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MANU/BH/0081/1962

Equivalent Citation: AIR1962Pat308

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.O.O. No. 135 of 1960

Decided On: 30.01.1962

Appellants:**Sheodhar Mahton and Ors.**
Vs.
Respondent:**Sitaram Mahton and Ors.**

Hon'ble Judges/Coram:
Vaidynathier Ramaswami , C.J., R.K. Choudhary and Kamla Sahai , JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Prem Lall, Parmeshwar Prasad Sinha and Gupteshwar Prasad, Advs.

For Respondents/Defendant: Thakur Prasad and Jagat Narain Prasad Sinha, Advs.

JUDGMENT

R.K. Choudhary, J.

1. The facts leading to the presentation of this appeal, shortly stated, are these :

2. One Ramsaran Das was admittedly the Mahant of Dhoomnagur Math in the district of Champaron. After his death, one Basudeva Das claimed to have succeeded him as the Mahanth of the Math as being his only 'chela'. According to him, however, he was forcibly dispossessed from the Math as well as its properties by several persons, including one Tribeni Mahto, who were fill residents of village Dhoomnagar. Accordingly, the said Basudeva Das in 1949, filed a title suit, being Title Suit No. 61 of 1949, in the court of Subordinate Judge, Motihari against Tribeni Mahto and others, which was heard by the Additional Sub-ordinate Judge of that place. The defence taken by the defendant's, Tribeni Mahto and others, was that Basudeva Das was not the Mahanth of Dhoomnagar Math and that he was never in possession of the properties belonging to it. It was contended on their behalf that, after the death of Mahanth Ramsaran Das, his senior 'chela', Tulsi Das, became the Mahanth and he was in possession of the Math properties. It was also pleaded that the suit could not proceed in absence of the said Tulsi Das. Thereafter, the plaintiff Wasudeva Das added the said. Tulsi Das a party defendant in the suit, and the case of the plaintiff was that Tulsi Das was set-up by the defendants and he had no concern whatsoever with Mahanth Ramsaran Das or the Dhoomnagar Math. Tulsi Das, however, contested the suit on the ground that he was the Mahanth as being the senior 'chela' of Mahanth Ramsaran Das and that the plaintiff Basudeva Das was only a Karpardaz of the Math. An Ekrarnama purporting to have been executed by Basudeva Das was filed in the case to show that he was only a Karpardaz of the Math.

The learned Additional Subordinate Judge found that Basudeva Das was forced to execute the Ekrarnama, referred to above, and that he was not the karpardaz of the Math. He also found that Tulsi Das was not the Mahanth and that the plaintiff

Basudeva Das was the Mahanth of the Math as having succeeded Mahanth Ramsaran Das and was in possession of the Math properties. It was also found that Tulsi Das was a simpleton and was set up by others, and that the plaintiffs case of possession and dispossession was true. The title of the plaintiff Basudeva Das was, accordingly, declared and a decree for possession, with mesne profits, was passed against all the defendants, including the said Tribeni Mahto. The mesne profits having been ascertained in a separate proceeding, a decree for the same was passed, and that decree was later on assigned by the decree-holder on the 28th February, 1958 in favour of Sitaram Mahto, Nathuni Mahton and Ramji Mahton, respondents in this appeal, by a registered deed, who put the same in execution, in Execution. Case No. 17 of 1953 against Tribeni Mahto alone.

On the 25th December, 1958. Tribeni Mahto died, and his son and grandsons who are the appellants in this court, were substituted in his place in the execution case on the 26th August, 1959. They took an objection to the execution of the decree as against them on the ground that the debt was 'Avyawaharika' and they had, therefore no pious obligation to pay the same, and the joint family property was not liable. The learned Additional Subordinate Judge overruled the objection by his order dated the 27th April, 1960 and held that the son and grandsons of Tribeni Mahto were bound to pay the mesne profits debt. They, therefore, filed the present appeal in this court.

3. The appeal first came up for hearing before a Single Judge of this Court who referred it to be heard by a Division Bench. Before the Division Bench, it was found that there were divergent decisions of this court on the point involved in the case which necessitated the decision of the same by a larger Bench. Accordingly, the following question of law was referred for decision by a Full Bench :

> "Whether the appellants are liable, in the circumstances of this case, to Satisfy the decree for mesne, profits granted against Tribeni Mahton on the 24th February. 1951, and whether the question as to whether the debt was 'avyawaharika' or not may properly be decided after taking into account the conduct of Tribeni Mahton before the passing of the decree in Title Suit No. 61/62 of 1949/50."

