The Indian Law Reports

PUNJAB SERIES

APPELLATE CIVIL

Before Tek Chand, J.

THE HINDUSTAN COMMERCIAL BANK, LTD.,—*Appellant.*

versus

SOHAN LAL AND OTHERS,—*Respondents.*

Regular Second Appeal No. 612 of 1955.

1961

Sept., 6th

Hindu Law—Liability of sons for the debts of father—Sons' liability—Whether extends to payment of debts of the father incurred as surety for a third person.

Held, that if the debt had been incurred by the father, whether a personal debt or a mortgage debt, the doctrine of sons' pious obligation to meet his liability from the estate inherited by them is attracted, but where the father had incurred an obligation as a surety not against the debt incurred by him, but a third person, the sons cannot be compelled to meet such a liability as that would be deemed *Avyavaharika* in the sense of a "debt for a cause repugnant to good morals" according to Celebrooke's translation of the term.

Second Appeal from the decree of the Court of Shri William Augustine, Senior Subordinate Judge, with enhanced Appellate Powers, Amritsar, dated 14th May, 1955, modifying that of Shri Gian Chand Jain, Sub-Judge, IV Class, Amritsar, dated the 31st December, 1953.

H. R. SODHI, U. S. SAWHNEY, AND K. L. KAPUR, ADVOCATES, for the Appellants.

D. R. MANCHANDA, ADVOCATE, for the Respondents.

JUDGMENT

Tek Chand, J. TEK CHAND, J.—This is a regular second appeal preferred by the Hindustan Commercial Bank Ltd., against the decree and judgment of the Senior Sub-Judge, Amritsar, granting declaration to the plaintiff that the property in suit is ancestral joint Hindu family property and that the final decree passed in favour of the bank against Gaggu Mal was not binding upon Gaggu Mal's son, Sohan Lal and for an injunction restraining the bank from getting the property sold in execution of the bank's decree against Gaggu Mal. The parties were left to bear their own costs. The Senior Sub-Judge agreed with the findings of the trial Court on the issues and had merely modified the trial Court's decree as he felt that it had not been happily worded. To all intents and purposes, both the Courts had given decision in favour of the plaintiff and against the defendant-bank.

Gaggu Mal had three sons, Sohan Lal, Mohan Lal and Madan Lal and a daughter, Vidya Wati. Mohan Lal, the second son of Gaggu Mal, was the sole proprietor of Messrs. G. M. Mohan Lal and Co., and had dealings with the appellant-bank. On 26th January, 1945, Gaggu Mal executed a letter of guarantee in favour of the appellant-bank which had given cash credit facilities to Messrs. G. M. Mohan Lal and Co. to the extent of Rs. 85,000. A guarantee was given by Gaggu Mal for the payment of all moneys then or hereinafter due from the principal debtor during the period of the continuance of the guarantee. It was stated in the document that the guarantee would bind his respective heirs, executors, and administrators, and would be enforceable by the bank and its assignees. Gaggu Mal had on the same day deposited with the bank title-deeds and had thus created an equitable mortgage upon his estate and interest in the property to which the documents related, for the purpose of securing the payment to the bank of moneys due from Messrs. G. M. Mohan Lal and Co. (*vide* Exhibit D. 3). These title-deeds related to immovable property.

On the basis of the equitable mortgage thus created in favour of the bank and as evidenced by the letter of guarantee referred to above, a suit for the recovery of Rs. 47,208-11-3 was filed by the bank and on 26th January, 1949, a preliminary decree was awarded in favour of the bank for the above amount with costs against the then defendants recoverable by the sale of mortgaged property in terms of Order 34, rule 4, Civil Procedure Code. It was directed that if the defendants would not pay by 25th April, 1949, the sum decreed, then the mortgaged property or sufficient part thereof would be sold by auction and if the price fetched by the sale would be insufficient then it would be open to the Bank to make an application for the grant of a personal decree. The final decree was passed under Order 34, rule 6, on 18th August, 1949. The bank had sued out execution of the final decree passed in its favour.

