Privy Council Appeal No. 58 *of* 1941
Allahabad Appeal No. 26 *of* 1938

Hemraj *alias* **Babu Lal** (since deceased) **and others** – – *Appellant*

v.

Khem Chand and others – – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH MAY, 1943

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD RUSSELL OF KILLOWEN
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal by special leave from a decree of the High Court of Judicature at Allahabad dated the 12th May, 1938, which affirmed a decree of the Subordinate Judge of Agra dated the 12th September, 1936.

The appeal arises out of an execution application made by the appellant's father, Hemraj, since deceased, for the execution of a money decree which he had obtained against one Danpal in the Court of the Subordinate Judge of Agra, afterwards confirmed on appeal against the present respondents, the sons of Danpal, by the attachment and sale of the ancestral property in their hands.

The parties are governed by the Mitakshara law. The question for determination is whether the respondents can lawfully object to the execution of the decree on the ground that having regard to the nature of the judgment debt, the rule of the pious obligation of a son under the Hindu law to pay his father's debt does not apply to this case; or, in other words, is the debt in respect of which the decree was obtained an *avyavahariḳa* debt?

Both Courts in India allowed the objection. Hence this appeal by the decree-holders.

Hemraj and Danpal, with others, formed a joint Hindu family. In 1925, a suit was instituted, in the Court of the Subordinate Judge of Agra, by Hemraj on behalf of himself and another, for partition of the joint family property, against Danpal and the members of his branch of the family. Included in the suit was a promissory note for Rs.5264 dated the 21st November, 1924, executed in favour of Danpal by three brothers, Ram Chand, Sri Chand, and Moonga Ram. This note had been executed in renewal of an earlier note dated the 21st December, 1921, for Rs.4680, which itself was in renewal of a promissory note dated the 22nd February, 1919, for Rs.4000, which had been advanced by Danpal out of family funds. The partition suit was referred to arbitration and a decree in terms of the award was passed on the 19th June, 1926.

Besides other items of property, the aforesaid promissory note was allotted to Hemraj under the award; it provided that a document or decree which was allotted to one member would be his, that the member in whose name it stood would be responsible to prove its legal necessity and that he should file it in court within seven days of the decree. It also provided that " such a document should be within time, otherwise the party in whose name the document stands shall be responsible for the amount due together with interest up to the date of arbitration award " (see sections 2, 6 and 17 of the award). Danpal did not file the document within the specified time, but he filed instead, without giving any notice to Hemraj, another document executed by the three debtors on the 21st June, 1926. Hemraj filed his application for execution of the decree on the 9th January, 1928. Danpal then filed on the 6th February, 1928, the promissory note dated the 21st November, 1924, by which time it had become time-barred.

On the 3rd December, 1928, Hemraj filed a suit in the Court of the Subordinate Judge of Agra for the amount due under the promissory note making the executants of the note, defendants 1 to 3, and Danpal, defendant No. 4. The suit was dismissed as against defendants 1 to 3 as barred by time, but it was decreed against Danpal. It was admitted in the suit that the document dated the 21st June was a forgery. The proceedings showed that Danpal allowed the promissory note to become barred by acting fraudulently towards Hemraj. In the course of the judgment, the Subordinate Judge remarked: " Danpal defendant has all along been acting dishonestly towards the plaintiff and he cannot be allowed to take advantage of his cleverness and fraud." The appeal against this decree preferred by Danpal during the course of which he died was dismissed by the High Court. The learned Judges observed:

" We consider that the duty was cast on him (Danpal) of making over to the plaintiff the documents in regard to this particular debt due from defendants 1 to 3 and we consider that he has not proved that he carried out that duty."

In the execution application taken out by Hemraj on the 16th March, 1936, to execute the above decree, out of which the present appeal has arisen, the respondents took the objection that since the debt was created by " the misconduct and stupidity of Danpal " there was no liability on their part to pay the debt and therefore the ancestral property in their hands was not liable to be attached and sold. The Subordinate Judge accepted the objection and dismissed the application on the following main ground.

" The decree was not passed in respect of any debt borrowed by Danpal. It was in respect of loss and damage caused to the other side due to the negligence or wrongful act of Danpal. The sons are not bound for the payment of such decree, nor under Section 53 the joint family property in their hands can be attached and sold in satisfaction of such a decree."

The appeal filed by Hemraj against the above decision was dismissed by the High Court. In the course of his judgment Verma J. (with whom Bennet J. agreed) observed as follows:

" Now in the case before us it is clear on the facts and on the findings recorded by the trial Court as well as by this Court in the suit which has resulted in the decree sought to be executed that Danpal had been guilty of dishonesty and grossly improper conduct. If he had filed the pro-note dated the 21st November, 1924, within seven days of the passing of the decree in the partition suit, as it was his clear duty to do he would not have incurred the liability in question. Instead of doing what as an honest and decent person he was bound to do, he adopted a dishonest and devious course of conduct . . . In my judgment the conduct of Danpal, which has resulted in this liability was clearly repugnant to good morals . . . The trend of this authority is in favour of the view that a debt which is repugnant to good morals is an avyvaharika debt and is not binding on the sons."

