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MANMOHAN DAS v. BALDEO NARAIN TANDON

The judgment given by the High Court cannot be challenged on any of the grounds urged on behalf of the appellant, and must be affirmed. Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed.

Solicitors for the appellant: *Nehra & Co.*

Solicitors for the 1st respondent: *Douglas Grant & Dold.*

APPELLATE CIVIL

Before Mr. Justice Thom and Mr. Justice Bajpai

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April, 16

RAGHUNANDAN SAHU AND OTHERS (PLAINTIFFS) *v.* BADRI TELI AND OTHERS (DEFENDANTS)*

*Hindu law—Antecedent debt—Immoral or illegal debt—*Avyavaharika *debt—Decree against father for damages for malicious prosecution—Sons and grandsons not liable—Interest, rate of—Compound interest.*

An antecedent debt of the father or grandfather is not binding on the sons and grandsons if the debt is an immoral or illegal debt or an *avyavaharika* debt. No hard and fast rule can be laid down for determining what debts are included in the term "*avyavaharika*" debt, which may, however, be fairly rendered as an obligation arising from an act repugnant to good morals or opposed to fair dealings. In the case of a decree against the father or grandfather, like a decree for damages, the act which is the foundation of the suit for damages has got to be scrutinised and it has to be seen whether the act was a *vyavaharika* act or an *avyavaharika* act. Bringing a false and malicious complaint without reasonable and probable cause is a tortuous act opposed to public policy or decent *vyavahara,* and therefore an *avyavaharika* act. A decree against the father or grandfather for damages for malicious prosecution is, *prima facie,* founded on an *avyavaharika* act which comes within the category of immoral or illegal or improper debt, and such a decree can not constitute an antecedent debt binding upon the sons and grandsons.

Interest at 9 per cent. per annum, compoundable every year, was *held* to be not *prima facie* unreasonable, excessive or hard.

*Second Appeal No. 946 of 1931, from a decree of Makhan Lal, Second Additional Civil Judge of Jaunpur, dated the 17th of March, 1931, modifying a decree of Suraj Prasad Dubey, Munsif of Shahganj, dated the 3rd of September, 1929.

Mr. *Harnandan Prasad*, for the appellants.

Messrs. *N. Upadhiya* and *Lakshmi Saran*, for the respondents.

THOM and BAJPAI, JJ.:—This is a second appeal by the plaintiffs, and the defendants have filed cross-objections under order XLI, rule 22 of the Civil Procedure Code. The plaintiffs are the sons and grandsons of one Ram Bharose Sahu. They brought the present suit, out of which this appeal has arisen, for the recovery of Rs.3,706 on the basis of a mortgage executed by one Khedu Teli on the 3rd of November, 1913, in favour of Ram Bharose. Defendants Nos. 1 to 5 are the descendants of Khedu Teli, and the remaining defendants Nos. 6 to 15 are subsequent transferees of the mortgaged property. It is not necessary to state in detail the various pleas taken in defence by the several defendants; it is sufficient for the purposes of the appeal and the cross-objections to say that they asserted that the mortgage was not binding on them, and they further pleaded that they had paid a sum of Rs.300 on the 26th of December, 1922, for which no credit was given by the plaintiffs in the suit. They also said that even if the mortgage be held to be binding on the defendants, the rate of interest entered in the bond, namely 9 per cent. per annum compoundable yearly, was excessive, and Khedu Teli had no necessity to borrow money at such an exorbitant rate of interest.

The details of the mortgage consideration of Rs.3,200 as entered in the deed consisted of the following items: (1) Rs.1,393 due on a simple money bond dated the 16th of January, 1911; (2) Rs.964-4-0 due on bahi khata accounts; (3) Rs.176 due for ornaments pawned through Babua Teli; (4) Rs.116-12-0 paid to the mortgagor on account of expenses of execution and other household expenses; and (5) Rs.550 cash taken before the sub-registrar for paying some decretal amounts.