4. This Full Bench has, accordingly, been constituted to decide the question referred to above, which consists of two parts, namely, (i) whether the appellants are liable, in the circumstances of this case, to satisfy the decree for mesne profits granted against Tribeni Mahton on the 24th February, 1951, and (ii) whether the question as to whether the debt was 'avyawaharika' or not may properly be decided after taking into account the conduct of Tribeni Mahto before the passing of the decree in Title. Suit No. 61/62 of 1949/50".

5. There is no controversy in the present case with regard to the interpretation of the expression 'avyawaharika' which, according to Colebrooke's translation, which has been accepted by the Privy Council in the case of Hemraj v. Khemchand MANU/PR/0016/1943 : AIR 1943 PC 142, meant a debt for a cause repugnant to good morals as being the nearest approach to the spirit of the text. It is also not in dispute, as has been, pointed out in Ramasubramania Pillay v. Sivakami Ammal MANU/TN/0481/1925 : AIR 1925 Mad 841, on which reliance has been placed by counsel for both the parties, that, if the act of the father is grossly unjust or immoral or flagrantly dishonest, the debt would be 'Avayawaharika' within the meaning of the Hindu Law. The only controversy between the parties in this case is with respect to the time with reference to which the nature and the character of the debt in question

are to be ascertained and as to whether, on the facts and in the circumstances of the case, the debt is 'Avyawaharika' within the meaning of the Hindu Law. The question in regard to the time with reference to which the nature and the character of the debt have to be ascertained is the subject-matter of the second part of the question referred to this Bench, and the other question as to the debt being 'Avyawaharika', in the circumstances of the present case, forms the subject-matter of the first part of the aforesaid question'.

6. The two parts of the question referred to above have to be dealt with separately, and I will proceed to examine the second part of the question as to whether the question as to whether the debt was 'Avyawaharika' or not may properly be decided after taking into account the conduct of Tribeni Mahto before 'the passing of the decree in Title Suit No. 61/62 of 1949/50. This part of the question arose on the submission made on behalf of the respondents that, in ascertaining whether the debt is 'Avyawaharika', the court cannot go into the past history of the debt and has to come to a conclusion either way with reference to the circumstances existing at the time when the debt in question was actually incurred. The argument put forward on behalf of the respondents is that the obligation, of the son to discharge his father's debt depends upon the nature or character of the debt when it originated, and that an examination of the circumstances before or after the liability is incurred is irrelevant to ascertain the nature or character of the debt, and, in support of this contention, reliance has been placed by learned counsel on a Bench decision of this court in Kirit Singh v. Mt. Chandrakali Kuar AIR 1951 Pat 587.

The submission that the circumstances after the liability is incurred are irrelevant while ascertaining the nature or character of the debt admits of no controversy, and counsel for the appellants has not challenged the correctness of this principle of law. He has, however, contended that the above principle is not applicable to the, circumstances before the debt in question, was incurred. In other words, he has put forward an argument that, in order to ascertain whether the debt in question is 'Avyawaharika' or not, one has to look to the past history as to how it initially originated and, without an examination of the past history, it is not possible, in most cases, to find out the true nature or character of the debt in question. The submission is that, in order to determine the nature or character of a debt in question, one has to examine the circumstances which necessitated at its inception the creation of such a debt. In support of this contention, reliance has been, placed on the cases of Darbeshwari Singh v. Raghunath Prasad Singh MANU/BH/0050/1949 : AIR 1949 Pat 515; Sudhansu Kumar Singh v. Mt. Ramjhari Kuer MANU/BH/0036/1957 : AIR 1957 Pat 115 and Govind Prasad Vasudeva Prasad v. Raghunath Prasad Indra Prasad AIR 1939 Born 289.

7. Before examining the decisions cited above, it may perhaps be necessary to notice the decision of the Privy Council in MANU/PR/0016/1943 : AIR 1943 PC 142, a reference to which has already been, made above and on which reliance has been placed in the decisions cited by both the parties. In that case, appears that there was a joint family consisting of Hemraj and Danpal with several other members, and there was a promissory note executed in favour of Danpal dated the 21st November, 1924, the consideration for which had originally been advanced from the joint family funds. On a partition between the members of the joint family, the said promissory note, though standing in the name of Danpal, was allotted to the share of Hemraj, and under the terms of the decree Danpal was to file it in court within seven days of the decree. The decree also provided that, if the document was not within time, the party in whose name it stood shall be responsible for the amount due together with

interest. Dhanpal, however, did not file the same within the time allowed in the decree and it was actually filed in Court on the 6th February, 1928, by winch time it had become time-barred. Hemraj, therefore, filed a suit for recovery of the amount due under the promissory note, which was decreed against Danpal and that decree was affirmed in appeal.

