MORE AVENUES FOR DELAY UNDER THE PIOUS OBLIGATION

IN A recent decision by V.K. Mehrotra J. of the Allahabad High Court, the matter of the pious obligation took yet another turn. The decision in this case, *Onkar* v. *Babu Ram*[1] introduced a complication which is well intentioned, but which is likely to afford another avenue for stalling and delay in matters pertaining to pious obligation, and thereby further impair the commerce of *Mitakshara* coparceners. The court has seen fit to add to the pious obligation maze the new twist of limiting an heir's liability for his father's debt--under certain circumstances—to only that portion of the debt which was actually necessary for the maintenance of the heir.

The facts in the case are as follows: In 1952 one Faqir Chand, who was responsible for the maintenance of his son and a minor brother, borrowed sR. 2000 from Babu Ram for the ostensible purpose of the maintenance of these two minor charges, for repairs to the ancestral house, and for the family business—putting up the ancestral house as security for the loan. Twenty years later, after the death of Faqir Chand, Babu Ram sued Faqir Chand's son, Onkar, and Faqir Chand's younger brother, Ram Saran, for settlement of the debt which had grown to Rs. 4,480 with interest *pendente lite* and future.

The trial court found that there was no joint family which included the younger brother Ram Saran at the time of the loan, and so Ram Saran was exempted from any liability for the debt. This, according to the trial court, left Faqir Chand and Onkar with a one-third interest in the ancestral estate. The trial court also found that Babu Ram—the plaintiff had failed to establish that Faqir Chand's alienation in the form of the mortgage of the ancestral house was done out of legal necessity for the benefit of the estate. Babu Ram's claim was accordingly dismissed. On appeal, the lower appellate court found that the loan was not *avyavaharik* and that legal necessity *had* been established; hence, Onkar, as heir to the one-third share, was liable for the debt on the principle of pious obligation.

Onkar appealed to the High Court and Mehrotra J. reversed the decision of the appellate court. He held that before a debt can be considered to have been contracted for legal necessity or for benefit of the estate, the court must determine whether the amount of the loan was necessary "having regard to the income which the family otherwise enjoyed."[2] In this case,

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1. A.I.R. 1981 All. 128.

2. *Id.* at 129. This seems a rather restrictive guideline. Surely, even families with substantial incomes may need to borrow money for legal necessity. Necessity is the question here, not income.

the record of the trial court showed that in 1952 the family house was bringing in a rental income of Rs. 300 per month, and the judge concluded that in light of this fact a loan of Rs. 2000 for the maintenance of the two minors (he does not mention the matter of repairs to the house and the needs of the family business) may have been excessive. He set aside the decision of the lower appellate court and sent the case back to that court, so that it might determine what portion of the original Rs. 2000 loan was actually necessary for the maintenance of Onkar, and directed that his liability be limited to that portion of the debt (presumably, plus the interest on that portion of the debt as well).

This, it seems to me, is opening the matter of the pious obligation to a new and unnecessary complication. Whenever a loan is made out of legal necessity, the heirs can claim later that the amount was actually excessive and that their liability should be reduced. Imagine the trial court's difficulty in determining, in *Onkar's* case,—nearly thirty years later—exactly what portion of the loan was actually legally necesssary. (There must have been *some* evidence of legal necessity, since the lower appellate court found that such had been established).

This new requirement will further impair the ability of a Hindu to operate in the market place with the same capacities as his Muslim, Christian, or *non-Mitakhsara* brothers. At present not only is the fiscal freedom of a borrower governed by the *Mitakhsara* significantly impaired by the guarantees of the birthright of his heirs under the *Mitakhsara* system, but a lender must also be extra wary and satisfy to himself that there is legal necessity for the loan (all the time aware of the likelihood that the matter of legal necessity will be the easiest avenue of escape from liability for the heirs).[3] Now, under this ruling of the Allahabad High Court, yet another avenue of escape—or at least delay has been presented to the heirs of the *Mitakhsara* debtor. Even if a lender satisfies himself that legal necessity *does* exist, he must proceed knowing that the *precise amount* of that legal necessity is a question which may be subject to litigation.

What can have been the reason for introducing the new requirement of determining what is "essential" as well as legally necessary in such a loan? Obviously, Mehrotra J. is concerned, and rightly, lest innocent, minor *Mitakhsara* coparceners should be unfairly "saddled with liability" that the head of the family might excessively mortgage the heirs' birthrights for his own gain. But is this really a concern in *Onkar's* case, and is it necessary to raise the "essential" necessity question at all? I think not. Let's look at *Onkar's* case. In 1952, the head of a family that owns a

3. These questions have been discussed too frequently to require a listing of the most important cases here. For the best single summation of these problems, see J.D.M. Derrett, "*Indica Pietas* : a Current Rule Derived from Remote Antiquity" in *Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte* 37-66 (1969) ; also in *Essays in Classical and Modern Hindu Law*, vol. 4 at 142-72.

house generating Rs. 300 per month in rent (an amount which in 1952, indicates a substantial piece of property) as well as a family business, seeks a loan of Rs. 2000. Surely, Faqir Chand must have seemed a good risk. Not only did he have the backing of this property as a guarantee, but since the loan was found not to be *avyavaharik* and was made for legal necessity (at least in *some* measure, apparently), Faqir Chand had an heir who must assume the liability. It must have seemed a sound fiscal decision to make this loan to a man of such substance, who could offer so many guarantees of repayment (in the form of mortgaged property and an heir).

