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Certain earlier decisions of this Court which appear to be in favour of the respondent were cited before the learned Civil Judge, but it is clear that the later view of this Court is in favour of the plaintiff and, as we have stated, there is now a Full Bench decision of this Court which concludes the matter in the plaintiff's favour.

The result, therefore, is that we are bound to hold that the claim out of which this suit arose was not one falling within the purview of section 326(1) of the Municipalities Act, 1916, and that being so, no notice as prescribed by that sub-section was necessary. This appeal, therefore, must be allowed and the decrees of the lower courts set aside. As the lower appellate court has not considered the other issues in the case, we remand the case to that court to be heard and determined according to law. The court must consider the remaining issues and then pass such a decree as it deems proper. The costs of this appeal and of the previous proceedings in the courts below will abide the event. The plaintiff is entitled to a refund of the court fee.

Before Mr. Justice Bennet and Mr. Justice Verma

HEMRAJ (DECREE-HOLDER) *v.* KHEM CHAND AND OTHERS (JUDGMENT-DEBTORS)*

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Hindu law—Sons' liability for father's debts—Avyavaharika *debt, repugnant to good morals or fair dealings—Decree for damages resulting from a wrongful act of the father—Sons or the family estate in their hands not liable—Civil Procedure Code, order XXXII, rule* 3(5)—*Guardian* ad litem *continues to represent the minor in execution stage.*

Under the Hindu law the sons' liability for the father's debts does not arise where the debt or liability incurred by the father was an *avyavaharika* debt, i.e. one due to such conduct of the father as would be considered repugnant to good morals or fair dealings. For this purpose it is not necessary that there should have been an element of criminality in the conduct of the father; it is enough if it was a wrongful act which a decent and fair minded person would not do.

*First Appeal No. 344 of 1936, from a decree of H. P. Asthana, Civil Judge of Agra, dated the 12th of September, 1936.

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So, where by the terms of a decree in a partition suit the father was required to file in court, within seven days of the decree, a promissory note which stood in his name but was allotted at the partition to the share of the plaintiff, and after the expiry of that time he filed a forged promissory note and ultimately, about two years later, he filed the genuine promissory note only after it had become time barred, and the plaintiff then sued the father and obtained a decree for damages against him for the loss caused by his conduct, which was found by the court to have been grossly improper and dishonest, and upon the death of the father the decree was sought to be executed against the sons and the ancestral property in their hands, it was *held* that as the decree was founded upon an *avyavaharika* conduct of the father it constituted an *avyavaharika* debt, and the sons and the ancestral property in their hands were not liable under it.

A guardian *ad litem* appointed by the court for a minor defendant continues to represent him in the subsequent execution proceedings and a petition of objections filed by any other person on behalf of the minor in the execution proceedings is not maintainable.

Messrs. *S. K. Dar* and *Din Dayal,* for the appellant.

Sir *Tej Bahadur Sapru* and Mr. *S. B. L. Gaur*, for the respondents.

VERMA, J.:—These two appeals arise out of execution proceedings.

One Bohra Dan Pal was a member of a joint Hindu family with Hemraj the appellant, and father of the respondents, in E.F.A. No. 344 of 1936. Dan Pal had advanced a sum of Rs.4,000 to Ram Chand and Sri Chand, who are brothers, on the 22nd of February, 1919, and had a promissory note executed by them in his favour. That promissory note was renewed by Ram Chand and Sri Chand and their brother Moonga Ram on the 21st of December, 1921, for Rs.4,680 in favour of Dan Pal. The debtors again executed a fresh promissory note for Rs.5,264 on the 21st of November, 1924, in favour of Dan Pal in lieu of the previous promissory note, dated the 21st of December, 1921. In the year 1925 a suit for partition of the joint family

property was filed by Hemraj on behalf of himself and his minor younger brother against Dan Pal and the members of his branch of the family. This was suit No. 365 of 1925 of the court of the Civil Judge of Agra. This partition suit was referred to arbitration and a decree in terms of the award was passed on the 19th of June, 1926. Besides other items of property, this debt due under the promissory note mentioned above from Ram Chand and his brothers was allotted to Hemraj. In paragraph 2 of the award the arbitrators laid down that any document or decree which was allotted to one member of the family would be his and the member in whose name that document stood would be responsible to prove the debt and its legal necessity. In paragraph 6 of the award it was laid down that the party in whose possession any such document was, i.e., a document which stood in his name but was allotted to the opposite party, must file the said document in court within seven days. It was further provided that the said document must be within limitation otherwise the party filing that document would be responsible for the money due on that document and that the plea of limitation by that party would be groundless because he would be deemed to have realised the consideration of that document by some means or other. Thus under the award, on the basis of which the court passed a decree in the suit, it was the duty of Dan Pal to file the promissory note, executed in his favour by Ram Chand and his brothers, within seven days of the decree as the document stood in his name and had been allotted by the award and the decree to Hemraj and his brother. Dan Pal did not do so, but after the expiry of the week, filed on the 28th of June, 1926, another document purporting to have been executed by the debtors on the 21st of June, 1926. He did not explain in any manner what had happened to the promissory note, dated the 21st of November, 1924, or the previous promissory notes of the 21st of December, 1921, and the 22nd of February, 1919. He