As regards the first item the courts below have held that this was an antecedent debt inasmuch as it was due

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on a previous simple money bond dated the 16th of January, 1911, which in its turn was executed in lieu of an earlier bond, dated the 4th of February, 1898, for Rs.999. There is no controversy before us as regards the sum of Rs.1,393 which, from what we have stated before, is clearly an antecedent debt binding on the sons and grandsons of Khedu Teli.

As regards the second item of Rs.964-4-0, it is clear that this was due on bahi khata accounts ranging from the years 1909 to 1912 and, as such, this also constitutes antecedent debt and is binding on the defendants.

As regards the third item of Rs.176, the finding of the courts below is that no connection has been shown between Babua Teli and Khedu Teli, and a debt incurred by Babua Teli cannot be binding on the descendants of Khedu Teli, even if the latter took upon himself the responsibility of paying the aforesaid debt.

As to the fourth item of the mortgage consideration, namely Rs.116-12-0, the position is that Rs.40 has been considered by the courts below to be sufficient to cover the expense of stamp and registration, but there is no evidence to show the legal necessity for the remaining item of Rs.76-12-0, and that portion of the mortgage consideration has been held to be not binding on the defendants.

So far there is no difficulty, and the findings of the court below are not open to attack in second appeal. The main controversy has centred round the fifth item of the mortgage consideration, namely the sum of Rs.550, taken in cash before the sub-registrar for paying certain decretal amounts. The case for the plaintiffs was that the decrees having been passed against Khedu Teli prior to the execution of the mortgage deed in question, the decretal debt constitutes an antecedent debt and, as such, the defendants as sons and grandsons of Khedu Teli are bound to pay the same. They produced four decrees of the year 1912 of the court of the City Munsif against

Khedu Teli, and it was urged that the sum of Rs.550 was taken by Khedu Teli for paying the said decrees. The defendants alleged that the decrees themselves showed that they were passed against Khedu Teli in favour of different persons in suits for damages for malicious prosecution, and the plea was that the debt was an immoral or an illegal debt. The law is that an antecedent debt of the father, grandfather or great-grandfather is binding on the son, grandson and great-grandson, unless the debt is an immoral or an illegal debt. In *Chhakauri Mahton* v. *Ganga Prasad* (1) MOOKERJEE, J., after quoting various texts from the Institutes of Manu, Yajnavalkya, Brihaspati, Ushanas, Gautama, Vyasa and Katyayana has summarised the result, and the following debts according to the ancient law-givers appear to be immoral debts: (1) Debts due for spirituous liquors, (2) debts due for losses at play or gambling debts, (3) debts contracted under the influence of lust or wrath, (4) debts due for promises made without consideration or useless gifts, (5) debts for being surety for the appearance or for the honesty of another, (6) unpaid fines, (7) unpaid tolls, (8) commercial debts, and (9) debts that are *avyavaharika*.

These headings can be deduced from one or other of the ancient texts, and it is also clear that some of them have not been affirmed by judicial decisions, e.g., the text of Gautama, chapter XII, section 41, to the effect that the sons are not liable for their father's commercial debts has long become obsolete, and sons are now liable for debts incurred by the father in the course of business carried on for the benefit of the family, but there can be no doubt that British Indian courts have recognized that *avyavaharika* debts of an ancestor are not binding on his descendants, and in various cases difficulty has arisen by reason of an absence of an accurate definition of the term *avyavaharika* debt. It has been translated in various ways as debts that are not "lawful", "usual", "customary", "proper", "supportable as valid by legal arguments and

(1) (1911) I.L.R. 39 Cal. 862.

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on which no right could be established by the creditor in a court of justice", but the best rendering is perhaps that by Colebrooke as a debt for a cause "repugnant to good morals".