Can one reasonably suspect fraud here? Could it be that Faqir Chand set out to mortgage his son's birthright in order to use the money for his own purposes with the full intention of passing on the debt to his son at his death ? Possibly ; but still such an intention does not jeopardize the loan repayment since the heir, Onkar, must assume the liability. It seems unlikely that this loan was deliberately allowed to accumulate excessive interest by the creditor Babu Ram. A loan of Rs. 2000 to a man of these apparent means is not in itself, a crushing debt, nor would it have been a necessarily unreasonable amount when required for the purposes claimed at the time of the loan. The interest, too, does not appear to have been excessive—indeed, inflation has far out-stripped the interest. This transaction has the appearance of being a reasonable one, and if fraud were to be suspected, it could be as likely that the debtor intended all along never to repay the loan in the expectation that his heirs would be able successfully to challenge the loan on the grounds that it was not made for legal necessity.

Mehrotra J. cites *Dudh Nath* v. *Sat Narain Ram*[4] as recognizing "the principle that there must be some correlation between the need of the family and the extent of its liability to discharge the debt contracted by the father or any alienation made by him." This is no doubt a sound and reasonable observation. But what of the remaining portion of the debt ? Let us say, that the trial court somehow manages to fairly determine exactly how much of the original Rs. 2000 was for legal necessity, and that amount was Rs. 500. This leaves a debt of Rs. 1500. Now, the question of whether or not this debt is secured by a mortgage of the father's interest in the ancestral house, or whether it is unsecured, is of little consequence in this case. *Faqir Chand* v. *Harnam Kaur*[5] explicitly stated that the pious obligation of a son extends to all debts of the father whether secured or unsecured, so long as they are not *avyavahārik*. This means that Onkar would be liable for the entire Rs. 2000.

Onkar's case involved a debt which, with interest, amounted to less than Rs. 5000. The Allahabad High Court in its decision has created yet

4. *Supra* note 1 at 130 ; A.I.R. 1966 All. 315.
5. A.I.R. 1967 S.C. 727 at 729-30.

another opportunity for litigation and the consequent delay and expense. In the Supreme Court case cited above the court was dealing with a debt that was 14 years old and suffered from a similar uncertainty of legal necessity, yet the court observed that the delay in settling this debt had already been considerable, and, while it would ordinarily return the case to the High Court for a determination of legal necessity, since the relevant facts were on record, it went ahead and determined the matter itself and thereby enabled the case to be finally settled. As things stood at the end of *Onkar's* appeal, a debt which had been outstanding for more than 29 years was still subject to further deliberation, and even that deliberation may not be the end of the matter.

Surely, it would not be unreasonable in such cases to recognize the inevitable consequence of this sort of debt. All parties were agreed in *Onkar's* case that the debt was not *avyavahārik*. Should it eventually be determined that the mortgage was invalid for lack of legal necessity, that simply changes the debt from one which is secured to one which is unsecured. Given these facts, would it have been unreasonable for the court to have gone ahead and resolved this 29 year old debt in the way that it would inevitably have to be resolved, namely that Faqir Chand's heir, Onkar, on the principle of pious obligation, is liable for the entire amount of the debt ? Some portion of the debt may be secured by the father's mortgage of the ancestral property if legal necessity can be shown, and the rest would then be an unsecured debt, but it is still Onkar's liability. Moreover, even the procedural question of the distinction between execution of a money decree and a mortgage decree has little bearing on a case of such small magnitude.

A *Mitākhṣarā* debtor can postpone payment of his father's debt by challenging it on at least the following three grounds :

(*i*) antecedency
(*ii*) morality (*avyavahārik* or *vyavahārik*)
(*iii*) legal necessity.

Now, by virtue of the Allahabad judgement even if all three of these conditions are determined to be such that the heir is liable for the debt, he can challenge the debt on the ground that though there was legal necessity the legal necessity did not justify the entire amount of the loan. Mehrotra J. has added a refinement to the precedent of *Faqir Chand*[6] but at what cost ? The trial court must again determine whether or not there was legal necessity, but the record was available to the High Court. A new avenue of challenge to debts incurred by *Mitākhṣarā*-governed *kartās* has been opened ; with the inevitable result that this will, in yet another small way, limit their fiscal freedom and their ability to conduct their business. The whole matter of the pious obligation is, as has been obser-

6. *Ibid.*, the text of whose decision at 731 and 732 would have better suited his argument than *Dudh Nath's* case.

ved elsewhere,[7] intended to provide some sort of equality in fiscal matters for coparceners governed by *Mitākhsarā* while still affording some comfort for the religious sensibilities of those Hindus concerned with the spiritual obligation of the son to pay a father's debts. Over the years, this doctrine has been refined to minimize (although, one suspects, never finally eliminating) fraud and abuse by both creditor and debtor. This decision, while adding a further refinement to the principle of the pious obligation, also complicates that principle insofar as it affords a new avenue for litigation and delay in order to determine what proportion of a legitimate debt is for legal necessity.

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7. Derrett, *A Critique of Modern Hindu Law* 27-28 (1970).

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