

(1937) 07 CAL CK 0001
In the Calcutta High Court

Baij Nath Prasad and Others

APPELLANT

Vs

Ram Gopal Lachhmi Narayan and Others

RESPONDENT

Date of Decision : 06-07-1937

Acts Referred:

Partnership Act, 1932 — Section 4

Citation : AIR 1939 Cal 92

Hon'ble Judges : Costello, Acting C.J.; McNair, J

Bench : Full Bench

Judgement

Costello, Ag.C.J.

1. This is an appeal against a judgment of Lort-Williams J., dated 9th April 1936, given in favour of the plaintiffs with costs against each and all the defendants but limited as regards the minor defendants to their share in the family assets. The suit was filed on 11th February 1935 for the recovery of the sum Rs. 31,983-5-0, being the balance of the amount said to be due and owing to the plaintiff in respect of loans made in the year 1934. There was no real dispute about the loans or the amount outstanding at the time the suit was brought. The pleadings in the case are not very explicit or even clearly drawn and they do not fully or satisfactorily set out the points in controversy between the parties. A number of issues were however raised and settled at the hearing and these are to be found at p. 39 of the paper book. The learned Judge dealt with the matter in his judgment upon the footing that it was only necessary to consider three of these issues, namely : Was the business, which had originally been a joint family business, being carried on by the defendants as a partnership business at the time when the loans were made? Were the loans taken in the ordinary course of business and for the benefit of the business so carried on? Did the defendants hold out the managers of that branch, or part of the business carried on under the firm name of Kishori Lal Mukundi Lal as accredited agents and managers of the business carried on by the defendants? The main question, if not indeed the only question, which the learned Judge had to decide at the trial, was whether all

or some only of the defendants were liable for the debt due to the plaintiffs.

2. The defendants were members of a joint Hindu trading family governed by the Mitakshara law. They are all descendants of a man named Lala Earn Dayal, who was the founder of a number of businesses carried on by and on behalf of the family in various parts of India. The head office was at Jhusi in the District of Allahabad. Lala Ram Dayal had two sons, the elder of whom Lala Madho Prasad died without issue. The other son Lala Dwarka Prasad had five sons, named Lala Harnam Das, Lala Mohan Lal, Lala Kishori Lal, Lala Kanhaya Lal and Lala Mukundi Lal, and each of these sons had sons and other descendants, who formed five branches or parts of the joint family, which were referred to both in the trial Court and at the hearing of the appeal as groups I, II, III, IV and V. They are set out in detail in the genealogical table annexed to the plaint (as Ex. A). It is not disputed that originally each group carried on and was responsible for a part of the joint family business on behalf of and in the interest of all the members of the joint family; each of the parts consisted of a single business or a number of associated businesses operated in various places or districts in India and under a variety of firm names. The descendants of Lala Kishori Lal, who died on 16th October 1924, are group III and they carried on a part (or section) of the joint family business at Calcutta and Jhusi (Allahabad). Group IV consisting of the descendants of Lala Kanhaya Lal, who died in 1929, similarly carried on another part of the joint family business under the firm name of Mohan Lal Kanhaya Lal at Madras and Naini (Allahabad) and under another firm name (Beni Prasad Kedar Nath) at Bombay. Group IV contended however that the business at Bombay was not at the time of the suit, and never had been, any part of the joint family business. The plaintiffs' claim was not disputed by indeed it was actually supported by some of the members of group III and the whole of that group, including the members who are minors, contend that all the defendants are jointly liable for the debt. This was denied by the members of the other groups, but the "only serious defence was made by group IV, though counsel on behalf of groups I, II and V were allowed to address the Court at the hearing. It was admitted that all the businesses mentioned above (except that at Bombay) originally belonged to and were carried on by the various groups on behalf of the joint family. The position at the trial really was that group III was in effect in the same side as the plaintiffs, whereas the claim was resisted by the defendants who were members of groups I, II, IV and V on the ground that the joint family had ceased to exist as such prior to the time when the loans were made and that after the break up of the joint family no member or group of members of the former joint family had any right or authority to act for or on behalf of or to pledge the credit of any other members of groups.

3. The dividing line, if it may be so described, came into existence in the year 1926, in that there is no dispute that up to that time the family was joint and all the businesses were joint family business. The plaintiffs had had dealings with the firm of Kishori Lal Mukundi Lal, that is to say, with group 3, even as long ago as some years before 1920 (paper-book I, p. 58, Qs. 9-11). The primary matter,

