[96] A majority of this Court, however, having held (S. A. Nos. 703-5 of 1878) that the decision of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* is binding on the Courts of this Presidency, I agree that this case be remanded to the Lower Appellate Court for trial of the issues proposed by the Chief Justice.

KERNAN and MUTTUSAMI AYYAR, JJ., concurred in the order proposed.

Ordered accordingly.

NOTES.

[This case is still authoritative, *see* **(1908) 30 All. 460** for a similar view. *See* also (1881) 4 Mad. 320; (1882) 5 Mad. 61.

The case of (1887) 9 All. 493 deals with the question of onus.]

[4 Mad. 96.]

APPELLATE CIVIL—FULL BENCH.

1st April, 1881.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, MR. JUSTICE INNES, MR. JUSTICE KERNAN, MR. JUSTICE KINDERSLEY, AND MR. JUSTICE MUTTUSAMI AYYAR.

Sivasankara Mudali.....(Seventh Defendant), Appellant

and

Parvati Anni and others.....(Plaintiffs), Respondents.*

Hindu Law—Sale in execution of proper decree against father—Son's interest in family property passes.

Per CURIAM (INNES and MUTTUSAMI AYYAR, J.J., *dissenting*):—In the Madras Presidency, where ancestral property has been bought at a sale in execution of a decree against the father of a Hindu family, the purchaser is not bound to go further back than to see that there was a decree against the father and that the property was property liable to satisfy the decree if the decree had been properly given against the father. A *bonâ fide* purchaser for valuable consideration of an estate purchased in execution of a decree against the father under such circumstances is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as part of ancestral property.

Girdharee Lall v. *Kantoo Lall* (L. R. 1 I. A. 321) followed.

THIS case was referred to a Full Bench for decision, the Judges of the Divisional Bench (KERNAN and MUTTUSAMI AYYAR, JJ.) differing in opinion.

Mr. *Johnstone* for Appellant.

Ramachandrayyar for Respondent.

[97] The facts are fully set out in the Judgments of the Full Bench (TURNER, C.J., INNES, KERNAN, KINDERSLEY, and MUTTUSAMI AYYAR, JJ.).

* Second Appeal No. 433 of 1878 against the decree of O. B. Irvine, District Judge of South Arcot, modifying the decree of C. Venkoba Chariar, District Munsif of Chidambaram, dated 21st January 1578.

Turner, C.J. (Kindersley, J., *concurring*).—I understand that the question referred to the Full Bench in this case is confined to the objection taken by the respondents. It appears that *Murugappa Mudali* and *Sivagnana Mudali*, when living together as undivided brothers, on the 21st September 1859, executed a bond hypothecating certain lands to secure the repayment to *Rajagopal Naidu* of a sum of Rs. 898-8-9, expressed to be due on a settlement of accounts.

The bond was assigned to *Kuppal Ramanujammal*, who, in 1873, instituted Original Suit 201 on the Original Side of this Court and obtained a decree against the defendants, and for a sale of the mortgaged property in the event of default being made in payment of the mortgage debt within a period specified.

It does not appear from the record of Original Suit 201 how it came to pass that the claim for the enforcement of the mortgage was entertained in the High Court, but this is immaterial. No objection could be taken to the decree against the defendants personally, and it appears to have been transmitted to the District Court and executed as a personal decree. After attachment, a house and lands were sold, and the house and a portion of the lands purchased by *Shivashankar Mudali*, the only party to this appeal for a sum of Rs. 700.