The present suit is instituted by Sohan Lal, one of the sons of Gaggu Mal, for a declaration that the properties mentioned in the plaint are ancestral, undivided, and joint Hindu family properties of the plaintiff and of Gaggu Mal who was impleaded as defendant No. 2. The decree which had been made final was not binding on the plaintiff. Prayer was made for the grant of a perpetual injunction restraining the bank from bringing the property to auction-sale in execution of the decree against Gaggu Mal. It was contended that Mohan Lal, the other son of Gaggu Mal, was the sole proprietor of Messrs. G. M. Mohan Lal and Co. It was maintained that the execution of the letter of guarantee by Gaggu Mal in favour of the bank was without legal necessity and for no benefit of the joint Hindu family. The plaintiff, in the circumstances, was not bound by that decree. It may be stated here that the stage for filing an application under Order 34, rule 6, Civil Procedure Code, for grant of personal decree for the balance against the mortgagor, Gaggu Mal, has not yet arisen.

This suit was contested on behalf of the defendant-bank and it was denied that the property

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was either ancestral or formed part of the joint Hindu family property. It was pleaded that the mortgage money was used for discharging the debts of G. M. Mohan Lal and Co. G. M. Mohan Lal and Co. was the joint Hindu family firm and letters 'G. M.' stood for Gaggu Mal and Mohan Lal was Gaggu Mal's eldest son. It was also contended that the plaintiff was under a pious obligation to pay the debts of his father and these debts had not been raised for any immoral purpose.

The following issues were framed:—

(1) Whether the property in dispute is ancestral joint Hindu family property *qua* the plaintiff ?

(2) Whether the plaintiff is not bound by the decree passed against defendant No. 2, dated 26th January, 1949, and made final on 18th August, 1949 ?

(3) Whether the debt on the basis of which the said decree was passed against defendant No. 2 was immoral or illegal and not binding upon the plaintiff ?

(4) Whether the present suit is not maintainable in the present form without getting the decree set aside ?

The trial Court decided issues Nos. 1, 2 and 4 in plaintiff's favour and granted the declaration prayed for and also perpetually restrained the bank (defendant No. 1) from bringing the property in dispute to sale. The bank then filed an appeal which was dismissed. The appellate Court agreed with the conclusions of the trial Court on issues Nos. 1, 2 and 4. On the third issue, it was found that the mortgage debt was not proved to have been incurred for illegal or immoral purpose. The following additional issue was framed and the case was remanded—

"Whether the mortgage in dispute was effected for legal necessity or for the

benefit of the joint family or for payment of antecedent debts ?"

The trial Court was directed to decide the additional issue and issue No. 2 afresh after allowing the parties to produce further evidence if they so desired. The bank's further appeal to the High Court was unsuccessful.

After the remand, the trial Court decided the additional issue against the bank and the second issue in plaintiff's favour. In accordance with the above findings, the plaintiff's suit was decreed on 31st December, 1953. The bank went up in appeal and the Senior Sub-Judge, Amritsar, found that Gaggu Mal, defendant No. 2, was the Karta of Hindu joint family consisting of Gaggu Mal and his sons. The decree was passed against both Gaggu Mal and Mohan Lal but Mohan Lal was found to be the sole proprietor of Messrs. G. M. Mohan Lal and Co. with which Gaggu Mal had no concern. Gaggu Mal had guaranteed payment of the debt due as surety for his son Mohan Lal. The mortgage decree passed in favour of the bank did not create personal liability of Gaggu Mal for the payment of the debt and no personal decree against Gaggu Mal having been applied or passed the plaintiff Sohan Lal was not bound in any way by that decree. The decree passed in favour of the bank against Mohan Lal had not been challenged. On the basis of these findings, the Senior Sub-Judge had granted declaration and perpetual injunction to the plaintiff as prayed for by him in his plaint. The bank feeling aggrieved has come up in second appeal to this Court. The appeal has been filed against Sohan Lal as respondent No. 1 and Gaggu Mal was impleaded as respondent No. 2. Gaggu Mal died on 23rd December, 1959, and his three sons mentioned above and his married daughter Vidya Wati were made the legal representatives.