which had to be considered at the trial, was a suit for partition instituted on 2nd January 1926, in the Court of the Subordinate Judge of Allahabad by Pratap Chand, a grandson of Madan Lal against Kanhaya Lal, his grandfather, and the only surviving representative of that generation, and others, i.e. the sons and descendants of Kanhaya Lal and his brothers. In that suit, on 20th April 1926, a joint written statement was put in on behalf of the members of groups III, IV and V, on 5th May 1926, a written statement was put in on behalf of Suraj Prasad of group II and on 14th May 1926, there was a written statement on behalf of Basdeo Prasad of group II, and some months later, viz. on 14th September 1926, a supplementary written statement was put in on behalf of groups III, IV and V. On 21st February 1927 judgment was given by the Subordinate Judge (Ex. A, at p. 96 of the paper, book), and on 9th March 1927 there was a decree. On 13th March 1927 there was an appeal by groups III, IV and V and others: see Ex. A, p. 3, and on 11th November 1928, group IV filed a reply in the Court of the Subordinate Judge regarding the Bombay business. On 13th January 1931, when the appeal was before the High Court, an order was made by consent embodying a settlement between the parties on certain terms. These are set out in part 2 of the paper-book, pp. 259 to 263, and on 13th January 1931, that is to say on the same day there was an order of the High Court embodying the terms of settlement. That is to be found in paper-book 2, at p. 264. The learned Judge has stated that there can be no doubt-and indeed it was not seriously disputed at the trial that the effect of the proceedings in the Court in Allahabad was to cause a partial disruption of the joint family. The mere filing of the partition suit by Pratap Chand would operate to cause an immediate severance of the joint status. It is indeed clear law that, the institution of a suit for partition by a I member of the joint family is an unequivocal intimation of his intention to separate and that there is consequently a severance of his joint status from the date when the suit is instituted. A decree may be necessary for working out the results of the severance and for allotting definite shares," but the status of the plaintiff as separate in estate is brought about by assertion of his right to separate whether he obtains a consequential decree or not : *Girja Bai v. Sadashiv Dhundiraj* AIR (1916) P.C. 104 : see also the opinion of Sir George Lowndes in AIR 1931 154 (Privy Council) , where his Lordship says this:

It is now settled law that a separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his cosharers of his desire to sever himself from the joint family. This was laid down in *Suraj Narain v. Iqbal Nariain* (1913) 35 All. 80. The question was further examined in *Girja Bai v. Sadashiv Dhundiraj* AIR (1916) P.C. 104 and the principle was reaffirmed and the last mentioned case was followed in *Kawal Nain v. Budh Singh* AIR (1917) P.C. 39 where Lord Haldane says : "The status of the plaintiff as separate in estate is brought about by his assertion of his right to separate".

4. It is to be observed however that the consent decree which was made in the Allahabad High Court in 1931 provided that the joint property was to be divided

into five portions or lots; one for each of the five groups to be given to them in the manner provided for in the settlement. This indicated that the members of each group intended to remain joint inter se. So we may take it that each of the groups was functioning as an undivided entity.

5. The debts which were the subject-matter of the suit were contracted in the month of March 1934. On the 9th of that month the plaintiffs advanced to Kishori Lal Mukundi Lal (that is group III) the sum of Rs. 20,000 by a cheque, see paper-book II, pp. 278 to 279, and on 22nd March 1934, a further sum of Rs. 20,000, also by cheque drawn through Kishori Lal Mukundi Lal (Book II, pages 280-281). Receipts were given by Kishori Lal Mukundi Lal by the pen of Banwari Lal, who was a son of Kishori Lal, the leading member of group III - (paper-book II, pp. 18 to 19). There are entries in the books of the plaintiffs showing not only these transactions but earlier transactions also: see paper-book II, pp. 95 to 108. The learned Judge stated that the debts in question were contracted in 1934 in the firm name of Kishori Lal Mukundi Lal and it was contended by the members of all the groups, except group III, that at that date no member of group III had any power or authority to act for or on behalf of or to pledge the credit of any other member or group of members, so the learned Judge expressed the opinion that it is clear that no such power or authority could arise or exist unless given expressly or by implication, that is to say, by reason of some contractual agreement made either expressly or by implication between the parties, though doubtless in the final accounting and adjustment the managers of the various branches of the business could claim credit for such expenditure as was incurred for the benefit or necessity of the estate. In support of this opinion he referred to the case in *Sri Ranga Thathachariar v. Srinivasa Thathachariar* AIR (1927) Mad. 801. The learned Judge held that no such agreement as referred to above was ever made expressly (apart from the terms of settlement) and so the ultimate question for his decision was whether any such agreement had arisen by implication by reason of the terms of settlement, the conduct of the parties or the surrounding circumstances. The conclusion arrived at by the learned Judge, upon a consideration of all the facts of the case, was that such an agreement must be implied and that it was intended by and agreed between the adult members of the various groups that all the businesses should-even after the consent decree be continued to be carried on upon the same terms and conditions as thereto fore until a definite division and allotment should be made, that is to say until the final decree - though doubtless none of them anticipated that so long a time would elapse between the date of the consent decree, which was merely a preliminary decree, and that of the final decree effecting a decisive division and allotment. The conclusion of the learned Judge was based on a number of reasons which are set forth in the judgment and stated concisely at p. 232 of the paper-book At that page, the learned Judge says:

Of course the parties could no longer carry on with the legal status of members of a joint Hindu trading family, but impliedly they agreed and intended to carry on in partnership and under the management of the various kartas or managers

of the several branches of the business, and with similar powers as they had had theretofore, until the time arrived for such division and allotment.

