
(1990) 03 KL CK 0046
In the High Court Of Kerala
Case No : A.S. No. 65 of 1983

Satheesan and another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 26-03-1990

Acts Referred:

Constitution of India, 1950 — Article 19(6), 37, 47
Contract Act, 1872 — Section 23

Citation : (1990) 2 KLJ 596

Hon'ble Judges : Vargese Kalliath, J

Bench : Single Bench

Advocate : P.N.K. Achan and P.N. Raveendran, for the Appellant;

Judgement

Vargese Kalliath, J.—This appeal raises a novel and interesting question. It concerns the application of the theory of pious obligation in relation to an abkari debt. Defendants 1 and 2 appeal. Plaintiff is State of Kerala represented by the District Collector, Palghat. The State sought a decree to recover from the 4th defendant personally also by the sale of the properties of defendants 1 to 3 an amount of Rs. 46,816.19 being the abkari arrears due to the Government from the 4th defendant. These are the facts.

2. 4th defendant had bid in auction the right to run Toddy Shop No. 31 of Palghat Range for Rs. 42,000/-. He defaulted payment of abkari dues. Plaintiff demanded payment, but the 4th defendant did not pay the dues and so, revenue recovery proceedings were initiated and the properties allotted to the share of the 4th defendant as per the partition decree in O.S. 104/70 on the file of the Sub Court, Palghat were sold and an amount of Rs. 2,050/- was recovered.

3. State contended that the debt was incurred by the 4th defendant -father of defendants 1 to 3 and the properties allotted to defendants 1 to 3 are also liable for the debt of their father. The properties are ancestral properties and so, the plaintiff can proceed against those properties for the debt incurred by the father applying the theory of pious obligation.

The defence.

4. The main contention raised by the defendants-appellants herein is that their share in the family are not liable for the debt incurred by the father. Considering the nature of the debt, though the debt is incurred by the father, the properties of defendants 1 to 3 cannot be amerced invoking the theory of pious obligation. The debt is an avyavaharika debt, to which pious obligation theory does not apply at all. So, it was contended that the properties of the defendants are not liable for the debt of the father and no decree can be passed against defendants 1 to 3.

Approach of the court below;

5. The court below raised several issues. On the basis of the contentions raised and the evidence adduced by the parties, the court considered those issues and decreed the suit. In decreeing the suit the court below found that the debt incurred by the father - 4th defendant - is not an Avyavaharika debt and as such for the debt of the 4th defendant, the ancestral properties of defendants 1 to 3 are liable. The court below observed that the business may be connected with toddy and liquor but that does not mean that it is illegal or immoral. Even D.W. 1 admits that now-a-days honourable persons have taken to that business. On a consideration of the facts and circumstances of this case, I do not find anything to uphold the contention of the defendants that the debt involved in this case is either immoral or illegal. That being so, a duty is cast upon the sons under the principles of pious obligations to discharge the same.

The intellectual inquiry gravitated by the appellants:

6. Counsel for the appellants submitted before me that the court below did not properly comprehend the principle of Hindu Law which mandated a pious obligation on the part of the sons to discharge the debt of the father. Counsel wanted me to examine this question in detail. He persuaded me to make an investigation on this aspect of the question considering the background of the attitude and approach as reflected in the fundamental law of this country, The Constitution of India. He pointed out Colebrooke's translation of "Avyavaharika debt" "a debt for a cause repugnant to good morals" has been treated as making the nearest approach to what the word meant in Mitakshara on the Yajnavalkya-smrithi, the basic text on the subject and told me, naturally the concept-"what is morally repugnant" changes with the times order of the day and march of events. In view of the declared sentiments of the founding fathers expressed in the constitution in regard to prohibition, he says that the question requires a deeper consideration. Considering the exhaustive and able arguments advanced by counsel on both sides, I feel that I am bound to examine the matter in extenso.

The lineament of the liability ?

7. Certainly, the liability of the sons to discharge the debts of their father

(personal debts) is generated from an obligation enjoined by religion and piety which found recognition in Mitakshara Law where the debts incurred by the father are not tainted with immorality. There is no doubt that if the theory of pious obligation is applicable the sons are bound to discharge the debts of the father, whether the father is alive or dead. On this aspect of the matter, the decision of the Supreme Court reported in Venkatesh Dhonddev Deshpande Vs. Sou. Kusum Dattatraya Kulkarni and Others, throws clear light :

Where father is the Karta of a joint Hindu family and the debts are contracted by the father in his capacity as manager and head of the family for family purposes, the sons as members of the joint family are bound to pay the debts to the extent of their interest in the coparcenary property. Further, where the sons are joint with their father and the debts have been contracted by the father for his own personal benefit, the sons are liable to pay the debts provided they were not incurred for illegal or immoral purposes. This liability arises from an obligation of religion and piety which is placed upon the sons under the Mitakshara law to discharge the father's debts, where the debts are not tainted with immorality. This liability of the sons to pay the father's debts exists whether the father be alive or dead. A further requirement is that for an effective partition of a Mitakshara joint Hindu family a provision for the joint family debts should be made. In order to determine what property is available for partition, provision must first be made for joint family debts which are payable out of the joint family property, personal debts of the father not tainted with immorality, maintenance of dependant female members, and of disqualified heirs, and for the marriage expenses of unmarried daughter. This must be so because partition is of joint family property and if joint family debts are repaid before the partition only the residue would be available for partition. Therefore, if partition is effected before paying the debts, provision to pay the debts should be made so as to determine the residue available for partition.