At the hearing of the appeal, a preliminary objection was taken on behalf of the respondents, that the appeal to His Majesty in Council is incompetent as the sum involved is below Rs.10,000, and the case is otherwise not a fit one for appeal under the Civil Procedure Code. This

objection has no force, since the appeal was admitted by the special leave granted by His Majesty in Council, and is overruled. Their Lordships will therefore proceed to consider the main question argued in the appeal, viz. " whether the judgment debt in question is in the nature of an *Avyavaharika* debt which would exempt the respondents from the pious obligation of discharging their father's debt.

Under the Hindu law, a son is under a pious obligation to pay his father's debts to save him from punishment in a future state for non-payment of his debts. " According to the notions of Smrithi writers it is regarded as sinful to remain in debt and a debtor's salvation is deeply imperilled if he dies indebted. According to Vrihaspati a person who does not repay his debt ' will be born in his creditor's house as a slave or servant or woman or a quadruped.' According to other writers a person dying in debt goes to hell. A duty is therefore cast upon every person to discharge debts incurred by him." (See *Peda Venkauna* v. *Sreenivasa Deekshatulu*, I.L.R. 41, Mad. 136, at 149.) Thus, if the father dies without discharging his debts, a Hindu son is obliged to pay his undischarged debts and relieve him from his sins. As observed by this Board in *Girdharu Lall* v. *Kantoo Lal* (1874, L.R. 1, I.A., at p. 321): " It being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts." But this obligation is not unqualified, for the son is not bound to pay his father's debts if the debts are *Avyavaharika*. The Smrithi texts on which this qualification is based will be found in the learned judgment of Mookerjee J. in *Chhakauri Mahton* v. *Ganga Prasad* (I.L.R. 39, Cal. 862). Their Lordships will in this judgment refer only to one text, the text of *Usanas* (ascribed also to *Vyasa*), the only text which uses the term *Avyavaharika* (*Na Vyavaharikam* in the original). After enumerating certain specific debts more or less in the same language as used by the other Smrithi writers, *Usanas* adds a supplementary category of debts which the sons need not pay which are *Avyavaharika*. The text of *Usanas* appears in Vijnaneswara's commentary on ch. II, v. 47, of Yajnavalkya, which lays down exceptions to the general rule relating to son's liability to pay the father's debts contained in v 50. These verses (see Mandlik, p. 205) are as follows:

Ch. II, v. 50. " When the father is abroad, or in difficulties, his debt proved by witnesses if undisputed, should be paid by the son and grandson."

Ch. II, v. 47. " The son shall not pay the [paternal debts] contracted for wines, lust, gambling, or due on account of the unpaid [portion] of a fine or toll or [on account of] an idle promise."

In his commentary to this verse, Vijnaneswara refers to the text of *Usanas* which is:

" A fine, the balance of a fine, likewise a bribe, or a toll or the balance of it, are not to be paid by the son, neither shall he discharge a debt which is *Avyavaharika* (Na (not) Vyavaharikam).

There has been much difference of opinion as regards the precise significance of the term *Avyavaharika*. Colebrooke translates it as meaning " debts for a cause repugnant to good morals "; Mandlik renders it as " not proper ", and Sir Dinshaw Mulla in his " Hindu Law " accepts Colebrooke's translation. The term has also been interpreted in various judgments by Courts in India, but the decisions are not all uniform. The Bombay High Court translates the term as " unusual or not sanctioned by law. . . . Put into simple English the texts amount to this: that the son is not held liable for debts which the father ought not as a decent and respectable man to have incurred. He is answerable for debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices." (*Durbar Khachar* v. *Khachar Harsur*, I.L.R. 32, Bom. 348). This decision has been disapproved in subsequent decisions in Bombay, and by other High Courts also. Mr. Justice Mookerjee renders the term as equivalent to " not lawful, usual or customary " (*Chhakauri Mahton* v. *Ganga Prasad* (*supra*)), while Mr. Justice Sadasiva Iyer paraphrases it as " a debt which is not supportable by legal arguments and on which no right could be established in the creditor's favour in a Court of Justice."

(*Venugopala Naidu* v. *Ramanadhan Chetty*, I.L.R. 37, Mad. 458). Many of the interpretations given to the term have been collected by Patkar and Tyabji JJ. in *Balragaram Tukaram* v. *Maneklal Mansukhbhai* (I.L.R. 56, Bom. 36). Its meaning has been considered in other decisions also (see *Govindprasad* v. *Ragunath Prasad* (1939, Bom. 533); *Ramasubramania* v. *Sivakami Ammal* (1925, A.I.R., Mad. 841). Their Lordships do not think that any useful purpose will be served by reviewing these and the other decisions brought to their notice, as in their opinion the principles with reference to which the term *Avyavaharika* should be interpreted and by which this case should be decided are sufficiently clear and do not conflict with those decisions. They will now refer to those principles.

