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deceased father of the minor defendant. The plaintiff's case is that on the death of the grandfather, Ganesh Das, during whose lifetime his son Gokul Das (the father of the defendant) had already separated, there was a dispute between the other two sons, Kishun Das and Ram Das, relating to the partition of the family property. This suit ultimately resulted in a written compromise which was dated the 24th of June, 1922, and was filed in court on the 26th of June. The last portion of this compromise, the interpretation of which is in dispute, referred to a security bond to be executed by Gokul Das. Gokul Das executed the security bond sued upon on the 26th of June, 1922, and admittedly handed it over to the plaintiff Kishun Das. The court passed a decree in terms of the compromise on the 4th of July, 1922. An attempt was made to get the security bond executed by Gokul Das registered, but on objection being raised by Gokul Das the registration was refused. On the death of Gokul Das, the present suit was instituted for the enforcement of his liability under the security bond against his minor son.

The claim was resisted by the defendant on various grounds, the principal ones of which were: (1) The defendant was not bound to discharge the debt at all under the Hindu law.

[The other grounds, which are not material for the purpose of this report, are here omitted. Portions of the judgment dealing with those grounds are also omitted.]

The last point urged by Sir *Tej Bahadur Sapru* on behalf of the defendant is that there can be no liability of the son for the payment of a debt incurred by reason of suretyship when it is not shown that consideration had been received by the father. It is conceded that in a large number of cases the liability of the Hindu son for the debt due by the father as surety has been accepted.

We may mention the case of *Maharaja of Benares* v. *Ramkumar Misir* (1), following the cases of *Tukaram Bhat* v. *Gangaram Mulchand* (2) and *Sitaramayya* v. *Venkatramanna* (3). There are other cases as well. We may mention the latest cases of this Court, namely *Salig Ram Misir* v. *Lachhman Das* (4) and *Toshanpal Singh* v. *District Judge of Agra* (5).

It is not necessary to consider in this case whether such a liability justifies an alienation by a Hindu father straight off, and the less so if he has grandsons. On this point there is some difference of opinion in the two cases of this Court quoted just above. The Calcutta High Court in *Hira Lal Marwari* v. *Chandrabali Haldarin* (6) seems to have adopted the view expressed in the first mentioned case.

But the learned advocate has argued that there is an exception to this general rule which was not pressed in these cases. He relies strongly on the case of *Narayan* v. *Venkatacharya* (7) and particularly on the observations of CHANDAVARKAR, J., at page 411 that "The law as laid down in the Mitakshara, by which the parties are governed, is that a grandson is not liable to pay a debt which his grandfather contracted as a surety unless the latter in accepting the liability of a surety received some consideration for it." It is urged that the same principle applies to the case of a son.

In the first place, the observations of the learned Judge were confined to the liability of a grandson and as undoubtedly there is some distinction between the liability of a grandson and that of a son under the Hindu law so far as the debt of the father as a surety is concerned, this case cannot be accepted as any authority for the liability of the son. In the next place, with great respect to the learned Judge, there seems to have been some mistake in

(1) (1904) I.L.R., 26 All., 611.
(2) (1898) I.L.R., 23 Bom., 454.
(3) (1888) I.L.R., 11 Mad., 373.
(4) (1927) I.L.R., 50 All., 211.
(5) (1928) I.L.R., 51 All., 386.
(6) (1908) 13 C.W.N., 9.
(7) (1904) I.L.R., 28 Bom., 408.

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assuming that the law is laid down in those terms in the Mitakshara. As a matter of fact, we can find no passage therein where the liability of the grandson to pay the debt of a grandfather, contracted as a surety, is subject to the receipt of consideration.

The subject is dealt with at length in chapter VI, section 4 of the Mitakshara which deals with sureties and their liability. Placitum 53 says: "Suretyship is enjoined for appearance, for confidence and for payment. On failure of either of the first two, the surety (himself) in each case shall pay; on that of the third, his sons also must pay." Again placitum 54 says: "If a surety for appearance or for confidence die, the sons have not to pay; in the case of a surety for payment the sons have to pay." These texts are very clear and they lay down that the sons are liable to pay the debt of their father incurred as a surety for payment. In the note No. 12 there is a reference to a pledge. It is in these terms: "If the surety for appearance or for confidence binds himself after taking sufficient pledge, then his sons also must pay the debt incurred by becoming surety, from the property taken in pledge." This note applies to the case of the surety for appearance or for confidence and does not on the face of it apply to a surety for payment of a debt. That this is so is further supported by the passage quoted from Katyayana as an authority for this statement of the law: "Should a man become a surety for the appearance of a debtor from whom he had received a pledge (as his own security), his son, on the demise of his father, may be compelled to pay the debt from the pledged property." The comment goes on to add: "Here security for appearance includes a security for confidence." There is no reference to security for payment. It follows that it is not correct to say that in the Mitakshara it is laid down that the liability of the son for payment of his father's debt as surety is confined to the case where sufficient pledge has been taken. As regards the grandsons there seems to be no liability at all.