8. In this case, from the facts it is clear that admittedly, the debt is a pre-partitioned debt and no provision is made for the discharge of the same, in the partition. It is also in evidence that defendants 1 to 3 are in possession of ancestral properties. So, defendants 1 to 3 can escape the liability of their father's debt being fastened to the ancestral properties in their hands only if defendants prove a case that the debt incurred by their father is an Avyavaharika debt.

Multifaceted questions in re. Avyavaharika debt:

9. What is the concept of Avyavaharika debt. This leads to the multifaceted questions-The scope, extent and width of the theory of pious obligation-its origin and source. What debts will come within that circle of Avyavaharika debt - I feel that it is the duty of the court to decide the radius of that circle on the basis of Sastras and Smritis and the textual exposition of the concept, the precedents on the question and the mores of the time and the propriety and dictates of the society, The question is whether an abkari debt is a debt which will come under

that circle of debt termed as Avyavaharika debt by Hindu Smritis and sastras. There are expositions clear, at the same time, difficult to apply on facts, on this question are available in the text books. Precedents are also not wanting. Nature and source:

10. I shall begin my investigation on the nature and source of the obligation known to Hindu law as pious obligation of the sons to discharge the liability of their father. Is it merely because of the sanction of law or is it based on good conduct and fairness or is it based on Disraeli's "truth in action" or Cicero's right reason applied to command and prohibition or is it on any other higher principles in Hindu Law.

11. Certainly, Hindu Law postulates three sources of liability. The liability of a person to pay back the loan taken by him generates preeminently from the moral obligation and it takes precedents over legal obligations. When it is moral obligation, it is intimately linked with that religious duty of discharging the debtor from the sin of his debts. The second source of liability is ethical or moral duty of paying a debt contracted by one whose assets have passed into the possession of another. Third is the legal duty of paying a debt contracted by one person. It is possible to have cases in which more than one of these grounds of liability are co-existent; but, under the Hindu Law there cannot be any dispute that one is sufficient. Hindu Law mandates that the first ground of liability arises only in the case of a debtor and his own sons and grandsons. The obligation of a son or a grandson to re-pay the debt of his father or grandfather is not merely a legal obligation. Its non-payment is a sin. Exponents of Hindu Law say the consequences of non-payment would follow the debtor into the next world. Brihaspati says: "He who, having received a sum lent or the like, does not repay it to the owner, will be born hereafter in his creditor's house, a slave, a servant, a woman, or a quadruped".

12. From the above quote, it would appear strange and shocking to know how a woman is treated in the ancient society. She is bracketed with a slave and a quadruped, but it is comfortable to note that the Vedas-Rig Veda, Atharv Veda, Yaju Veda-contain references which would tell us that the status of a woman was not the status of a slave or a quadruped. Several references from Vedas can be quoted. In Atharv Veda, XIV. 1.43-44, 11.36.3), it is said that woman is the light and life of both her families, that of her parents and that of her husband; in the home of her father-in-law she is a queen, she occupied a position equal to that of her husband, brother-in-law, mother-in-law and father-in-law. In Rig Veda, 1.82.5; 11.53.6, it is seen stated that even in war, women used to remain with their men on the field.

13. The son has an obligation to discharge the debt of his father, independent of receiving any assets from the father. It is his religious duty to relieve his father from the evil consequences, which Brihaspati has enumerated. A man with an undischarged debt is considered as a man who has committed sin and it was enjoined by the Sastras that the son, whether he possesses any joint family

property or not, should extricate the father from the after-death tribulations consequent thereon by paying off the father's debt, if the same was not tainted by illegality or immorality. (Vide Narada, iii. 4, 5 and 6).

14. In Mulla's Principles of Hindu Law, this aspect is highlighted by saying that the liability to pay the debts contracted by the father, though for his own benefit, arises from an obligation of religion and piety, which is placed upon the sons under the Mitakshara Law to discharge the father's debts, where the debts are not tainted with immorality. See Chockalingam v. Muthukaruppan (1938) Mad. 1019, Lakshminarasayya v. Papayya (55) A.P. 97. It is also to be noted that the fact that the father was not the kartha or manager of the joint family or that the family consists of other co-parcener, does not affect the liability of the sons in no way. It exists irrespective of these facts. See Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, .

15. In the Introduction to Modern Hindu Law, Derrett finds that the source of pious obligation is nothing but a necessary corollary to the Mitakshara birth right. The Supreme Court has expressed the obligation as follows:-

The basis of the doctrine is spiritual and its sole object is to confer spiritual benefit on the father. It is not intended in any sense for the benefit of the creditor.