Mr. Hans Raj Sodhi, learned counsel for the appellant-bank, has assailed the findings of the lower Courts and has contended that the plaintiff was under a pious obligation to pay his father's debts and that it made no difference whether it

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was a simple debt or a mortgage debt. He also contended that after a mortgage decree had actually been passed, no suit was maintainable on behalf of the son except on the ground that the debt was immoral. He cited a number of authorities which will be presently considered.

Paragraph 290 of Principles of Hindu Law by Mulla provides that where the sons are joint with their father and debts have been contracted by the father for his own personal benefit, the sons are liable to pay the debts provided they are not incurred for an illegal or immoral purpose. The liability to pay the debts contracted by the father, though for his own benefit, arises from an obligation of religion and piety which is placed upon the sons under the Mitakshara law to discharge the father's debts where the debts are not tainted with immorality. The sons' liability was not affected by the father not being the manager of the joint family. In para 298, Mulla has enumerated immoral (*Avyavaharika*) debts and they included "debts for being surety for the appearance or for the honesty of another." According to Sir M. Monier-William's Sanskrit English Dictionary, one of the meanings of Vyavahara is "propriety, adherence to law or custom". According to Colebrooke "*Avyavaharika*" means "a debt for a cause repugnant to good morals". There are other translations of this term,—*vide* Mayne on Hindu Law at page 398 but Colebrooke's translation has met with the approval of the Privy Council and of the Supreme Court as the nearest approach to its true concept [*vide Hem Raj* v. *Khem Chand* (1), and *S. M. Jakati* v. *S. M. Borkar* (2)]. The liability in question incurred by Gaggu Mal is in the nature of a surety debt.

The Hindu law of suretyship was well developed by the ancient law-givers. Yajnavalkya classified sureties into three kinds. According to him "suretyship is ordained for appearance, for honesty, and for payment; the two first sureties

(1) A.I.R. 1943 P.C. 142
(2) A.I.R. 1959 S.C. 282

and not their sons, must pay the debt on failure of their engagements, but even the sons of the last may be compelled to pay it." He laid down "should a surety for the appearance or the honesty of another die, his sons need not pay the debt; but the sons of a surety for payment or delivery must pay the sum lent or deliver the thing undertaken." (Colebrooke, Volume I, page 174). Vrihaspati added a fourth class not much different from the third. According to him—

> "Four sorts of sureties are mentioned by Sages in the system of jurisprudence : for appearance, for honesty, for paying a sum lent, and for delivering the debtor's effects.
>
> The first says, 'I will produce that man'; the second says 'that man is trustworthy'; the third says 'I will pay the debt'; the fourth says 'I will deliver his effects.'
>
> On failure of their engagement, the two first, but not their sons, must pay the sum lent at the time stipulated; the two last, on default of the borrowers, and even their sons, if they die and leave assets." (*vide* Colebrooke, Vol. I, p. 164).

Vyasa, in Smritiehandrika, said—

> "The sureties 'for trust' should be made to pay the debts; but not the sons of the sureties. But in the case of the sureties for 'payment' or 'for proceedings', their sons should pay." (*vide* Hindu Law in its Sources, by Jha, Volume I, page 185).

According to Manu (VIII, 159, 160)—

> "159. But money due by a surety, or idly promised, or lost at play, or due for

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spirituous liquor, or what remains unpaid of a fine and a tax or duty, the son (of the party owing it) shall not be obliged to pay.

160. This just mentioned rule shall apply to the case of a surety for appearance (only); if a surety for payment should die, the (judge) may compel even his heirs to discharge the debt." (*vide* Sacred Books of the East, Volume 25, edited by Max Muller, page 282).

The above texts leave no room for doubt as to the liability of the sons for suretyship debts incurred by their father undertaking payment of money lent. So far as case-law on the subject is concerned, a number of authorities have been cited by the learned counsel on behalf of the appellant-bank. In *Sitaramayya* v. *Venkatramanna* (1), it was held that it would be the pious obligation of the sons under Hindu law to pay the debts incurred by the father as a surety for the return of a loan. This proposition was affirmed in *Tukarambhat* v. *Gangaram Mulchand Gujar* (2), and again in *Chettikulam Venkitachala Reddiar* v. *Chettikulam Kumara Venkitachala Reddiar* (3), and *The Maharaja of Benares* v. *Ramkumar Misir* (4).