It was found in that case that Danpal allowed the promissory note to be time-barred by acting fraudulently towards Hemraj. The decree we put in execution against the sons of Danpal. had died in the meantime. The sons of Danpal objected to the execution of the decree on the ground that the judgment-debt was 'Avyawaharika' and that they had no pious obligation to pay the same. Their objection prevailed in the Courts in India and the decree-holder preferred an appeal before the Privy Council. It was contended on behalf of the respondents that their father, Danpal, acted fraudulently and dishonestly in not filing the promissory note in court in time and allowed it to be time-barred with a view to dishonestly deprive Hemraj from recovering the amount, and thus created a liability of paying a debt to Hemraj which was 'Avyawaharika'. On behalf of the decree-holder appellant, however, it was urged that the debt became rightly due at the very moment when the promissory note was allotted to the share of Hemraj and the subsequent conduct of Danpal in allowing the promissory note to be time-barred could not be taken, into account for determining the nature and character of the debt and for holding it to be 'Avyawaharika'. Their Lordships of the Judicial Committee accepted the contention raised on behalf of the decree-holder appellant and held that the sons were bound to pay the same. In course, of discussion of the above point, their Lordships of the Judicial Committee observed as follows:

> "It also appears to be clear on principle, and on authority, that examination of the nature or character of the debt should be made with reference to the time when it originated, in other words, when the liability was first incurred by the gather. If on such examination, it is found that at its inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son."

It was further pointed out by their Lordships that the rule is not rigid but has to be applied with reference to the circumstances of each case and that, when a particular debt is called in question, it will be the duty of the court to examine its nature in the light of principles mentioned above which are not exhaustive, but only basic. It is, therefore, clear that, in order to find out whether a debt in question is tainted with immorality so as to be characterised as 'Avyawaharika', one has to see as to how it initially originated and thus to go into the past history of the debt.

8. In MANU/BH/0050/1949 : AIR 1949 Pat 515, a suit was brought by the father on a deliberately false claim, and in that suit a decree for cost was passed against him. The question arose whether the son was liable to pay the same under the rule of pious obligation, or that debt was 'Avyawaharika'. In order to decide the above question, this court had to consider the nature of the claim put forward on behalf of the father, and, alter coming to the conclusion that the claim of the father in the suit was fraudulent and dishonest, this court held that the debt was 'Avyawaharika' for which the son was not liable under the theory of pious obligation. Certain cases were cited before their Lordships in that case in which the debts concerned in those cases were held not to be 'Avyawaharika' and the sons were held liable for the same. Their Lordships distinguished those cases for the reason that there was no finding in those cages that the debt incurred by the father was in its inception immoral or dishonest.

Thus, this decision also impliedly supports the contention that the Conduct of the father in doing the act which ultimately resulted in creating a debt could very well be gone into in order to ascertain the character of the debt.

9 . In AIR 1951 Pat 587, a different view was taken, and it was held that an examination of the circumstances before a liability is incurred was irrelevant to ascertain the nature or character of the debt, it is submitted on behalf of the appellants that the above decision is not legally correct and it requires reconsideration. As a matter of fact, the correctness of this decision was doubted in MANU/BH/0036/1957 : AIR 1957 Pat 115, a detailed discussion of which will be made later. It has, therefore, to be seen whether the decision in AIR 1951 Pat 587, with respect to the above point is correct or not.

That was a case where one Raghunandan Singh, father of the plaintiffs, along with one Awadh Singh, claimed raiyati interest in some bakasht lands situated in an estate belonging to one Mossammat Chandrakali Kuer (defendant No. 1). A dispute having arisen between the parties with regard to the possession of this land, a proceeding under Section 144 of the Code of Criminal Procedure was started, which ended against defendant No. 1. Defendant No, 1, however, had executed a deed of gift with respect to the land in question in favour of her grand-daughter, and, therefore, she along with her grand-daughter, instituted a title suit for possession of the disputed land against Raghunandan Singh and Awadh Singh. The suit was contested by Raghunandan Singh and Awadh Singh on the ground that the said land had been settled with them by Chandrakali under a 'sada patta', and, in support of this, a 'hukumnama', admittedly bearing the thumb impression of Chandrakali, and several rent, receipts were produced on behalf of Raghunandan and Awadh. This defence was disbelieved and the suit of Chandrakali was decreed with costs, and the said decree was affirmed in an appeal preferred by Raghunandan Singh and Awadh Singh. They, thereupon, preferred a second appeal in the High Court, and, during the pendency of that second appeal, Raghunandan Singh died and his sons were substituted in his place. The second appeal, however, was also dismissed with costs.