(Vide Lohar Amrit Lal Nagji Vs. Doshi Jayantilal Jethalal and Others,).

In the case at hand, the observation made by the Supreme Court that it is not intended in any sense for the benefit of the creditor is significant.

16. In the celebrated decision, Brij Narain v. Mangala Prasad (A.I.R. 1924 P.C. 50), the Privy Council has laid down certain propositions. I shall quote what Lord Dunedin has said, which has now become classical.

(1) The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but

(2) If he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate,

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached,

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead.

17. Yajnavalkya says he who has received the estate or the wife of the deceased should be made to pay his debts or failing either, the son who has not received an inheritance. In the case of a sonless deceased, those who take the heritage

must be made to pay. Of course, there is a little difference in the matter of the obligations resting upon sons, grandsons and great grandsons. The son was bound to discharge the ancestral debt as his own. He has to discharge the principal debt with interest. This is irrespective of the fact whether he received any assets or not from the ancestor. The grandson has to discharge the debt without interest and the great grandson's liability arose only if he received any assets from the ancestor. See *Masitullah v. Damodar* (1926) 53 I.A. 204 and *Lakshmanaswami v. Raghavacharyulu* (I.L.R. (1943) Mad. 717).

18. This obligation finds its source from the texts of Narada. Narada says: "The grandsons shall pay the debt of their grandfather, which having been legitimately inherited by the sons has not been paid by them. The obligation ceased with the fourth descendant". "Fathers wish to have sons on their own account, thinking in their minds, "He will release me from all obligations towards superior and inferior beings". Certainly the duty of relieving the debtor ancestor from the evil consequences of dying without discharging the debt falls on the male descendants to the second generation. It is clear that the liability to pay the debt arises from the moral and religious obligation to rescue him from the penalties arising from non-payment of his debts. The obligation is purely religious. Being a religious duty transformed into a legal obligation, naturally the character of the debt should be examined from the stand point of justice and morality. Mayne on Hindu Law has stated the general rule that the son is liable to pay the debts of the father except when they are of such a character as to fall within one or other of the exceptions recognised by the ancient Smritis. The Smritis referred are:

Manu, VIII, 158-164; Yajn. 11, 47, 53, 54; Brih XI, 39, 47-49, 51; Usanas apud Mit on Yajn, 11, 47: Gaut XII 41; Vyasa apud Jagannatha, 1, 5, 203 (Dig 1, 211); Katyayana apud Jagannatha, Dig 1, 5, 196, 197 (Dig 1, 207); Vas XVI, 31; Vishnu, VI, 41, 27 39.

The exceptions classified are:-

1. Debts due for spirituous liquor;
2. debts due for lust;
3. debts due for gambling;
4. unpaid fines;
5. unpaid tolls;
6. debts due for anything idly promised or promises without consideration or anything promised under the influence of wrath;
7. Suretyship debts due as surety for appearance, or for confidence or honesty of another;
8. commercial debts; and
9. debts that are not vyavaharika.

19. Colebrooke's Digest tells us that the exceptions are based upon certain texts. Brihaspati says, "The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or of wrath; or sums for which he is a surety, or a fine, or a toll, or the balance of either". There are other similar texts- vide Colebrooke, "Digest", Vol. i. pp. 247, 300, 305, 307, 311; "Narad Smriti", chap. iii. para 11.

20. It is significant to note that the son need not pay a fine or the balance of a fine, a toll or the balance of it, or any debt of the father which is avyavaharika. Debts that are not vyavaharika or avyavaharika form a general or miscellaneous class but debts due for spirituous liquor form a named exception. This aspect is important and significant in the enquiry I am bound to make in this case.

21. In AIR 1943 142 (Privy Council) , the Judicial Committee of the Privy Council speaking through Sir Madhavan Nair, said:-

The duty cast upon the son being religious or moral, the character of the debt should be examined from the standpoint of justice and morality. The 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 father. 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. The rule is not rigid but has to be applied with reference to the circumstances of each case. When a particular debt is called into question, it will be the principles mentioned above, which the duty of the Courts to examine its nature in the light of are not exhaustive but only basic, and to see whether in the circumstances it is of the kind which will give exemption to the son from the liability of paying it, on the ground that it is repugnant to morals i.e. avyavaharika.

(emphasis added)

22. There are so many reported cases of High Courts in India wherein conflicting views are seen expressed in regard to the exact scope and content of the term "avyavaharika debt". As I have already referred to the fact that Colebrook has translated the word Avyavaharika debts as "debts" for a cause repugnant to good morals". Sir Dinshaw Mulla in his Hindu Law accepts Colebrook's translation This term has been the subject of interpretation in various judgments by courts in India, but the decisions are not at all uniform.

23. In Girdharee Lall v. Kantoo Lal (I.I.A. 321), Sir Barnes Peacock quotes the following passage from Hanuman Persaud's case (6 M.I.A. 393) :-

Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate would still be an act of pious duty on the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt

and not to the nature of the estate...

It is interesting to note what Sir. Barnes Peacock has said :

It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it...

