APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), and Mr. Justice Ranade.

1898.
September 26.

TUKARAMBHAT (ORIGINAL DEFENDANTS NOS. 2—5), APPELLANTS, *v.* GANGARAM MULCHAND GUJAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Joint family—Surety—Father's liability as surety—Liability of his sons for the debt for which he was surety.

Ancestral property in the hands of sons is liable for a father's debt incurred as a surety.

REFERENCE by F. C. O. Beaman, District Judge of Belgaum, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff sued to recover from the defendants Rs. 388, the price of grain supplied to the first defendant, who was a Mahomedan. The other defendants (Nos. 2—5), who were Brâhmins, were the sons of the deceased surety of defendant No. 1. The Subordinate Judge passed a decree awarding the claim. On appeal by defendants Nos. 2—5 the Judge made a reference to the High Court in the following terms:—

"This is an important question of law which has never yet been decided by our High Court, except in one early case to which I have no means of access. That question is, whether ancestral property in the hands of sons is liable to a father's debt incurred as a surety?

"In this case the father, a Brâhmin, stood surety for a Mussalmân.

"Mayne says (para. 279) 'The sons are not compellable to pay sums due by their father.....for which he was a surety (except in the cases before mentioned).' What these cases are, does not very clearly appear, unless they are intended to be included in the general principle of pious obligation. That, however, begs the whole question. Jagannath, who is not of high authority in this Presidency, denies that a son is not liable for the debt of his father incurred as a surety. Whence it might be inferred that earlier commentators had so affirmed. In a foot-note Mayne says 'As regards suretyship, the son's liability has been expressly affirmed—*Moolchund* v. *Krishna*(1); *Sitaramayya* v. *Venkatramanna*(2).' The first case is that to which I have once referred. Mofussil Courts are not furnished with Bellasis' Reports. But it must have been decided comparatively long ago and before the law of this Presidency had been moulded by the minds of successive great Judges into its present form. The latter case was decided by Muttusami Ayyar and Parker, JJ., and is a very inadequate authority. The point now in issue was conceded at their Lordships' bar, and the

* Civil Reference, No. 5 of 1898.

(1) (1844) Bellasis Reports, 54. (2) (1888) 11 Mad., 373.

issue to be tried was limited to whether that case was maintainable under the Contract Act. It is submitted that the question is still open to Bombay. I may add that the judgment contains this passage: 'The decision of the Subordinate Judge rests on the ground that ancestral property inherited by a son from his father ought to be treated as assets available for the payment of the father's debts neither vicious nor immoral, and that the debt incurred by him as surety for the repayment of a loan is within the scope of that obligation.'

"The Smritis of Manu and Yájnavalkya, Brihaspati and the Mitákshara support the decision, and that in Bhattacharji's Hindu Law the decision is cited without disapproval or any comment. Such a suretyship may very well fall within the meaning of 'an idle promise': *vide* Mandlik's Hindu Law, 113. Brihaspati expressly mentions suretyship as not entailing any obligation on sons. In the view of most early Hindu moralists, suretyship was consistently disapproved. Grady's Hindu Law, 84, 85, where Gautama, 1 Dig., 305, is quoted with approval 'So debts originating in suretyship shall not involve sons.'

"On the other side are Mandlik's Hindu Law, p. 103, quoting Katyayana, Strange's Hindu Law, p. 301. In suretyship the son is always liable subject to assets and without interest where the undertaking was for payment—Manu Chap. 8, 160, 162; Yájnavalkya, 1 Dig., 247; Katyayana, 1 Dig., 248, 255.

"On principle I see no reason why a son should not be liable to pay his father's debt incurred as a surety. The criterion is not, I think, the advantage gained by the family, but the sin incurred by the parent should he not fulfil his promise. That sin in the eye of the moralist is not much affected by questions of consideration. A man may with perfect propriety stand surety for a friend, and he is as much morally bound to discharge his promise as he would be in law if it were supported by consideration."

Narayan V. Gokhale (*amicus curiæ*) appeared for the appellants (defendants Nos. 2—5):—He referred to Manu, Chap. VIII, pl. 159; Brihaspati, Chap. IX, pl. 40, 41 and 51; Gautama, Chap. II, pl. 41; Mandlik's Hindu Law, pp. 107, 108 and 206; Colebrooke's Hindu Law, Vol. I., pp. 164—176; Strange's Hindu Law, Vol. I, pp. 300, 301; *Moolchund* v. *Krishna*[1]; *Sitaramayya* v. *Venkatramanna*[2].