During the pendency of the appeal in the first appellate court, Chandrakali took out execution of the decree for costs passed by the trial court against Raghunandan Singh and Awadh Singh, and certain land belonging to the joint family consisting of Raghunandan Singh and his sons was sold at a court sale and purchased by Chandrakali, who subsequently obtained delivery of possession thereon. A suit was thereafter, instituted by the sons of Raghunandan Singh challenging the sale on the ground that they were under no pious obligation to pay up the decree for costs awarded against their father inasmuch as he was guilty of fraudulent act In producing a forged 'hukumnama' bearing the thumb impression of Mosst. Chandrakali Kuer in support of the settlement of the land in his favour, and it was contended that the decree for costs was in the nature of an 'Avyawaharika' debt. The defence taken by Chandrakali Kuer was that the plaintiff Kirit Singh was himself a party to the fraud along with his father, Raghunandan Singh, and the decree for costs was not an 'Avyawaharika' debt. In order to give a decision on the contentions raised on behalf of the parties, a question arose for consideration as to whether the court could look to the past history resulting in the debt in question or the circumstances existing at the time of actual creation of the debt only were relevant for ascertaining the nature or character of the debt. Lakshmikanta Jha, Chief Justice, who gave the judgment in that case, Chatterji, J. agreeing with him, made the following observation :

> "The obligation of the son to discharge his father's debt depends upon the

> nature or character of the debt when it originated an examination of the circumstances before or after the liability is incurred is irrelevant to ascertain the nature or character of the debt. If there is something illegal or immoral in the act of the father when the liability is incurred, the son is not hound to discharge it. If, however, the father incurs a debt (voluntary or involuntary) to make good a loss caused by his wrongful act, such a debt cannot be said to be illegal or immoral, and the Son cannot claim exemption merely because the act in consequence of which the obligation to make compensation arose was an illegal or immoral act, or both illegal and immoral."

The learned Chief Justice supported the above observation by an illustration as under :

> "Suppose, for instance, a father steals a property but later on repents, and being unable to restore the stolen property makes good the loss by incurring a debt. Such a debt cannot be said to be immoral or illegal in its origin because the purpose of the debt is highly moral. A son cannot be absolved from liability to pay such debt simply because the father was guilty of an immoral act when he committed the theft."

10. As already observed, the correctness of the principle of law that an examination of the circumstances after the liability is incurred is irrelevant to ascertain the nature or character the debt has not been challenged and does not admit of any controversy. It is also perfectly correct that, if there is something illegal or immoral in the act of the father when the liability is incurred, the son is not bound to discharge it. But, with utmost respect to the learned Chief Justice, I do not feel inclined to agree with the rest of the observations quoted above. The illustration that the learned Chief Justice has given may safely be met by another illustration. Suppose, for instance, a father borrows money from a creditor absolutely for immoral purpose on a promissory note, and, before the promissory note becomes time-barred, he renews the same for She principal and interest up to the date of the renewal. The creditor then sues the father on the renewed promissory note and obtains a decree. He, thereafter, proceeds against his son to realise the decretal debt under the rule of pious obligation of the son to pay the debt of his father. Can it be said that the son would not be entitled to challenge his liability to pay the decretal debt as being 'Avyawaharika' by tracing its origin and examining its past history? In my opinion, he will be perfectly entitled to ash the court to examine as to how the debt was originally incurred and what was its nature and character at that time. Though in the above illustration at the time when the promissory note was renewed or at the time when the decree was passed against the father on the renewed promissory note, there was no question of any illegality or immorality, but when it originally initiated, it was undisputedly tainted with immorality and illegality. The son. therefore, in my opinion, is perfectly entitled to challenge his liability on the ground of the debt, at its inception, being immoral or 'Avyawaharika'. It is very difficult to have any hard and fast rule of law in regard to the question at issue, and each case has to be decided with respect to the facts and the circumstances of that case.

11. The view that I have taken appears to be correct on another principle also. If in the illustration given by me, the son is debarred from asking the court to examine the past history as to how the debt in suit was incurred, the exemption of the son from the liability to pay such a debt would always be defeated by the father or his creditor by renewing the document on the basis of which the debt is originally taken for illegal and immoral purposes. I do not think the rules laid down in the Hindu Law

ever contemplated to give rise to such a situation. In my opinion, even on she illustration given by the learned Chief Justice, it must be held that the debt was 'Avyawaharika' and the son could not be legally made liable to pay the Same.