The Mitakshara is a book of the highest authority in the Benares school, and even if there were more ancient texts capable of being interpreted in a different way, we would be bound to accept the interpretation put upon these texts in the Mitakshara. Similarly even if the law were differently interpreted in the Bombay school (Mayukha) or the Bengal school (under the Dayabhaga) we would be bound to give preference to the view expressed in the Mitakshara. But as a matter of fact, we do not find that the law has been differently laid down either in the more ancient texts or in the Bombay school. Admittedly the chapter on debts in the Dayabhaga is not extant, and there is accordingly no discussion of this question in that treatise.

In the Laws of Manu (Colebrooke's Hindu Law, Volume I, page 173, 3rd edition) after reciting that the son of the surety shall not in general be obliged to pay money due by a surety it is stated: "Such is the rule in case of a surety for appearance or good behaviour; but if a surety for payment should die, the Judge may compel even his heirs to discharge the debt." There is no exception laid down as regards the receipt of consideration.

It is not necessary to refer to the opinion of Gautam who was apparently inclined to the view that there is no liability in any case. In the Institutes of Vishnu (Max Muller's Sacred Books of the East, Volume VII, page 46, chapter VI, verse 41) it is stated: "Suretyship is ordained for appearance, for honesty, and for payment: the first two (sureties, 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)." There is no exception laid down as regards the receipt of consideration.

The contention that there is such an exception is mainly based on the statement of the law as laid down in the Mayukha (Stokes' Hindu Law Books), chapter V,

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section 3, paragraph 1. It lays down that sureties are of three kinds according to Yajnavalkya. It then proceeds to illustrate the three kinds of sureties. Paragraph 2 deals with the liability of the sureties themselves and then of their sons. Quoting Katyayana it is stated: "Money due by a surety need not, on any account, be paid by his grandsons, but in every instance such a debt incurred by his father must be made good by a son without interest." Then the text of Vyasa is quoted under which a grandson is not liable. We then come to paragraph 3 which is in these terms: "This however, supposing the security to have been undertaken by him without receipt of property (or consideration) in return: for if he received (any) property as an inducement to become surety, in that case the sum for which he was bound shall be paid, with interest, by his sons or grandsons. And accordingly Katyayana declares: 'Should a man become surety for the appearance of a debtor, from whom he had received a pledge (as his own security), the creditor (if that surety die), may compel his son to pay the debt, even without assets left by his father.' " In our opinion this exception does not mean that even the liability of the son does not arise unless there has been a receipt of property or consideration by the father. It merely states that the law laid down in the previous paragraphs was as regards the liability of the father, his sons and grandsons on the assumption that there had been no such consideration. When there is no such consideration, the father is liable and so are the sons for the principal, but not the grandsons. The exception, however, is "if he received any property as an inducement to become surety; in that case, the sum for which he was bound shall be paid with interest by his sons or grandsons." That is to say, in case there has been a receipt of consideration the sons and grandsons, both, are liable to pay the principal with interest. Thus the exception imposes a further liability on the grandsons in the event of there having been consideration

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and does not in any way diminish the liability of the sons if there had been no consideration. It is thus obvious that the text of the Mayukha cannot be cited in support of the contention urged on behalf of the appellant.

As a matter of fact, the law as laid down in the Mayukha appears to be somewhat different from that laid down in the Mitakshara and accordingly we are bound to accept the interpretation of the law as laid down in the latter book. Under the Mitakshara the liability of the surety himself exists for the payment of the debt where the surety is for appearance, for confidence or for payment; the liability of the son exists in the case of surety for payment, but the liability of the grandsons for the payment of the debt incurred as surety does not exist. But if the surety for appearance or for confidence had bound himself after taking pledge, then his sons also must pay the debt incurred by becoming surety, from the property taken in pledge.

The case before us is that of the liability of the son of the surety and not of his grandson. We have accordingly no hesitation in holding that the liability can be enforced against the defendant appellant.

In our opinion, therefore, the decree of the court below was correct. The appeal fails and is dismissed with costs.

APPELLATE CRIMINAL

Before Mr. Justice Thom and Mr. Justice Bennet

EMPEROR *v.* YASHPAL*

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Criminal Procedure Code, sections 236, 237(1) *and* 307(3)—*Trial by Jury—Reference by Sessions Judge against verdict of jury—Power to convict, on such reference, on a charge which was not framed but could have been framed—Arms Act* (XI *of* 1878), *sections* 19(*f*) *and* 20.

In a trial by jury on a charge under section 19(*f*) of the Arms Act the jury, by a majority of four to one, gave a verdict

*Criminal Appeal No. 358 of 1932, from an order of Tej Narain Mulla, Sessions Judge of Allahabad, dated the 7th of March, 1932.