

(1938) 10 MAD CK 0014
In the Madras High Court

Nachimuthu Goundan and Another

APPELLANT

Vs

Balasubramania Goundan by mother and next friend,
Kaliyammal

RESPONDENT

Date of Decision : 24-10-1938

Acts Referred:

Contract Act, 1872 — Section 25

Citation : AIR 1939 Mad 450 : (1939) ILR (Mad) 422 : (1939) 49 LW 309 :
(1939) 1 MLJ 352

Hon'ble Judges : Krishnaswami Aiyangar, J

Bench : Division Bench

Judgement

Krishnaswami Aiyangar, J.—The question for decision in this appeal is whether the mortgage sued on is binding on the undivided sons of the

mortgagors. The argument against it is that there was neither an antecedent debt nor a justifying necessity and in its absence the father had no

authority to bind by his act the interest of his sons in the joint property. No new principle of law is therefore involved in the decision of this appeal:

for the doctrine of antecedent debt is at least as old as (1879) L.R. 6 I.A. 88 (Privy Council) if not older still and has now been finally and

authoritatively declared by the Privy Council. Though the rule itself in this form does not find express mention in the Texts of Hindu Law or the

commentaries, there can be no doubt that it is but the logical outcome of the fundamental principle stated in the Mitakshara, Chapter I, Sections

27, 28. The author says:

Therefore it is a settled point that property in the paternal estate is by birth, although the father has independent power in the disposal of effects

other than immovables, for indispensable acts of duty and for purposes

prescribed by Texts of law as gifts through affection, support of the family, relief from distress and so forth, but he is subject to the control of his sons and the rest in regard to immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained that though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten and they who are yet still in the womb require the means of support; no gift or sale should therefore be made. Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family, and especially for pious purposes.

2. The underlying object of the restriction is plain enough, namely, the conservation of the family substance for the benefit of the existing and future members of the family. In a loose though not in a strict legal sense the family property in the hands of the father or the manager may perhaps be

termed a trust for the family itself conceived as a continuing unit. It was in this sense that in *Sahu Ram Chandra v. Bhup Singh* (1917) 33 M.L.J. 14

: L.R. 44 IndAp 126 : ILR 39 All. 437 (P.C.) Lord Shaw observed as follows:

In short, it may be said that the rule of this part of the Mitakshara law is that the joint family state is in this position. Under his management he (the

father) can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would

enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain, and it might be, a deliberate

breach of trust. The Mitakshara law does not warrant or legalise any such transaction.

3. Once it is realised that it is a kind of trust, that lies at the foundation of the restriction (see also *Venkataramaswami v. Imperial Bank of India* at

Rajahmundry (1938) 14 M.L.J. 461 (F.B.) it will be easy to understand its scope as well as its applicability. At first sight, it may look as if there is

very little purpose in requiring that there should not only be a debt but that it must also be an antecedent one. According to Hindu Law it is equally

the pious obligation of the son to discharge the father's debt, whether it had been antecedently or was concurrently incurred. Both have to be met

from out of the family estate, and there is no escape from either except by the

practice of fraud or dishonesty. If accordingly the family property is the fund out of which both classes of debt have to be met, no rational distinction could be made between the two and this indeed was the view of

such eminent Hindu Judges as Sir V. Bhashyam Aiyangar, J., in *Chidambara Mudaliar v. Koothaperumal* (1903) 14 M.L.J. 181 : ILR 27 Mad.