12. On the principle as enunciated by the learned Chief Justice that the circumstances before the liability was incurred were irrelevant to ascertain the nature or character of the debt, it was held in that case that, even if Raghunandan Singh was guilty of a fraudulent act in filing 'hukumnama', which was not genuine, his conduct before the date of the decree could not be taken into consideration and the decree for costs could not be said to be 'Avyawaharika'. In support of his decision, the learned Chief Justice relied on the cases of Kartar Singh v. Hariji Mal 128 P R 1879 at p. 374 and Natasayyan v. Ponnusami ILR Mad 99. In the first case, the question as to whether the circumstances before the creation of the debt could be taken into consideration or not was not specifically raised and decided and the case proceeded on the assumption that the son could go behind the decree. In the second case, the filler collected certain amount of money on account of another person, but never paid to, or accounted for to, that person and dishonestly retained the money for which a decree was passed against him. It was contended on behalf of his son that the debt, being immoral, was not binding on him. This contention was rejected by the High Court. It is manifest from the facts of this case that the liability was incurred by the father the moment he collected the amount of money for another person and at that time there was no question of any immorality or illegality in the collection of the money. His subsequent conduct of dishonestly retaining it, therefore, could not make it an 'Avyawaharika' debt. I have already observed that, if the debt at its inception is genuine and not tainted with immorality or illegality, the subsequent dishonesty of the father could not make it 'Avyawaharika' and, as such, in that case the debt was held to be binding on the son. These two cases, therefore, are no authority for the proposition that the facts and circumstances existing before the debt in question could not be looked into for ascertaining the nature and character of the debt. With utmost respect to the learned Chief Justice, I differ from the view taken by him, and most respectfully state that the decision in the above effect in the case of MANU/BH/0032/1951 : AIR 1951 Pat 387, is not correct and has to be overruled.

13. Subsequent to the decision in Kirit Singh's case, AIR 1951 Pat 587, a similar question arose in Raja Prasad Singh v. Mit, Ramjhari Kuer, Misc. Second Appeal No. 138 of 1950, D/- 5-10-1953 (Pat), and I, sitting singly, following the above decision, which was binding on me, held that in order that a father's debt may not be binding on the son as being 'Avyawaharika', its nature and character have to be ascertained with reference to the facts existing at the time, when it was incurred and the facts and circumstances existing before the date are irrelevant to the enquiry. Since, however, I thought the matter required further consideration, I granted leave to appeal under the Letters Patent. In the Letters Patent appeal, which is reported as MANU/BH/0036/1957 : AIR 1957 Pat 115, the view taken by me in the second appeal was not accepted as correct and their Lordships doubted the correctness of the decision in AIR 1951 Pat 587, referred to above. Their Lordships felt that the question needed further consideration by a larger Bench; but since the appeal had to be dismissed on the ground that the decree for mesne profits was not held to be in respect of a debt tainted with immorality and that the debt incurred was pot an 'Avyawaharika' debt within the meaning of the Hindu Law, the question was not referred in that case to a larger Bench.

14. The view taken by me on the above point gains support from a Full Bench decision of the Bombay High Court in MANU/MH/0166/1938 : AIR 1939 Bom 289. Ir

that case, it was held that where a person in possession of property, to which be was not entitled disposes of that property and eleprives the rightful owner of that property, his conduct is dishonest and the son is not liable for the debt arising out of his conduct, Beaumont, C. J., in the course of the judgment, observed that there could be only one relevant date to consider and that was the date on which was incurred the liability of the father which was sought to be enforced against the son, and that the question must be whether at that date the liability was of the nature alleged. Wassoodew, J. in his concurring judgment, referring to the question about the liability of the son, observed that the answer to that question must depend upon the nature and character of the act itself which results in the liability enforceable at law, and the court has to consider whether at the point of time when the accrual of the right takes place the act is 'Avyawaharika'. Lokur, J., while considering the conduct of the father in disposing of the property, to which he was not, entitled, observed that his conduct was certainly opposed to good morals and the son could not be held liable for the debt arising out of such conduct of his father.

15. A similar view has been expressed in Raghunandan Sahu v. Badri Teli MANU/UP/0308/1936 : AIR 1938 All 263. In that case, one Khedu Teli failed a complaint against certain persons, who were ultimately acquitted, and they obtained decrees against Khedu Teli for damages for malicious prosecution. In order to satisfy those decrees, a mortgage was created by Khedu Teli, and, in the suit brought on the mortgage against the song and grandsons of Khedu Teli, be having died in the meantime, the plea taken by them was that, as the origin of the debt was a malicious prosecution by Khedu Teli, the debt on the mortgage was tinted with immorality and illegality and was an 'Avyawaharika' debt and that they were not liable to pay the same. This objection prevailed, and it was held in that case that the 'Avyawaharika' debts of an ancestor are not binding on his descendants, and there is no difference in principle between a case in which a liability to repay is cast by actual borrowing and a case in which a person is bound to discharge an obligation created by a judgment of Court, It was further pointed out that no hard and fast rule can be laid down and the Courts have got to look at each debt and the circumstances in which it arises in order to find out whether it is 'Avyawaharika' or 'Vyawaharika'. In the case of a decretal debt, like a decree for damages the act which is the foundation of the suit for damages has got to be scrutinised and due has got to see whether the act was a 'Vyawaharika' act or an 'Avyawaharika' act. I entirely agree with the above view taken in that case.

