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order in the claim case; and that the order in the claim case ceases to be conclusive as between the decree-holder and his representative, on the one hand, and the objector and his representative on the other, when the property is subsequently attached by the same decree-holder or his successor in title.

King, J.

BY THE COURT:—The answer to the first part of the question is in the negative and that to the second is in the affirmative.

PRIVY COUNCIL

TOSHANPAL SINGH AND OTHERS *v.* DISTRICT JUDGE OF AGRA AND OTHERS

J. C.* 1934 *July* 19

[On appeal from the High Court at Allahabad.]

Hindu law—Sons' liability for father's debt—Illegal and immoral debt—Fund under control of father—Criminal breach of trust—Onus of proof—Indian Penal Code, section 405.

The Hindu secretary of a school committee was in charge of a fund deposited at a bank, and was authorised to draw upon it only for specific purposes connected with the school. After his death the committee sued his sons to recover from them out of property left them by their father, or out of the property of their joint Hindu family, an alleged deficiency in the fund. The deficiency amounted to Rs.42,993, and according to the father's own admission Rs.30,016 of it was due to drawings by him for purposes other than those authorised: *Held,* that the drawings in question were criminal breaches of trust within section 405 of the Indian Penal Code, and that under Hindu law the sons to that extent were not liable, but that they were liable for the balance of the deficiency as they had not shown that they were not under a pious obligation in respect of it.

In the absence of further directions by the committee, the only obligation of the appellants' father in relation to the fund had been not to draw upon it save for the specific purposes which they had authorised, and until the moment of the improper withdrawals he had been guilty of no breach of duty, civil or otherwise; it was therefore unnecessary to consider whether sons were liable in Hindu law to pay a sum which had originally been a civil obligation of the father, but which he had subsequently misappropriated; nor whether the illegal and

*Present: Lord BLANESBURGH, Lord ALNESS and Sir JOHN WALLIS.

immoral debts in respect of which a son is not liable are only such debts as are of a strictly criminal nature.

Decree of the High Court, I. L. R., 51 All., 386, varied.

APPEAL (No. 55 of 1931) from a decree of the High Court (July 25, 1928) modifying a decree of the Subordinate Judge of Agra (August 14, 1925).

[The appellants' father, who died in 1923, had been secretary to a school committee; in that capacity he had been in charge of a fund deposited at a bank, and had authority to draw upon it for purposes connected with building operations. After his death, the respondents (representing the committee) instituted a suit against the appellants claiming from them, out of property of their father which had come to them or out of the property of their Hindu joint family, an alleged deficiency in the fund.

The facts appear fully from the judgment of the Judicial Committee.

The trial Judge found that the deficiency amounted to Rs.48,143, and made a decree for that sum. In his opinion the father had not been guilty of criminal breach of trust in respect of the deficiency.

Upon appeal to the High Court the learned Judges (KENDALL and NIAMAT-ULLAH, JJ.) found that the deficiency was Rs.42,993 only, and modified the decree by reducing it to that amount. They were of opinion that where a father had been civilly liable in respect of money in his hands, his sons were liable even if the father had subsequently misappropriated it. They were further of opinion that in the present case no criminality upon the part of the father was proved. The appeal is reported at I. L. R., 51 All., 386.

1934. February 8, 9, 12, 13, 15. *DeGruyther, K. C.*, and *Mockett*, for the appellants: The deficiency in the fund was due to drawings by the appellants' father for his own purposes, or at any rate for unauthorised purposes, and were criminal breaches of trust within the Indian Penal Code, section 405. The plaintiffs' principal witness stated in terms that the appellants' father had