326 and Bannerji, J., in *Allahabad, Chandradeo Singh v. Mala Prasad* I.L.R.(1909) 31 All. 176 (F.B.), and it was not till the Privy Council finally

pronounced against it that the true basis of the principle emerged into view *Sahu Ram Chandra v. Bhup Singh* (1917) 33 M.L.J. 14 : L.R. 44

IndAp 126 : ILR 39 All. 437 (P.C.), 28 CWN 253 (Privy Council) *Venkataramanayya Pantulu v. Venkatarama Dass* (1905) 16 M.L.J. 69 : ILR

29 Mad. 200 (F.B.) and *Arumugham Chetty v. Muthu Koundan* (1918) 37 M.L.J. 166 : ILR 42 Mad. 711 (F.B.). What appears to be a cogent

explanation is given by Aikman, J., in *Chandradeo Singh v. Mata Prasad* ILR (1909) 31 All. 176 (F.B.), where he has observed as follows:

At first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt, and a mortgage for a debt incurred

for the first time when the mortgage is executed. But if the distinction is observed, it will tend to preserve the property in the family as it will render

it more difficult for a Hindu father to incur debts which might ultimately have the effect of dissipating that property.

4. In other words the creditor will have one more hurdle to jump and the family will have a little more time to avert the threatened danger. At this

time of day it is perhaps pointless to enter into a discussion of the reason of the rule for the rule itself has now been clearly and unequivocally

settled by the decisions of the highest tribunal. It is with the application of that rule or rather the meaning of the word "debt" in the phrase

"antecedent debt" that we are concerned in this appeal remembering that the corresponding term in the Sanskrit text is _.k.

5. The facts of this case lie in a narrow compass. Two brothers who had themselves started a mill business and carried it on for some years

presumably with the aid of family funds were obliged in April, 1925, to take a new partner whose contribution by way of capital enabled them to

meet the debts then owing and to continue the business itself. The new partner was plaintiff's father who paid a sum of Rs. 20,000 towards his

share of the capital, an equal sum represented by the value of the business premises and the plant and machinery therein belonging to the brothers

being treated as their contribution. The partnership was to run for a period of five years and the profits and losses were to be shared equally

between the plaintiff's father on the one hand and the two brothers together on the other. Clause 4 of the partnership deed which is the only

relevant clause is as follows:

It was agreed that we should conduct the business...up to the said period and, at the end of the period, compare the purchase, etc., and all

accounts duly maintained and divide the net profit and/or loss in equal shares, one half for the individual No. 1 (the plaintiff's father) and the other

half for the individual Nos. 2 and 3 (the two brothers). So, if any of us is willing to separate himself from us before the due date, such person

should forfeit the profit relating to his share and receive the balance of principal after deducting his loss therefrom after the expiry of the period of

the partnership.

6. Long before the period expired, and indeed within four months after the new partnership, the plaintiff's father died, and the partnership became

dissolved. The plaintiff being a minor; his mother wisely decided not to continue the partnership any longer and desired that the partnership

accounts should be taken, the share of the deceased partner ascertained and paid over to her. The accounts were accordingly taken with the

assistance of certain mediators and a sum of Rs. 30,294-13-4 was found due. For a portion of that amount, namely, Rs. 14,732-13-4,

outstandings of the business were assigned to her and for the balance of Rs. 15,562 the suit mortgage was executed. The assignment is Ex. B

dated 1st September, 1925, and the mortgage, Ex. A, dated 30th August, 1925. Both these documents were in fact parts of one transaction and

were brought into existence close upon the settlement of the partnership accounts, and in order to implement it. Subsequent to the mortgage one of

the brothers Krishnaswami Goundan died within a few months leaving four sons, defendants Nos. 2 to 5 and a grandson, defendant No. 7. The

other brother Vellai Goundan is the first defendant, and his son is defendant No. 6. The main defence to the suit was that pleaded by these sons

and grandson, namely, that the mortgage as such could not affect their shares in

the mortgaged property as until the settlement of the partnership accounts which was practically simultaneous with the mortgage, there was no debt as such in law, but merely a duty to account. It was accordingly urged that the requisite conditions of antecedent debt were not present in this case as the mortgage was not really or sufficiently disconnected from the precedent debt in point of fact or time. In the Court below it appears to have also been urged that the business in question was in the nature of a speculative trade, that a debt incurred in it, even regarding the deceased partner's interest in the partnership assets as a debt, should be held to be of an immoral or illegal nature. But this contention was rightly and summarily overruled, and has not been repeated before us.

