.

111. It is clear therefore when even after partition a father's pre-

existing debts (preparation debts) be discovered the sons are enjoined to pay the same rateably to their shares.

112. On the Hindu law texts, texts which are all of undoubted authority, the liability of a son or grandson to pay the ancestral debt stands supreme and stands irrespective of whether he has got or not any assets of the father or grandfather. It is also clear on the original Hindu rule of law, that a father or grandfather had an absolute right to have recourse to the entire family property including the shares of his sons and grandsons to pay his own debts. It is also clear that if a pre-partition debt be discovered, it is the duty of the sons and grandsons to pay the same in proportion to their respective shares taken by them in the family property.

113. Such being then the law, is it open to the members of a joint Hindu family, consisting of a grandfather, sons and grandsons, to defeat the right of the creditors of the grandfather simply by sitting down and dividing the family property, ignoring the entire debts of the grandfather? In other words, if, as is undoubtedly the law as recognized in the British Indian Courts, the creditor could enforce a sale of the entire family property to recover the grandfather's debts, could the members of the family nullify that right by simply telling the creditor:

> Although all that property which you could sell are still in our possession, we won't pay you because we have now divided up the property and the worst that you can do is to sell the share which we have given to the grandfather?

114. It is true a simple creditor has no charge on the property, but it is not a charge that he seeks to enforce. A simple creditor has no charge on his debtor's property, yet so long as the debtor has not transferred any property and is in possession of the same, the creditor can enforce his remedy against that property. When the debtor sells a portion of his property and the sale is a bona fide one, the creditor loses that property from his remedy against it, but that is because a third party has purchased the property for a consideration. In the case before us, to pay the grandfather's debt, the sons and grandsons are equally liable,' the property in their hands is liable, no portion of it has passed out of their possession for a consideration, and yet it is contended that they should be allowed to say that by virtue of a partition among the very debtors themselves, the creditor's remedy is virtually gone. If this were the law, it would be a very bad law indeed.

115. The argument which is advanced on behalf of the sons and grandsons is this: The grandfather has a right to sell the family property to pay his own debts only so long as the family is joint and he loses it the as end the property is partitioned. But this is not a correct proposition of low. I have shown from the holy texts that this is not the idea of Hindu law. A partition must be preceded by payment of debts, but even if this had not been provided for, on ordinary notions of fairness, the entire assets available to the creditor could not have been taken away, by virtue of an act of those who were virtually debtors themselves.

116. No equity whatsoever cornea into play in favour of the sons and grandsons who profess to have partitioned the property. Then again, no text of Hindu law has been quoted to show that the father or grandfather's right to pay his own debts out of the family property exists only so long as the family property remains undivided. It is true that if a debt is contracted after partition, the matter would be different. That is because the separation has come about before the debt was contract

ed and it cannot be said the father was contracting debts on the. faith of property which was neith er in his possession nor under his control. It may be that under strict Hindu law the separated son s' liability would still exist, but the modern notions of equity will not probably permit of the rules being strictly enforced. I have already shown above that the liability of the sons and grandsons to pay the debts of the father or grandfather was never regarded by the Hindu law-
givers as being dependent on the nature of the property. Therefore it is not correct to say that a pa rtition without paying the pre-
partition debts of the father or grandfather will prevent a creditor of a pre-
partition debt from enforcing his remedy against what was the family property before partition. F or the foregoing reasons I would answer question 1 in the affirmative.

117. Question 2 is not at all difficult to answer. Where a debt is contracted for the benefit of the f amily, all the members of the family are liable to pay the same and the liability arises on the princ iple of representation. There is a large number of texts of Hindu law which recognize such liabilit y and I may refer to without quoting them, the several texts quoted in Dr. Jha's admirable book: s ee quotations Nos. 252 to 254 at pp. 215 and 216, again Nos. 258 to 260 at pp. 216 and 217. Bef ore however the creditor proceeds against the whole of the family property he has to obtain a dec ree against the members whose property he wants to seize in execution and establish the liability of such members for the debt. The liability may be there but it has to be established by means of a decree. I would answer question No. 2 also in the affirmative.

