it is, by many members of the Bar (one Advocate clearly would have nothing to do with the arrangement in this case) this danger of the Bar being asked deliberately to draft false affidavits will not arise.

ABDUR RAHMAN J.—I agree.

V.V.C.

APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair and Mr. Justice Varadachariar.

PATELKHANA VENKATARAMASWAMI AND ANOTHER (DEFENDANTS 3 AND 4), APPELLANTS,

1938, April 1.

v.

THE IMPERIAL BANK OF INDIA AT RAJAHMUNDRY AND THREE OTHERS (PLAINTIFF AND DEFENDANTS 1, 2 AND 5), RESPONDENTS.*

Hindu law—Antecedent debt—Father—Money advanced to, in pursuance of an agreement to execute a mortgage if and when called upon—Agreement genuine and not a device to evade law—Subsequently mortgage called for and same executed by father—If agreement and mortgage part of the same transaction—Original debt, "antecedant debt", if.

If money is advanced to the father in a joint Hindu family in pursuance of an agreement merely to execute a mortgage if and when called upon, the fact that subsequently a mortgage is called for and executed will not make the debt and the mortgage part of the same transaction within the meaning of *Armugham Chetty* v. *Muthu Koundan*(1), but the debt will constitute an "antecedent debt" within the meaning of Hindu law. The agreement must be a genuine agreement and not a device to evade the law.

Case-law reviewed and discussed.

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* Appeal No. 251 of 1933.

(1) (1919) I.L.R. 42 Mad. 711 (F.B.).

VENKATA-RAMASWAMI v. IMPERIAL BANK OF INDIA.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 18 of 1932.

The appeal came on for hearing before VARADACHARIAR and PANDRANG ROW JJ., when their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH :—

VARADACHARIAR J.—This appeal arises out of a suit to enforce specific performance of an agreement entered into by defendants 1 and 2 to execute a mortgage in favour of the plaintiff bank to secure repayment of moneys advanced to them in pursuance of that agreement. Moneys were advanced on more than one occasion and some time in December 1930 the plaintiffs say that they asked for the execution of the security in pursuance of the agreement. The bank had obtained a simple money decree against defendants 1 to 4 for the amount due.

Defendants 1 and 2 are father and son and defendants 3 and 4 are the minor sons of the second defendant. All the four defendants are members of an undivided family. The fifth defendant is the Official Receiver in the insolvency of the first and second defendants. Defendants 1 and 2 seem to have carried on a joint business and they purported to borrow money from the plaintiff bank in connection with that business, but the question has not been raised or decided whether that was an " ancestral " business in respect of which defendants 1 and 2 can create a mortgage so as to bind the shares of defendants 3 and 4 in the family property. Defendants 3 and 4 contend that, according to the test laid down in the Privy Council decisions, the suit debts are not " antecedent debts " in relation to the mortgage, because they were lent on the strength of the agreement to create a mortgage and that therefore any mortgage executed by defendants 1 and 2 on foot of such agreement cannot bind their shares in the family property.

If these defendants had not been impleaded in this suit, specific performance might have been decreed in the usual course as against the parties to the agreement, leaving the question of the binding character of the mortgage to be agitated in appropriate proceedings. But as they have been impleaded in this suit and the question has been raised and dealt with

in the Court below, we do not think it proper to ignore that contention. The learned Subordinate Judge was of opinion that the mortgage now to be executed by defendants 1 and 2 must be deemed to be one in respect of an " antecedent debt ", because the debts had already been advanced. The appellants' learned Counsel relies on the decision of a Division Bench of this Court in *Rajayya* v. *Satyanarayanamurthy*(1) in support of his contention that, where money has been advanced on the strength of an agreement to create a security on the family property, the fact that the mortgage comes to be executed only after the advance has been made will not make the mortgage valid as one created to secure repayment of an " antecedent debt ". This is a direct authority on the point; but we have felt some difficulty in reconciling it with the principle of the Full Bench decision in *Armugham Chetty* v. *Muthu Koundan*(2) which was approved by the Judicial Committee in *Brij Narain* v. *Mangal Prasad*(3). If money which had been advanced on a mortgage of joint family property can be regarded as an " antecedent debt " validating a later mortgage securing repayment of the same sum, it is not easy to see why money which has been advanced on the strength of an agreement to execute a mortgage should be regarded as standing on a different footing. The principle of the decision in *Armugham Chetty* v. *Muthu Koundan*(2) has also been applied by the Privy Council in *Lal Bahadur* v. *Ambika Prasad*(4). But for the judgment in *Rajayya* v. *Satyanarayanamurthy*(1), we should have been prepared to concur in the decision of the lower Court. In view however of that decision, we refer to the decision of a Full Bench the question " whether money advanced to the father in a joint Hindu family in pursuance of an agreement to create a mortgage as and when required by the lender will constitute an antecedent debt so as to make the mortgage (when it comes to be executed) binding even on the shares of the sons of the borrower."

