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mentioned in the second paragraph of section 373. The plaintiff did not require leave to withdraw from the suit unless accompanied with liberty to bring a fresh suit, and, as the Subordinate Judge considered that he ought not to give that liberty, he ought simply to have dismissed the application. Now it is clear that he had no power to make the order he did as to costs unless plaintiff had withdrawn from the suit. But the plaintiff had not withdrawn from the suit. All he did was to apply to the Court for the permission to withdraw from the suit with liberty to bring a fresh suit. The Judge had no right to assume that the plaintiff had withdrawn from the suit when he refused to him the liberty which was the sole purpose of his application.

The rule accordingly will be made absolute with costs, and the order will be varied by substituting therefor an order in these terms: The application for permission to withdraw from the suit with liberty to bring a fresh suit for the subject matter of the suit is dismissed with costs.

The result will be that the case must be restored to the file.

Rule made absolute.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

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 February 3.

DURBAR KHACHAR SHRI ODHA ALA (ORIGINAL PLAINTIFF),
 APPELLANT, v. KHACHAR HARSUROGHAD (ORIGINAL DEFENDANT),
 RESPONDENT.*

Hindu Law—Debt—Son's liability to pay father's debts—Decree for damages resulting from a wrongful act committed by the father—Ancestral estate in the hands of the son not liable under the decree.

The plaintiff obtained a decree against the defendant's father for damages to the plaintiff's property caused by a dam erected by the latter which obstructed the passage of water thereto. On the latter's death the decree was sought to be enforced against his son with respect to the ancestral estate in the hands of the son.

* Second Appeal No. 415 of 1907.

Held, that the son was not liable under Hindu Law under the decree. His father's act in obstructing the passage of water to the decree-holder's lands may not have been illegal in the usual sense of the term, that is to say, it may not have been committed in contravention of any express provision of the law; but the result of the suit showed that it was wrongful, and for a liability so incurred the son could not be held answerable when the estate that had come to his hands had derived no benefit from the act.

Under Hindu Law, the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father; not for those attributable to his failings follies or caprices.

SECOND appeal from the decision of Chimanlal Lallubhai, First Class Subordinate Judge, which A. P., at Ahmedabad, reversing the order passed by C. H. Vakil, Subordinate Judge at Dhandhuka.

Proceedings in execution.

The plaintiff's father obtained a decree against the defendant's father in Suit No. 27 of 1878, for damages caused by the latter on account of the obstruction caused by him in carrying water from a certain well to the plaintiff's lands.

In execution of this decree, the lands belonging to the defendant's father were attached in 1888. The decree was then transferred to the Collector for execution. The Collector instead of selling to the lands, managed it and sent the net proceeds to the Court for payment to the plaintiff.

The defendant's father died in 1901. The plaintiff thereupon applied to have the name of the defendant (son of the judgment-debtor), placed on the record in place of that of his father. The defendant in answer to this contended that the decree being one for damages could not be executed against him.

The Subordinate Judge gave effect to the contention of the defendant and ordered the Darkhást to be dismissed. This decree was reversed on appeal; the learned Judge holding that the Darkhast should be restored to the file and the contentions of illegality and immorality raised by defendant should be decided on their merits.

On remand the Subordinate Judge held that the judgment-debt was not illegal or immoral and ordered execution to proceed against the defendant.

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On appeal the lower appellate Court held that the judgment debt was illegal, immoral and was not one for which the defendant as heir of his father was liable under the Hindu Law. He therefore ordered the *Darkhast* to be disposed of.

The plaintiff appealed to the High Court.

Scott (Advocate General) with *L. A. Shah*, for the appellant.

G. N. Thakore, for the respondent.

KNIGHT, J.—In 1878 a decree was obtained against the father of the present respondent. Certain *Talukdári* lands of his were placed under attachment, and execution was thereafter effected through the instrumentality of the Collector, who retained the management of the lands in his hands and paid the decree holder the profits accruing therefrom.