6. It is clear therefore that the trial Judge gave judgment in favour of the plaintiffs as against all the defendants in the suit upon the footing that, even though there had been a severance of the joint Hindu family at a date some three years prior to the making of the loans which were the subject-matter of the suit, and even though upon such severance there was nothing in the nature of a partnership by operation of law, there was in fact a contractual partnership based upon an agreement to be implied from the conduct of the parties and the circumstances of the case. In considering this matter in appeal it is perhaps desirable to remind ourselves of the definition of partnership as now contained in the Partnership Act of 1932, which by Section 4 declares that partnership is the relation between persons who have agreed to share the profit of a business carried on by all or any of them acting for all. Section 5 says that the relation of partnership arises from contract and not from status, and in particular the members of a Hindu undivided family carrying on a family business as such are not partners in such...business. It is however pointed out at p. 354 of Mr. Golap Chandra Sarkar Shastri's well-known treatise on Hindu Law that joint Hindu family trade is a species of ancestral joint property : in which every member of a Mitakshara joint family acquires by birth an interest in the same way as in other kinds of property. They become not only coparceners but also copartners of the trading firm. A joint family trading partnership appears to differ from ordinary partnership in two respects, namely (i) it is not dissolved by the death of any member and (ii) a member of the family becomes a co-partner by operation of law.

7. Mr. S.C. Bose on behalf of the appellants urged that after the separation which was brought about by the partition suit, the Calcutta and Jhusi business remained in the charge of group III and that, after the consent decree, that group carried on the business on money borrowed from third parties and also from other members of what had been the joint family and he relied upon the fact that at the time, when the debts were contracted, no reference was made to any other group. Mr. Bose's contention was that, after the consent decree, the members of the joint family ceased to be coparceners and became co-owners, but not copartners. In this connexion he referred to the case in *Balkishan Das v. Ram Narain Sahu* (1903) 30 Cal. 738 and relied upon the evidence given on behalf of the plaintiff by Ratan Lal (pp. 58, 59, 61 of the paper-book), by Baj Pai (pp. 72, 73, 75, 77, 79, 81, 86, 88, 95, 98, 99, 101) and Sangam Lal (pp. 106, 107, 113) and in particular the evidence at p. 129 as showing that there never was any agreement for partnership. In the case, which I have just mentioned, there was an *ikrarnama* entered into between four members of a joint Hindu family, which stated in unambiguous terms that defined shares in the whole estate had been allotted to the several coparceners. It was held that this effected a separation in estate and its legal construction and effect could not be controlled or altered by the subsequent conduct of the parties. Evidence of some of the

coparceners having continued to enjoy their shares in common would not affect their tenure of their property or interest in it.

8. Mr. Bose strenuously urged that no case of partnership was put to any of the witnesses and that none of the plaintiffs' witnesses made out any case of partnership and, on the strength of the decision in *Balkishan Das v. Ram Narain Sahu* (1903) 30 Cal. 738 Mr. Bose contended that the property ceased to be joint immediately the shares had been defined, and thenceforth the parties held the property as tenants-in-common and referred to Mulla's *Hindu Law*, Edn. 8, para. 322 at p. 389. One of the points made by Mr. Bose was that neither Banwari Lal nor Sangam Lal of group III ever called upon the members of the other groups to contribute. Thus it was that the status of the members of the former joint family never went beyond that of co-owners. The plaintiffs, said Mr. Bose, had failed to show that the status of co-owners was ever changed or added to and so there never was any partnership between the several groups and no one of the groups was liable for the acts of any of the other groups.

9. Mr. Bose, having drawn a distinction between co-ownership and partnership, proceeded to say that the findings of the learned Judge were that the old joint family business had gone, the parties therefore from being joint tenants became merely tenants-in-common, and there never was any express agreement for partnership between the parties. The evidence of Sangam Lal showed that the parties never even met and discussed the matter. That fact, taken with his statement that it was still a joint family business (p. 106) and indeed all the evidence in the case, meant that it was simply a joint family business and thus any implication of partnership was quite ruled out. No one had said that the members of the groups regarded themselves as partners and the plaintiffs had rested their case upon it being a joint family business and nothing else. If it was to be contended that there was a partnership, some witness should have said that the parties had assumed the position of partners, and their relations with the third parties should have been such as to raise the inference of partnership. The fact, that there was no outward change, was not sufficient because no case of holding out can be made upon the basis of mere silence. There must be some positive act. There was no obligation to give notice of the change of status from that of coparceners to that of co-owners in common. Mere silence is not sufficient. Moreover, estoppel could only arise if there was a duty to disclose the altered circumstances. In this connexion he referred to the case in *Greenwood v. Martins Bank* (1933) A.C. 51. The learned Counsel argued that no representations were ever made by group 4 or any other group or anything done or said, which" could amount to a representation. This is shown by the evidence of Ratan Lal to the effect that he knew nothing. The two letters relied on by the plaintiffs could not help the plaintiffs or affect the other groups. Ratan Lal's evidence is destructive of any theory of holding out.