7. The only question then is whether the consideration for the mortgage was an antecedent debt in the sense in which that expression is understood

in Hindu law. The argument for the appellant is that until the accounts are taken and the liability ascertained, it is impossible to posit that there is or

will be a debt due by one partner to the others or vice versa. The liability to account of a partner or partners in a running or even a dissolved

partnership does not, it was argued, amount in law to a debt in being, but was merely the possibility or contingency of a debt to arise in the future.

Till it is known how the accounts stood, it was urged there could be no debt and no partner liable for it. The appellant's learned Advocate was not

prepared to go the length of saying that in no case of unsettled accounts could there be a debt in law even if there remained nothing more than a

pure arithmetical calculation to arrive at the correct figure. What he did urge was that so long as there was no debtor and creditor relationship

established, no debt could come into existence and that in a partnership there is no such relationship until the business is dissolved and until the

liability of the partners inter se is ascertained by the taking of the usual accounts.

8. There may be some support for this argument if one confines one's attention to the meaning of the word "debt" according to its common law

acceptation. Jenks' definition is that it is:

a definite sum of money recoverable from one person (the "debtor") by another person (the "creditor") by means of a common law action;

whether payment can be claimed immediately or not." (Jenks' Digest of English Civil Law, Book III, Title II, Section 1620.)

9. The action of debt lay according to Anson (Anson's Law of Contract, 17th Edn., p. 53; Pollock's Principles of Contract, 10th Edn., pp. 135

and 136):

For liquidated or ascertained claims arising either from breach of covenant, or from non-payment of a sum certain due for goods, supplied, work

done, or money lent.

10. The qualification that the claim in respect of a debt so called, should be definite, ascertained or liquidated has its roots in the old common law

action of debt which was proprietary in character, and was in fact a claim for the recovery of money by way of restitution, rather than the

enforcement of an obligation arising out of contract (Pollock and Maitland's History of English Law, 2nd Edn., Vol. II, 203 to 207). Its

supersession by assumpsit or the indebitatus count, the practical abolition by the Common Law Procedure Act, 1852, of the distinction between

debt and assumpsit, and the doing away altogether with the formal pleadings of the Common Law Courts by the Judicature Act, 1873, are familiar

knowledge to the Student of English Legal History. (Holdsworth's History of English Law, Vol. II, pp. 366, 367 and III, pp. 420, 421, 442, 443;

Anson's Law of Contract, 17th Edn., page 44.) The distinction between debt and damages, the former relating to a liquidated claim, and the latter

generally to an unliquidated demand still clings to English legal phraseology and still exerts a limited, none the less real influence on modern English

jurisprudence. With that technical narrow meaning of the word we are not here concerned. For we are not considering a proposition of English

Law or the provisions of a Statute based on that law. We have on the contrary to deal with a totally different subject and a totally different system

of law. We have in fact to assign a meaning to the word "Rina" according to the sense in which that word has been used in the texts of Hindu Law.

To such a word and in such a context, are we to apply the English Common Law meaning of the word or are we to go back to those texts

themselves and to the language in which they have been clothed, in order to ascertain the true meaning of the word "Rina" indifferently rendered as

debt in English and occurring in the modern text books and in the decision of the Courts when defining the obligation of a Hindu son to relieve his

father from the sin of the undischarged debt?

11. The narrower interpretation will at once lead to obvious and startling consequences. The larger and more numerous obligations arising out of contracts and quasi-contracts, trusts and other fiduciary relationships though leading to monetary liability and without the slightest taint of immorality or illegality in any of them, will fall outside the pious duty. And yet we find the texts full of passages Garuda Sanyasayya Vs. Nerella Murthenna and Others, and the reports full of cases, in which obligations which are far removed from debt in the narrow sense have been clearly recognised.

