

(1950) 01 BOM CK 0004

In the Bombay High Court

Case No : Second Appeal No. 788 of 1947

Laxmipatirao Shriniwas Rao Deshpande

APPELLANT

Vs

Krishtrao Bhimrao Deshpande and Another

RESPONDENT

Date of Decision : 25-01-1950

Acts Referred:

Citation : AIR 1950 Bom 356 : (1950) 52 BOMLR 342

Hon'ble Judges : Dixit, J

Bench : Single Bench

Advocate : K.G. Datar, for the Appellant; V.N. Lokur, for the Respondent

Judgement

[1] This second appeal raises a question of Hindu law which is whether a Hindu son is liable to pay the debt of his father in respect of a liability incurred by him in relation to a decree for mesne profits.

[2] The appellant who is the son of defendant 1 contends that he is not liable to pay the debt because the debt is ayyavaharika, and the question is whether the contention is well founded. The facts necessary to understand the question may be shortly stated.

[3] The suit giving rise to this appeal has a genesis in a suit instituted as long ago as 1902. That was Suit No. 558 of 1902 on the file of the Second Class Joint Subordinate Judge, Hubli. The suit was brought by one Trimal or Timappa Bhimrao claiming a 1/5th share in the estate of one Hanment who had left a widow Gangabai and who died in 1898 without leaving any issue. The property in respect of which the suit was brought was in possession of defendant 1 in that suit who is the grand-father of the present appellant. Defendant 13 in that suit was one Bhimrao who died during the pendency of the suit and his widow was brought upon the record. Bhimrao too claimed a 1/5th share in the estate of Hanmant. Bhimrao's widow is plaintiff 2 in this suit. Plaintiff 2 took in adoption plaintiff 1 on 23rd April 1942.

[4] It is not necessary to set out at length the history of the litigation except to

mention the fact that the suit ended in a decree in favour of the plaintiff in that suit, and defendant 13 in that suit, who is plaintiff 2 in this suit, was also awarded a 1/5th share in the property in dispute in that suit. The decree was challenged in a first appeal by Appeal No. 233 of 1908 ; but the lower appellate Court confirmed the trial Court's decree with a slight variation. There was then a second appeal to this Court, being Second Appeal No. 339 of 1911. The second appeal too was dismissed, and the case is reported in the case of Laxmipatirao Shrinivas Deshpande Vs. Venkatesh Tirmal Deshpande, . The appellate decision is dated 21st July 1916.

[5] Defendant 13 in that suit, i.e., plaintiff 2 in this suit, obtained possession of the share falling to her husband on or about 23rd July 1923. She then applied for having the amount of mesne profits awarded to her under the decree in the suit of 1902 as confirmed in appeal ascertained and asked for a final decree ; and, on 25th March 1926, a final decree was passed, and plaintiff 2 became entitled to recover the amount of mesne profits in the sum of Rs. 4,375 with interest at 12 per cent, from the date of the final decree in respect of her 1/5th share, and that decree was passed against defendant 1 who is the father of the present appellant.

[6] Plaintiff 2 then applied to execute the decree for the amount of mesne profits by darkhast No. 432 of 1936 by attachment and sale of lands mentioned in her execution application. In the execution proceedings that followed, sales were held on 7th March 1941, and plaintiff 2 through her attorney at those court sales purchased the lands in suit.

[7] The lands in suit are, (1) Survey No. 10/2B measuring 5 acres and 2 gunthas assessed at Rs. 9-7-0 ; (2) i.e., land No. 2 Survey No. 11/1 measuring 10 acres and 23 gunthas assessed at Rs. 27-4-0 ; and (3) Survey No. 22/2 + 4 measuring 21 acres and 25 gunthas assessed at Rs. 45-15-0. These three lands are situated at a village by name Ganjigatti. In due course plaintiff 2 was given three sale certificates, and when she attempted to take possession of these lands through the revenue officers she was, as was to be expected in such cases, met with an objection by defendant 2, the objection being that the court-sales were not binding upon him and that they did not affect his share in the lands sold.

[8] On 5th March 1943, the plaintiffs, who are respectively the adopted son and the adoptive mother, filed the present suit against defendant 1 the (the father), defendant 2 (the son) and certain other persons claiming possession of the property. The two other persons were respectively the widow of Kristappa, a brother of defendant 1, and one Irappa, who was said to be a tenant of defendants 1 and 2.

[9] Defendants 1, 3 and 4 did not appear. The suit therefore proceeded against them ex parte. Defendant 2 filed a written statement raising various contentions. It was contended that in law there could be no personal decree against defendant 1 for the amount of mesne profits, that defendant 2 was not made a party to the execution proceedings that the suit lands were the self-acquired

properties of defendant 1 that those properties had been given to defendant 2 by way of a family arrangement long before the attachment and sales, that the judgment-debtor, had no saleable interest in the property, that the lands in suit were taken lands which could not have been purchased by plaintiff 2, that the plaintiffs should have sued for a general partition, that the claim was barred under S. 47, Civil P. C., that plaintiff 1's adoption by plaintiff 2 was disputed, and that the suit was barred by limitation.