ON THE REFERENCE—

M. S. Ramachandra Rao for appellants.—Moneys were being advanced by the Imperial Bank of India to the appellants' father in pursuance of an agreement by him to execute

(1) 1934 M.W.N. 812.
(2) (1919) I.L.R. 42 Mad. 771 (F.B)
(3) (1923) I.L.R. 46 All. 95 (P.C.).
(4) (1925) I.L.R. 47 All 795 (P.C.).

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a mortgage for the same when called upon to do so. Subsequently the Imperial Bank of India called upon the appellants' father to execute a mortgage. The moneys that were advanced under such circumstances under the agreement could not be an " antecedent debt " in connexion with the mortgage. *Rajayya* v. *Satyanarayanamurthy*(1) is on all fours with the present case. This case is stated to be contrary to the decision in *Armugham Chetty* v. *Muthu Koundan*(2) which is approved in *Brij Narain* v. *Mangal Prasad*(3).

[VARADACHARIAR J.—Should the debt be an " antecedent debt " with respect to the mortgage or with respect to the agreement?]

The question as to what is an " antecedent debt " came up for decision before the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*(4). The relevant passage appears at pages 447 and 449. There is an article in the journal portion of 35 Madras Law Journal by the then Editor, Mr. Varadachariar as he then was, which I adopt as my argument. The illustration given in the article fits in with the present case. There is nothing in *Armugham Chetty* v. *Muthu Koundan*(2) or in *Brij Narain* v. *Mangal Prasad*(3) which militates against that view. The present question is discussed in Mulla's Hindu Law at pages 355 and 360. In *Armugham Chetty* v. *Muthu Koundan*(2) the point is discussed at page 719.

[VARADACHARIAR J.—In *Armugham Chetty* v. *Muthu Koundan*(2) there were two mortgages one after the other. In the present case there was an agreement which was to be followed by a mortgage if and when called for.]

In that case when the first mortgage was executed the second mortgage was not in contemplation, but in the present case when the agreement was executed the mortgage was in contemplation. It is the presence of the agreement which brings the present case within the rule laid down in *Sahu Ram Chandra* v. *Bhup Singh*(4). This distinction is pointed out in *Ram Rekha Singh* v. *Ganga Prasad Mukaraddhwaj*(5), which was decided after *Brij Narain* v. *Mangal Prasad*(3). In the latter case the test laid down is that when the first mortgage was executed the second one should not have been in

(1) 1934 M.W.N. 812. (2) (1919) I.L.R. 42 Mad 711 (F.B.).
(3) (1923 I.L.R. 46 All. 95 (P.C.). (4) (1917) I.L.R. 39 All. 437 (P.C.).
(5) (1926) I.L.R. 49 All. 123 (F.B.).

contemplation. It is the original understanding that makes the second transaction part of the first.

O. T. G. Nambiar for first respondent.—The history of " antecedent debt " has to be looked into if it is to be properly understood. It is based on the theory of pious obligation of sons to discharge the debts of their father which are neither immoral nor illegal. It was first considered in *Suraj Bunsi Koer's* case(1). After the decision in that case the controversy was as to whether a debt contemporaneous with a mortgage could be an " antecedent debt ". In *Sahu Ram Chandra* v. *Bhup Singh*(2) the Privy Council set at rest that controversy. It is in that connexion the Privy Council used the term " dissociation in fact ". *Rajayya* v. *Satyanarayanamurthy*(3) ignored this aspect. In the present case under the terms of the agreement until a demand is made on the constituent to execute a mortgage there is only a probability of a mortgage coming into existence. No specific amount has been fixed upon. The transaction was not meant to be a device to evade the law.