118. Question 3.-
It has been urged on behalf of the appellants that although it may be open to a father or grandfath er to sell the entire family property to pay his own debts, it is not open to a receiver in insolvency to proceed to sell the shares of the sons and grandsons in the insolvency proceedings. It is conce ded that the receiver would be entitled to proceed against the sons and grandsons by way of suit, t o establish their liability by means of a suit and then to enforce that liability by execution of a dec ree. But it is urged that a remedy by way of taking proceedings in the insolvency proceedings the mselves is not open to the receiver. I really do not see that there is any substantial basis for this ar gument. A receiver, it is said, does not represent the creditors, but he represents the judgment-
debtor. As a matter of fact, a receiver is neither a representative of the insolvent purely, nor is he purely a representative of the creditors. He is an officer of the Court and he has been created by t he legislature to simplify procedure and to minimize the trouble of an indebted person and of his creditors. The scheme of the law of insolvency is well known and is this: The receiver is to take h old of all the properties of the judgment-
debtors, i. e., all the properties which are available to the judgment-
debtor to utilize for the payment of his debts are available to the receiver for the same purpose. T he creditors are estopped from pursuing their usual Remedy against the debtors by means of suits and executions. They have to go to the insolvency Court and prove their right to be paid and wh en they have done so, the receiver takes up their case and pays them either in full or rateably acco rding as the assets of the insolvent will allow. If the creditors themselves could proceed against al l the family property to recover their debts payable by the grandfather or the father, I fail to see w hy, on principle, the receiver should not be entitled to pursue the same remedies which are open t o the creditors. The only difference is that the creditors are no longer entitled to proceed by suit a nd execution and the receiver is also not entitled to proceed by suit or execution, except where th e Court grants sanction for the purpose. The Full Bench decision of the Madras High Court in the matter of Balusami ayyar (1) has been relied on behalf of the appellants. With all respect, I fail t

o see eye to eye with the decision and have no hesitation in answering the question in the affirmat ive.

119. Point No. 4.(tm) In the circumstances mentioned in the question, namely, where a simple m oney debt, binding on the entire family, remains unpaid and the members of the family enter into a partition without, making any provision for the payment of the family debt, there can be no dou bt, that the creditor may bring a suit against all the members of the family and obtain an adjudicat ion to the effect that the debt was incurred by the head of the family or other members of the fam ily for the benefit of the family, and on getting a decree, may proceed to attach and sell the indivi dual shares of the divided members of the family and realise the money. The question now to be answered is whether, if the principal members of the family, who, we take it, incurred the debt ar e declared insolvents, can the receiver in insolvency have recourse directly to the shares of the m embers who have not been declared insolvents in the order to realise the debts payable by the ins olvent?

120. Now there is an essential difference between the right of a father to sell his sons' share in the family property to pay his own debts, and the power of a manager or managers of a family to pa y the debts incurred by them, as managers of the family out of the shares belonging to the other members of the family. Suppose A, B, C and D are members of a joint Hindu family and A is the manager, B, C, and D not being sons of A, but being say, brothers and nephews of A. A. borrows a sum of ₹ 1,000/-
from E on a promissory note in order to pay arrears of land revenue or say for the marriage of B' s daughter. if E brings a suit for recovery of the money against A on the promissory note and reco vers a decree, he cannot, in execution of that decree, attach the shares in the family property, belo nging to B, C and D. In execution of the decree he can bring to sale only the individual share of A and no more. If however A were the father of B, C and D and then if the decree were against A alone, E would be entitled to take out execution against the entire family property belonging to A , B, C and D and to sell it, on the sole ground that A was the father of B, C and D. The only case i n which E would not be able to attach and sell the entire family property would be the case of the debt being tainted with immorality.

121. The difference between the father's position and the position of the manager of the family w ho was not a father, was clearly recognised by their Lordships of the Privy Council in the famous case of ***Brij Narain v. Mangla Prasad (5) (at p. 104 of 46 All)***. In respect of the managing copar cener of a joint undivided estate their Lordships simply said:

> The managing coparcener of a joint undivided estate cannot alienate or harden the estate q ua the manager except for purposes of legal necessity.

122. But in the case of the father and sons their Lordships said that the father could:

> lay the estate open to be taken in execution proceeding on a decree for payment of that de bt.

123. The same could not be said of a simple money decree made against the managing member o f family even if the debt were incurred for family necessity.

124. On the Hindu law texts, there can be no manner of doubt that the power of the managing me mber of a family to bind the other members in respect of debts incurred by himself arises out of t he principle of agency, arising out of a necessity alone. It is not the case of the manager being ap pointed an agent by other members of the family some of whom may undoubtedly be minors.

125. Let us consider this point at length. The Mitakshara in Ch. 1, Section 1, placiturn 27, points out that the family property is meant for the support of all, whether born or unborn, and therefore no gift or sale can be made of the family property. Then (in placitum 28) the learned author says that there is an exception to this principle. The exception, he points out, is based on a text of Brih aspati as quoted by Ratnakar and runs as follows:

> Even a single individual may conclude a donation, a mortgage, or a sale of immovable pr operty, during a season of distress, for the sake of family and especially for pious purpose s.