[10] The learned trial Judge dismissed the plaintiffs' suit. The plaintiffs went in appeal before the District Court, Dharwar, and the learned District Judge allowed the plaintiff's appeal, set aside the decree of the trial Court and granted the plaintiffs a decree for possession together with mesne profits and costs with further directions appropriate to the circumstances of the case. From the appellate decree defendant 2 has come up in second appeal.

[11] Two questions have been raised in this appeal. It is true that various questions were raised in the trial Court, but they have not been raised in this Court. It is therefore, necessary to deal with the two contentions.

[12] The first contention is that the appellant is not liable to pay the debt of his father on the ground that the debt in respect of which the liability was sought to be enforced was an avyavaharika debt. The law on the subject of an avyavaharika debt has been exhaustively considered in a decision of this Court reported in the case of *Rajaram Podval v. Maneklal* 34 Bom. L. R. 55 : . It is not necessary to refer in any great detail to the principle which no longer admits of any dispute that a Hindu son is not liable for a debt of his father if it is shown that the debt is avyav A. I. R. 1932 Bom. 136aharika, and the question for decision is whether the debt in dispute is avyavaharika debt. Mr. K. G. Datar for the appellant contends that the debt is an avyavaharika debt. The law on the subject was further considered in another decision of this Court reported in the case of *Govindprasad v. Raghunathprasad* 41 Bom. L. R. 589 : A. I. R. 1939 Bom. 289. The opinion of the Full Bench which is expressed in the headnote is in the following terms :

"Under Hindu law, a son is not liable to pay his father's debts which are avyavaharika, that is of a character which is illegal, dishonest or immoral. Thus, he is not liable for his father's debt which is essentially dishonest in character and incurred for a dishonest purpose.

A debt contracted by a Hindu father for the purpose of depriving the rightful owner of his property is an avyavaharika debt, which it is not pious obligation of the son to pay."

[13] Mr. Datar for the appellant contends, relying on his decision, that the debt in this case too is not binding on the appellant. In order to examine this contention, it is necessary to mention some more facts. In the suit of 1902 which gave rise to the liability of defendant 1 in respect of the amount of future mesne profits there was a dispute relating to the property of one Hanmappa, and the plaintiff in

that suit as well as the appellant's grandfather laid a claim to the property in dispute. The dispute will be apparent on a reference to the case of Laxmipatirao Shrinivas Deshpande Vs. Venkatesh Tirmal Deshpande, already cited. It is only necessary to mention the nature of the defence of defendant 1 in that suit, and his defence was that the adoption of Shrinivasrao by Laxmipatirao was in a dyamushyayana from which rendered him competent to inherit both to Laxmipatirao and Hanmappa ; and, secondly, that the plaintiff's claim was barred by limitation. It is apparent from the history of the case which I have already traced that this defence failed both in the Court of first instance and also in the Court of First Appeal as well as in the Court of Second Appeal. The view which the lower appellate Court has taken is that it cannot be said that the defence of the grandfather of the present appellant was a dishonest defence. Laxmipatirao, the ancestor of the present appellant, asserted a title to the property in dispute in that suit on the ground that his own father had been adopted in the dyamushyayana form, and although that defence failed in three Courts, it cannot be reasonably suggested that the retention of the property in the hands of the ancestor of the present appellant was dishonest. It seems to me that the facts of the present case are clearly distinguishable from the facts which were the subject of discussion in the Full Bench case, already referred to. In the Full Bench case, Govindaprasad v. Raghunathprasad 41 Bom. L. R. 589 : A. I. R. 1939 Bom. 289 , the father had contracted debt for the purpose of depriving the rightful owner of his property, and upon those facts it was held that the debt which was incurred was an avyavaharika debt. If the facts can reasonably be distinguished, it seems to me that the Full Bench decision does not really assist the present appellant. But it is settled that the principle is that where the defence is a dishonest defence, the debt incurred in connection with such a defence must be held to be an avyavaharika debt. The question must be decided by a reference to the dispute between the parties. In this case the appellant's ancestor raised a contention that he and not the plaintiff in that suit was the owner of the property, and it seems to me that there was a bona fide dispute as regards the right to the property in dispute in the suit of 1902. It is not in dispute that the liability which is now said to be enforceable against the present appellant is a liability incurred in consequence of the decree passed in the suit of 1902. It seems to me, therefore, that the present appellant is bound by the debt of his father and that he cannot successfully contend that he is not liable to pay his father's debt.

[14] The view I take is supported by a good deal of authority. In the first place, in Mayne's treatise on Hindu law and Usage, Edn. 11 (1950), the learned editor has at p. 405 expressed his view as follows : "This liability of the father for mesne profits is one for which the sons cannot claim exemption." Below this opinion is to be found a foot-note, and a reference to the foot-note shows that the opinion is supported also by a good deal of authority. A similar question arose for decision in the Madras High Court in the case reported in Palanivel Ramasubramania Pillay and Another, by mother Muthammal Vs. Sivakami

Ammal, . The headnote in that case is in the following terms :

"In execution of a decree for mesne profits, the shares of the sons of the judgment-debtor in the joint family property, are liable to be attached and sold.