Other respondents were unrepresented.

M. S. Ramachandra Rao replied.

Cur. adv. vult.

OPINION.

LEACH C.J.

LEACH C.J.—The suit which has given rise to this reference was instituted in the Court of the Subordinate Judge of Rajahmundry by the Imperial Bank of India, the first respondent. The bank sued to enforce specific performance of an agreement entered into by the second and third respondents with the bank to secure repayment of moneys advanced to them. The second respondent is the father of the third respondent. They and the appellants, who are the minor sons of the third respondent, constitute an undivided family. In 1923 the second and third respondents started a business, and for this purpose opened an account with

(1) (1879) I.L.R. 5 Cal. 148 (P.C.). (2) (1917) I.L.R. 39 All. 437 (P.C.).
(3) 1934 M.W.N. 812.

VENKATA-RAMASWAMI v. IMPERIAL BANK OF INDIA.

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the bank. On 14th August 1923 in pursuance of an arrangement with the bank, which was willing to finance them, they executed a document in the following terms:

"In consideration of the Imperial Bank of India advancing us sums of money from time to time we hereby undertake not to alienate or in any way transfer or mortgage any of our immovable property as per schedule attached and which at present is not mortgaged to any one.

We hereby agree when called upon to do so to execute a legal mortgage of these properties, with or without possession or conveyance to the said bank as the bank may require, so long as we are indebted to the bank.

This agreement to be in force till cancelled by us by a registered letter."

From time to time the bank lent money to the second and third respondents without calling upon them to execute any mortgage in its favour. By 1931 the second and third respondents had become heavily indebted to the bank and in that year the bank obtained two decrees against them in respect of advances. The first decree was for a total sum of Rs. 25,482–11–0, made up of Rs. 5,070–1–0 due on a promissory note dated 19th December 1930, and Rs. 20,412–10–0 due on three hundis dated respectively 30th March 1930, 5th November 1930 and 29th November 1930. The second decree was for Rs. 5,099–3–0 due on a hundi dated 30th October 1930. In December 1930 the bank demanded that the second and third respondents should execute a mortgage to secure their indebtedness, but this demand was not complied with, and on 5th April 1932 the bank sued for specific performance of the agreement which I have just quoted. The suit was decreed and the sons of the third respondent were held to be liable to the extent of their interests in the family properties They have appealed, and contend that

there can be no decree for specific performance so far as they are concerned, because the mortgage which the Court ordered to be executed was not in law a mortgage for an antecedent debt. As this question is of importance and as the decision in *Rajayya* v. *Satyanarayanamurthy*(1) would appear to be in conflict with certain decisions of the Privy Council the following question has been referred to us :—

" Whether money advanced to the father in a joint Hindu family in pursuance of an agreement to create a mortgage as and when required by the lender will constitute an antecedent debt so as to make the mortgage (when it comes to be executed) binding even on the shares of the sons of the borrower?"

In delivering the judgment of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*(2) Lord SHAW said that the issue of the father could only be bound where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by the joint estate. The judgment concluded with the following statements:

" In truth in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact. The Courts in India, wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust, will not be slow to deny effect to a mortgage so brought into existence."

This judgment was considered by a Full Bench of five Judges of this Court in *Armugham Chetty* v. *Muthu Koundan*(3) and there WALLIS C.J. expressed the opinion that their Lordships only meant that if the so-called " antecedent debt " was incurred so shortly before the execution of the mortgage, say two

(1) 1934 M.W.N. 812. (2) (1917) I.L.R. 39 All. 437 (P.C.).
(3) (1919) I.L.R. 42 Mad. 711 (F.B.).