24. It is significant to note that courts have always got a duty when a particular debt is disputed as not a vyavaharika debt to examine its nature to determine whether there is a moral obligation on the part of the son to discharge that debt. It has to be remembered that the rule relating to this matter is not rigid and that it has to be applied with reference to the circumstance of each case.

25. In considering the true interpretation of an avyavaharika debt, basing on Colebrook's translation, viz., debt incurred for a cause repugnant to good morals, left us examine whether a debt payable by a father on account of a breach of trust is a debt which can be classified as an avyavaharika debt. In *Venugopala Naidu v. Ramanadhan Chetty* (1914) 37 Mad. 458, the father was found accountable for certain sums and the sons were held liable on the ground of general principles of morality. In holding so, the Madras High Court relied on *Natesayyan v. Ponnusami* (1893) 16 Mad. 99. The facts of this case are these:

26. The defendant's father collected sums of money, on account of plaintiff's family, but neither paid them nor accounted for them. The sons were held liable, although the learned Judges expressed the view that the transaction was a dishonest one on the defendant's father's part. In both these cases, one which comes under a trust and the other a dishonest act of not paying amounts collected by the father on account of plaintiff's family, the reason for holding that the son has got a pious obligation is that it is a sacred obligation to restore, to those lawfully entitled, the money unlawfully retained. It is observed by the learned Judges thus:-

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.

27. We have to examine whether the approach made by the learned Judges in the matter of the obligation of the son to discharge a debt of the father on the principle that it was the duty of the father to discharge the debt is correct or not. I have got my own serious doubts about the correctness of that approach made by the learned Judges in the light of the principles relating to avyavaharika debt under Hindu Law. Every debt that is justly due is not necessarily a debt not tainted with illegality or immorality within the meaning of the term avyavaharika debt. It is clearly stated that debts due for spirituous liquors by the father is not a debt, which has to be discharged by the son on the principle of pious

obligation. If the father has purchased spirituous liquors from a shop, certainly the shop owner is entitled to the price of it and" it is a debt justly due from the father. Perhaps the father may be a teetotaler and he might have purchased it for the purpose of entertaining his guests. Perhaps, he might have purchased it for presenting it to some persons as a reward for some services rendered to him or to his family, for example, if a father got the good services of a doctor, when his son or daughter was ailing and he wanted to reward him for his services and the doctor was a person interested in good spirituous liquors and that the father had purchased a good brand of whisky and presented it to the doctor, but he failed to pay the price of the liquor to the shop owner, can it be said that the debt that the father owes to the shop owner is not a just debt? The innocent shop owner has a just legitimacy to realise the amount from the father. Certainly, the shop owner has got every entitlement to get the price of the liquor he has supplied, to the "father" but it will be difficult to hold that the son has got an obligation to discharge that debt under the pious obligation, since the debt due for spirituous liquors is a class of debt which will fall within the enumerated exceptions recognised by ancient Smritis. So, it is not possible to lay down a rule that every debt that is justly due is a debt not tainted with illegality or immorality for the purpose of determining the nature of that debt as one which would come within the exception or not.

28. I may refer to another hypothetical case. If a father steals money, certainly, the father is obliged to return it. It is also in the nature of a trust obligation. It is incumbent upon the sons to pay it back under the ordinary law if the sons have inherited father's property. But the question is whether the son has got a pious obligation to discharge that debt. In *Ramasubratnania v. Sivakami Ammal* (A.I.R. 1925 Mad. 842) a Division Bench consisting of Venkatasubba Rao and Madhavan Nair, J.J. said in such circumstances, "the son is under no such obligation"-"such obligation" - an obligation under the pious obligation theory. There the question is Did the father contract the debt for an immoral purpose and does not morality of the son and the obligation of the son towards his father demand that the debt should be paid back under the pious obligation theory? As I understand, with great respect, I would say there is a possibility of committing a mistake from a confusion of standpoint. It is difficult to find a legitimately due debt as not a just debt. Even in the case where the father goes and consumes spirituous liquors from a Bar and if he declines to pay the price of it, the debt he has contracted is a debt which is legally enforceable and no court will decline to grant a decree if the shop owner files a suit against the father? In the ordinary sense it is a legal debt, as it is an enforceable debt and as a consequence, it is a just debt. But, the son has no obligation to discharge such a debt under the pious obligation theory because the Hindu Law in dealing with pious obligation of the son, does not look at the question from that point of view, I have just adverted to. It is interesting to note that in the following cases, the son was not held liable to satisfy a creditor under the pious obligation theory. In *Ratan Lal v. Birjbhukan Saran* (1921) 61 I.C. 774) it was held that the son is not liable to satisfy a decree

obtained against the father, for damages for retracting from a bid at an auction. It cannot be said that the debt is an immoral debt under the ordinary law. In *Mahabir Prasad v. Sri Narayan* (1918) 3 Pat. L.J. 396, the son was found not liable for money due on a contract of indemnity by the father in respect of a property sold. It has to be noted that in the earlier case, in fact a decree was obtained by the creditor. So, naturally, it should be a legal debt. In this case, the father contracted the debt under an indemnity. Naturally, the person has sold the property on the guarantee that if any loss is occasioned to him, it will be indemnified by the father. There is absolutely nothing immoral about it. Nevertheless, the court held that the son has no pious obligation to discharge such a debt.