"A debt, which is not immoral, at its inception is binding on the son, though subsequently it may be tainted by dishonesty and immorality. Improper, imprudent, unreasonable, or dishonest debts are not necessarily immoral. But liability arising by the commission of offences by the father has been always held to be immoral. The test of benefit to the estate is not a material question for consideration as the liability of the son depends upon the nature of the act.

"The liability for mesne profits is not in the nature of "danda" or fine. The obligation is rina or in the nature of a debt."

It is of interest to note that one of the Judges who decided the case was Madhavan Nair J., (now Sir Madhavan Nair). This case was quoted with approval by their Lordships of the Privy Council in the case of AIR 1943 142 (Privy Council) . The principle which their Lordships laid down in Hemraj's case is expressed in the headnote as follows :

"The translation of the term avyavaharika debt used in Hindu law, by Colebrook as "debts for a cause repugnant to good morals makes the nearest approach to the true conception of the term and may well be taken to represent its correct meaning.

The duty cast by Hindu law upon the son to pay his father's debt being religious or moral, the character of the debt must be examined from the standpoint of justice and morality. The examination of the nature or character of the debt must be made with reference to the time when it originated, in other words, when the liability was first incurred by the father. If, on such examination, it is found that at its inception the debt is not tarnished or tainted with immorality or illegality, then it is binding on the son. This rule is not rigid but has to be applied with reference to the circumstances of each case. The above principles are not exhaustive but only basic.

A debt which in its inception is a just and true debt does not become avyavaharika merely by the subsequent dishonest conduct of the father in not paying it within time."

There is to be found a passage in this judgment of their Lordships of the Privy Council at page 508 taken from the case of Natasayyan v. Ponnusami 16 Mad. 99 : 3 M. L. J. 1 That passage is as follows :

"Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation and for the non-discharge of which punishment in a future state might be expected to be inflicted, if any. The son is not bound to do anything to relieve his father from the consequences of his own

vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money he has unlawfully retained."

Their Lordships express their concurrence with this view."

[15] It seems to me, therefore, that this case clearly negatives the contention raised on behalf of the appellant because, according to the principle which they accept from Natasyayan's case 16 Mad. 99 : 3 M. L. J. 1 a Hindu son is bound to restore to those lawfully entitled money which his father has unlawfully retained. In the present case the liability at its inception cannot be said to be dishonest. Even granting that the conduct of the appellant's father was dishonest at a subsequent stage, that does not make the original debt *avyavaharika*. Although the suit was filed in 1902, this Court decided the second appeal not until 1916. It cannot, therefore, be said that, at any rate, between 1902 and 1916 the conduct of the appellant's ancestor was in any sense dishonest because the matter was *sub judice* ; and even assuming that it was not proper on the part of the appellant's ancestor to retain possession of the property after 1916, it seems to me that his subsequent dishonesty does not convert a debt which in its inception was a just and a lawful debt into an unlawful debt. Under those circumstances, therefore, the present appellant must be held to be liable in respect of the debt of his father incurred in connection with the decree for the amount of *mesne profits*. The first contention, therefore, must be rejected.

[16] The second contention is a short one and can be disposed of very shortly. The point taken is that the plaintiffs' suit is barred by limitation. The suit was filed on 5th March 1943, and it is claimed for the appellant that the suit is barred under Art. 11-A, Limitation Act. The facts in relation to this question are these. After the execution proceedings were transferred to the Collector and the property was sold, the present appellant put in an obstruction, his contention being that the property was not liable to be sold, he having got the property under a family arrangement between him and his father. The *Mamlatdar* made an order referring the plaintiffs to the Collector. This was on 23rd July 1941. Then the *Prant Officer* by his order dated 5th March 1942, made an order referring the present plaintiffs to a civil Court, and this was on 5th March 1942. If limitation commenced to run from 5th March 1942, then the suit which was filed on 5th March 1943, is clearly within time. But it is contended on behalf of the appellant that limitation began to run not from 5th March 1942, but from 23rd July 1941. The contention is, in my opinion, not correct, and it is apparent by reference to R. 13-A of the rules framed in regard to execution by the Collector and cited at page 91 of the Civil Manual, Volume I, 1940. That rule is as follows :

"Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Collector complaining of such resistance or obstruction. The Collector shall fix a day for investigating the matter and shall summon the party

against whom the application is made to appear and answer the same."

[17] It is clear from this rule that it is for the Collector to investigate into the question. It is apparent, therefore, that the Mamlatdar will have no authority to investigate into the obstruction. The limitation, therefore, does not begin to run from 23rd July 1941, and it cannot be suggested that limitation really started from 5th March 1942, because the Prant Officer referred the present plaintiffs for redress in a civil Court. It seems to me, therefore, that the plaintiffs' suit is not barred by limitation. That was the view taken by the Court of first instance where the point was not pressed, and that was the view also taken in appeal. In my opinion, therefore, the second point also must be rejected.

[18] In view of the above conclusions, the lower appellate Court's decision is, in my opinion, clearly right. The result is that the appeal fails, and the same will be dismissed with costs.

[19] Appeal dismissed.