Brihaspathi in describing the fate of a debtor who dies without having discharged a debt refers to him as one who received a sum lent or the like (Colebrooke's Digest I, 228, attributed also to Katyayana). According to Katyayana, the son is bound to carry out what an ancestor has promised for religious purposes (Colebrooke's Digest I, 206). Usanas obviously understands Rina in the wider sense, though of course he excludes certain categories as falling outside the limits of the obligation, being Avyavaharika in nature or origin. According to the texts, a surety debt, commercial tolls, debts due for spirituous liquors, for lustful pleasures, gambling debts, unpaid fines, promises without consideration had in terms to be excluded as otherwise, being rinas the sons would be bound to discharge them by reason of their pious obligation see the texts collected in Chhakauri Mahton v. Ganga Prasad I.L.R.(1911) 39 Cal. 862. The words ""dhana"" and ""rina"" (Manu _ks /kus p), Riktha and Rina (Yagnavalkya, Chapter II, 119, _d~Fke`.ke~) coupled together in the texts, seem to have been so used in a comprehensive sense, for describing all varieties of divisible assets and liabilities. Otherwise obligations other than debts strictly so called would bind only the man who incurred them while he is alive and will die with him when he dies and though alive or dead, the family assets in his hands will be divisible among the sons while the liabilities will be left unprovided for. Such an absurdity could not have been in the contemplation of the authors of the Texts and we at any rate do not feel justified in attributing it to them, in the absence of clear and definite words to the contrary. If dhana includes in its connotation all varieties of property and assets, we see no reason why rina should not be held to include all varieties of obligations and debts as well. Apart from the texts of Hindu Law, the word has been frequently used in the wider sense in Sanskrit literature. Witness for instance the well-known Vedic Text referring

to the triple debt which attaches to a Brahmin at birth tk;ekuks oS czk.kfL= fHk#_.kok tk;rs czič½i;sZ.k_f""kH;ks ;Ksu nsosH;% igt;k fir` H;% AA

other instances could be easily multiplied.

12. Coming to the decided cases on the point in Garuda Sanyasayya Vs. Nerella Murthenna and Others, , the sons were held liable for the

unaccounted collections made by a father out of the trust estate under his charge and the learned Judges Wallis, C.J. and Seshagiri Aiyar, J.,

refused to recognise the subtle distinction as they called it, between accountability and debt. In a later case, Muthammal v. Sivakami Ammal

(1925) 21 L.W. 606 in which the point was more directly raised, the learned Judges considered the question of the liability of the son to pay

mesne profits decreed against the father and held that their pious obligation extended to it. The case is instructive for the collection of cases in

which the liability was established against the sons in respect of a variety of causes of action far removed from debt in the limited sense. In none of

them, it is noteworthy, was it disputed that there was a debt but only that the debt was not of a nature which would bind the son's interest.

Venkatasubba Rao, J., explained the position in these words:

It was contended that the obligation to pay mesne profits is not in the nature of a debt, that it is not in fact "rina" which means strictly "what is taken

under a promise to repay". We agree with Mukerjee, J. see Chhakauri Mahton v. Ganga Prasad I.L.R.(1911) 39 Cal. 862 at 877 that the word

"rina" as used in the texts has a much wider application than a mere debt or loan. I am prepared to go further than merely hold that at any rate, a

judgment-debt comes within the expression "rina"; for, if this narrow construction be adopted, a son can be held liable only after a decree is

passed against the father; whereas, if he is originally impleaded in the suit for damages, he can resist it, on the ground that there has been no debt,

as there has not been a judgment. This would be a clear anomaly.