If the doctrine of pious obligation is to be given full effect, there cannot be any doubt that a Hindu son should be held liable for every undischarged debt of his father, for nothing can be nobler than to obtain complete exemption for the father from all penalties which might follow from the non-disoharge of his debts; but this position is not maintained. That the doctrine has reference to the nature or character of the debt which creates the liability can hardly be disputed; this appears from the following pronouncement made by Lord Justice Knight Bruce in *Hanuman Persaud's* case (*see* (1856) 6 M.I.A. 393 at 421).

> " Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate would still be an act of pious duty on the son. 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. . . ."

In *Girdharee Lall* v. *Kantoo Lall* (*supra*); Sir Barnes Peacock quotes the above rule and then proceeds as follows:—

" It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it. . . ."

This also makes clear the connection between the nature of the debt and the liability to pay it. That the duty cast upon the son being religious or moral, the character of the debt should be examined from the standpoint of justice and morality appears to be fairly clear from the decisions. In this connection regard may also be had to the debts mentioned in the texts which the son need not pay, most of which are of an objectionable character. It also appears to be clear on principle, and on authority, that examination of the nature or character of the debt should be made with reference to the time when it originated, in other words, when the liability was first incurred by the father. If on such examination, it is found that at its inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son. This principle, stated as rule 1 by Venkatasubba Rao and Madhavan Nair JJ. in *Ramasubramania* v. *Siva Kami Ammal*, 841 (*supra*), at pages 845, 852 respectively, in language almost identical, is amply borne out by the numerous authorities which they have examined. The rule is not rigid but has to be applied with reference to the circumstances of each case. These principles which are implicit in the notion of " pious obligation," and are also deducible from the decisions, should be kept in mind in interpreting the term *Avyavaharika* used in the text. The decisions which their Lordships have examined proceed on the ground common to them all, that debts in the nature of *Avyvaharika* are debts which would be comprised in the expression " illegal or immoral debts." Having regard to the principles underlying the rule of " pious obligation," which forms the foundation for the son's liability, their Lordships think that the translation of the term *Avyavaharika* as given by Colebrooke makes the nearest approach to the true conception of the term as used in the Smrithi text, and may well be taken to represent its correct meaning. In their Lordships' view, the term does not admit of a more precise definition. When a particular debt is called into question, it will be the duty of the Courts to examine its nature in the light of the principles mentioned above, which are not exhaustive but only basic, and to see whether in the

circumstances it is of the kind which will give exemption to the son from the liability of paying it, on the ground that it is repugnant to morals. It has now been definitely established by the decision of this Board in *Toshanpal Singh* v. *District Judge of Agra* (1934, L.R. 61 I.A. 350) that a son is not liable to pay a debt created by his father which would render the father liable to criminal prosecution.

Judged in the light of the above principles, their Lordships have no doubt that the debt in question is not *Avyavaharika*. It had its origin when the promissory note dated the 21st November, 1924, was allotted to Hemraj by the decree passed in the partition suit. It then became the duty of Danpal to hand over the document to Hemraj in time, and as he did not do so he became responsible for the amount, in other words, he became indebted to Hemraj for the amount due under the promissory note. The position was well described by the trial Court which passed the decree in favour of Hemraj and also by the Appellate Court which confirmed it. Their Lordships have already drawn attention to their views. The money which the appellants are now seeking to realise by execution from the ancestral property of the defendants is the sum which was rightly due to Hemraj from their father, as he kept back the promissory note without handing it over in time. In *Natassayyan* v. *Ponnusami* (I.L.R. 16 Madras 99 at p. 104) the learned Judges observed:

> "Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money he has unlawfully retained."

Their Lordships express their concurrence with this view. The above language may well be used to describe appropriately the nature of obligation of the respondents in this case also, to discharge the debt brought about by the conduct of their father. The principle enunciated in *Natassayyan* v. *Ponnusami* (*supra*) was referred to and applied by the learned Judges of the Calcutta High Court in *Peary Lalsinha* v. *Chand Charan Sinha* (11 C.W.N. p. 163). The subsequent dishonest conduct of Danpal, which led to the suit and the decree, so much relied upon by the Courts in India and made the basis of their decision, cannot in their Lordships' view affect the nature of the father's debt which at its inception was a just and true debt. As no such immorality or illegality in the nature of the original debt as would absolve them from the obligation to discharge it has been shown by the respondents, the debt sought to be realised is not an *Avyavaharika* debt and the appellants are therefore entitled to proceed against the ancestral property in their hands in execution of the decree for payment of that debt.

In the result, the decrees of the Courts below are set aside. The Subordinate Judge will restore the execution application filed by Hemraj to his file and proceed with it according to law. The appellants will get their costs throughout—before the Board and in the Courts in India. Their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council

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DELIVERED BY SIR MADHAVAN NAIR

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