In the Munsif's Court *Murugappa Sivagnana* and *Rajagopal* were examined *Murugappa* deposed that the debt was just, that it had been incurred for paddy supplied, and a debt of Rs. 500 or thereabouts which *Rajagopal* had discharged. The Munsif considered that after the lapse of 17 years it would be unreasonable to require evidence of particular items in the account, even if such evidence existed. He held that, under the circumstances, it was incumbent on the sons and grandsons of *Sivagnana* to show that the transaction was merely nominal, and that consideration did not really pass. On the evidence of *Murugappa*, he found that the debt was a family debt. He, therefore, held the interests of the sons and grandson of *Sivagnana* passed by the auction sale in execution of the decree obtained against their fathers. On appeal, the District Judge arrived at the same conclusion and for the like **[98]** reasons. One of the auction purchasers, *Sivasankara Mudali*, having presented a second appeal against the decree of the Lower Appellate Court in respect of other property, the respondents have filed an objection to the decree of the Lower Appellate Court in respect of so much of the property sold in execution in Original Suit 201 of 1873 as was purchased by the appellant. They again rely on their plea that, inasmuch as the respondent *Chinnappa Mudali* and the minor sons and grandson were not parties to the suit, their interest did not pass by the auction sale.

We observe that proceedings were erroneously instituted and allowed to proceed in the names of the mothers of the minors instead of in the names of the minors represented by their mothers.

It having been held by a majority of the Court that the decision of the Privy Council in *Girdharee Lall's* case (L. R. 1 I. A., 321) must be followed by this Court, the objection must be disallowed, but without costs, as the point has been for the first time decided in this Presidency.

Innes, J. (Muttusami Ayyar, J., *concurring*).—The first plaintiff is the second wife of second defendant, and appears as being the mother and guardian of two of his minor sons. (Properly speaking, the sons should have been plaintiffs by their next friend, their mother.) Third plaintiff is another son of second defendant, and second plaintiff is the widow of a fourth son. These two last sons are sons of second defendant by his first wife. First defendant is the brother of second defendant. The suit was brought to establish plaintiffs'

right to four-fifth share of certain family landed property in possession of defendants, portions of which had passed to the possession of the several defendants from third to eleventh by mortgages, private sales, or Court sales; some of these latter took place since the suit, in execution of the decree in C. S. 201 of 1873 of the High Court. But this suit was instituted after attachment, though before sale in execution of the decree in that suit.

The questions between the plaintiffs and the seventh defendant are the only questions with which we have to deal.

The District Munsif gave the plaintiff four-fifth share in the property of second defendant alone, after deducting the portions sold to **[99]** fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh defendants, the sales in which he held to be binding on plaintiffs.

The seventh defendant claimed a portion of the lands as having been sold to him seven or eight years prior to the suit by one *Alavanda Naik*, to whom they were sold twelve years before the suit, and said that he had had enjoyment ever since.

The remaining lands in his possession, 5 acres, 30 decimals, he said he had purchased in auction sale in execution of the decree in C. S. 201 of 1873 of the High Court, passed in a suit by fourth defendant against third plaintiff's father and uncle, who in this suit are first and second defendants, respectively.

The Munsif's decree allowed him to retain these two items of property.

The plaintiffs appealed.

The District Judge in appeal did not interfere with the Munsif's decree as regards the property purchased by seventh defendant at the sale in execution of the decree, but disallowed seventh defendant the other portions, as there was no evidence of the sale to *Alavanda Naik* by first and second defendants.

Seventh defendant appeals on the grounds—

That plaintiffs admit the sale to *Alavanda Naik*; second defendant, the father, also admits it;

That plaintiffs were not born at the date of the sale and are not in a position, therefore, to question it; and

That seventh defendant and *Alavanda* were in possession for more than twelve years.

The plaintiffs, as respondents, take objection to the decree in so far as it allows seventh defendant to retain what he purchased in execution of the decree in C. S. 201 of 1873. They were not, they say, parties to that suit, and the sale must be held to be invalid to the extent of their share.

The only question argued, and the only one which I conceive the Full Bench has to decide, is the question arising out of the objections of plaintiffs to the Appellate Court's decree. The sales took place under the decree in Suit 201 of 1873 on 19th November 1875. The present suit was brought before the sale, at date of the attachment. The object was to set aside the attachment; but the atttachment proceeded to sale. It does not appear that **[100]** there was a *sale of the property* ordered by the Court; there was merely an attachment and sale of the interest of the judgment debtors, the present first and second defendants.