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gave no notice or intimation of the filing of this document to the plaintiffs in the partition suit. Hemraj filed an application for execution of the decree in the partition suit in respect of several promissory notes and other articles which he alleged Dan Pal had not made over to him in accordance with the decree and prayed for the recovery by execution of over Rs.10,000. This application for execution was filed on the 9th of January, 1928, and one of the promissory notes about which Hemraj complained was this promissory note of Ram Chand and his brothers. It was only then that Dan Pal filed on the 6th of February, 1928, the promissory note dated the 21st of November, 1924. By this time a suit on this promissory note was time barred. On the 3rd of December, 1928, Hemraj filed a suit No. 191 of 1928 in the court of the Civil Judge of Agra for the recovery of Rs.6,615 on the basis of the promissory note, dated the 21st of November, 1924, and impleaded the executants of the promissory note as defendants Nos. 1 to 3 and Dan Pal as defendant No. 4. The suit was dismissed by the trial court as against the executants defendants 1 to 3 on the ground that it was clearly barred by time, but it was decreed against Dan Pal on the grounds that it was his duty to have filed the promissory note dated the 21st of November, 1924, in court within seven days of the passing of the decree in the partition suit, that his conduct throughout had been dishonest and that Hemraj was entitled to recover the amount from Dan Pal as he was prevented from recovering it from the debtors by Dan Pal's conduct. In this suit it was admitted that the document, dated the 21st of June, 1926, which purported to be a fresh promissory note, or an acknowledgment of liability, executed by the debtors and which was on the record, was not a genuine document. There were allegations and counter allegations by each party against the other in respect of this document. Whatever may be the truth with regard to this matter the fact remains that

Dan Pal had in his possession the promissory notes of 1919, 1921 and 1924 executed by Ram Chand and his brothers, but did not file them within seven days of the passing of the decree in the partition suit as it was his duty to do. He filed instead a document of the 21st of June, 1926, and gave no notice to Hemraj that he had filed it, and this document subsequently became the subject of controversy. In the course of his judgment the Civil Judge had remarked: "Dan Pal defendant has all along been acting dishonestly towards the plaintiffs and he cannot be allowed to take advantage of his cleverness and fraud." Again, when dealing with issue No. 3, the Civil Judge made the following remarks: "The alleged pro-note which is before the court is admittedly forged. The execution of any other pro-note is not at all proved by any satisfactory evidence. What seems to have happened is this that Dan Pal was the *karta* of the family of Hemraj and others. When he was threatened by a partition suit on behalf of Hemraj he adopted various tactics to withhold a greater portion of the family outstanding debts and cash money in his own pocket and to deprive the other members of the family of their legal share in the said debts and cash amount. In pursuance of the said scheme he concealed the debts and the cash as far as possible. He might have made an attempt to get a pro-note executed in favour of his father-in-law Mathura Prasad in lieu of the pro-note existing against defendants 1 to 3, but when the said debt was discovered and when in the partition suit of the parties it fell to the share of the present plaintiff, he finding his scheme exposed got a pro-note executed by defendants 1 to 3 in favour of plaintiff and filed it in court. But later on, for reasons best known to Dan Pal and the executants of the said pro-note, the original of it was got removed from the file and a forged one inserted in its place." Dan Pal filed a First Appeal No. 391 of 1929 in the High Court against the decree passed by the Civil Judge. During the

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pendency of this appeal Dan Pal died and his sons were brought on the record as legal representatives of Dan Pal and the appeal was continued. This Court affirmed the decree of the trial court and dismissed the appeal filed by Dan Pal. In the course of the judgment it was observed: "We consider that under this award it was the duty of defendant 4 to file in court the promissory note of the 21st of November, 1924, within one week. The defendant did not do so, and it is shown by a proceeding of the 6th of February, 1928, in the partition record in execution that defendant 4 only filed this promissory note of the 21st of November, 1924, on that date and that up to that time he had it in his possession. At the date on which he filed it, it was time barred." The document dated the 21st of June, 1926, which was on the record was exhibit 3. In a subsequent portion of the judgment of this Court the following observations were made: "But the point which defendant 4 has to prove is that on the 28th of June, 1926, defendant 4 did file a genuine document. There is nothing whatever except his own statement to show that he had filed a document other than exhibit 3 which he admits to be a forged document." It was held that "the onus lay on defendant 4 to prove that he had placed the document on the record within a certain time which would enable the plaintiff to realise the debt due from defendants 1 to 3 and we are convinced that the defendant 4 has failed to prove that he carried out this duty." The appeal was accordingly dismissed.