16. On a careful consideration of the authorities discussed above, my concluded Opinion is that, while considering the liability of the son under the rule of pious obligation in Hindu Law to pay the debt of his father, the facts, the circumstances and the conduct of the father antecedent to the incurring of the debt in question could be looked into to ascertain the nature and the character of the debt so as to be binding on the son as being not 'Avyawaharika'. In that view of the matter, in the present case, the conduct of Tribeni in forcibly dispossessing Mahanth Basudeva Das, which ultimately resulted in the decree for mesne profits against him is passed in Title Suit No. 61/62 of 1949/50 could be taken into account for ascertaining the nature and the character of the debt. This part of the question therefore, has to be answered in the affirmative.

17. Now remains the first part of the question as to, whether the appellants are liable, in the circumstances of this case, to satisfy the decree for mesne profits granted against Tribeni Mahto on the 24th of February, 1951. In this connection, Mr. Thakur Prasad, appearing for the respondents, has pressed an argument that a decree

for mesne profits can never in law be an 'Avyawaharika' debt. His argument is that, whatever may be said with respect to the forcible possession taken by a trespasser, his receipt of the usufruct of the land on cultivation of the same cannot be a dishonest act on his part. In other words, the submission is that, since even a trespasser gets the usufruct of a land over which he has trespassed by dint of his labour in getting the same cultivated, the receipt of the produce cannot be 'Avyawaharika'. In support of his contention, he has relied on the cases of Nanomi Babuasin v. Modun Mohun MANU/BH/0036/1957 : AIR 1957 Pat 115 : 13 Moo IA 1 (PC) MANU/TN/0481/1925 : AIR 1925 Mad 841, Karan Singh v. Bhup Singh ILR All 16 (FB), Peary Lal Sinha v. Chandi Charan Sinha MANU/WB/0224/1906 : 11 C WN 163 and Laxmipatirao v. Kristrao MANU/MH/0015/1950 : AIR 1950 Bom 356. These are all cases of mesne profits in which the sons have been held to be liable for payment of the mesne profits debts incurred by their fathers.

18. In 13 I A 1 (PC), one Girdhari had wrongfully ousted one Mrs. Collis from a land held by her under lease from him, and she sued him to recover possession and mesne profits, A decree was made in that suit for possession and a certain sum of money was awarded to her as mesne profits. In execution of the decree for mesne profits, a portion of the family ancestral hind of Girdhari was sold, and purchased by a stranger. Thereafter, the sons and the widow of Girdhari filed a suit challenging the sale on various grounds, including the ground that the mesne profits debt was 'Avyawaharika'. It was found in that case that the mesne profits debt was a family debt and it was, therefore, held to be binding on the sons and the widow of Girdhari.

In MANU/BH/0036/1957 : AIR 1957 Pat 115, the sons of the judgment-debtor were sought to be made liable for a decree for mesne profits obtained by the decree-holder against their father. The sons were, however, held to be liable because it was found in that case that there was no material to support the allegation of the sons that the claim of their father was fraudulent in the title suit in which the decree for mesne profits was passed.

19. In MANU/TN/0481/1925 : AIR 1925 Mad 841, the facts were those. One Subramania died leaving two widows and a son by each, Kandasami and Balasubramania. After Subramania's death, there was a partition between his two sons. Subsequently, Kandasami died, and his widow instituted a suit against Balasubramania for possession of the property that fell to the share of her husband at the partition. The suit was contested by Balasubramania on the ground that there was no completed partition. A decree, however, was passed in favour of the widow of Kandasami for possession and mesne profits. Before the decree for mesne profits could be recovered in execution, Balasubramania died, and his sons, who were substituted in his place, objected to the execution on the ground that they were not liable to pay the decree for mesne profits as the same was created due to the dishonest act of their father and was thus 'Avyawaharika'. In deciding that question, one of the principles of law that was enunciated by their Lordships was that the son could claim immunity only when the father's conduct was utterly repugnant to good morals or was grossly unjust or flagrantly dishonest. Considering the facts of that case, and applying the above principle of law, their Lordships held that, though the act of Balasubramania was not by any means honest, yet his conduct in being in unlawful possession of the property was not so grossly unjust or immoral, or so flagrantly dishonest as to make the debt 'Avyawaharika' within the meaning of the Hindu Law. The sons were, therefore, held liable to pay the debt.