The District Judge finds that the sales were in execution of a decree obtained on a debt incurred for purposes binding on the family. The question is whether it is enough to show this to make the sales binding on the plaintiffs.

The rules of law imposed by the cases of Girdharee Lall v. Kantoo Lall and Girdharee Lall *v.* Muddun Thakoor (L. R. 1 I. A., 321) have lately been again approved and recognized in the case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh*. (L. R. 6 I. A, 88), and these cases go the length of laying it down, *first*, that sons cannot obtain relief from the Courts against alienations made by a Hindu father in a family governed by Mitakshara law in favour of creditors in discharge of debts, even if those debts were purely personal to the father, unless they are shown to have been immorally incurred; also, *secondly*, that a purchaser is not bound to go further back than to see that there was a decree against the father, and that the property was property liable to satisfy the decree, if the decree had been given properly against the father. In such case one who has *bona fide* purchased the estate under the executing and *bona fide* paid a valuable consideration for it, is protected against the suit of the sons seeking to set aside all that has been done under the decree and execution, and to recover back the estate as joint ancestral property (see *Suraj Bunsi Koer's* case).

The question is whether this doctrine can be applied to this and kindred cases under the law, current in the *Madras* Presidency.

In the present case we have to do only with the second of these propositions.

The rule laid down cannot depend upon the difference between a sale under a decree for sale of mortgaged property and a sale in execution of a money decree. In neither case does or can the sale affect the interests of persons who are not parties to the decree.

It is said that there is this difference in the case of the order of a Court to sell property mortgaged, that it orders the sale not **[101]** of the right, title, and interest of the debtor, but "the sale of the property." With all respect for those who hold the opinion that this makes any difference, I venture to say that it does not. It was said by the Judges in Proladh Misser *v.* Oodit Narain Singh (10 W. R., 292), that the purchaser does not purchase the rights and interests of the judgment-debtor, but the rights which the mortgagee brings to sale by virtue of the decree, that is, the right or charge which is his security, or the hypotheca or mortgage made to the extent to which he was, at the date of the charge, entitled to charge it, but is has never been maintained that such a charge would affect interests other than those which the person who charged the property had a right to affect.

It would, indeed, be strange to find that a person, with a qualified power, could, by exercising it in a particular way, or suffering a decree to be passed against him in a particular form, affect interests which the qualification of his power restrained him from affecting.

The decision in Deendyal Lal *v.* Jugdeep Narain Singh * (I. L. R., 3 Cal., 47; S. C. L. R., 4 I. A., 252) is an authority, if any were required, for saying that the debt is no more binding upon the son, because it is secured by a hypothecation than if it were without that security, and if that be so, it is difficult to see how creditor can become possessed of authority to affect the interests of the son by merely obtaining a decree to enforce the hypothecation security for a debt not otherwise binding on the son.

When, therefore, it is said, as in Proladh Misser *v.* Oodit Narain Singh, "The purchaser purchases the rights which the mortgagee brings to sale by

* "It is difficult to see upon what principle the hypothecation of the property in question can be taken to improve the position of the creditor."—*Deendyal Lal* v. *Jugdeep Narain Singh*.

virtue of the decree," all that is meant is that the purchaser does not purchase merely the equity of redemption, but the property hypothecated to the extent to which the mortgagor had power to alienate it. The decree in ordering the sale " of the property " means the property of the debtor, *i.e.*, his right and interest in it at the date of the mortgage.

[102] Does the rule laid down in Girdharee Lall *v.* Kantoo Lall depend, then, upon the members of the family being regarded as constructively parties to the decree in execution of which the sale took place? This question must be answered in the negative, because, if that were so, it could not be open to the plaintiffs in a subsequent suit to question the alienations upon any ground whatever; but the Judicial Committee admit that they may be questioned on the ground of immorality.