The word used in the text for debt is *"rina"*, which literally means a loan, but it is obvious that there is no difference in principle between a case in which a liability to repay is cast upon a person by actual borrowing and a case in which a person is bound to discharge an obligation created by a judgment of court. Both are *"rinas"*, that is, debts, and the question is whether the obligation created by the four decrees mentioned before was an obligation which not only Khedu Teli but his sons and grandsons also were bound to discharge. A debt may arise out of a contract, as where the money is borrowed by the father, and then one will have to look into the purpose for which the money was borrowed in order to determine whether it is a *vyavaharika* or an *avyavaharika* debt; or it may arise out of an act which amounts to a criminal offence, for example theft, in which case it is clear that the liability of the sons would be non-existent, see *Toshanpal Singh* v. *District Judge of Agra* (1); or it may arise out of a tort or a civil wrong. Various cases were cited before us at the Bar, but it is not necessary to notice them in detail. It was boldly argued by Mr. *Harnandan Prasad* on behalf of the appellants that where a debt arises out of a tort or civil wrong committed by the father the sons are liable, and they are absolved only where the debt is the outcome of an act which amounts to a criminal offence; whereas Mr. *Upadhiya* on behalf of the respondents contended that there are "debts of a father with a stigma far short of criminality attached, for which his sons are not liable", that a pecuniary liability arising out of a breach of civil duty by the father involving moral turpitude constitutes an *avyavaharika* debt and that the sons are not liable to discharge that pecuniary liability.

The question was raised before their Lordships of the Privy Council in *Toshanpal Singh's* case (1), to which

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reference has already been made, but in view of the concession made by the parties the question remained undecided. We are, however, of the opinion that no hard and fast rule can be laid down and the courts have got to look at each debt and the circumstances under which it arises in order to find out whether it is a *vyava-harika* or an *avyavaharika* debt. In the case of a decretal amount, like a decree for damages, the act which is the foundation of the suit for damages has got to be scrutinised, and one has got to see whether the act was a *vyavaharika* act or an *avyavaharika* act, that is an act "repugnant to good morals" or an act which is "opposed to fair dealings".

In the present case from the materials on the record all that we know is that several persons obtained decrees for damages for malicious prosecution against Khedu Teli. In an action for malicious prosecution the plaintiff must prove (1) that he was prosecuted by the defendant, (2) that the proceedings complained of terminated in favour of the plaintiff, if from their nature they were capable of so terminating, (3) that the prosecution was instituted against him without any reasonable and probable cause, (4) that the prosecution was instituted with a malicious intention in the mind of the defendant, that is, not with the mere intention of carrying the law into effect but with an intention which was wrongful in point of fact, and (5) that he has suffered special damage when the proceedings are other than criminal proceedings, unless the poceedings are such as from their very nature are calculated to injure the credit of the plaintiff. It is clear that the persons who obtained decrees against Khedu Teli satisfied a court of law on all the above five points The act of Khedu Teli in bringing a malicious complaint without reasonable and probable cause was a tortuous act opposed to public policy or decent *vyavahara* and, as such, an *avyavaharika* act. We are fortified in the view we have taken by the case of *Sunder Lal* v. *Raghu-nandan Prasad* (1). In the absence of any evidence on

(1) (1923) I.L.R. 3 Pat. 250.

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behalf of the plaintiffs to show the circumstances under which the complaint in question was made by Khedu Teli the only legitimate conclusion to which we can arrive is that Khedu's act was an illegal and an immoral or improper act, and the pecuniary liability arising therefrom is not binding on his sons and grandsons. This being our view, there is no force in the present appeal.

As to the cross-objections it is contended by the respondents that the lower appellate court "erred in allowing compound interest when the creditor had failed to prove that the defendants were under such a necessity that they could not get a loan on lesser interest". The rate of interest mentioned in the bond is 9 per cent. per annum compoundable every year, and the contractual rate of interest has been allowed by the lower appellate court. We are of the opinion that if the rate of interest is *prima facie* reasonable, it may be considered to be justified. In the case of *Bajrangi Misir* v. *Padarath Singh* (1) interest at the rate of 12 per cent. per annum was considered reasonable, and the stipulation for compounding the interest at the end of each year was under the circumstances of the case not considered unreasonable. The lower appellate court observes that there is no evidence on behalf of the defendants that the rate of interest mentioned in the bond was excessive or hard, and we can see no ground for interference in second appeal.

For the reasons given above, we dismiss this appeal with costs and the cross-objections with costs.

(1) [1930] A.L.J. 1073.