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hours or two days, as to establish that it was incurred on the credit or security available by the joint family immovable assets, such a debt is not an " antecedent debt " and therefore the mortgage which is executed for such a so-called antecedent debt will not affect the sons' shares. Viewing the decision of the Privy Council in this light the Court held that, if a Hindu father borrows money on the security of the family estate and later gives another mortgage, the first debt constitutes an " antecedent debt ", notwithstanding that it was secured on the family estate. In *Brij Narain* v. *Mangal Prasad*(1) the Judicial Committee expressed their entire agreement with the views of WALLIS C.J. in *Armugham Chetty* v. *Muthu Koundan*(2) and in order to prevent misconception in future on this and connected questions stated the following propositions of law:

"(i) The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity; but

(ii) if he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(iii) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

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

(v) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

The fourth proposition would appear to be an embodiment of the concluding portion of Lord SHAW's judgment, where he expressed the opinion that the

(1) (1923) I.L.R. 46 All. 95 (P.C.). (2) (1919) I.L.R. 42 Mad. 711 (F.B.).

transaction must be one which cannot be regarded as a cloak for a breach of trust. If the debt and the mortgage are not part of the same transaction, but are independent of one another, the mortgage will be binding on the issue of the mortgagor.

In *Rajayya* v. *Satyanarayanamurthy*(1) KRISHNAN PANDALAI J. sitting with CURGENVEN J. observed that, if a man advanced a loan to a father in a joint Hindu family and agreed with him to take a mortgage for the loan and subsequently in pursuance of that agreement does take the mortgage, the mortgage cannot be said to be for a debt antecedent to the original loan. This statement of the law is very wide and may give rise to misconception. The mortgage may be independent of the debt despite the fact that the agreement between the parties contemplated the furnishing of security, if called for. If the money is lent on the express condition that a mortgage will be executed later and a mortgage follows, the debt cannot be said to be independent of the mortgage, but if the arrangement is merely that the debtor shall give security, if and when required, the position is very different. It may never be required and probably will not be called for, if the creditor remains satisfied with the debtor's personal liability. If it is required because the creditor at a later date has his suspicions of the debtor's stability or for some other reason, it cannot be said that the advancing of the money and the subsequent mortgage are part and parcel of the same transaction.

Now, what is the position in the present case? The bank did advance moneys to the second and third respondents and continued to lend moneys entirely without any security. For several years the bank was satisfied with the undertaking given by the second and

(1) 1934 M.W.N. 812.

VENKATA-RAMASWAMI v. IMPERIAL BANK OF INDIA.

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third respondents not to alienate their properties. It is true that the second and third respondents had undertaken to provide security when called upon to do so, but this does not alter the fact that moneys were advanced without security. When security was called for, there was a debt really in existence. In our opinion, it cannot be said that there was here a breach of trust on the part of the second and third respondents or that the bank was a party to a colourable transaction. In other words it cannot be said that the debt was any part of the mortgage, or, to use the words of Lord DUNEDIN in *Brij Narain* v. *Mangal Prasad*(1), "part of the transaction impeached". In this country an agreement to mortgage creates no charge, and this is of importance in this connexion.

For the reasons stated we would answer the reference in this sense. If the agreement is merely to execute a mortgage, if and when called upon, and the money is lent on this understanding, the fact that subsequently a mortgage is called for and executed will not make the debt and the mortgage part of the same transaction within the meaning of *Armugham Chetty* v. *Muthu Koundan*(2), but the debt will constitute an "antecedent debt" within the meaning of Hindu law. The agreement must be a genuine agreement and not a device for evading the law.

MADHAVAN NAIR J.—I agree.

VARADA-CHARIAR J.

VARADACHARIAR J.—I agree. There is a real distinction between cases in which the lender and the borrower contemplate the giving of security as only a future possibility and cases in which from the outset the parties contemplate only a mortgage loan. In the former case, the lender is prepared to start with only

(1) (1923) I.L.R. 46 All. 95 (P.C.), (2) (1919) I.L.R. 42 Mad. 711 (F.B).

the personal liability of the borrower and conceivably may never call for the execution of a mortgage at all. Security is, in such cases, ordinarily called for only when in course of time it is found that the borrower has not been repaying his dues with the promptness with which he was expected to repay or is getting into financial difficulties. When, for such reasons, the creditor calls for the execution of a mortgage, there will be in existence an indebtedness which has for some time been outstanding merely on the personal liability of the borrower. This debt can at that very moment be recovered from the *whole* of the joint family property of the debtor including the shares of his sons and it is to avert proceedings to that end that the debtor will be called upon to give a security. It does not seem reasonable in such a case to speak of the " antecedency " of the debt as *illusory*; nor can it be said that there was no *bona fide* debt or that it was " colourably incurred for the purpose of forming a basis " for the mortgage; *per* STANLEY C.J. in *Chandradeo Singh* v. *Mata Prasad*(1).

