

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

1915.
August 20.

RAMKRISHNA TRIMBAK NADKARNI, AND OTHERS (ORIGINAL DEFENDANTS NOS. 12 TO 14) APPELLANTS *v.* NARAYAN AND OTHERS, SONS AND HEIRS OF THE DECEASED SHIVRAO NARAYAN ARAS (HEIRS OF ORIGINAL DEFENDANT No. 1), RESPONDENTS.^o

Hindu Law—Debt—Son's liability to pay father's debts—Debts contracted in trade carried on against Government Servants' Conduct Rules, 1904.

Sons cannot escape liability for payment of the debts of their father contracted in a trade carried on by him in contravention of Government Servants' Conduct Rules on the ground that the conduct of their father in contracting debts in such trade was *avyavahar*.

SECOND appeal against the decision of C. V. Vernon, District Judge, Karwar, modifying the decree passed by P. Srinivas Rao, Additional Subordinate Judge, Karwar.

The facts of the case were briefly as follows :—

One Trimbak Annappa, (defendant No. 5), father of the appellants (defendants Nos. 12—14) while serving as a postmaster of Ankola wanted to carry on a fish trade and thereby earn something in addition to his salary as a postmaster. He being a Government servant could not openly carry on trade without infringing the Government Servants' Conduct Rules, 1904. He, therefore, secured the assistance of defendant No. 1 who agreed to supply money for the trade. The fish trade continued for about 8—9 years when it was stopped owing to heavy losses. The defendant No. 1 then represented to Trimbak that the losses sustained in trade amounted to about Rs. 6,000 and persuaded him to execute a mortgage bond in his favour on the 24th April 1900 for Rs. 3,000 as security for his being reimbursed

^o Second Appeal No. 278 of 1914.

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his (Trimbak's) share of the estimated losses. The plaintiff took from defendant No. 1 an assignment of the said mortgage bond on 15th August 1901 and brought a suit to recover Rs. 3,347-8-0 being the amount due thereon by sale of the mortgaged property.

The defendants Nos. 12--14, who had an interest in the property mortgaged by their father, defendant No. 5, to defendant No. 1, pleaded that they were not liable for their father's debts; that they did not admit the *bona fides* of the mortgage bond of their father; that it was passed for debts incurred for immoral and illegal purposes; that their father was given to profligate habits and was fond of gambling in speculative transactions; that they were not liable under the Hindu Law to pay off debts so imprudently incurred by their father.

The Subordinate Judge framed the following among other issues:—

(1) Whether defendant No. 5 contracted the above debt for illegal or immoral purposes as alleged by defendants Nos. 12--14?

(2) Is the mortgage transaction of defendant No. 5 with defendant No. 1 null and void by reason of its having been entered into in violation of the Government Servants' Conduct Rules as prescribed by Government?

He found on these issues that though the mortgage transaction of Trimbak, defendant No. 5, with defendant No. 1 was not null and void under section 23 of the Indian Contract Act, the defendants Nos. 12--14 were not bound to pay the debts as they were incurred by their father in the course of an ill-concerned trade conducted imprudently and in a most unbusinesslike manner. He, therefore, passed a decree directing the amount to be realized by sale of the father's (defendant No. 5's) interest alone in the mortgaged properties.

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The District Judge, on appeal by the plaintiff, modified the decree so as to make the interests of defendants Nos. 12—14 in the mortgaged properties liable as well as the interest of defendant No. 5.

The defendants Nos. 12—14 appealed to the High Court.

G. S. Rao and *Y. N. Nadkarni* for the appellants:— We contend that the mortgage by defendant No. 5 was not binding on defendants Nos. 12—14, because the debt was either illegal or improper and conferred no benefit upon the estate.

Defendant No. 5 was a postmaster at Ankola and the Government Servants' Conduct Rules prohibited any trading on his part. But in contravention of these rules he traded for eight or nine years and incurred debts and had to pass mortgage bond dated 24th April 1900. That being so, this is one of those debts which the sons are not bound to pay as being improper or *avyavaharik*: see *Durbar Khachar v. Khachar Harsur*⁽¹⁾.

Any debt incurred by a Government servant in any manner prohibited by rules is improper. And where the text admits of such a wide interpretation of the term '*avyavaharik*' then the Courts will exempt the sons from the liability.