10. Mr. Bose quoted from *Lindley on Partnership* in order to emphasize the difference between co-owners and partners and in that connexion referred to the

case in AIR 1937 61 (Privy Council) . He argued that the real position was that the groups were co-owners only and not partners and that, although group 3 might be entitled to make improvements to that part of the property which was in their possession, they could not, upon the final partition, recover any compensation for such improvements. Mr. Bose invited us to come to the conclusion that, taking the evidence at its worst and putting the matter as high as possible in favour of the plaintiffs, the utmost that could be said on the evidence was that there was a holding out of group III as authorized to act on behalf of a coparcenary and not on behalf of a co-partnership. Mr. Bose's argument may be summed up thus : the partition suit was a bona fide one; there was therefore no joint family after the year 1931. Proceedings subsequent to the consent decree have gone on; no suggestion has been put forward that the parties had reunited or had any intention of so doing. All this gave rise to the position in law that, as from the year 1931, the members of the family became co-owners and have so continued down to the present time with all the rights and obligations as such and nothing more. There is no evidence of any representation or of any conduct which might amount to representation that what previously had been a joint family business had been converted into a partnership business. No evidence to show that the members of the different groups even met or discussed the possibility and it is clear that at no time between the year 1931 and the year 1933 did group III ever demand any contribution in the way of capital or in the shape of four-fifths or any other proportion of the expenses which they had incurred. All this negatives any idea of partnership. It clearly appears that the plaintiffs did not rely on any representation or any conduct on the part of any of the other groups. From the beginning to the end of the evidence the case of partnership had never been put either to the plaintiff's own witnesses or to the defendant's witnesses. No suggestion was made to Beni Prasad that the adult members were partners or that Banwari Lal was their agent. In any event, the new extension practically the starting of a fresh business was in any case beyond the scope of the powers of any karta or manager, for the utmost he could do would have been to preserve the business as it was.

11. Mr. S.N. Banerjee on behalf of the plaintiffs-respondents contended, on the other hand, that the defendants were all liable. The position was that there was a trading family whose business was ancestral, as it was a Hindu trading family. This family carried on trade which extended to Rangoon and Madras. No doubt the immediate effect of the partition had been to make the members tenants-in-common, but it was admitted that the business was carried on between the time when the partition suit was instituted in the year 1926 and the date of the preliminary decree in that suit in the year 1927 and also between the year 1927 and the year 1931 when the consent decree was made at the appellate stage. From the time of the preliminary decree onwards therefore the business went on by agreement for the purpose of making profit and so the members of the groups were in law partners. Mr. Banerjee pointed out that the evidence showed

that the factory at Jhusi was completed in the year 1926. (List A. Item 1 All. Bk). Between the years 1926 and 1933 the manufacture of sugar was going on. It had started in 1924 : see Sangam Lai's evidence, paper-book, Vol. 1, p. 107, Q. 13. Both the factories were being run not only before the partition suit was started and during the pendency of the suit but also after 1931. The factory was started before the suit was instituted: it was carried on up to the time of the preliminary decree and afterwards, always and at all times with the consensus of group IV. The evidence of Beni Prasad shows that there was, at no time, any change in management : see pp. 189, 190 and 191. It does seem clear that no changes with regard to management were in fact introduced either during the period 1926-31 or during the period 1931-34.

12. It may be taken therefore that throughout these periods the business was being managed on behalf of all with the authority of all. It is significant that, according to the evidence of Beni Prasad (who is the only witness from group IV), there took place a meeting about 5th or 6th January 1931 (p. 178), that is to say shortly before the making of consent decree-or rather the settlement-which was to be embodied in the consent decree. It seems only reasonable to suppose that the representatives of the various groups," who attended that meeting, must have discussed the question as to what was to be done as regards the carrying on of the business and must have come to some arrangement about it. As the learned Judge points out, the terms of settlement refer to the entire net income after meeting the necessary expenses or losses during the pendency of the suit. The words "meeting...losses" in that context can refer only to business losses. Mr. Banerjee argued that in any case, where there is a severance, but nevertheless business goes on the same as before, the position in law must be that the relationship was one of partnership and not otherwise. In support of this proposition, Mr. Banerjee referred us to the case in *Jatti v. Banwari Lal* AIR (1923) P.C. 136 and in particular to a passage in the opinion of Lord Dunedin which appears at p. 353. The passage in the judgment of Lord Dunedin is this:

Separation having been effected in 1876, and the business being carried on by the three brothers, the business became an ordinary partnership, subject to the Contract Act.