126. It will be noticed that the rule is that there will be no sale of family property and the excepti on is necessity. The right of an individual member to transfer the property arises because necessit y Constitutes itself the agent of other members. Can it then be said that the individual member ha s a " power" to sell or transfer, which may be described as property " which may be transferred or vested in a receiver as the property of the individual? This " power to transfer" is not confined to the managing member. The words "even a single individual " exclude the idea of the managing member. Indeed, in the case of payment of a debt incurred from necessity the texts have gone so far as to say that where even a servant incurs a debt for the benefit of the family, it is the duty of t he master to pay the same: see for example Manu 8, Section 167, quoted at No. 270, p. 219 by D r. Jha in his admirable book " Hindu Law in its Sources." The translation is as follows:

> Should even a servant effect a transaction for the sake of the family, the master, whether i n his own country or abroad, should not repudiate it.

127. The commentator Medatithi comments on this sloka as follows:

> During the master's absence, whatever the servant does for the maintenance of the family must be held to be valid.

128. Now, no doubt, the creditor may bring a suit against the servant for the money borrowed by him for his master's sake. Can the creditor then, by obtaining a decree against the servant proceed to sell the master's property because the servant borrowed the money for the master's family nec essity and the Hindu law enjoins it as the master's duty to pay the same? No doubt, if the creditor brings the suit against the servant and the master both, or against the master alone, on the ground of implied agency in the servant to contract the debt, the decree, when obtained, will be executabl e against the master's property. Nobody would say that the servant had a power to sell the family property and that power to sell may be utilized by the servant's receiver in insolvency and the rec eiver may seize the master's property to realize the debt.

129. There are numerous texts which have been all collected together from the Smritis to show th at debts incurred for family necessity, by whomsoever it may be, must be paid by all for whose b enefit the debt has been incurred. For these texts see Dr. Jha's "Hindu Law in its sources," pp. 21 5 to 217, paras. 252 to 270.

130. Now to go back to the question before us, we have to decide whether a debt incurred individ ually by a single member of the family, for the benefit of it, can be realized in the insolvency juri sdiction of a Court when the borrower alone has been declared to be an insolvent? The liability of the several members of the family who are not insolvents has to be declared by a suit by the cred itor or receiver in insolvency and when a decree is obtained against the individual members, in e xecution of that decree the individual shares of the non-
insolvent members may be brought to sale. In the illustration given above, let us take it that A bec omes an insolvent on account of the promissory note of ₹ 1,000/-
that he executed in favour of E. Now if A could make out a case of distress" and sell a portion of the family property to pay off the debt incurred by him under the promissory note, he, no doubt, might effect a sale which would bind the individual members of the family. But if there be no cas e of "distress", A would have no right to sell any portion of the family property simply because h e had to borrow money on a particular occasion to meet a family necessity.

131. Take, for the sake of example, this case: The family consists of A, B, C and D and has a larg e property consisting of Government promissory notes and landed property. The Government pro missory notes, let us further take, yield ₹ 5,000/-
every six months as interest, payable on 15th March and 15th September every year. Now suppo se the land revenue payable in May has remained unpaid, and on 1st September this being sought to be recovered by the Collector's peon, by the arrest of the manager of the family. The manager borrows money from the village banker by executing a promissory note for ₹ 1,000/-
and pays it. He knows that 15 days later he would recover ₹ 5,000/-
from the Government Treasury as the interest of the Government promissory notes and he would pay up the banker. Surely, after borrowing ₹ 1,000/-
A could not be entitled to sell a part of the zamindari property so as to bind the other members of the family, although 15 days later a sum of ₹ 5,000/-
was available in order to pay off the debt. There is no case of "distress" which would justify an i ndividual member of the family to sell a portion of the family property, but if A be the father and if A should sell a part of the family property on 10th September (having incurred the debt of 1st S eptember) the sale would be binding on his sons B, C and D it being a bona fide sale in payment of an antecedent debt. In the father's case there is no question of "distress".

132. It will be seen from a study of the above illustration that there is an essential difference betw een a father's right to sell his sons' property to pay his own debts and the "emergency power" of a n individual member or even a servant to enter into a transaction in case of distress. All debts are not incurred because of distress, and although a liability may be there to share a particular debt in curred by one of the members of the family, it doss not follow that the person who incurred the d ebt is entitled to sell the property.

133. Then again, the several members of a joint family who are not the debtor but who have sepa rated from the manager may escape liability by contributing their individual shares to the debt inc

urred for the family. If the individual quota is paid up there is no question of selling the shares.