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acted criminally. But even if the drawings were not criminal acts within the Penal Code, the debts resulting from them were illegal or immoral debts, and the appellants therefore were not liable under Hindu law. The Hindu texts as to the liability of sons for their father's debts were elaborately considered in *Bal Rajaram Tukaram* v. *Manecklal Mansukhbhai* (1), and in *Chhakauri Mahton* v. *Ganga Prasad* (2); in both the learned Judges translated Avyavaharika in a manner not materially differing from Colebrooke, namely "debts for a cause repugnant to good morals". The High Court relying upon a statement in the judgment of MOOKERJEE, J., in the last named case were of opinion that if the father had been originally under a civil liability the sons continued liable although there had been a subsequent misappropriation by him. That statement however was *obiter* and, it is submitted, not correct; MOOKERJEE, J., in an examination of the cases, merely mentions it as a view adopted in some of them. Reference was also made to *Chandra Sen* v. *Ganga Ram* (3), *Mahabir Prasad* v. *Basdeo Singh* (4), *Natasyyan* v. *Ponnusami* (5), *Pareman Dass* v. *Bhattu Mahton* (6), *McDowell & Co.* v. *Ragava Chetty* (7), *Kanemar Venkappayya* v. *Krishna Chariya* (8), *Gurunatham Chetty* v. *Raghavalu Chhetty* (9), *Durbar Khachar* v. *Khachar Harsur* (10), *Medai Tirumalayappa Moodelliar* v. *Veerabudra* (11), *Venugopala Naidu* v. *Ramanadhan Chetty* (12), *Hanmant Kashinath* v. *Ganesh Annaji* (13), *Chandrika Ram Tiwari* v. *Narain Prasad Rai* (14), *Jagannath Prasad* v. *Jugal Kishore* (15), *Brijnath Shargha* v. *Lakshmi Narain Kaul* (16).

Upjohn, K. C., and *Wallach*, for the respondents: There were concurrent findings that the debt of the

(1) (1931) I.L.R., 56 Bom., 36.
(2) (1911) I.L.R., 39 Cal., 862.
(3) (1880) I.L.R., 2 All., 899.
(4) (1884) I.L.R., 6 All., 234.
(5) (1892) I.L.R., 16 Mad., 99.
(6) (1897) I.L.R., 24 Cal., 672.
(7) (1903) I.L.R., 27 Mad., 71.
(8) (1907) I.L.R., 31 Mad., 161.
(9) (1908) I.L.R., 31 Mad., 472.
(10) (1908) I.L.R., 32 Bom., 348.
(11) (1909) 19 Mad. L. J., 759.
(12) (1912) I.L.R., 37 Mad., 458.
(13) (1918) I.L.R., 43 Bom., 612.
(14) (1924) I.L.R., 46 All., 617.
(15) (1925) I.L.R., 48 All., 9.
(16) (1932) I.L.R., 8 Luck., 35.

appellants' father was not tainted by immorality, and those findings were correct. There was a mere failure to account and possibly negligence, but no act or omission amounting to a crime was proved. The onus was upon the appellants to prove that the debt was one for which they were not liable under Hindu law: *Brij Narain* v. *Mangal Prasad* (1). Further, the father was originally civilly liable for the balance of the fund, and there is ample authority that a subsequent misappropriation by him would not exempt his sons: *Natasayyan* v. *Ponnusami* (2), *Gurunatham Chetty* v. *Raghavalu Chetty* (3), *Medai Tirumalayappa Moodelliar* v *Veerabudra* (4), *Chhakauri Mahton* v. *Ganga Prasad* (5).

DeGruyther, K. C., replied.

July 19. The judgment of their Lordships was delivered by LORD BLANESBURGH: —

This is an appeal from a decree of the High Court of Judicature at Allahabad of the 25th July, 1928, confirming, with a modification in its amount, a decree of the Additional Subordinate Judge of Agra, dated the 14th August, 1925.

The respondents, plaintiffs in the action in which these decrees were made, are members of the Committee of Management of the Balwant Rajput High School, Agra. The appellants, defendants to the action, are the sons of Thakur Dhianpal Singh, who was for many years secretary of the Committee. He died on the 30th May, 1923, the head of a joint undivided Hindu family.

The respondents in their plaint of the 20th July, 1924, claimed as sums to be paid by the appellants from the property left them by their father, and also out of the joint family property in their hands, the sum of Rs.86,863-4-2, or such other sum as might be found due to them from Thakur Dhianpal Singh. The

(1) (1923) I.L.R., 46 All., 95(104). (2) (1892) I.L.R., 16 Mad., 99.
(3) (1908) I.L.R., 31 Mad., 472. (4) (1909) 19 Mad. L.J., 759
(5) (1911) I.L.R., 39 Cal., 862.