29. In *Rama Iyengar v. Secretary of State* (1909) 20 M.L.J. 89, the court fee payable to the Government by a father who brought a suit in forma pauperis was held to be an immoral debt. In *Sunder Lal Vs. Raghunandan Prasad and Others*, , the son was held not liable for damages, awarded against the father for malicious prosecution.

30. There are cases which have taken a totally different view. In *Raghunandan Prasad v. Chem Ram* (1915) 27 I.C. 895 it was held that it was the pious duty of a son to pay the money due under an indemnity clause in a sale deed executed by the father. In *Hari Singh v. Sant Prasad Singh* (1916) 32 I.C. 969, where one of the two purchasers wrongly withdraw the whole of the purchase money and was directed by a decree of the court to repay the other purchaser's share, the son was held liable on the ground that the act of the father was not immoral or criminal. In *Sumer Singh v. Liladhar* (1911) 33 All 472, it was held that the money borrowed by the father to defend the suit for defamation is a debt and the son is liable to pay. It is not clear whether the father was eventually found guilty of defamation or not.

31. From the conflict of views now I have adverted to, I feel that one thing is certain, there is no rigid or fixed rule. Even if there is a rule, it is necessarily elastic. Every test is open to criticism. Considering the nature of the obligation, it is incapable of having a straight jacketed application or precise definition.

32. One other aspect to be considered is the question whether the son has really been benefitted by the father's act or the debt contracted by the father which was sought to be enforced against the son under the pious" obligation theory. I feel that if the son is benefitted by the debt incurred by the father, it would be his duty to pay back the debt. This duty is referable to the pious obligation of the son. But, it is to be noted that this utterly ethical consideration which prompted me to say that it is a duty which can legitimately be characterised as the pious obligation of the son is not considered as a factor at all in the determination of the question of pious obligation. I say so, since Mukherjee J. in a very exhaustive decision on pious obligation theory in *Chhakauri Mahton v. Ganga Prasad* (39 Cal. 862) observed that the liability of the son depends upon the nature of the debt and the test of benefit is immaterial. Certainly, there is good reason for the view

taken by Mukherjee J. By an act of theft, the father was able to add assets to the estate and on the death of the father, the son who gets the estate is benefitted. But it is difficult to hold that the son is liable to discharge the debt under the pious obligation theory. I feel that I should refer to 39 Cal. 862 before I consider the question whether the pious obligation theory is applicable on the facts of the case before me.

33. Mukherjee, J. considered the question of the obligation of a son to discharge the debt of his father under a decree for damages on account of the injury done to the plaintiff's crop by the obstruction of a channel through which he was entitled to irrigate his lands. Mukherjee, J. held that the son has pious obligation to discharge the debt, where on facts "it could not be said that the decree obtained was due to an act of the judgment debtor, which was a wanton interference with the rights of the decree holder and that the liability imposed thereby on the judgment debtor was an illegal or immoral debt". There is no case proved that by doing the abkari contract defendants 1 to 3 have been benefitted.

34. In Pannalal and Another Vs. Mst. Naraini and Others, the Supreme Court observed that "the fathers's power of alienating the family property for payment of his just debts may be one of the consequences of the pious obligation when the Hindu Law imposed upon the sons; or it may be one of the means of enforcing it, but it is certainly not the measure of the entire obligation. In Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, , the Supreme Court has referred to Pannalal and Another Vs. Mst. Naraini and Others, . Here, the debt sought to be recovered by casting liability on the properties of defendants 1 to 3 is arrears of abkari dues - a debt contracted by the father of defendants 1 to 3, the 4th defendant. I shall investigate the question whether this debt of 4th defendant is a debt incurred for a cause repugnant to good morals.

Variable trends in the development of morals:

35. In Gherulal Parakh Vs. Mahadeodas Maiya and Others, in dealing with a question of public policy, an argument was advanced to interpret the provision - section 23 of the Contract Act - in reimmorality by drawing an analogy in Hindu Law relating to doctrine of pious obligation of sons to discharge their father's debt. It was contended that what the Hindu Law considers to be immoral in that context may appropriately be applied to case u/s 23 of the Contract Act. The Supreme Court did not approve the argument. It was said that section 23 of the Contract Act is inspired by the common Law of England and it will be more useful to refer to the English Law than to the Hindu Law texts dealing with a different matter. But, considering the import of the word "immoral", the Supreme Court observed thus:-

The word "immoral" is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standards norms of life. It may

also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilization of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose.