13. That is clearly a slip on the part of the noble and learned Lord, because at the time when he was expressing that opinion, there was no Partnership Act in India, but the law of partnership was contained in certain Sections of the Contract Act. In my judgment however this case is not of very much value for our present purposes, because it was only three out of four, brothers who were held to be partners, Mr. Banerjee's argument amounted to this that in all cases separation or severance of a joint status, if followed by a continuance-of a joint business and the status quo ante as regards the carrying on of the business, must result inevitably in this, that what, would otherwise have been a state of co-parcenership becomes eo instanti and ipso facto a state of partnership, and the

members of the joint Hindu trading family from being coparceners immediately become copartners, or rather the partnership element in relationship of the members of a joint Hindu trading family persists even; after severance and is enlarged into something akin to an ordinary contractual partnership, because all the essentials of the definition contained in Section 4, Partnership Act, are present. This is shown by or is to be inferred from the statement in the terms of settlement as regards the "meeting losses," to which I referred a moment ago.

14. In support of his argument, Mr. Banerjee invited us to consider the nature of a joint Hindu family business, and in this connexion he referred us to the case in *Samalbai Nathubhai v. Someshvar* (1880) 5 Bom. 38 . In that case it was held that the rights and the liabilities, arising out of the joint ownership in a trading business created through the operation of Hindu law between the members of an undivided Hindu family, cannot be determined by exclusive reference to the Contract Act (9 of 1872). It must be considered, also with regard to the general rules of Hindu law which regulate transactions of undivided families. Melvill J. in his judgment said:

As stated in *Ramlal Thakursidas v. Lakshmidas Muniram* (1861) 1 Bom. H.C.R. 51 an ancestral trade may descend, like other inheritable property, upon the members of a Hindu undivided family. The partnership so created or surviving has many, but not all of the elements existing in an ordinary partnership. For example, the death of one of the partners does not dissolve the partnership. Nor, as a rule, can one of the partners, when severing his connexion with the business, ask for an account of past profits and losses.

15. The learned Judge continues:

Whether a Hindu who becomes entitled by inheritance to a share in a trading business, is ipso facto and without his own consent, involved in all the liabilities of a partner, it is not necessary for us to determine.

16. In the earlier case in *Ramlal Thakursidas v. Lakshmidas Muniram* (1861) 1 Bom. H.C.R. 51 to which Melvill J. referred, the then Chief Justice, Sir Matthews Sausse, said:

The case in *Petumdoss v. Ramdoss* (1848) Tay 279 before Sir L. Peel is an authority that an ancestral trade, like other Hindu property, will descend upon the members of a Hindu undivided family; and we think that such a family can, by its managers or its adult members acting as manager, enter into copartnership with a stranger. In carrying on such a trade, infant members of an undivided family will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incident to and flowing out of the carrying on of that trade, whether it be singly or with a copartner.

The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of bona fide trade dealings, should

not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family property.

Were such a power not implied, property in a family trade which is recognized by Hindu law to be a valuable inheritance, would become practically valueless to the other members of an undivided family wherever an infant was concerned, for, no one would deal with a stranger, if the minor were to be at liberty on coming of age to challenge as against third parties the trade transactions which took place during his minority.

The general benefit of the undivided family is considered by Hindu law to be paramount to any individual interest, and the recognition of a trade as inheritable property renders it necessary for the general benefit of the family that the protection, which the Hindu law generally extends to the interest of a minor, should be so far trenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of the family property; but their infringement is not to be carried beyond the actual necessity of the case.

17. Mr. Banerjee also referred to the case in *Raghunathji Tarachand v. Bank of Bombay* (1910) 34 Bom. 72 where it was held that:

Under Hindu law a joint family which carries on a trade handed down from its ancestors, becomes a trading family, trade being one of its kulacharas (duty or practice); it attracts to itself all the necessary incidents of trade.

The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose, is subject to only one important exception...Where a family carries on a business or profession, and maintains itself by means of it the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family.

18. Chandavarkar J. said at page 77:

These preliminary considerations of Hindu law must be borne in mind at the outset in the present case, because in my opinion they show that a joint family which carries on a trade handed down from its ancestors, becomes a trading family; trade being one of its kulacharas it attracts to itself all the necessary incidents of trade. The members of such a family may indeed not be partners in the strict sense of the term because their relations inter se are those of coparceners. But the definition given of partnership both in the *Vyavahara Mayukha* and the *Mitakshara* is that where several persons, such as traders, etc., carry on business jointly it is *sumbhuya samuthanum*, i.e., partnership.