Hemraj has applied for execution of the decree against the sons of Dan Pal, namely Khem Chand major and Sundar Lal and Rajendra Nath minors, and the family property in their hands. Two sets of objections under section 47 of the Civil Procedure Code were filed, one by Khem Chand and the other on behalf of Sundar Lal and Rajendra Nath through their mother. So two miscellaneous cases were registered in the court below. Both sets of objections raised the same point, namely

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that the liability incurred by Dan Pal in respect of which the decree under execution had been passed was of such a nature that the sons were not bound under the Hindu law to satisfy that decree. In other words, they pleaded that the conduct of Dan Pal had been *avyavaharika* and that the decree which was passed against him in consequence of that conduct constituted an *avyavaharika* debt. The court below has dismissed the objection filed on behalf of the minors on the ground that Khem Chand having been appointed their guardian by the court, the petition of objections filed through their mother was not maintainable. E.F.A. No. 475 of 1936 has been filed on behalf of the minors against this order. The objection of Khem Chand has, however, been allowed by the learned Civil Judge. He has held that it was due to Dan Pal's negligence and dishonesty that Hemraj's claim against the debtors on the promissory note became barred and that the decree, being in respect of loss and damage caused to Hemraj by the wrongful act of Dan Pal, could not be executed against the sons and the family properties in their hands. E.F.A. No. 344 of 1936 has been filed by Hemraj decree-holder against this order.

The point that has been argued before us is whether the decision of the court below allowing the objection of Khem Chand and holding that the decree could not be executed against Dan Pal's sons and the family properties in their hands is correct. Having given the matter careful consideration, I have come to the conclusion that the decision of the court below is right and should be affirmed. The point urged by the learned counsel for Hemraj decree-holder is that the wrongful act of Dan Pal in consequence of which the decree was passed was of a civil nature and that the doctrine of Hindu law relied upon by Dan Pal's sons cannot be availed of unless there is an element of criminality in the conduct of the father. He has cited the cases of

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Sumer Singh v. *Liladhar* (1), *Beni Ram* v. *Man Singh* (2) and *Chandrika Ram* v. *Narain Prasad* (3). On the other hand, it has been contended by the learned counsel for Khem Chand that it is not necessary that there should have been an element of criminality in the conduct of the father and that if his conduct was such as would be considered "repugnant to good morals", the sons would not be liable. The cases of *Chhakauri Mahton* v. *Ganga Prasad* (4), *Durbar Khachar* v. *Khachar Harsur* (5), *Sunder Lal* v. *Raghunandan Prasad* (6), *Ratan Lal* v. *Birjbhukan Saran* (7), which is a decision of a Bench of this Court, *Raghunandan Sahu* v. *Badri Teli* (8) and *Brij Behari Lal* v. *Phunni Lal* (9) have been relied upon. The case of *Toshanpal Singh* v. *District Judge of Agra* (10) has also been cited, but in that case the father had been guilty of a criminal offence. 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 Dan Pal had been guilty of dishonesty and grossly improper conduct. If he had filed the promissory note, dated the 21st of 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 and brought on himself this liability to make good the loss which he had caused to Hemraj by that conduct. In my judgment the conduct of Dan Pal which has resulted in this liability was clearly repugnant to good morals. As observed in the case of *Brij Behari Lal* v. *Phunni Lal* (9) mentioned above, which is the latest case in this Court, the trend of authority is in favour of the view that a debt which is

(1) (1911) I.L.R. 33 All. 472.
(2) (1911) I.L.R. 34 All. 4.
(3) (1924) I.L.R. 46 All. 617.
(4) (1911) I.L.R. 39 Cal. 862.
(5) (1908) I.L.R. 32 Bom. 348.
(6) (1923) I.L.R. 3 Pat. 250.
(7) (1921) 61 Indian Cases, 774.
(8) I.L.R. [1938] All. 330.
(9) [1938] A.L.J. 470.
(10) (1934) I.L.R. 56 All. 548.