Can a suit of this kind be viewed as a peculiar proceeding allowed for the purpose of effecting justice in the nature of a reopening of the original case and adding the plaintiffs as parties, whereby they are enabled to have their objections to the alienations fairly considered? Clearly not, for then they would be added as defendants and it would be for the creditor to make out his case; but, under the rule in Girdharee Lall, it is for the objecting sons to make out their case in the character of plaintiffs.

The rule depends mainly upon the view that the son must discharge his father's debts, not only after he is dead, but in his lifetime, unless they are immoral debts, and that view appears to me to be one which is not in accordance with the law current in Madras.

In the texts as to debts, the object seems rather to be to provide for the future welfare of the debtor than to secure the satisfaction of the creditor.

Take, for instance, the Vyavahara Mayukha, Chapter V, Section 21, quoting Narada. Even when the creditor and every possible representative have disappeared, the debt is to be paid. To whom? To worthy priests, or, failing them, it is to be thrown away into water or fire.

Debts owing to others than priests, the king may take to himself, if the creditor be not present.

When cast into water or fire, the money is carried to the account of (the deceased or of) his ancestors in a future state.

It is clear that a moral duty is imposed on the debtor to mulct himself of what he has borrowed.

The texts point to the object of the law having been rather the creation of a horror of debt than the satisfaction of the creditor.

[103] This object is effected by erecting debt into a sin which pursues a man into the next world.

The duty enjoined on the son of paying the grandfather's and the father's personal debts is, from the texts, only a pious duty to discharge his father from the penalties incurred by dying in debt. The passage from Katyayana, quoted in the Mayukha (page 124, *Stokes*), beginning " The Judge shall compel a son to pay the debt of his father," is qualified in its meaning by the passage immediately following it, which is not quoted in the Mayukha but is to be found in the Digest, Vol. I, page 190, from which it seems clear that the preceding passage quoted in the Mayukha contemplated only the case of the sons having taken assets. The words " liable to bear the burden" are explained by the Compiler of the Digest to mean " not under a disability." But if this is the meaning, the

Judge would have to enforce the debt, moral or immoral, provided the son was capable of property and not under a disability. It seems much more reasonable to conclude that "liable to bear the burden" had reference to the question of whether the debt was one for which the son could justly be made answerable, by reason of its having been incurred for proper family purposes.

In the present day it would be unsafe to depend entirely upon ancient texts which run counter to social usages. *See* as to this the text of *Vyasa* which was referred to in argument, Chapter I, Section 1, Clause 27, of the portion of the Mitakshara relating to Inheritance. If this were now followed rigidly, a father, though in the position of manager, could effect no alienation at all for the most urgent family purposes without convening all his sons and obtaining their consent, and, even then, it would be invalid if any female of the family happened to be with child.

If the rule of the ancient law, whether it was a mere moral precept or a legal obligation, is in the present day to be enforced, it should be enforced in its integrity; and if this be done, it will follow that a son's obligation to pay his ancestor's debts is irrespective of any estate at all, ancestral or other.

When the father is dead, the debts devolve on the son. Then how is the obligation to be enforced? The question as to who is the person upon whom the debts devolve is no doubt a question of Succession. but the question of the extent of the liability [104] of the son to the debtor is, just as the question of the liability of the original debtor would have been whom the son represents, a question of Contract, and, according to the law long current in this Presidency and continued by Act III of 1873, such questions are not required to be determined (except on the Original Side of the High Court) by Hindu Law, but they must be decided by the Statute Law, or, where that is wanting, by the law of equity and good conscience, and this law has been in a great measure settled by the course of decisions as to contracts of this kind.

It was held in *Bombay* that the legal obligation was irrespective of assets until Act VII of 1866 was enacted to limit the liability; but, in the other Presidencies, the obligation was not held to extend beyond assets.