In 1901 the judgment-debtor died, the decree being still unsatisfied, and the estate passed to his son, the respondent, by survivorship. The decree-holder caused his name to be brought upon the record under section 234, Civil Procedure Code, as the legal representative of the judgment-debtor, and sought to proceed with the execution. But the respondent objected, *inter alia*, on the ground that the obligation embodied in the decree was one which did not bind him. This objection he was entitled to raise under section 244: see the similar case of *Umed Hathising v. Goman Bhaiji* ⁽¹⁾.

After delays arising from remands and other causes, the lower appellate Court eventually held that the objection was good, and ordered the *darkhast* to be dismissed. Against this order the decree-holder has now appealed.

The decree was obtained for damages to the decree-holder's property caused by a dam erected by the judgment-debtor, which obstructed the passage of water thereto. The learned Judge of the Appeal Court has described that act, in words of perhaps unnecessary strength, as "illegal, wrongful and malicious." Looking to the account of the act on which he bases these epithets, we may define it as no more or less than a civil wrong. It was one which, the learned Judge finds, did not confer any

(1) (1895) 20 Bom. 385.

benefit upon the ancestral estate (or was not proved to have conferred any benefit); and these we must accept as the findings of fact in the case.

Now the question is whether the ancestral estate in the hands of the son may be held to the satisfaction of a decree so obtained against the father. Some confusion has obscured the discussion of questions of this nature owing to the inaccurate description of the paternal debts which the Hindu Law does not expect a son to pay as those which are tainted by illegality or immorality. From debts so tainted the son is indeed exempt; but the maxims of Hindu Law demand a less restricted interpretation than the words suggest. The texts are:—

Vrihaspati:—"The sons may not be compelled to pay sums due by their father for spirituous liquors, for losses at play, for promises made without consideration, or under the influence of lust or anger, or sums for which he stood surety, or a fine or a toll, or the balance of either (of these)", (Ch. XI, 51).

Ushana:—"A fine, or the balance of a fine, likewise a bribe or a toll or the balance of it, are not to be paid by the son, neither shall he discharge improper debts." (*Mitashara* II, 48—see *Bhattacharya's Hindu Law* p. 247, Ed. 2).

The word translated *improper* in the concluding sentence of the latter text is *avyavahara*, which may perhaps be better rendered as *unusual*, or *not sanctioned by law or custom*. It is this word that has crept into our text books under the guise, or disguise, of *illegal* or *immoral*: and it will be seen that it really bears a wider significance. Put into simple English, the texts amount to this: that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices.

Applying these maxims to the case before us, we must conclude that the son is not liable under the decree. His father's act in obstructing the passage of water to the decree-holder's lands may not have been illegal in the usual sense of the term, that is to say, it may not have been committed in contravention of any

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express provision of the law ; but the result of the suit shows that it was wrongful, and for a liability so incurred the son cannot be held answerable when the estate that has come to his hands has derived no benefit from the act.

It has been further contended that the suit in which the decree was passed was one which in virtue of the provisions of Act XII of 1855 could have been maintained against the son, and that *a fortiori* the execution of the decree against him can be prosecuted. This however is erroneous ; for the act relates only to suit brought against the heirs of a deceased person for a wrong committed by the latter within the year preceding his death. As at the date at which respondent was brought upon the record many years had elapsed since the tort committed by the judgment-debtor, the decree-holder could not have derived, and cannot now derive, any advantage from the special provisions of this Act. Nor can we discern any force in the argument that the respondent is stopped from raising this objection by his acquiescence in the execution of the decree during the life-time of his father. The estate was then in his father's hands, and he was under no obligation to seek for a declaration that in the event of his father dying with the decree still unsatisfied execution could not proceed against himself.

For these reasons we must confirm the order of the lower appellate Court and dismiss the appeal with costs.

Decree confirmed.

R. R.