In ILR All 16 (FB), the appellants, Karan Singh and others, obtained a decree under

the Rent Act for the profits of their recorded share in the ancestral property, and, in execution of that decree, the joint family property of Tota Ram, his sons and grandsons was attached. Subsequently, the sons and the grandsons of Tota Ram instituted a suit for declaration that their share in the joint family property was not liable to sale in execution of the decree. Their suit failed as there was no allegation that the debt in respect of which the execution proceedings were had was for immoral purposes or such debt as the sons and grandsons were relieved from their pious obligation to satisfy,

20. In AIR 1950 Born 356, a decree for mesne profits was passed in a suit against defendant No. 1 in which he set up a plea of adoption. This defence failed in all the Courts, including the High Court. A question arose as to the liability of the grandson of defendant No. 1 to pay the mesne profits debt. That question was decided against the grandson because it was held in that case that the defence of his grand-father could not be said to be a dishonest defence. In MANU/WB/0224/1906 : 11 C WN 163, the finding was that by the unlawful receipt of the profits the judgment-debtor enriched His own estate which passed by survivorship into the hands of the appellants. In view of the above fact, their Lordships observed that they could not discover any intelligible principle upon which a debt of this character might be described as immoral and illegal, and they held that the sons were under a pious obligation to discharge the just debts of their father.

21. The decisions in the cases cited above depended on the facts and circumstances of each case and none of these cases is an authority for the broad proposition of law, as submitted by counsel for the respondents, that a decree for mesne profits can in no case be legally held to be immoral or 'Avyawaharika'. These are all cases in which, on the evidence, the debts were 'Vyawaharika', and, therefore, they have no application to the present case, the material facts of which are different from the facts of those cases.

22. The argument that, while enjoying the usufruct of the land on which the father had trespassed he has only realised the fruits of his labour of cultivating the land, which can never be said to be immoral, is also not tenable. No doubt, the act of a trespasser in forcibly dispossessing the true owner from the land is most unjust, but it is equally unjust and dishonest on his part to retain the same forcibly after having dispossessed the true owner. The debt incurred by such a trespasser due to his dishonest act of retention of possession is, therefore, tainted with immorality and illegality and is 'Avyawaharika' so as not to be binding on his sons.

23. Several other cases, though they are not cases of mesne profits, have been cited by counsel for both parties for the purpose of deducing the principle which may equally be applied to the mesne profits cases, I will first deal with those cases in which the debts under consideration have been held to be 'Avyawaharika', and, as such, not to be binding on the sons. In Sunder Lal v. Raghunandan Prasad MANU/BH/0230/1923 : ILR Pat 250 : AIR 1924 Pat 465), a decree was passed against the father in respect of damages for malicious prosecution. It was held to be an illegal and immoral act on the part of the father to lodge, such a maliciously false criminal case against the decree-holder and to be a highly tortious act. In those circumstances, it was decided in that case that the shares of the sons in the joint family properties were not liable in execution of such a decree. The following observation of their Lordships in that case is very important;

"It was an illegal and immoral act on the part of the defendants to lodge a

maliciously false criminal case against the decree-holder. It is also opposed to public policy. The course adopted by the defendants could not possibly be said to be for the benefit of the family and was fraught with great risk to the family status and reputation. It was a highly tortious act. The prosecution was held to be false, and Teju and Gobardhan were liable for criminal prosecution as well as for civil damages, and the damages awarded in the Civil Court were like a fine imposed upon them in a criminal case."

A Bench of the Allahabad High Courtin MANU/UP/0308/1936, referred to before, following the above case, took the same view, and held that an act of a person in bringing a malicious complaint without reasonable and probable cause is a tortious act opposed to public policy or decent 'Vyawahara', and as such an 'Avyawaharika' act, and a pecuniary liability arising therefrom in the form of a decree for damages for malicious prosecution, is not binding on his sons or grandsons, and that money borrowed by such a person to pay off the decretal amount in the suit for damages for malicious prosecution being an 'avyawaharika' debt is not binding on his sons or grand sons.

In MANU/BH/0050/1949 : AIR 1949 Pat 515, referred to above, the question for consideration was whether a decree for costs passed against the father in a suit instituted by him based on a deliberately false claim was an 'Avyawaharika' debt. On a consideration of "the conduct of the father in bringing a false claim and the authorities on the subject it was held in, that case that such a decree for costs being for a cause repugnant to good morals was in the nature of an 'avyawaharika' debt, and the son's share in the joint family property was not liable to be sold in execution.