Following the rule laid down by the late Sadr Court in their Proceedings of the 27th February 1837 and of the 8th December 1840 (*see* Circular Order 73), the decisions in this Presidency have determined that the liability of the son exists only to the extent to which he may have taken assets—Sadr Decrees 1851, page 13; Sadr Decrees 1860, p. 78; also Rayappa *v.* Ali Sahib (2 M. H. C. R., 336), Karuppan *v.* Verial (4 M. H. C. R., 1). There are decisions to the same effect in Bengal and the North-West Provinces.

The dictum of Lord Justice Knight Bruce, "By the Hindu Law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate," had relation solely to the question of whether the obligation was charged upon self-acquired as well as ancestral property of the father which became assets in the hands of the son, as is clear from the words immediately following. It did not mean to lay it down that the son's own property was liable equally with what he received from his father's estate.

What then are the assets?

The term is technically used to signify the property of the deceased person himself which he left at his death and is available for paying his debts. In the term "property," besides rights actually possessed and enjoyed, are included also

all [105] potentialities which the deceased had and which pass to his heirs subject to the liability to pay his debts.

It is a contradiction to say that a father leaves assets in the property of his son, or that a son takes assets of his father in property which belongs to the son himself.

It seems scarcely necessary to contend at the present day for what, when it comes directly in question, is always admitted, that a son under the Mitakshara law has a complete property in the estate of the grandfather. According to the Mitakshara his property is by birth, and he has a power of interdiction to prevent the father dealing with it to his prejudice. He can also insist upon his father dividing the property and giving him his share. A text of Yajnavalkya to be found in Chapter I, Section 1, paragraph 30, of the portion of the Mitakshara on the subject of inheritance, which says "separated kinsmen, as those who are unseparated, are equal in respect of immoveables, for, one has not power over the whole to make a gift or mortgage," is interpreted to mean that among unseparated kinsmen, the consent of all indispensably requisite, because no one is fully empowered to make an alienation since the estate is in common.

The consent of others is requisite to the alienation, not because the coparcener desiring to make the alienation had not an actual property in his unseparated interest, but because the property is in common.

The text seems to be limited in its application to the dealing of any one coparcener with the whole estate. The Commentary no doubt implies that one coparcener cannot, without the consent of the rest, alienate the estate to any extent whatever. In other words, the Mitakshara while it declares that the coparcener has a distinct property by birth in the ancestral property which he can compel his father to partition off to him, denies him the power, before partition, of conveying to a stranger his right to a share without the consent of the other coparceners. As a member of a coparcenary body, he cannot, without the consent of the other members, affect prejudicially their coparcenary property. This view has been very consistently adhered to in *Bengal* and has also guided the decisions in the North-West Provinces though it is not there so consistently acted upon. But in Madras and Bombay the law has progressed and has materially departed from [106] the ancient standard. The decisions since 1813 have established that, whatever the ancient law may have been, the law applicable to this Presidency at the present day admits of a coparcener alienating his interest without the consent of the other coparceners; for, it seems inconsistent to say that a coparcener cannot alienate his interest, but can only confer upon a purchaser for value an equity to a partition. That, in effect, is an alienation, though the means of realizing what is so alienated may be somewhat indirect; and if he may himself fix the value at which he will thus sacrifice his coparcenary right to his share in a partition, there can be no substantial reason why he should not be in a position to alienate it for good as well as for valuable consideration. Upon this point the decisions have expounded the existing law as recognizing in the son not a more complete right of property than he possessed according to the ancient law, but the same right only more capable now of ready and immediate realization than it may perhaps have been regarded in the time of Vijnaneswara. The father's right of property is necessarily limited by that of the sons, and is confined to an equal share with each of the sons in the ancestral property.

The text says, "he who has received the estate or heritage (Riktha) shall pay the debt," &c.—Mitakshara, Part I, Chapter VI, Section 3, verse li, edition of Girischander Tarkalankara.