(emphasis added)

36. What actions are right or wrong, good or evil? At different times and places, man's behaviour has been ruled by various answers to this query, and these are the province of ethics. While philosophical ethics study questions of validity, comparative ethics examine the rules and ideals as in fact found at various times in different societies, and the part that they play in human affairs. When society advances, various types of social norm emerge; e.g.; legal, religious, moral and conventional. Certainly, the distinctions develop slowly, and in earlier phases they are not evident. Of course, there can be moral elements common to all known societies. Some elementary duties of doing and furthering the well being of others are insisted upon all societies. Telling the truth and keeping promises are widely recognised as duties though they are sometimes withheld from strangers. Mutual aid is widespread and generosity everywhere praised. The higher religions extend the duty of helping the needy and distressed beyond clan or country to strangers. Making charity a duty shows moral advance, though the link between almsgiving and sacrifice sometimes may distort deeper moral insight. "If almsgiving is the medicine of sin, it may become detached from charity; we may thus lose sight of deeper needs and ways of permanently relieving them." Modern society is gradually achieving revolutionary changes here; it accepts a duty not just to deal with ills as they arise, but to forestall them. Man is beginning to develop an international conscience, responding not only to the occasional cry of distress, but bending his efforts toward abolishing disease and poverty, ignorance and neglect, while helping those who are building up new societies.

37. Pride is condemned everywhere. Modesty is praised. Boastfulness and arrogance are widely condemned. Certain religions make pride not just a vice but a sin. It cannot be denied that there is variability in moral concepts. Variations due to difference in moral import of the same acts in different social situations and institutional framework are quite common. The exacting of payment for money on loan is usury at one level of economic development, but legitimate interest at another. A telling instance is the variability found in different classes of society in the matter of conjugal fidelity. The rules ensuring conjugal fidelity vary considerably. If we take proliferate people, it is a stringent duty for the wife, but not generally for the husband. Perhaps, there may be exceptions. In the ancient civilisations, the law generally required faithfulness from the wives only. The Roman jurists condemned adultery in the wife because of the danger of introducing strange children to the husband. Jewish law requires chastity from both parties. Christianity makes no distinction between husband and wife. Popular morals and the laws relating to divorce and separation show, however

that the standards are not the same for the two.

38. There can be variations in the code of morality from change of knowledge or belief regarding the nonmoral qualities acts and consequences. It can be illustrated by the present day moral attitude towards birth control. The attitude changes as we learn more about infant and maternal health, human heredity and the economic consequences of population policy. The writings of E.A. Westermarck and W.E.H. Lecky show countless variations in moral attitude are caused by differing religious and magical beliefs. Further, variations are due to different ways of meeting primary needs and due to different in moral insight. Finally we cannot ignore variations in morals due to relations between law and morals. Men make and remake laws as their notions change. In the same way, laws in turn may have a great influence in shaping, developing or perverting men's sense of justice. It is impossible to have precision in this matter. It is impossible to put your thumb and say here is a non-variable moral for all times to attempt such a precision on a matter which has got the character of variability on different reasons would certainly end in disaster. I stop it here.

Moral precepts of the Constitution:

39. Now I shall refer to the Directive Principles of State Policy (Part IV) of the Constitution. Article 47 strikes by its language a different note from the language used in the other articles in Part IV. It speaks of primary duties.

Duty of the State to raise the level of nutrition and the standard of living and to improve public health. The State shall regard the raising of level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

40. Before dealing with this article, it is profitable to consider the binding nature of the articles in Part IV or rather the legal force of this article. Dr. Ambedkar said:-

If it is said that the Directive Principles have no legal force... I am prepared to admit it. But I am not prepared to admit that they have no sort of binding force at all. Nor am I prepared to concede that they are useless because they have no binding force in law.....What great value these directive principles possess will be realised better when the forces of right contrive to capture power.

When it had been decided not to make directive principles justiciable, Sir B.N. Rau, who had an important role to play in the framing of our Constitution wrote an article in the Hindu in August, 1948 and defended the directive principles and said:

Many modern constitutions do contain moral precepts of this kind, nor can it be denied that they may have an educative value.

Certainly it is a right description of the directive principles when he said they are moral precepts, A very important question was posed, what would have happened, if the directive principles had not been enacted? What difference would have been made to the administration of our country if directive principles had not been included in our Constitution? Justice Hegde has given the following answers in his Rau Lectures, which has been referred to by Bhagwati, J. in *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, .

(a) Since the directive principles are fundamental and a duty is imposed on the State to implement them in making laws, (those) who are entrusted with certain duties and functions will fulfil them in good faith and according to the expectations of the community.

(b) Again Sir Ivor Jennings was not correct in thinking that by the provisions of Part IV, our founding fathers wanted to bind the future of this country by their own philosophy of life. The framers of the Constitution could not have been unaware of the changes that were taking place around them and the changes that were likely to place in the future. The programme envisaged in Part IV was for immediate implementation. The objectives intended to be achieved thereunder are those that were necessary to meet the immediate needs of the people.