In MANU/MH/0166/1938 : AIR 1939 Bom 289 a Full Bench of the Bombay High Cour held that where a person in possession of a property, to which he is not entitled, disposes of that property and deprives the rightful owner of that property, his conduct is dishonest and the son is not liable for the debts arising out of such conduct. These cases, therefore, show that, if the debt in question results on account of certain acts done by the father, which are immoral or unjust and dishonest at their inception, the sons cannot be held to be liable to pay the same under the theory of pious obligation.

24. I will now come to those cases cited on behalf of the respondents in which the sons have been held liable to pay their fathers' debts. In Girdharee Lal v. Kantoo Lal 1 I A 321 (PC), there were two brothers who had become heavily indebted, and, on being pressed by their creditors, they sold some ancestral land for discharge of those debts. Their sons, later on, instituted a suit to obtain possession over the land sold by their fathers on the ground that the debts were incurred by them through extravagance and immorality and to provide funds for like purposes. The suit failed because, according to their Lordships of the Judicial Committee, there was nothing on the record to show that the debts for the payment of which the land in suit was sold were incurred for immoral purposes.

In MANU/PR/0016/1943, the facts of which have already been given earlier, the sons of Danpal were held liable to pay the debt created by him by not filing the promissory note in question in Court under the terms of the decree in the partition suit. It was found that the liability of Danpal arose the moment that promissory note was allotted to the share of Hemraj, and his subsequent dishonest conduct in not filing the same in court within the time allowed under the decree and allowing the same to become time-barred could not make the debt 'Avyawaharika'.

In Pashupat Pratap Singh v. Lalat Bahadur Singh MANU/UP/0021/1944), a Hindu father remained in possession of certain property after the expiry of the term of the 'thicca'. A question arose as to whether his sons were bound to pay the amount of mesne profits for the period during which their father was in possession after the expiry of the term. It was held that the sons were liable to pay the same because it was not known as to in what capacity he was continuing in possession either as a lessee holding over, or as a licensee holding in continuation of the permission. These cases, therefore, were decided on their particular facts, and the principle deducible from them cannot go beyond this that where the conduct of the father in doing any act is not tainted with immorality, any debt resulting from such a conduct, though that may have been incurred even due to subsequent dishonesty of the father, is binding on the son. They are, however, no authority for the proposition that, even if the conduct of the father at its inception is dishonest and unjust, the debt resulting from such a conduct would be binding on his sons: rather, on a consideration of the cases, referred to above, the law on the subject seems to me to be that a son is exempted from the liability to pay a debt of his father under the rule of pious obligation if the debt resulted as a consequence of an act of the father which, when that act was done, was tainted with immorality.

25. Applying the above principle of law, the I position in the present case seems to be perfectly clear. Tribeni Mahto, without any semblance of claim, forcibly dispossessed Mahanth Basudeva Das from the Math properties and enjoyed the usufruct of the same, along with others who sided with him in forcibly dispossessing the Mahanth In the suit brought by the Mahanth for recovery of possession, it was held that the defendants, including Tribeni Mahto, were wrongfully in possession of the Math properties and were liable for mesne profits. On ascertainment of the mesne profits, a decree was granted against those defendants on the 24th of February, 1951, and that decree was ultimately sought to be executed, after the death of Tribeni Mahto, against his son and grand-sons. The conduct of Tribeni Mahto in forcibly dispossessing the Mahanth and retaining possession of the Math properties was undoubtedly grossly unjust and flagrantly dishonest. His son and grandsons, therefore, had no liability under the theory of pious obligation to pay the same. The first part of the question, therefore, has to be answered in the negative.

26. On a consideration of the facts and the circumstances of the present case, along with the law on the subject, I have reached the conclusion that the appellants are not liable, to satisfy the decree for mesne profits graced against Tribeni Mahton on the 24th of February, 1951, and the question as to whether the debt was 'Avyawaharika' or not may properly be decided after taking into account the conduct of Tribeni Mahto before the passing of the decree in Title Suit No. 61/62 of 1949/50. The reference is answered accordingly.

27. The case will now be placed before the Division Bench for final disposal.

Vaidynathier Ramaswami, C.J.

28. I agree with the reasoning and conclusion of my learned brother Choudhury, J. I also agree with him that the decision of the previous Division Bench in AIR 1931 Pat 587, is not correct and must be overruled.

Kamla Sahai, J.

29. I entirely agree.

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