In *Mata Din Kandu* v. *Ram Lakhan Ahir* (5), it was held by a Division Bench following the *Maharaja of Benares* v. *Ramkumar Misir* (4), that sons in a joint Hindu family are liable for the due fulfilment of hypothecation bond entered into by their father as surety. In *Daljit Singh* v. *Harkishan Lal Sah* (6), a Division Bench of Allahabad High Court expressed the view that under the Mitakshara the son is liable to pay the debt incurred by the father as the result of being a surety for payment of money lent and for delivery of goods on

(1) I.L.R. (1888) 11 Mad. 373
(2) I.L.R. (1899) 23 Bom. 454
(3) I.L.R. (1905) 28 Mad. 377
(4) I.L.R. (1904) 26 All. 611
(5) A.I.R. 1930 All. 87
(6) A.I.R. 1940 All. 116

the basis of pious obligation resting on the son to the extent of his interest in the joint family property.

Before considering the authorities cited by Mr. D. R. Manchanda, learned counsel for the respondents, it will be proper to examine the nature of the liability of Gaggu Mal when he stood as a surety. Mr. Manchanda maintained that the liability of Gaggu Mal was not personal and the decree passed by the Sub-Judge on 26th January, 1949, Exhibit P. 17, for Rs. 47,208-11-3, was not a personal but a mortgage decree. It was stated in the letter of guarantee (Exhibit D. 3) executed by Gaggu Mal in favour of the bank that he was creating an equitable mortgage upon his estate and interest in the property to which the title-deed related for the purpose of securing payment to the bank which was owing from G. M. Mohan Lal and Co. As guarantor, Gaggu Mal had created an equitable mortgage. Consequently, a preliminary decree in terms of Order 34, rule 4 was passed in favour of the bank for recovery of Rs. 47,208-11-3. It was clearly stated in paragraph 3 of the decree that if the amount realised from the sale of the mortgaged property was insufficient then the plaintiff would be at liberty to make an application for passing a personal decree in respect of the balance of the amount due. This leaves no doubt that personal decree had not been passed at that stage. This decree was made final on 18th August, 1949, and it was both against Gaggu Mal and Mohan Lal. The question to be considered is whether to a liability of such a nature the principle of son's pious obligation is attracted or not. In *Raja Brij Narain Rai* v. *Mangla Prasad Rai* (1), the Privy Council summed up the Hindu Law bearing on alienation by father of a joint family under Mitakshara into five propositions. According to the second proposition, if the alienor is the father and the reversioners 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

(1) A.I.R. 1924 P.C. 50

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execution proceeding upon a decree for payment of that debt. According to the third proposition, if the father purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest. In *Hira Lal* v. *Puran Chand* (1), a Full Bench of the Allahabad High Court examined the question and came to the conclusion that the propositions laid down in *Raja Brij Narain Rai's* case were not mutually exclusive and Misra, J., said "I find it difficult to proceed upon the assumption that third proposition excludes the second." The question under reference was answered by holding that the word "debt" in the second proposition laid down by the Privy Council in *Raja Brij Narain Rai's* case did not refer only to a simple money debt, but also to a debt secured by a mortgage. The view which found favour with the Full Bench was that according to ancient law-givers, the debt was not conceived of merely as an obligation but as a sin which was visited on the debtor and followed him in the next world. The liability to extricate the father from that sin by paying off his legitimate debts was the origin of the religious and moral obligation of the son. The presence or the absence of a collateral security in the discharge of the debt, according to this decision, would be equally immaterial, for a debt would be simple whether or not it was realisable from some specific immovable property. A debt secured by a mortgage is as much a debt of the father as an unsecured debt. In modern times, however, the doctrine of pious obligation is confined to the extent to which properties are inherited from the father whether self-acquired or ancestral.

In *Linqbhat Tippanbhat Joshi* v. *Parappa Mallappa Ganiger* (2), Bhagwati, J., said—

> "If under the terms of the surety bond the father has rendered himself personally liable, be it an ordinary personal bond

(1) A.I.R. 1949 All. 685
(2) A.I.R. 1951 Bom. 1

> or even a mortgage or a pledge importing personal liability for the deficit if any on the realization of the security, the sons are certainly liable to pay the father's personal debt incurred in this manner to the extent of their right, title and interest in the joint family properties."