repugnant to good morals is an *avyavaharika* debt and is not binding on the sons. The principles applicable to such cases are discussed in the elaborate judgment of MOOKERJEE, J., in *Chhakauri Mahton* v. *Ganga Prasad* (1). The cases cited by the learned counsel for Hemraj do not in my opinion apply to the present case. In the case of *Sumer Singh* v. *Liladhar* (2) the father, Rikhi Lal, had been sued for damages for libel. The first court had dismissed the suit but the lower appellate court had decreed it. Rikhi Lal wanted to file a second appeal and needed money for that purpose. He borrowed it from a bank and Sumer Singh's father stood surety for him. The bank realised the money from the surety and Rikhi Lal executed a promissory note in favour of Sumer Singh's father. Subsequently Sumer Singh sued Rikhi Lal on the promissory note and obtained a decree and wanted to proceed against the family property. Thereupon the sons and grandsons of Rikhi Lal brought the suit which gave rise to the second appeal in which the ruling cited was given for a declaration that the property could not be attached and sold. It was pointed out in the course of the judgment that the decree which Sumer Singh wanted to execute was a decree in a suit on a promissory note and was not a decree for damages for libel. The ruling of the Bombay High Court in *Durbar Khachar* v. *Khachar Harsur* (3) was distinguished and it was held that "the promissory note represented money which the father had borrowed for the purpose of defending himself against a suit for damages", and that the debt was therefore one for which a Hindu son and grandson were liable. In the present case the decree that has been obtained by Hemraj is a decree for damages or compensation on account of loss caused by the wrongful act of Dan Pal.

In the case of *Beni Ram* v. *Man Singh* (4) the facts were these. One Mathura Prasad, the head of a joint

(1) (1911) I.L.R. 39 Cal. 862.
(2) (1911) I.L.R. 33 All. 472.
(3) (1908) I.L.R. 32 Bom. 348.
(4) (1911) I.L.R. 34 All. 4.

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Hindu family, was committed to the court of session on charges under sections 467 and 471 of the Indian Penal Code. In order to raise funds for his defence Mathura Prasad, with one of his sons Janki Prasad, mortgaged some of the family property. The mortgagee brought a suit for recovery of the amount due to him under the mortgage deed and impleaded Janki Prasad who was one of the executants of the deed, Beni Ram another son of Mathura Prasad, and two sons of Janki Prasad. It was held by this Court that the necessity of raising money to pay for the defence of the head of a joint Hindu family committed to the court of session on a serious criminal charge was a valid legal necessity such as would support a mortgage of the family property executed by the father and one of his sons for such purpose. That is a very different point from the one which arises for consideration in the present case. At page 6 of the report CHAMIER, J., after mentioning a number of cases which had been cited in the arguments, observed that they "afforded little, if any, assistance, for in all of them the question was whether a father's liability originating either in the commission of a crime or the breach of a civil duty could be enforced against the family property in the hands of his sons or grandsons. In all of them the question discussed was whether the debt incurred was illegal or immoral. The question of legal necessity was not discussed in any of those cases." The decision was based on the ground that it was a case of *musibat*, i.e. distress or calamity, which threatened the family and the mortgage was executed and money was raised with the intention of warding off that *musibat*.

In the case of *Sumer Singh* v. *Liladhar* (1) also there was a calamity threatening the family and funds were raised with the intention of making an attempt to ward it off. The fact that it was a civil action for damages for libel does not in my opinion make any difference.

(1) (1911) I.L.R. 33 All. 472.

In the case of *Chandrika Ram* v. *Narain Prasad* (1) a suit had been filed by Narain Prasad against Ram Nandan and his brothers for recovery of a sum of money in respect of trees that had been cut and for demolition of a building. The suit was decreed and the decree was executed in 1914 and a sale took place in 1916, the decree-holder himself being the purchaser. On Narain Prasad failing to obtain possession, he brought a suit for possession and obtained a decree in 1920. Then the sons of Ram Nandan brought a suit for a declaration that the sale which had taken place in 1916 and the subsequent decree for possession of 1920 were not binding on them. This Court agreed with the courts below in dismissing the suit. On the facts the case is distinguishable and does not apply to the case before us.

On the other hand, the rulings cited by the learned counsel for Khem Chand go the whole length of his contention. In my judgment the conduct of Dan Pal was at least as reprehensible and repugnant to good morals as is the conduct of a man who is found to have initiated a prosecution without reasonable and probable cause, and is subsequently successfully sued for damages for malicious prosecution. That is what had happened in the cases of *Sunder Lal* v. *Raghunandan Prasad* (2) and *Raghunandan Sahu* v. *Badri Teli* (3). In my opinion the decision of the court below is correct and should be affirmed, and E.F.A. No. 344 of 1936 should be dismissed.

Coming now to the connected appeal, I am of opinion that the decision of the court below in this case also is correct. A guardian *ad litem* of the minors having been appointed by the court, any petition on their behalf should have been filed through that guardian and not through any one else. The court below is right in holding that the petition of objections on behalf of the minors filed through their mother is not entertainable. I would dismiss E.F.A. 475 of 1936 also.

BENNET, J.:—I agree.

(1) (1924) I.L.R. 46 All. 617. (2) (1923) I.L.R. 3 Pat. 250.
(3) I.L.R. [1938] All. 330.