(c) Unfortunately, an impression has gained ground in the organs of the State, not excluding the judiciary, that because the Directive Principles set out in Part IV are expressly made by Article 37 not enforceable by courts, these Directives are mere pious hopes not deserving immediate attention. I emphasise again that no part of the Constitution, is more important than Part IV; that part together with Part III embodies the philosophy of our Constitution. Part IV contains the ideals to be achieved and prescribes the manner in which those ideals are to be realised. To ignore Part IV is to ignore the sustenance provided for in the Constitution, the hopes held out to the Nation and the very ideals on which our Constitution is built up

. 41. Article 47 is the epitome of that great truth that living precedes living well or being precedes well being. Prohibition of the consumption of intoxicating drinks except for medicinal purposes is a moral precept enshrined in our Constitution. Health is undermined by consumption of intoxicating drinks and so, the State is directed to endeavour to bring, about prohibition of consumption of intoxicating drinks except for medicinal purposes. There is no gainsaying that the founding fathers included intoxicating drinks in Article 47 along with drugs which are injurious to health knowing that it will undermine the health of the people since alcohol is a narcotic (a depressant) and addiction to alcohol produces grave economic and social consequences. Seervai has summarised the message which the directive principles contained in Article 47 addresses to the State in his book *Constitutional Law (Vol. II)* Page 1610.

So implement your primary duty as prescribed by Art. 47; whether other

directives help you in achieving the objective of Art. 47 should be pursued to the best of your capacity and power; but whatever directive hampers the objective in Art. 47 should be left alone, for the discretion to secure the well being of the people through these directives is left to you.

Field J. in *Crowley v. Christensen* (34 Lew. Ed. 620 at 623) gives a clear exposition of the injury that is caused to the public health on account of consumption of intoxicating drinks:

There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But as it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with and dependant upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore, been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a licence be exacted from the keeper of saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality and not of federal law. The police power of the State is fully competent to regulate the business - to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licences for that purpose. It is a matter of legislative will only.

42. The above quote has been approved by the Supreme Court in *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, , A Constitutional Bench of the Supreme Court held that to determine whether the restriction imposed in regard to trade is reasonable or not within the meaning of Article 19(6) of the Constitution, on the right given under cl. 19 (1) (g), it is necessary to have regard to the nature of the business and the conditions prevailing in a particular trade. It was held that the State has the

power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. It is very important to note that the restrictions imposed in regard to a trade in intoxicating drinks was justified among other reasons that the State has the power to prohibit the trades which are illegal or immoral, thereby the Supreme Court indicated that the nature of trade in intoxicating liquor is "illegal or immoral or injurious to the health and welfare of the public". Of course, Entry 8 Schedule VII of the State List gives power to the State to legislate laws restricting or regulating the sale of intoxicating liquors. By the Abkari Act, the full control of the trade in intoxicating liquor included in the Act is taken by the State. But that will not change the fundamental nature of the trade, viz., illegal immoral or injurious to the health and welfare of the public. A permission or a licence under the Abkari Act naturally saves the person from being proceeded against under criminal law.

43. In 1963 KLT 183 (Kurian v. Government of Kerala) Madhavan Nair, J. had occasion to consider the nature of this trade when it was being done under a licence. His Lordship was considering the question u/s 23 of the Contract Act. An agreement by an abkari contractor to sell a fixed quantity of liquor a month and in default to pay damages was found to be unlawful. In considering this question u/s 23 of the Contract Act, Madhavan Nair, J. said:

Section 23 enacts that the object of an agreement is unlawful if the Court regards it as immoral or opposed to public policy...

Further, His Lordship said, the words "immoral" and "public policy" denote two types of conduct affecting the welfare and depending largely on the current sentiments and developments of the society. Therefore; the Legislature has left the expressions "immoral" and "public policy" without particular definition to be determined by the courts of the day. The expressions "immoral" and "opposed to public policy" depend upon the mores of the day and the peculiar circumstances under which the question is considered. In that case, the object of the agreement was to compel the plaintiff to sell a minimum quantity of liquor a month at his shop. Plaintiff is bound under the agreement to compel his customers to drink at least the fixed minimum quantity of liquor a month or if that could not be done, to attract more and more customers so as to keep the minimum distribution of the fixed quantity of liquor a month at the shop. It was found that the ultimate purpose of the agreement which forms the object of the agreement is to spread the liquor habit which has to be stated as both immoral and opposed to public policy. The reasoning given by the court is that the agreement guaranteeing a sale of a fixed quantity of liquor every month is unlawful and the levy of damages by the State for its breach is illegal. The learned Judge has quoted in the judgment the observations of Field J. in *Crowley v. Christemen*. The learned Judge has stated the pernicious effects of propagating liquor habits on the public morals and finally held that it offends the public policy. It is pertinent to quote the sentiments of discontent expressed by the learned Judge: "I could not escape feeling wonderment as I listened to the

arguments in support of the agreement in Ext. A1 and of the action taken by the Government in enforcement thereof coming from the learned Government Pleader representing a Government wedded to a policy of absolute prohibition both its own laws and by the Constitution".