The argument which has been urged on behalf of the respondents is that distinction should be drawn between a debt contracted by and due from the father to which pious obligation attaches ; and a debt due from third persons but guaranteed by the father. It is urged that to such a case, no pious obligation attaches. In this case, the debtor of the bank was Mohan Lal and the father stood surety for his son's debts.

The facts in *Kesar Chand* v. *Uttam Chand* (1) bear some analogy to the facts of this case. In that case, security bond had been executed by a Hindu father not for the purpose of any debt due by him but for the payment of a debt which was due from third parties. The Privy Council held—

> "Unless there was a debt due by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property."

The distinction between the Privy Council decision in *Kesar Chand's* case and the Allahabad (Full Bench) decision in *Hira Lal's* case is that in the latter the father had himself incurred the liability and had mortgaged the property for his own debt and not for the debt due from a third party.

Allavenkataramanna v. *Palacherla Mangramma* (2), has been cited by the learned counsel

(1) A.I.R. 1945 P.C. 91
(2) A.I.R. 1944 Mad. 457

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for the respondents as an authority for the proposition that it is not competent for the father to charge family property so as to bind his sons to secure an obligation incurred by him as a surety when such an obligation was not antecedent to the creation of the charge. Reliance was also placed upon *Bharatpur State* v. *Sri Krishan Dass* (1). In *Ganga Saran* v. *Lala Ganeshi Lal* (2), the Full Bench expressed the view that it was not open to the father, who is the Karta of a joint family, to bind his family estate by executing a surety bond not as security for the due performance of a contract which he himself had pledged but as security for payment of a debt which was due by third parties. It was held that a decree obtained against the father upon the surety bond could not be executed against the joint family property. The view taken in the earlier Full Bench decision in *Bharatpur State's* case was followed.

The learned counsel for the appellant had relied upon a Single Bench decision of this Court in *Kishan Chand* v. *Rakesh Kumar* (3), but that does not seem to me to be in point. It was held that proposition No. 2 laid down by the Privy Council in *Raja Brij Narain Rai's* case referred to those cases in which a decree had been obtained and to those cases in which the sons merely sought to challenge an alienation. The learned Single Judge expressed the view that distinction must be between cases in which the mortgagee had filed a suit on the basis of the mortgage and obtained a decree and cases in which no decree had been obtained.

After considering the above authorities, one line of demarcation is traceable. If the debt had been incurred by the father, whether a personal debt or a mortgage debt, the doctrine of sons' pious obligation to meet his liability from the estate inherited by them is attracted, but where the father had incurred an obligation as a surety not

(1) A.I.R. 1936 All. 327
(2) A.I.R. 1939 All. 225
(3) 1956 P.L.R. 409

against the debt incurred by him but a third person, the sons cannot be compelled to meet such a liability as that would be deemed *Avyavaharika* in the sense of "a debt for a cause repugnant to good morals" according to Colebrooke's translation of the term. This view is in accord with the decision of the Privy Council in *Kesar Chand* v. *Uttam Chand* (1) and does not come into conflict with the view held by the Hindu jurists.

In view of what has been stated above, the appeal fails and is dismissed. In the circumstances of the case I will not burden the appellant-bank with costs.

B.R.T.

CIVIL ORIGINAL

Before D. Falshaw and Tek Chand, JJ.

THE NATIONAL TOBACCO COMPANY OF INDIA LTD,—*Petitioner.*

versus

SIMLA BANKING AND INDUSTRIAL COMPANY LTD. (IN LIQUIDATION),—*Respondent.*

Civil Original No. 13 of 1959.

1961

Sept., 11th

Banker and Customer—Bank collecting the amount of bill and remitting it by bank draft as per instructions of the customer but without making arrangement for its encashment—Draft dishonoured on presentation—Relationship between the bank and customer—Whether that of trustee and cestui que trust or debtor and creditor—Bank going into liquidation—Customer—Whether entitled to rank as preferential creditor in respect of the amount of the draft.

The petitioner company sent several consignments of cigarettes to one of its customers at Simla and instructed

(1) A.I.R. 1945 P.C. 91.