'*Avyavaharik*' means improper or unbecoming. See West and Buhler, Appendix p. 1239; Colebrook Digest, Vol. I, p. 210, where '*avyavahar*' is translated as 'a purpose repugnant to good morals': Mandlik's Translation of Vyavahar Mayukh at p. 113.

Those debts only which are excusably incurred are binding upon the sons. The debts which are excusably incurred are those incurred for the use of the family or for a necessary purpose. See Mitakshara, Chapter I,

⁽¹⁾ (1908) 32 Bom. 348.

sec. 1., pl. 27—29; also Stoke's Translation at pp. 376 and 393.

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Nilkant Atmaram for the respondents:—The case of the appellants in the lower Courts was that the mortgage was void because it was opposed to public policy and secondly that the sons were not liable, because the trade was carried on in an unbusinesslike manner.

The point made here is that the sons are not liable, because the trade in respect of which the debts were incurred, was carried on by their father in contravention of the Government Servants' Conduct Rules.

Whatever may be the character of the debt, since defendant No. 1 has paid it at the request of defendant No. 5, he ought not to be affected.

The debt being an antecedent debt, father and the sons are bound to pay. Government Servants' Conduct Rule 14 relied upon by the other side cannot be given the strict interpretation which it would otherwise have, had it been a statute. It is a rule of conduct, the breach of which is not an offence.

'*Avyavaharik*' means that which is repugnant to good morals or opposed to law and custom. There must be something inherently bad in the act itself and not anything accidental. The case of *Durbi Khachar v. Khachar Harsur*⁽¹⁾ has been construed in *Chhakauri Mahton v. Ganga Prasad*⁽²⁾ and *Venugopala Naidu v. Ramanadhan Chetty*⁽³⁾ and there the distinction drawn is that when the act done by the father amounts to a criminal offence then the sons are not liable to pay.

In the present case there may be mere breach of duty, but that did not amount to a criminal offence and hence the debt cannot be said to be improper.

⁽¹⁾ (1908) 32 Bom. 348.

⁽²⁾ (1911) 39 Cal. 862 at p.871.

⁽³⁾ (1912) 37 Mad. 458.

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The case of *Durbar Khachar v. Khachur Harsur*⁽¹⁾ goes too far. The observations made therein ought to be restricted to the particular point decided in that case. Under that Ruling sons of a person who unsuccessfully defends a suit cannot be held liable.

Rao in reply.

SCOTT, C. J.:—The plaintiff sues to enforce a mortgage effected in his favour by the 1st defendant. The mortgage security consisted of a piece of land, the property of the 1st defendant, and of land which was the property of the family of the 5th defendant and his sons, the present appellants, which was ostensibly burdened with a mortgage-debt created by the 5th defendant in respect of certain payments made or liabilities incurred by the 1st defendant at the 5th defendant's request in respect of dealings in a trade in fish instituted by the 5th defendant and carried on largely under the management of the 1st defendant.

The present appellants pleaded that they were not liable for their father's debt; that they did not admit the *bona fides* of the mortgage bonds of their father; that they were passed for debts incurred for immoral and illegal purposes; that their father was given to profligate habits, and was fond of gambling in speculative transactions recklessly; that they derived no benefit from the transactions; and that they were not liable under the Hindu Law to pay off debts incurred by their father so imprudently.

When the case came to trial issues were raised upon the pleadings. The 2nd issue was whether defendant No. 5 contracted the above debt for illegal or immoral purposes as alleged by defendants Nos. 12 to 14. But during the hearing a further issue was raised in these terms:—Is the mortgage transaction of defendant No. 5

⁽¹⁾ (1908) 32 Bom. 348.

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with defendant No. 1 null and void by reason of its having been entered into in violation of the Government Servants' Conduct Rules as prescribed by Government? The point then made was that having been entered into in contravention of Government Servants' Conduct Rules, the transactions which resulted in the mortgage debt were null and void under section 23 of the Indian Contract Act as being agreements forbidden by law or opposed to public policy. The learned Judge held that the transactions were not void under section 23, but he decided the 2nd issue in favour of the present appellants. It was suggested to him that the whole scheme of business was *avyavahar*, and therefore, such as could not give rise to a liability in the sons to pay their father's debts, and upon the authority of *Darbar Khachar v. Khachar Harsur*,⁽¹⁾ he decided that the debts in suit came under that class of debts which it is not the bounden duty of the sons to pay as being illegal in the sense in which the Hindu Law texts so consider them. Accordingly a decree was passed for the amount claimed, and on default for sale of the father's interest alone in the family properties, and for sale of the property belonging to the 1st defendant.