The same text is quoted in the Vyavahara Mayukha, Chapter V, Section IV, paragraph 16.

The first paragraph of Chapter I, Section V, of the portion of the Mitakshara on Inheritance shows that Section III of the same chapter relates to partition of the father's estate as distinguished from that of the grandfather, so that the text "let the sons divide equally both the effects and the debts after the demise of their two parents" has a reference only to the liability of the sons, arising out of a partition of the father's estate. Now, although a son is said to have an inchoate right of property in the paternal estate, the father possesses a complete power of disposal over it before partition, and the sons, therefore, on the father's death, receive the estate as the father's assets. But the sons do not receive the grandfather's estate on the same footing. Each has his own distinct share which, although not yet "manifested by partition" (to use the expression Jimutavahana) is [107] none the less his property. What he receives from the father out of the grandfather's estate on the death of the father is the father's share only, and whether the words "Daya" and "Riktha" are rendered "wealth" or "heritage," or "estate," all that is received by the son on partition (after the death of the father) of the grandfather's estate, as "wealth," or as "heritage," or as "estate" is, at most, the share which the father possessed in the grandfather's estate, and that is the outside measure of the assets. A question here arises whether the son receives even this. Whether, that is, at the moment of death the father's share in the ancestral estate, by accruing to the sons by survivorship, does not become unavailable as assets.

It has been decided by the Privy Council in the case of Suraj Bunsi Koer *v.* Sheo Proshad Singh that when the interest of a deceased coparcener has been actually attached in his lifetime in execution of a mere money-decree against him, the attachment avails against the other coparceners after his death, and the decree may be executed against them in respect of the interest so attached. The Privy Council adverted to (and dissented from) two cases, one that of Goor Parshad *v.* Sheodeen (4 N. W. P., 137) and a case reported in the "Madras Law Reporter," p. 63, Kuppa Konen *v.* Chinnayen, in which it was held that, on the death of the coparcener, the share so attached survived to the other coparceners and the attachment fell through. The Privy Council holds that the attachment constitutes a valid charge upon the land to the extent of the interest seized, and this on the ground of the seizable character of the undivided share which was recognized in Deendyal Lal *v.* Jugdeep Narain Singh. The seizable character of the interest so recognized would seem to arise from the fact that though not actually severed and ascertained, it is, notwithstanding, the actual property of the coparcener who can dispose of it during his lifetime, and that, up to the moment of his death, it exists as his individual property capable of being severed.

The Court, in attaching it and placing it in the custody of the Court during the lifetime of the owner, holds it subject to its final order, and the Court is thus enabled, notwithstanding the subsequent death of the coparcener, to charge it as effectually as the [108] coparcener would have charged it by a hypothecation in his lifetime.

A will can only take effect from the death of the testator. No obligation has been incurred and no effectual disposition of the property has been made up to the moment of death. The right of the coparceners to take the share by survivorship is in conflict with the right by devise, and the right of survivorship being a right by the Hindu Law and a paramount right, takes precedence of the right by devise.

This, at least, is what is at present held (Vital Butten *v.* Yamenammal), 8 M. H. C. R. 6), but it is possible that on further discussion it may be found that what is so held introduces a departure from the principal upon which Hindu wills have been recognized at all, *viz.*, that a man may make a valid will of what he might give away in his lifetime. With reference, however, to what is at present held as to testamentary dispositions it may be contended that similarly the right by survivorship, being in conflict with the liability of the assets left by the father to the discharge of his debts, the share would, at the moment of his death, pass unencumbered to the coparceners under the paramount title by survivorship.

But here a different rule applies. The rule of Hindu Law requiring the taker of the wealth to discharge the debt steps in and has the effect of devolving the obligation with the accruing share upon the surviving coparceners. They take the estate charged with the debts ; for there is not any difference in property accruing by survivorship and property inherited, in the ordinary sense, in their liability to the discharge of debts of the person whose assets the property is.