19. These cases indicate that joint family trading business stands on a different footing from other assets, and that a joint Hindi family carrying on business is

necessarily something in the nature of a peculiar kind of partnership. I do not think it necessary for the present purposes however to decide whether the mere continuation of a business after separation by operation of law would be sufficient of itself to raise the presumption of or to constitute partnership as between the members of the family which had ceased to be joint. In the present case the evidence, to my mind, clearly demonstrates that in fact there was in fact no change at all and that it was entirely with the consent and at the desire of all other groups that group III carried on the business of Kishori Lal Mukundi Lal after the date of the consent decree exactly in the same manner as they had always done and that the business was so carried on not only for the possible benefit and advantage to group III itself but for that of all the groups. In my opinion the reasons advanced by the learned Judge for arriving at the conclusion that an agreement of partnership must be inferred are amply sufficient to support the conclusions at which he arrived.

20. I think it is clear from the terms of settlement themselves that it was indeed the intention of the parties that the business should go on as before until the final distribution of the assets. The circumstances in which the loans were taken, the letters which were written, the circumstances in connexion with the purchase of the machinery, the fact that moneys were passing between groups III and IV, and the form of the accounts between the groups, and lastly the method of assessing to income tax, all these things are, in my opinion, sufficient indications that there was, to all intents and purposes, a real partnership between the different groups and the members of the joint family. Therefore, apart altogether from any questions of law which were raised in the case and on the hearing of the appeal, I think the matter is entirely concluded by the findings of fact arrived at by the learned Judge. There is, to my mind, no doubt whatever that the debt which was the subject of the claims was incurred in the ordinary course and for the purpose of the business and was necessary for, and a benefit to, the family business. I agree with the learned Judge, too, in thinking that there is abundant evidence that the defendants did at all times hold out the managers of the firm of Kishori Lal Mukundi Lal as being the accredited agents of the family business and as such able to pledge the credit of, and attach liability for the debt to all the members of the trading family. I have carefully reviewed and considered all the evidence in the case, and have come to the conclusion that all the findings arrived at by the learned Judge on the facts are correct, and that in the circumstances of the case the plaintiffs were entitled to succeed as against all the defendants. The appeal is accordingly dismissed with costs.

McNair, J.

21. I agree with my Lord, the Acting Chief Justice and I propose to discuss the evidence in rather more detail. In January 1926, one member of a Hindu joint family governed by the Mitakshara sued for partition of his 1/60th share in the joint family property which included a net work of businesses throughout India. There was a preliminary decree in February 1931 declaring the plaintiff's share

in the property alleged in his plaint to be joint property. From that decree there was an appeal. The family consisted of five main groups and on 13th January 1931, a consent decree was passed dividing the family property, as shown in the plaint, into five lots and appointing a commissioner of partition. Thereafter the various members of the family who had been in charge of the numerous family businesses continued to trade and to carry on those businesses as before. The principal place of business was at Jhusi in Allahabad where there was a sugar mill which was managed by the members of the family who have been referred to as group III. The plaintiffs are suing to recover money borrowed by group III in 1934. Group III admits the debt and the only question for determination in this appeal is whether all the five groups or only group III are liable. The joint family was undoubtedly carrying on business as such prior to the partition suit. It is equally undoubted that there was a severance of the joint family status either in 1926, when the suit was instituted, or in January 1931 when the parties agreed to a decree for division of their property into five shares.

22. Beni Prasad, the senior member of group IV, who has taken the lead in contesting the liability of the family other than group III, has stated in evidence that no changes were introduced in the management of the family businesses after 1926. The learned trial Judge has held that the parties "impliedly agreed and intended to carry on in partnership" and the arguments for the appellant have been mainly directed to show that there was no partnership and that since the trial Judge bases the liability on partnership there is no liability. It cannot be doubted that a family trade carried on by members of a Hindu family does not possess all the incidents of partnership, but in many of the early cases the joint ownership of a trading family has been loosely referred to as a partnership and the line of demarcation has not been kept clear. The points of difference between a partnership and a joint Hindu family business are set out at length in para. 234 of Sir Din-shaw Mulla's Hindu Law. In order to find out whether the whole joint family or only group III are liable for the debt contracted by Kishori Lal Mukundi Lal, it seems to me unnecessary to decide whether in fact the terms on which these parties traded constituted in law a legal partnership. I am however of opinion that the members of the family had agreed to combine their property, labour and skill in the business which until the severance of the family had been a joint family business and that they had agreed to share the net income of the family property which includes the business. Such an agreement satisfies the definition of partnership required by Section 4, Partnership Act, and it would equally satisfy the definition contained in Section 239, Contract Act, which provided the definition of partnership prior to the passing of the Partnership Act in 1932.