44. I have stated that the theory of pious obligation does not admit the precise definition. It is just like public policy which is illusive, depending upon the current trends tone and tenor of the day. It is possible to draw a parallel in the matter of interpreting pious obligation with public policy. Courts have often quoted Mr. Justice Burrough's metaphor about public policy that public policy is an unruly horse. It is said that some judges thought that, it is more like a tiger and refused to mount it at all. Public policy has been defined by Winfield as "a principle of judicial legislation or interpretation founded on the current needs of the community". Of course, in the matter of public policy, there is considerable support in the judicial dicta that courts cannot create new heads of public policy. (See Gherulal Parakh Vs. Mahadeodas Maiya and Others,). But there is also no lack of judicial authority for the view that the categories of heads of public policy are not closed and that there remains a broad field within which courts can apply a variable notion of policy as a principle of judicial legislation of interpretation founded on the current needs of the community. (See Dennis Lloyd, Public Policy (1953) pp. 112-113).

45. In *Fender v. St. John Mildmay* (1938) AC 1 adverting to the observation of Lord Halsbury in 1902 AC 484 (*Janson v. Driefentein Consolidated Mines Ltd*). Lord Atkin said:

Lord Halsbury indeed appeared to decide that the categories of public policy are closed, and that principle could not be invoked anew unless the case could be brought within some principle of public policy already recognized by the law. I do not find, however, that this view received the express assent of the other members of the House; and it seems to me, with respect, too rigid. On the other hand, it fortifies the serious warning illustrated by the passages cited above that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.

Lord Thankerton summarised his view in the following terms:

In the first place, there can be little question as to the proper function of the Courts in questions of public policy. Their duty is to expound, and not to expand, such policy. That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances, where such circumstances are clearly within the scope of the policy. Such a case might well arise in the case of safety of the State, for instance. But no such case is suggested here. Further, the Courts must be watchful not to be influenced by their view of what the principle of public policy, or its limits, should be.

46. Like public policy, it is for the court to determine whether in a given case, the

theory of pious obligation can be applied or not. This happens, because, as I said earlier, the duty of the son to discharge the debt of his father under pious obligation is a duty, the genesis of which is religious sentiments and piety and avyavaharika debt is one repugnant to good morals. So, the question whether a person has got such an obligation taking into account the changing attitudes on the concepts of morality has to be trusted for interpretation to the Judges. Certainly, though the Judges have to be trusted to discharge this onerous function, they are interpreters of law and not exponents of the theory of pious obligation. There is no alternative in our system but to vest this power with the Judges. The intractable difficulty of discovering whether a debt is a debt incurred for a cause repugnant to good morals at any given time, certainly does not absolve the Judges from the duty of discovering it. I feel in conducting an enquiry, in this line, it is difficult to expect that the Judges are hide-bound by precedents. We are bound to look beyond the narrow field of past precedents though this may pose a different question as to which direction we must cast our gaze. Why not we cast our gaze on the moral precept enshrined in Part IV of the Constitution. The Judges are bound to base their direction on the opinions of men of world - here the opinions of men of world in regard to good morals - as distinguished from opinion's based on pure learning. Certainly in this exercise, they are not expected to consult their own personal standards predisposition or predilections, but those of the dominant opinion at a given time or what has been termed "customary morality". I am bound to consider the social consequence of a rule if any, propounded by the decision I am rendering in the light of the factual situation available in the case. It is difficult that men of world can be subpoenaed as expert witnesses in the trial of every action raising a question of pious obligation and for the determination whether the debt has been incurred for a cause repugnant to good morals. What is repugnant to morals is a matter on which there will be difference of opinion and it is not open to judges to make a sort of referendum or hear evidence or conduct an enquiry as to the prevailing moral concept. Judges are not expected to make an extra judicial enquiry because it is wholly outside the tradition of court where the tendency is to "trust the judge to be a typical representative of his day and generation." Our system and our law relies, on the implied insight of the judge on matters of controversy. It is the judges themselves assisted by the bar, who here represent the highest common factor of public sentiment and intelligence. See Percy H. Winfield, "Public Policy in English Common Law 42 Harvard Law Rev. 76 and also Dennis Lloyd Public Policy (1953) pp. 124.25. No one can assume that there is an assurance that judges will interpret the mores of their day more wisely and truly than other men. But this is totally a different point. The point is rather that this power, to say what is repugnant to good morals and in that context what is good morals-must be lodged somewhere and under our Constitution and laws, for the time being, it has been lodged in the judges and if they have to fulfil their function as judges, it could hardly be lodged elsewhere (See Cardozo - The nature of Judicial Process-pp. 135-136).

47. I think for a debt incurred by a Hindu following the Mitakshara Law under an Abkari contract, the properties of his son's cannot be proceeded with and even against ancestral properties in the hands of the sons cannot be proceeded with. I may make it clear that this does not mean that the contractor is not liable for the debt incurred by him under the contract. In the result, I set aside the judgment and decree to the extent it allows the plaintiff to realise the amount decreed by the court below from the personal and ancestral properties of defendants 1 to 3. The 4th defendant died pending the appeal. Defendants 1 to 3 and the widow of 4th defendant were impleaded as the legal representative of the 4th defendant. I make it clear that the estate of the 4th defendant will be liable for the debt of the deceased 4th defendant.

Appeal is disposed of as above. No order as to costs.