Vasudeo G. Bhandarkar (amicus curiæ) appeared for the respondent (original plaintiff):—In *Sitaramayya* v. *Venkatramanna*[2] the present point was not really in dispute. *Moolchund* v. *Krishna*[1] gives the old law as interpreted by the Shástris. See West and Bühler, p. 1239. The Mitákshara does not lay down that the son's liability is limited to a particular kind of surety-

(1) (1844) Bellasis Reports, 54. (2) (1888) 11 Mad., 373.

1898.

TUKARAM-BHAT v. GANGARAM.

ship of his father. The liability as a surety is not included among the debts which are classed as immoral or illegal. Both the Mitákshara and the Mayukha make no distinction in the nature of the debt for which the sons are held liable. The text of Brihaspati also states the rule generally, but Jagannath in his commentary makes the distinction—Colebrooke's Digest, p. 110. Gautama also gives the text generally without any restriction as to liability.

PARSONS, C. J. (ACTING):—The District Judge has referred the following point of Hindu law for the decision of this Court, *viz.*, whether ancestral property in the hands of sons is liable for a father's debt incurred as a surety. To that point we must add, to meet the facts of the case, the following words "for the repayment of grain lent," and we think that if the District Judge had noticed these facts, he would not have thought it necessary to make this reference, since upon it all the authorities agree and the conflict supposed to exist by the District Judge refers to a different kind of surety.

The general principle of English law, of course, is that the death of a surety does not affect his liability in respect of past transactions. Whatever liability had actually attached to the surety at the time of his death may be enforced against his representative.

Hindu law, however, recognizes four kinds of sureties: 1, for appearance; 2 for honesty; 3, for paying a sum lent; and 4 for delivery of the debtors' effects. In respect of the two former kinds, sons may not be responsible, but in the last two they are expressly declared to be liable. In the Laws of Manu (I quote this and succeeding authorities from Max Müller's Sacred Books of the East) at section 159 it is said that the son shall not be obliged to pay money due by a surety, but at section 160 it is explained that this rule applies to the case of a surety for appearance only: and that if a surety for payment shall die, the Judge may compel even his heirs to discharge the debt. Brihaspati in section 40 mentions the four classes of sureties and in section 41 says: "If the debtors fail in their engagements, the two first (the sureties themselves, but not their sons) must pay

the sum lent at the appointed time; both the two last (sureties), and in default of them their sons (are liable for the debt), when the debtors break their promise (to pay the debt)." Gautama, section 41, repeats Manu, section 159, but the note is to the effect that "Taking into account the parallel passages of Manu and Yájnavalkya, Haradatta very properly restricts this rule to a bail for the personal appearance of an offender." In Colebrooke's Hindu Law, Vol. 1, at page 164, the authorities on the subject of sureties will be found set out at length, and the liability of the sons in the case of suretyship for repayment of a debt is affirmed by Brihaspati (142), Yajnavalkya (144 and 152), (to which the note adds the Dipacalica and the author of the Mitákshara), Manu (151), Katyayana (153 and 158), Vyasa (157), and Smriti cited in the Mitákshara (159). The same authorities are quoted in Mandlik's Hindu Law at pages 107, 108 and 206.

There is also a judicial decision which affirms the son's liability. In *Moolchund* v. *Krishna*[1] the Court of Sadar Diváni Adálat concurred in the opinion of the Shástri to the effect that by Hindu law a son is always liable to fulfil the surety engagement of his deceased father to repay money as regards the amount of principal, and if a special agreement be made for interest, then he is also liable for interest.

We, therefore, answer the question in the affirmative.

RANADE, J. :—The question of Hindu law referred for the decision of this Court is "whether ancestral property in the hands of sons is liable for the debts of the father incurred by him as a surety." Both sides of the question were ably set before us in the learned arguments of Mr. Gokhale and Mr. Bhandarkar, and a careful consideration of the original texts and commentaries fully satisfies us that only one answer is possible to the question, and that answer must be in the affirmative.

The apparent conflict of authorities noticed by the District Judge in his observations in submitting this reference is obviously due to a misapprehension of the real nature of these texts and commentaries. They do not form, and were not intended to be

(1) (1844) 2 Bellasis' Reports, 51.

1898.