23. Mr. S.C. Bose for the appellant relies on the oral evidence in which the witnesses have referred to the business both before and after the partition as "a joint family business"; and he argues with some justice having reference to Section 5, Partnership Act, that a joint family business is not a "partnership". Nor is it a "firm" as defined by Section 4; but these expressions have been used

loosely not merely by those engaged in business, but also by lawyers and in reported cases, (e.g. Garth C.J. in *Bemola Dosse v. Mohun Dossee* (1880) 5 Cal. 792 "a joint family carrying on a business is necessarily a peculiar kind of partnership" approved by Jenkins C.J. in *Sakrabhai Nathubhai v. Maganlal Mulchand* (1902) 26 Bom. 206 and by Batchelor J. in *Raghunathji Tarachand v. Bank of Bombay* (1910) 34 Bom. 72 in reference to the activities of a family trade. Can it then be said that the use of the expressions "ancestral business" or "joint family business" by the witnesses as a description of this India-wide trading concern debars the Court from enquiring into the real nature of the business? Obviously that cannot be so. The Court is bound to consider all relevant documents and facts and from such consideration to try and arrive at the true intention of the parties. The decision then of this appeal resolves itself into a question of fact, for, only from an analysis of the facts adduced can the Court come to a conclusion as to the constitution of the business, which was carried on by the members of this family after the institution of the partition suit.

24. Assuming that the severance of the joint family took place in 1926, it is not disputed that all the various branches of the family business continued to be conducted in exactly the same manner as before, by the same managers, and on behalf of the members of the family until, at any rate, 1931. From the plaint in the partition suit we see the nature of the family business. List "A" attached to the plaint contains "details of shops under the general supervision of Lala Kanhaya Lal, the head of the family." It is provided in the terms of the consent decree that the properties given in list "A" are "shops with the business and not only the building." Item 1 in that list is a "shop" at Jhusi "in connexion with which a sugar mill is also under construction." From this it is clear that the sugar mill which has absorbed some eight lakhs of capital and which is now looked upon as a losing concern had not only been envisaged in 1926 but was already under construction. We find further from this list that "Lala Kishori Lal Mukundi Lal" was not a "shop" confined to Calcutta. Its ramifications extend also to Gorakhpur, Benares, Cawnpore and elsewhere in India, and the Rangoon "shop" (Item 9) is described as a "branch of Calcutta and Madras."

25. The inter-connexion of the business is well illustrated by Item 6, a shop in Benares City known as "Lala Kishori Lal Mukundi Lal." This was started by a member of group Y and the "present managers" are shown as members of groups III, IV and V. Finally, the inter-dependence of the various businesses is expressly set out in the plaint, for we find at the end of list "A" the following note : Each and every shop has its relations with all the others." Beni Prasad admits that after 1926 no changes were made in the management, and that no particular business was allotted to any member or to any branch. He states that a few days before the compromise decree in 1931 the members of the family discussed the terms on which the partition was to take place. The family business was by far the most valuable of the assets, being valued at about Rs. 1,30,00,000. It is impossible to accept the suggestion of Mr. Bose that a business of such magnitude and of so great value should be closed down instantaneously

on the passing of the preliminary decree. That the discussion ended in an agreement is apparent from the opening words of the consent decree, viz.:

In order to avoid future trouble and facilitate the partition the parties have agreed to the following terms.

26. Those terms include the division of the, property into five lots to be allotted subsequently to the five groups in the manner stated, and they contain the following clause:

There will be no account for mesne profits prior to the institution of the suit but the entire net income after meeting the necessary expenses or losses during the pendency of the suit shall be a part of the divisible property.

27. During the pendency of the suit must mean until the final decree in the partition suit, and I read the other words quoted as an agreement to divide the net profits among the parties to the agreement, after deducting the expenses of carrying on the business and any losses sustained by one or more of the branches. Such a business would be, so far as the outside world was concerned, a continuation of the joint family business and it is not to be wondered at that a witness who is continuing to trade with the same persons in the same manner as before should be under the impression that he is trading with the same legal entity. We now know that there had in law been a severance of the joint family status, and that the family trade may have acquired a different legal standing. The witness who professes ignorance of the preliminary partition decree may be excused if he considers that the joint family business still continues as before; for the evidence is that there was no outward or visible sign of any change having occurred. Not only is it in evidence that no notice was given to the outside world that the family had ceased to be joint or that the joint family business had been discontinued, but the members of the family took definite steps to create the opposite impression. In October 1934, the group to which the plaintiff in the partition suit belonged (group II) sent a notice to the Indian Produce Association stating that a final decree was pending in the family partition suit. It is significant that that notice, which was circulated to members of the association, enumerated the businesses at Calcutta, Benares, Jhusi, Naini and Madras, and stated that they were "joint family businesses." It went on to warn the public that the family as a whole refused to be bound by mortgages made by isolated members. I will deal presently with the circumstances in which that notice was issued; at the moment I refer to it only as part of the evidence which shows that the defendants intended to retain their joint interest in the business long after the preliminary decree. From it we find that the defendants, who are now contesting their liability on a loan to Kishori Lal Mukundi Lal on the ground that their interest in that business had ceased in March 1934 notified the public in October 1934 that the "firm" of Kishori Lal Mukundi Lal was a joint family business."