134. I trust I have said enough to show that in the case of any member of the family, not being th e father, whether he be the manager or not, it cannot be said that he has a right to sell the family p roperty simply because he has an " emergency power " and it cannot be said that the other memb ers of the family are liable to have their shares in the family property to be sold, as if they were th e principal debtors.

135. It has been said that if the non-
insolvent members of the family may be proceeded against by a suit, why should it not be possibl e for a receiver to proceed by way of an application before the insolvency Judge in order to establ ish the liability of the non-
insolvent members of the family and then, after establishment of the liability, to proceed to execu te, as it were, the decree so obtained. The suggestion may be plausible, but surely it is not safe or even right. The insolvency Court has a limited jurisdiction and only in matters where the jurisdict ion has been granted that it may be exorcised. The procedure in the insolvency Court is more or l ess summary. The right of appeal is limited. Then the right of appeal is not always to the same C ourt. For example, if a Subordinate Judge is declared to be an insolvency Judge, an appeal from h is judgment, whatever may be the value of the property involved, would go to the District Judge, and not to the High Court. The insolvency Court then is a Court of, limited jurisdiction and simpl y because in certain cases it has the power to decide questions of title that arises regularly and pro perly before it, it does follow that it is entitled to decide all suits and cases that do not fall within t he purview of the Court.

136. Take for example the case of the insolvent's debtors. The insolvent may have 200 debtors. T he receiver may say:

> The insolvency Court may decide under Section 4, Provincial Insolvency Act, all question s of title. Why should I go to other Courts to realize the money due from the insolvent's de btors. Why should I not make applications before the insolvency Court asking it to adjudi cate upon the liability of the insolvent's debtors and then proceed to enforce the liability b y seizing the debtor's property.

137. But the question of the liability of a third party does not fall within the jurisdiction of the ins olvency Court, and however convenient it may be to the receiver to apply to the insolvency Court , he must go to the regular Court to obtain a decree against the debtors of the insolvent. In the cas e under consideration the liability of the non-
insolvent members of the family has to be established The non-
insolvent members are in no way under the jurisdiction of the Court. They are not sons of the ins olvent, whose (sons') property is as good as the insolvent's to pay the insolvent's debts. Therefore there is no analogy between the case of an insolvent father and the case of a manager of the famil y who has become an insolvent. In the father's case it is enough that the father is a debtor, to seize the son's share for sale. The son must allow his share to be sold unless he can show that the parti cular debt sought to be realized is tainted with immorality. But in the case of an insolvent manage r of a Hindu family there is no liability of the shares of the other members of the family. In partic ular cases the other members of the family may be liable to contribute to the payment of the debt

incurred by the insolvent manager. It is only when that the non-
insolvent members fail to pay that the question of the sale of their property in execution may aris e. In the case of the son, as 1 have mentioned more than once, the son's share is as good as the fat her's share.

138. Let us look to Section 4, Prov. Ins. Act. Sub-
section (2) points out the cases in which a decision of the insolvency Court will be binding and fi nal. These must be questions between, on the one hand, the debtor and the debtor's estate and on t he other hand all claimants against him or it, and all persons claiming through, under them or any of them.

139. A claim by the debtor or on behalf of the debtor's estate cannot he litigated in the insolvency Court. This follows from the language. When a receiver of the estate of the managing members will ask for an adjudication as to the liability of the other members of the family to contribute to t he debt, he will be enforcing a claim by the insolvent estate against third parties. For this the inso lvency Court has no jurisdiction.

140. On a consideration of the entire law I am of opinion that it is not open to the receiver in the case of insolvency of principal members of the family to seize the property, received by the other members of the family not declared insolvent to pay the family debts. The receiver may proceed by suit in the proper Court for establishment of the liability of the non-
insolvent members, and on recovering a decree may proceed by way of execution.

141. Point No. 5.-
For reasons given on Point No. 4 my answer to Point No. 5! is that when the managing member of a joint Hindu family is adjudicated an insolvent on debts contracted as managing member and the other members of the joint family bring a suit for partition subsequent to the application in ins olvency, the receiver is not entitled to sell the property allotted to members of the family other th an the insolvent. But the receiver may bring a suit in the Court of proper jurisdiction (not being th e insolvency Court) against the divided members of the family and establish their liability, and ha ving done so may proceed to execute the same.

Banerji, J.

142. I agree with the conclusions arrived at by the Ag. C.J., and for the reasons given by him.

Young, J.

143. With regard to the answers to questions 1 to 5 I agree with the Ag. C.J.

Bennet, J.

144. I agree with the judgment of the Hon'ble Ag. C.J., on all points.

145. The answers to the first four questions are in the affirmative and the answer to the fifth quest ion is in the negative.
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