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Subordinate Judge decreed the suit for a principal sum of Rs.48,143-1-2. The High Court, on appeal, reduced the principal amount decreed to Rs.42,993-4-2, but otherwise confirmed the decree of the Subordinate Judge. The defendants again appeal.

As a liability of Thakur Dhianpal Singh, the amount is, before the Board, no longer in debate. The extent of this liability was seriously in issue in both courts below. As a result, the proceedings there were highly involved. The record is a forest of figures, bewildering in meticulous but unconvincing detail. With the High Court's figure of Rs.42,993-4-2 now accepted by the appellants as the measure of their deceased father's liability, this part of the case has ceased to be formidable. An analysis of the figure, a composite one, is, however, still necessary in order to ascertain to what extent it is a liability for which the appellants can be made responsible. Upon this, the only question now at issue, the relevant facts have emerged with great clearness as a result of the elaborate judgments delivered by the learned Judges in India, and their Lordships are thereby enabled to state with comparative brevity their relatively simple findings upon which the decision of the appeal must depend.

In March of 1915, the Government of India granted to the School Committee the sum of Rs.90,000 for additions to and alterations of the school buildings. The grant was made on conditions, one of which was that the money, pending its final application, should be placed on deposit with the Bank of Bengal. As to Rs.30,000, part of this grant, no trace, it appears, exists. Rs.60,000, treated as representing the entire grant, is found in the hands of Thakur Dhianpal Singh in June, 1916, and after being placed by him on fixed deposit for one year, it was on the 15th August, 1917, invested in War Loan repayable in three years. On repayment, Rs.50,000 was, on the 19th August, 1920, placed by Thakur Dhianpal Singh on deposit with the Bank of Bengal,

and Rs.10,000 on current account in each case in his own name. On the 16th October, 1920, he reported to the Committee the repayment of the War Loan and proceeded as follows:—

"I have consequently invested a sum of Rs.50,000 in fixed deposit with the Bank of Bengal at 4 per cent. per annum for one year, and Rs.10,000 in a current call account. I request the formal sanction of the Committee. I further beg that the Committee may be pleased to authorise me to operate on the account and draw the money, when necessary, to meet the expenses of the brick kiln and the acquisition of other building materials."

The sanction and authority so asked for were granted by the Committee on the same day.

An examination of the current account so opened is interesting. The account starts on the 19th August, 1920, with the credit of the Rs.10,000. Drawings upon it, the purport of most of them can only be guessed, commence at once and continue until the 19th August, 1921, when the account is overdrawn to the amount of Rs.51,026-6-2. On that date the Rs.50,000 fixed deposit, with Rs.2,000 interest accrued, is transferred to the credit of the current account, which was thereby put in credit to the extent of Rs.973-9-10. This credit, except as to Rs.64-4-1, was exhausted by drawings extending to the 15th October, 1921. The account then remained dormant until the 29th December, 1922, when it was formally closed by the balance of Rs.64-4-1 being drawn out by Thakur Dhianpal Singh himself. No sums were ever paid into the account except the two of Rs.10,000 and Rs.52,000, respectively. Accordingly on its credit side it was in result a separate account of the schools into which school moneys and no others were paid by Thakur Dhianpal Singh, and it is substantially true to say that these moneys had by the 15th October, 1921, been entirely expended by him in one way or another. Drawings in his own favour on the

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account amount to over Rs.34,000. It is convenient, however, at once to state that it does not follow that these drawings were in whole or in part applied by Thakur Dhianpal Singh to his own use or otherwise misappropriated. It could not have been regarded as impossible, if nothing more were shown with reference to them, that they were all ultimately applied by him for authorised purposes.

But, with both accounts in fact exhausted, Thakur Dhianpal Singh on the 19th May, 1922, sent an important communication to the Committee. In it, after referring to a discussion on the plans and estimates "of the proposed alterations and additions to the school buildings," which at the instance of the Committee he had had with the executive engineer of the Agra Division, he concludes as follows:—

"The estimate, according to the current Public Works Department rates, comes to Rs.78,684, and to the District Board rates it comes to Rs.73,459. But as far as I have calculated, I can get the entire thing done at a cost of Rs.60,000 if the Committee authorise me and sanction the amount. I shall undertake to complete the buildings according to the plan at a cost of Rs.60,000. The Committee has got in hand a sum of Rs.70,000."