TUKARAM-BHAT v. GANGARAM.

are gularly promulgated code of laws, every part of which has to be carefully correlated to other parts. They are rather of the nature of expositions of the theory of the law, and collections of recognized customs and approved usages. When any particular question has to be considered, the more general exposition has to be controlled by the maxims laid down in the particular chapter or chapters which specially treat of that matter, and the deficiencies of one text supplied by reference to other texts, and authorities. For instance, when the texts speak of the weakness, incapacity, and dependence of Hindu women, the general expositions must be qualified by the particular positions laid down in respect of the widow's estate, or woman's power over her *stridhan*, or the daughter's or sister's right of succession, found in the same or other works specially devoted to these subjects. An express particular text occurring in its proper place limits mere general statements of the principles made in other places. This is a rule of interpretation which is often found necessary even in more regularly constituted codes of law, but it is specially obligatory in the interpretation of ancient Hindu law books. With this clue in hand, the doubts and conflict noticed by the District Judge are easily removed or reconciled. Mr. Mayne, para. 270, quotes apparently from Dayabhaga the general position that "sons are not compellable to pay sums due by their father for spirituous liquor, for losses at play, for promises made without consideration, or under the influence of lust or wrath, or *sums for which the father was a surety*, or for a fine or toll." This is, however, obviously a general exposition intended to set forth the limitations upon the son's liability to pay his father's debts. Occurring in the context where it stands, it simply suggests that surety obligations recklessly incurred stand in the same category with other extravagant or immoral acts of the father which entail no liability on the sons. These propositions occur in the chapter on the recovery of debts. It would not be safe, however, to infer from such texts occurring in such a place that the words above italicised are to be literally understood. They are controlled by the particular maxims laid down in the special chapter on surety obligations. The texts relating to this special subject are referred to by Mr. Mayne in the foot-note to the same para.

It is not necessary to set them out here at length. It will be sufficient to state that Brihaspati recognizes four different classes of sureties: (1) sureties for appearance, (2) sureties for honesty, (3) sureties for payment of money lent, (4) and sureties for delivery of goods. The obligation of the first two kinds of sureties is limited to themselves personally, and does not bind their sons; but the obligation incurred by the last two kinds of sureties binds them, and their sons also after their death. The commentary of Ratnakar on this text expressly states that the sons shall be compelled to pay debts incurred by their father under the last two classes of surety obligations. The texts of Narad and Yajnavalkya recognize three classes of surety obligations only—those for appearance, those for honesty, and those for payment. Narad does not set forth the son's obligation in this place, but the Yajnavalkya text is quite as explicit as that of Brihaspati. The sureties of the first two classes must pay the debt, and not their sons, but the sons of the last kind of surety may be compelled to pay their father's debt incurred by him as surety. Katyayana refers to the same kind of surety when he lays down that the grandson of such a surety need on no account pay the debt, but the son must make it good without interest. The text of Vyasa makes the same distinction between the son and grandson's liabilities for such suretyship. Manu's texts on the subject clearly distinguish between sureties for appearance or good behaviour, and sureties for payment. The son shall not, according to Manu, in general be compelled to pay money due for suretyship, or idly promised to musicians and actresses, or lost at play, or due for spirituous liquors, or for tolls or fines. The general words "money due for suretyship" used in the text are expressly stated by the commentator Kulluka to refer only to sureties for appearance and good behaviour, but as regards a surety for payment, it is enjoined that the Judge may compel even his heirs to discharge the debt. Even as regards the first two classes of sureties, if they have derived any advantage, or received a pledge, their heirs may be compelled to pay the debt. The commentator Haradatta explains a similar text of Gautama by affirming the same distinction. This exposition of the authorities removes all apparent conflict, and the Pandits, whose advice was sought by the

1898.

TUKARAM-BHAT v. GANGARAM.

late Sadar Diváni Adálat in the case of *Moolchund* v. *Krinsha*[1], must have based their opinion on these same texts, though there is no express mention of the texts in the judgment. The more general texts which class suretyship obligation with reckless and immoral debts must, therefore, be qualified by the particular texts quoted above, and when so explained, it becomes clear that they refer to particular classes of sureties which do not include sureties for payment of debts, in respect of which last class, unless the debts can be shown to have been incurred for immoral or illegal purposes, the sons are liable to discharge their father's debts.

Order accordingly.

(1) (1844) Bellasis' Reports, 54.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Chief Justice (Acting), Mr. Justice Ranade and Mr. Justice Fulton.

A (WIFE), PETITIONER, *v.* B (HUSBAND), RESPONDENT.*

1898.

October 3.

Divorce—Husband and wife—Indian Divorce Act (IV of 1869), Secs. 17 and 20—Decree for nullity of marriage—Confirmation by the High Court—Time of confirmation—Practice—Procedure.

Under the Indian Divorce Act (IV of 1869) a decree for nullity of marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof.

REFERENCE by W. H. Crowe, District Judge of Poona, submitting decree for confirmation: see section 20 of the Indian Divorce Act (IV of 1869).

Suit for declaration of nullity of marriage on the ground of impotence.

The respondent did not defend the suit.

The Judge passed a decree for the petitioner, subject to confirmation by the High Court under section 20 of Act IV of 1869.

Lowndes, with *Marzban and Hemming*, appeared for the petitioner, and applied for immediate confirmation of the decree.

* Civil Reference, No. 7 of 1898.