There are said to be five ordinary modes of acquisition of property, *viz.*, "inheritance" (Riktha), "purchase," "partition," "seizure," and "finding"—and "Riktha" standing in the text "he who takes the estate must pay the debts" (Part I, Ch. VI, Section 3, verse li Mitakshara) is explained by the author to mean a thing which belonged to one man but has subsequently become the property of another, otherwise than by "purchase," "partition," "seizure," or "finding." The meaning of Riktha, therefore, is very **[109]** extensive and should not be limited to what is ordinarily understood by the term "inheritance." It is clear that the share lapsing is an accession to the survivors of what belonged to another, and as the acquisition by survivorship cannot be classed under the other modes of acquisition, it must fall within the classification of an acquisition of a kind included within the meaning of Riktha on the taking of which the liablity to pay the debts always attaches.

I think, therefore, that the share of the father which is said to survive to the sons must be classed as assets available for payment of his debts.

But it has been said that the effect of the decision of Girdharee Lall *v.* Kantoo Lall is to constitute the whole ancestral estate assets for payment of the father's debts. No doubt it enforces on the son the obligation of paying those debts, whether with assets of the father or from the son's own interest in the family property. But the decision only purports to expound the law and cannot, of course, have the effect of altering it or of converting the interest of the son into the estate of the father. The "share" or "interest" of the son continues to enure as his share or interest notwithstanding that the father may have left debts.

Upon the question of whether the son is liable to discharge the father's debts in the father's lifetime, I have only to observe that, until the case of Girdharee Lall *v.* Kantoo Lall, it was universally supposed that in the lifetim of the debtor the son was not liable under any circumstances to pay the father's personal debts. Chellappa *v.* Chellamma (M. S. D. 1851, p. 33) lays down the law to this effect and this view of the law has since been followed in *Madras*. The text of Narada," what remains of the paternal inheritance over 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 debtor," has reference to a partition after the father's death, and there is no text in support of the view that the son is liable in his father's lifetime for debts which it is quite possible the

father may himself discharge before his death. If this be so, his property could not be chargeable for these debts, and as the decision of the Privy Council is contrary to what is understood in this Presidency to be the Hindu Law as established by a long series of decisions, which **[110]** the Judicial Committee, in arriving at their conclusion, did not notice, I think we are not bound by the novel view taken by the Committee in this respect.

The conclusion I arrive at is that the case of Girdharee Lall *v.* Kantoo Lall ought not to be followed in this Presidency to the extent of laying upon a son the duty of discharging his father's debts in his lifetime, or as to the *dictum* that a son can only call in question charges created upon the property by the father on the ground that the debts, in discharge of which such charges were created, were of an immoral character.

I consider that we are still governed by the rules laid down in Saravana Tevan v. Muttayi Ammal (6 M. H. C. R., 371), and that where the decree is a decree against the father for his separate debts, the purchaser of ancestral property under the decree takes, at most, only the share or interest to which the father was entitled at the date at which the charge was created.

I would dismiss the appeal of seventh defendant, as the fact is found against him by the District Judge as to the purchase of the property in respect of which he appeals, and the High Court cannot interfere in the matter of his appeal; and I would allow the objections taken by plaintiffs to the Appellate Court's decree and restore the decree of the District Munsif in this respect. I would allow plaintiffs the costs of the appeal and second appeal. But, as the majority of the Court are of opinion that the decision in the case of Girdharee Lall *v.* Kantoo Lall is binding on the Courts of this Presidency, the case will be disposed of in accordance with their opinion.

Kernan, J.—I agree with the Chief Justice. No doubt the decree for sale does not act by way of estoppel against the sons and grandsons not parties to it, but they have failed to show sufficient grounds for impeaching it.

NOTES.

[*See* the Notes to 4 Mad. 1 *supra*.]