It is unfortunate that this communication was accepted by the Committee at its face value and without investigation or inquiry. As may be gathered from what has been already stated, the statement was little better than a tissue of falsehood. It represented the alterations and additions to the school buildings as being all still in the future, and it treated the Committee as having then in hand, presumably for the purpose of the alterations, a sum of Rs.70,000—the facts being that apart from the missing Rs.30,000 of Government grant, the Committee had never had any moneys in hand beyond those in the name of Thakur Dhianpal Singh, and that he had never treated himself in respect of that part as being accountable for any sum exceeding with interest Rs.62,000. Nor was even that sum in

hand. The whole of it had, except as to Rs.64, disappeared seven months before.

The Committee, however, still implicitly trusted their secretary. On the same 19th May, 1922, in response to his application, they resolved: "That the secretary be authorised to put in hand the alteration on the condition that the total amount expended does not exceed Rs.60,000."

And here it is convenient to pause for a moment in order to ascertain the legal position of Thakur Dhianpal Singh in relation to these moneys so left by the Committee in his charge.

He was entitled and empowered, as their Lordships think, to apply them, as in his discretion was proper, for any of the purposes which had been named by him and accepted by the Committee. As to the resulting balances, it was his duty to keep the moneys standing to the credit of one or other of the accounts referred to in his communication of the 16th October, 1920, until these were required for any of the purposes aforesaid.

With reference to these balances, he was under no further obligation, unless and until their application was otherwise directed by the Committee. No such direction was ever given. Accordingly if, and to the extent to which, Thakur Dhianpal Singh withdrew these moneys and applied them for his own purposes, he was guilty, as from the moment of withdrawal, of a criminal breach of trust. But until the moment of withdrawal he had been guilty of no breach of duty, civil or otherwise, in relation to them. It will be found that in this statement is disclosed the key to the solution of this appeal. The failure both of the learned Subordinate Judge and of the High Court to appreciate the situation, as thus stated, has led both Courts in India, as their Lordships very respectfully think, to a wrong conclusion.

Between the 15th May and the 30th January, 1923, Thakur Dhianpal Singh—he will in what follows be

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referred to as Dhianpal—drew cheques on the ordinary school account ostensibly for the expenses of the alterations and additions to the school buildings, these cheques in every instance being countersigned by successive Presidents of the Committee, Mr. J. R. W. Bennett and Mr. E. Bennet.

In November, 1922, for the first time, Mr. E. Bennet queried the signing of further cheques. Correspondence took place between him and Dhianpal. In the course of it, the secretary made the following statement:—

"The construction of the building is being carried out in accordance with the plans through the agency of contractors and occasionally labour on daily wages is engaged as well. For this work I have drawn the money in the manner I begged to put out in my letter of yesterday. An account of the money expended is kept in my office, separate from the other school accounts."

In his evidence at the trial Mr. E. Bennet stated:—

"I was not aware at the time of this correspondence that there was any Government grant. There is no mention in the correspondence that any Government grant was given, and Thakur Dhianpal Singh concealed this fact from my knowledge. He also concealed the fact that he had withdrawn about Rs.60,000, which were in two deposits of Rs.10,000 and Rs.50,000 of the Building Fund, and although the Committee had limited him to the expenditure of Rs.60,000, the cheques which he drew with the countersignatures of Mr. J. R. W. Bennett and myself had been drawn beyond the sum of Rs.60,000, and were being drawn not on any building fund provided by the Government, but on the ordinary school funds in deposit in the banks. After the death of Thakur Dhianpal Singh, I ascertained that he had drawn seven cheques for building purposes on ordinary school account, totalling Rs.21,597-3-2 up to the 20th January, 1923...

"The complaint against Dhianpal Singh is that Dhianpal, by misappropriating a portion of this money and other sums detailed in the plaint, committed criminal breaches of trust."