13. The other learned Judge Madhavan Nair, J., was also of the same opinion Muthammal v. Sivakami Ammal (1925) 21 L.W. 606. See also

Natasayyan v. Ponnusami (1892) 3 M.L.J. 1 : ILR 16 Mad. 99 . Quite recently a bench of the Allahabad High Court has expressed a definite

preference for the wider interpretation of the word as including a liability for unliquidated damages arising on a breach of contract by the father. We

are in entire agreement with the observations of the learned Judges who declined to accept the stricter meaning of the word "rina". They said:

If we carry it to its logical conclusion, the liability of a son to pay the antecedent debts of his father would not extend to any liability incurred

otherwise than by the advancing of a sum in cash to the father. We cannot believe that this was the intention of the author of the text (Brihaspathi,

Vol. 33, Maxmuller's Sacred Books of the East, page 319). We cannot believe for instance, that a son would not be liable to pay the unpaid price

of a commodity which had been bought by his father or to pay rent due by his father as a tenant (according to English Law an action of debt lay at

Common Law). We think that the son is bound to pay any sum which is lawfully due from the father provided that the father's liability is not in any

way tainted with immorality. Chatar Sen v. Raja Ram ILR (1938) All. 58 .

14. These authorities are sufficient to negative the appellant's contention. It may, however, be observed that even if the word rina in Sanskrit is to

be understood as meaning a debt, there is no warrant for importing into it the technical sense in which it has become wrapped up by the

peculiarities of the old English Common. Law and Procedure. Almost every English Dictionary includes obligation among the meanings of the word

debt", though ordinarily the word does mean that which is due from one person to another or what is owed. We even speak, metaphorically

perhaps, of owing a debt of gratitude. But whatever may be the meaning which a layman or a lawyer speaking the English language may attach to

it, we are unable to say that the word "debt" is the exact equivalent of rina in Sanskrit at any rate with all the technical import that that word carries.

Moreover the word "rina" has passed into colloquial use in the wider sense in most of the vernaculars of the presidency. It is not capable of being

fully or definitely expressed in any single English word. Like the words, Satya or Dharma which are but imperfectly translated as truth or duty, the

word rina also is often rendered though loosely, as debt, though such a rendering is sufficient enough for practical purposes. But when it becomes

necessary, to ascertain its significance for apportioning rights or liabilities, we must determine it not by reference to its English equivalent but by the

original Sanskrit word itself, giving to it just the meaning in which it is used or understood in the parent language in its literal or even colloquial

sense. What we cannot agree to is the attempt first to regard debt as a perfect synonym and then to understand it in the archaic sense in which the word was understood in the now obsolete old forms of Common Law actions. We must accordingly hold that the unascertained liability of the two brothers was a debt according to Hindu Law incurred by them in favour of the plaintiff's father from the time when the latter brought into the partnership the sum of Rs. 20,000 subject to its being returned with a reduction in case of loss or an addition on account of profit. It was thus both antecedent in time and independent in origin from the mortgage which, it is plain, could not have been in the contemplation of the parties when the capital was brought in. What was in fact contemplated was, as appears from the partnership deed, something totally different from what actually led to the execution of the mortgage. The test must therefore be held fully satisfied, antecedency in time and dissociation in fact being thus established.

15. It was urged that the word "debt" has been defined in some Indian cases in such a way as to exclude a liability for an amount to be yet ascertained by the taking of accounts. Two cases were cited both of which proceeded on the meaning of the word as used in two different statutes, and it was held that such a liability cannot be regarded as a debt within the meaning, in one case of Section 4(1)(a) of the Succession Certificate Act (VII of 1889) and in the other, within Section 25 of the Contract Act (IX of 1872). In *Sabju Sahib v. Noordin Sahib* I.L.R.(1898) 22 Mad. 139 Subramania Aiyar, J., to whom the case was referred on a difference of opinion between Shephard, O.C.J, and Benson, J., held relying on *Johnson v. Diamond* (1855) 11 Exch. Rep. 73 : 156 E.R. 750 that the liability arising from such an obligation could not be held to be a debt in the accepted legal sense of the term for the obvious reason that the liability was not in respect of a liquidated sum. It is not without interest that Benson, J., who took what may be called a common sense view of the matter, dissented, holding that when the accounts are taken and the sum due is ascertained, that sum while yet it remained unascertained was a debt within the Act. In *Doraisami Padayachi v. Vaithilinga Padayachi* (1916) 32 M.L.J. 422 : ILR 40 Mad. 31 (F.B.), a promise to pay the amount which may be found due by an arbitrator on the taking of accounts