If, as observed by Lord SHAW in *Sahu Ram Chandra* v. *Bhup Singh*(2), a further condition should be insisted on, before binding the son's share by the father's mortgage, namely, that at the time of advancing money the lender should not have had in view the " credit obtainable from immovable assets belonging to the joint family ", the position might be different; but this condition can no longer be insisted on in view of the Full Bench decision in *Armugham Chetty* v. *Muthu Koundan*(3) and of the decision of the Judicial Committee in *Brij Narain* v. *Mangal Prasad*(4). It is true that in *Brij Narain* v. *Mangal Prasad*(4)

(1) (1909) I.L.R. 31 All. 176, 190 (F.B.).
(2) (1917) I.L.R. 39 All. 437, 447 (P.C.).
(3) (1919) I.L.R. 42 Mad. 711 (F.B.). (4) (1923) I.L.R. 46 All. 95 (P.C.).

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their Lordships speak (in proposition No. 4) of the debt being " not part of the transaction impeached "; the transaction referred to in this passage is the mortgage itself. The proposition has evidently been so worded with a view to give effect to the observations of Lord SHAW at the end of the judgment in *Sahu Ram Chandra* v. *Bhup Singh*(1), when, referring to a father " at the end of his personal resources ", his Lordship instanced the case of a money-lender advancing money to him " relying upon an understanding express or implied " to give security.

Apart from attempts to evade the law, it may, even in cases where *only* a mortgage loan was contemplated, happen that there is some interval of time—long or short—between the advance of the money and the execution of the mortgage bond, e.g., because the requisite stamp papers are not immediately available, or details as to survey numbers, etc., relating to the property to be mortgaged have to be obtained, or one of the persons who has to join in executing the mortgage is not available, or the mortgagee is able to find only a portion of the money required and the execution of the document is postponed till he is able to find the balance. In these cases, it may well be said that, notwithstanding the interval, the loan and the mortgage are part of one and the same transaction. *Rajayya* v. *Satyanarayanamurthy*(2) will, on its facts, be found to fall in this group; because in that case, the original arrangement itself was for a mortgage loan of Rs. 5,000, but the lender was able to find only Rs. 3,000 immediately. The execution of the mortgage deed was postponed pending the advance of the balance of

(1) (1917) I.L.R. 39 All. 437, 447 (P.C.). (2) 1934 M.W.N. 812.

Rs. 2,000 and in the meanwhile the first advance of Rs. 3,000 was acknowledged by the execution of a promissory note.

Solicitors for first respondent: *King* and *Partridge*.

G.R.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Krishnaswami Ayyangar.

THE OFFICIAL ASSIGNEE, MADRAS (APPLICANT), APPELLANT,

v.

P. SURYAKANTHAMMAL AND ANOTHER (RESPONDENTS), RESPONDENTS.*

1938, May 4.

Presidency-towns Insolvency Act (III of 1909), sec. 58 (5)—Scope of—Contempt of Court—Power of Court to commit an agent of an insolvent for—Not limited by sec. 58 (5)—Inherent power of Court.

The powers of the High Court in its original insolvency jurisdiction to commit an agent of an insolvent for contempt are not limited to those conferred by sub-section 5 of section 58 of the Presidency-towns Insolvency Act. It has inherent power to commit to prison for contempt persons who deliberately aid an insolvent in defying an order of Court lawfully passed in the exercise of its insolvency jurisdiction.

Seaward v. *Paterson*(1) refered to.

APPEAL from the judgment of WADSWORTH J., dated 9th August 1937, in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 246 of 1937 in Insolvency Petition No. 417 of 1936.

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* Original Side Appeal No. 65 of 1937.

(1) [1897] 1 Ch. 545.