After Dhianpal's death—which took place, it will be remembered, on the 30th May, 1923—an auditor was appointed to examine the accounts relating to the school building. His report was subsequently filed in the action by the respondents. It takes a very serious view

of Dhianpal's transactions and refers, *passim*, to his misappropriation of assets and embezzlement. The respondents also caused the work actually done upon the school buildings by Dhianpal Singh to be valued.

It will be found that the valuation so made was adopted by the learned Subordinate Judge and is one of the basic figures on which the liability of Dhianpal, as finally ascertained, is arrived at.

On the 29th July, 1924, the respondents instituted in the court of the Subordinate Judge of Agra the action already so frequently alluded to, and out of which this appeal arises. The claim therein made against the appellants has been already stated. The learned Subordinate Judge upon it found that Dhianpal had to account for Rs.83,597-3-2, made up of the above sums of Rs.52,000, Rs.10,000, and Rs.21,597-3-2. He valued the work done by Dhianpal at Rs.35,454-2, and treating that as the sum for which credit had to be given, he held that Dhianpal's liability at the date of his death amounted to the Rs.48,143-1-2, already mentioned, and that liability he held that the appellants, as his sons, were under a pious obligation to discharge. They had contended that the claim was in respect of moneys with regard to which their father was criminally liable for breach of trust, and that for such defalcations of his, they, his sons, were not liable. The learned Subordinate Judge, however, was of opinion that Dhianpal had not been guilty of any criminal breach of trust, so that this plea did not avail the appellants.

In the High Court to which an appeal was taken by the appellants, the liability of Dhianpal was reduced as has been seen to a sum of Rs.42,993-4-2. For that sum the appellants were held liable. The learned Judges reviewed the authorities on the question of the pious obligation of sons to discharge their deceased father's debts and, in the result, held that if there was first a civil liability on the father's part, followed by an act which transformed that liability into a crime, the sons

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were bound to meet the civil liability to the extent of the family property, their obligation in that behalf being in no way altered by the father's subsequent crime. Applying that conclusion to the facts already stated, the learned Judges were of opinion that when Dhianpal, on the 16th October, 1920, obtained authority to draw cheques upon the two accounts, there was nothing to show that he had then any dishonest purpose: but he did then become responsible to account for the whole Rs.62,000, a civil liability which preceded his criminal misappropriations, if any there were. It had been suggested that Dhianpal's actions had been infected with criminality from the outset. That had not been proved, nor was it likely. They believed that Dhianpal acted at first in perfect good faith, and that it was not shown that he had subsequently been guilty of any criminal offence.

Their Lordships feel some surprise that on this question of criminality on the part of Dhianpal, none of the learned Judges attach any importance, nor indeed do they make any reference, to the direct charge against him made in evidence by Mr. Bennet, nor to the conclusions on that subject of the accountant's report, which the Committee had put in evidence and made part of their case. Their Lordships of course quite recognize that the mere allegation of a criminal breach of trust, even on oath, is no evidence that it was committed, but it does seem strange that as against parties innocent themselves of all crime, it should be sought to establish a liability which would be non-existent if the only sworn allegation on the subject made on behalf of the plaintiffs were true. The point, however, ceases to be important, and any difficulty their Lordships might have had in dealing with two concurrent findings on this subject is removed, by reason of this, that before the Board the fact that Dhianpal had been guilty of a criminal breach of trust was not really contested by the respondents, and that he was so guilty (for what amount

is another matter,) seems to their Lordships to have been clearly established.

Before the Board the respondents' case was put as follows: A father, it was said, who accepts a sum of money to be held for another, or to be applied in a certain way, comes at once under a liability, *ex contractu* or *quasi ex contractu,* although there may be no right of action against him until he has been guilty of some breach of duty, and this right of action may be enforced against his sons, although it appears that ultimately the father has criminally made away with the fund. This contention was supported by elaborate citation of authority. On the other hand, it was contended by the appellants, in an argument supported also by a great array of cases, that there were debts of a father with a stigma far short of criminality attached, for which his sons are not liable. It was not suggested by the respondents that the sons of a deceased father were liable in respect of a claim against him for criminal breach of trust. Nor was it denied that ultimately Dhianpal had been guilty of such a breach.