The 1st defendant who was made personally liable under the decree for any deficiency that might arise on the sale appealed to the District Judge, and again the same arguments were put forward on behalf of the present appellants. The Government Servants' Conduct Rules were only made use of for the purpose of contending that the contract was void as being contrary to public policy under section 23. The learned Judge held that defendants Nos. 12 to 14, the present appellants, failed to prove that their father's conduct was *avyavahar*, and accordingly modified the decree so as to make

(1) (1908) 32 Bom. 348.

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the interest of defendants Nos. 12 to 14 in the mortgaged property liable as well as the interest of defendant No. 5.

From that decree defendants Nos. 12 to 14 have appealed, joining as respondent only defendant No. 1, although they seek to reduce the mortgage security available for payment of the plaintiff's debt according to the decree of the District Court. It is clear, we think, that they cannot get a decree in the absence of the plaintiff. But it is desirable that we should express our opinion upon the points which have been thoroughly argued by the pleaders on both sides. Section 23 of the Indian Contract Act is no longer appealed to. The contention that the transactions were void as being contrary to public policy is abandoned, but the Government Servants' Conduct Rules are now used in aid of the argument that fathers' conduct was *avyavahar*. The only authority which can be relied upon in support of that contention is the case of *Durbar Khachar v. Khachar Harsur*⁽¹⁾. That case has not met with acceptance in any of the other High Courts in India; see *Chhakauri Mahton v. Ganga Prasad*⁽²⁾; *Venugopala Naidu v. Ramanadhan Chetty*⁽³⁾ and *Sumer Singh v. Liladhar*.⁽⁴⁾ But assuming for the purpose of argument that it was correctly decided, it only decides this, that a civil penalty imposed by way of damages upon the father for a civil wrong committed by him does not give rise to any moral obligation on the son to discharge that liability.

Now the Government Servants' Conduct Rule which is referred to in this case is as follows :—

" A Government servant may not, without the previous sanction of the Local Government, engage in any trade or undertake any employment, other than his public duties.

⁽¹⁾ (1908) 32 Bom. 348.

⁽²⁾ (1911) 39 Cal. 862.

⁽³⁾ (1912) 37 Mad. 458.

⁽⁴⁾ (1911) 33 All. 472.

A Government servant may undertake occasional work of a literary or artistic character, provided that his public duties do not suffer thereby; but the Government may in its discretion, at any time forbid him to undertake or require him to abandon any employment which in its opinion is undesirable."

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That is a rule which is not based upon any statutory prohibition, but is, as it is expressed to be, merely a rule of conduct. The 5th defendant who is alleged to have violated that rule was a postmaster at Ankola on a small salary, and in order to supplement his income he engaged in a fish trade, a very common occupation on the West coast of India. The work in connection with the trade, as appears from the evidence, was done almost entirely by the 1st defendant.

The question then is whether applying the test laid down in *Durbar Khachar v. Khachar Harsur* ⁽¹⁾ as the highest point at which the appellants' case can be put, such conduct on the part of the 5th defendant could be treated as conduct which the father "as a decent and respectable man" ought not to have engaged in; and whether the debts of the fish trade were debts "attributable to his failings, follies or caprices." We have no doubt that such debts cannot be said to be attributable either to his failings, follies or caprices, nor do we think that it can be said that his conduct in embarking in such fish trade is conduct of which no decent and respectable man would be guilty. As was put by Mr. Nilkant on behalf of the 1st defendant, if the restriction or the prohibition against embarking in trade occurred in a contract with a large employer of labour other than Government in which the clause was that the servant might not engage in a trade, it cannot be contended that a disregard of such an injunction would taint his trade dealings with immorality or impropriety as between himself and those with whom he traded. We, therefore, affirm the decree and dismiss the appeal with costs.

Decree confirmed.

J. G. R.

(1) (1908) 32 Bom. 348.