between the parties was held not to amount to a promise to pay a debt within the meaning of Section 25 of the Contract Act, the amount not being a liquidated sum. These decisions, whatever their value may be in the construction of statutes which have employed the English legal terminology, have no bearing on the meaning to be given to the expression in a different context, in a different language and for a principle of law altogether alien to the English system. The decision in *Thirunavukarasu Chetty v. Muthu Krishnan* (1931) M.W.N. 467 is, however, directly in point, and is not to be distinguished in this way though it was sought to distinguish it from the present case on the facts. The mortgage in that case was given by one partner to the other in a running partnership for the amount due on an investigation of the accounts necessitated by the bad faith of the mortgagor. The learned judges who decided the case held that until the settlement of the partnership account as such was arrived at, the relationship of creditor and debtor did not exist between the parties, and there could not be said to have been any debt existing antecedently to the mortgage. With respect, we find ourselves unable to accept this dictum as a correct statement of the Hindu law on the point. Their attention does not appear to have been called to the meaning of the word *rina* as explained in the cases cited above, nor was the rule of the Hindu law on this point put specifically before them. We therefore feel that we are at liberty to come to an independent conclusion for ourselves on a consideration of the relevant material which we may observe, had not been placed before them, and we think that our interpretation is more consistent with the texts and the principles of the Hindu Law.

16. A word about the distinction that was sought to be made on behalf of the respondent. It was urged that whether or not the liability of some partners to the other or others in an undissolved partnership is a debt, the moment a dissolution takes place there arises in law a debt properly so called, as there could be no more fluctuation and uncertainty about the rights of partners, as by reason of the dissolution all further transactions necessarily stop. Reliance was placed on Section 43 of the English Partnership Act, 1890, which runs as follows:

Subject to any agreement between the partners, the amount due from surviving or continuing partner or partners to an outgoing partner or the

representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

17. It was argued that this statutory provision is merely a declaration of the common law on the point, and hence in the case on hand, unlike the

case referred to above, the partnership became dissolved on the death of the plaintiff's father, an event which took place an appreciable time

before the mortgage. We may observe that no such provision is found in the Indian Act and even according to English Law, it would seem that

partners stand in a fiduciary relation to each other (Lewin on Trusts, 13th Edition, page 253), whether or not they are trustees in the full and proper

sense of the word. See Knox v. Gye (1872) L.R. 5 H.L. 656 per Lord Westbury. Cf. observations of Lord Hatherley, page 678. See also

Section 29 of the English Partnership Act, 1890; Vyse v. Foster (1874) L.R. 7 H.L. 318. Out of this relation arises in favour of the representative

of a deceased partner not necessarily a debt, but a right which consists in having an account of the property, of its collection and application, and

on receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership. The representative of a deceased

partner has no specific interest in or claim upon any particular part of the partnership estate. The whole property therein accrues to the surviving

partner. Whether the effect of Section 43 of the English Act is anything more than the putting to an end of all difficulties in the way of the

application of the rule of limitation to such a cause of action, it is not easy to determine. It is however not necessary to pursue the matter, as in our

view there was in this case an antecedent debt according to Hindu Law, and the mortgage was executed to discharge it.

18. The appeal accordingly fails and is dismissed with costs subject to the decision of the lower Court on the petition presented by the appellants

under Madras Act IV of 1938, which will be sent to the lower Court for disposal. The court-fee on the memorandum of appeal must be paid by

the appellants.

19. In the connected C.M.A. No. 312 of 1935, it is stated that in view of the dismissal of the main appeal no orders are necessary. It is also

accordingly dismissed, but without costs.