It is unnecessary, in these circumstances, as their Lordships think, for the Board to go in this case into these questions of law raised on either one side or the other. In view of the powers and duties prescribed for Dhianpal in relation to the Rs.62,000, there was, as their Lordships have already shown, in relation to the moneys misappropriated by him, no antecedent duty in respect of which any similar liability was either created or survived. Up to the moment of misappropriation his only duty in respect of the moneys misappropriated had been completely fulfilled. He was, in relation to these moneys, guilty of a criminal breach of trust *simpliciter,* and the difficult and doubtful question of law ventilated by the respondents does not here, on the facts, call for decision. Similarly, the question of law raised by the appellants need not, for the same reason, here be discussed.

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But the question still remains, with a criminal breach of trust no longer in contest, what part of the Rs.42,993-4-2 found to be due from Dhianpal represents his criminal misappropriation. This point has not been discussed in either Court in India, and it is one upon which affirmative evidence is lacking.

First of all, as the credits allowed by both Courts to Dhianpal are in respect of the ascertained value of his expenditure upon the buildings, and not as they should have been in respect of its actual amount, it is impossible to say whether the whole or what portion of the amount actually adjudged due represents criminal misappropriation. Nor is there any affirmative evidence by reference to which that lacuna can be supplied. Again, Dhianpal's actual drawings cannot, for reasons already given, be used to supply the missing figure: nor is there any other affirmative proof forthcoming from any other source.

In these circumstances it appears to their Lordships that for want of better evidence the extent of these defalcations must be confined to a sum which is within the terms of an admission made by Dhianpal himself.

This admission is to be found in a letter, perhaps the last letter written by him before his death. It is addressed to Radhey Lal, clerk to the headmaster of the school, on the 30th March, 1923, and after detailing his expenditure on the schools, amounting as he says to Rs.41,206-15-8, Dhianpal proceeds:

"There is an amount of Rs.66,975 outstanding against my name. To this amount add Rs.4,248, received from other sources as detailed above. The total amount comes to Rs.71,223-9-1, out of which deduct the total . . . amount expended, i.e. Rs.41,206-15-8. Thus leaving a balance of Rs.30,016-9-5. Please show this amount in my hand, which I shall account later on."

No accounts of this sum, or of any part of it, are forthcoming, and in the absence of any affirmative evidence as to the further extent of Dhianpal's misappropriations, this admission of his must, their Lordships

think, be taken as the extreme measure of the amount for which the appellants can in this action claim immunity. With regard to the sum of Rs.12,976-6-6, the difference between the Rs.30,016-9-8, and the sum of Rs.42,993-4-2 found by the High Court to be due from Dhianpal at his death, no case has been made by the appellants, and the burden is upon them to show that with respect to that liability of their father's they are not under a pious duty to discharge it.

It follows that this appeal should be in part allowed, and that the decree of the High Court of the 25th of July, 1928, should be for the principal sum of Rs.12,976-6-6 only.

And their Lordships will humbly advise His Majesty accordingly. As to costs, their Lordships think that in the result, there ought to be no costs to either side in either court in India, and the decree of the 25th of July, 1928, must be further modified in that sense. The respondents must pay to the appellants five-sixths of their costs of this appeal.

Solicitors for appellants: *Douglas Grant and Dold.*

Solicitors for respondents: *Hy. S. L. Polak & Co.*

RAGHUNATH SINGH AND OTHERS *v.* HANSRAJ KUNWAR AND OTHERS

J. C.*
1934
July 19

[On appeal from the High Court at Allahabad]

Transfer of Property Act (IV of 1882), sections 60, 92, 93—Mortgage—Redemption—Mortgage by conditional sale—Previous redemption decree—Whether right to redeem extinguished— Res Judicata.

A decree for redemption made in 1896 in respect of a mortgage by conditional sale provided that if the mortgagor failed to pay in accordance with the decree his "case will stand dismissed". By section 92 of the Transfer of Property Act, 1882, the decree should have provided that upon default the mortgagor should "be absolutely debarred of all right to redeem". No payment of the mortgage money was made; the mortgagee remained in possession, but did not apply for an order under section 93 of the

*Present: Lord RUSSELL of KILLOWEN, Sir LANCELOT SANDERSON, and Sir SHADI LAL.