28. Beni Prasad admits in evidence that there was no change in the management

of the business after 1926, that the accounts were not adjusted and that no allotment took place. In 1925-26, the accounts between the Calcutta and Naini branches show a balance in favour of Naini of Rs. 6,67,604. In the following year, Naini has a credit of Rs. 5,61,366. The accounts show the balance carried over from year to year from before the partition suit until after 1931 and in 1932-33 the balance in favour of Naini is Rupees 5,92,273. Beni Prasad in his evidence-in-chief stated that, prior to 1931 loans were made by one branch to another merely by entry in the account books, but that after 1931 no such loan was made without taking a hundi or promissory note. He has failed to produce his books either in support of his own case or to refute the plaintiff's case, but the books of the Calcutta firm contradict his evidence. From these it appears that some Rs. 25,000 in cash were lent by the Naini branch to Jhusi without hundis on various dates between 1931 and 1934. Beni Prasad seeks to distinguish these sums as money repaid within two or three days, but no such repayment appears from the books. In cross-examination he admits that the Naini branch sent Rs. 20,000 to Calcutta in 1932 for which no hundi or promissory note was demanded. Again Beni Prasad admits that the Calcutta branch bought gurrh for Benares, Naini and Jhusi, from before 1926 until 1934 without receiving money for the purpose. The extent of such purchases appears from an entry in the books of Sambat 1989 (1932-33), where Naini is debited with Rupees 2,37,673-4-0 for 45,566 bags of gurrh bought on their account.

29. In support of his statement that loans were only made on hundis after 1931, Beni Prasad had referred to a loan of Rs. 3,25,000 incurred by Jhusi on account of machinery. The story of this loan is told by Sangam Lal and Shyam Sunder of group III. Admittedly there was a gurrh refinery at Jhusi in 1924. Item 1 in list A and Item 33 in list B to the plaint in the partition suit refer to a "sugar mill under construction" in 1926 as part of the divisible property. In 1932 Government imposed a protective duty on gurrh and sugar and "the managers at Jhusi decided to install cane-crushing machinery, which they ordered at a cost of ?29,000 F.O.B. Glasgow. It was shipped and erected in 1933. Beni Prasad in evidence admits that he approved of this purchase. The total cost, some Rs. 8 1/2 lakhs, was raised by loans in the Calcutta market, again with Beni Prasad's approval. Creditors soon became pressing and Sangam Lal tried to raise a loan in Bombay by mortgaging the factory. He fell ill however and his brother Shyam Sundar went to Naini and arranged with Beni Prasad for a loan of Rs. 2 lakhs. That sum was received and a further Rupees 1,25,000 was then sought and was obtained after group III had signed hundis for the amount. Before the deal was completed Beni Prasad asked for a mortgage of group III's one-fifth share in the Jhusi Mill. That was refused, but he agreed to support an application to Court for leave to raise a sum of Rs. 6 lakhs by mortgage of the entire mill to pay off all outstanding debts.

30. The affidavit in support of the application stated that the petitioners (group III) were the "managing partners of the Sri Krishna Desi Sugar Works, Jhusi," which "was "an item of property subject to the partition suit." In para. 9, it is

stated that, unless the loan is raised and the debts met, "the business will suffer irreparable injury and the goodwill, reputation and credit of the family will be seriously jeopardized." "That application was supported by Beni Prasad's group (group IV) and also by group "V and Beni Prasad has admitted that these three groups controlled the bulk of the family business and that they were acting in concert during the early stages of the partition suit. In spite of this support the Subordinate Judge dismissed the application on the ground that sufficient necessity had not been proved to justify a mortgage of family property. The reason for applying to Beni Prasad for finance becomes clear from Beni Prasad's evidence. Beni Prasad was in control of the Naini, Madras and Bombay businesses and the moment the question of partition arose he claimed those businesses as his separate property in the same way as group III claimed the ^business over which they had control.

31. Groups III and IV were however adopting a united front against the other members of the family in the partition suit. Beni Prasad in 1933-34 closed down the Naini and Madras businesses with their various branches and retained the assets. He was therefore in funds, and he admits that the loans were made from these funds. Unless Beni Prasad could establish his claim to the business the funds were joint family funds but by obtaining the promissory note for Rs. 3,25,000 from group III he might be able to recover the debt as a private loan. If group III knew that the money came from the liquidation of the Naini and Madras business and if, in spite of that knowledge, they signed a promissory note in favour of group IV, group IV might thereafter be able to contend that this was an admission by group III that the businesses controlled by group IV were their own separate property. From the books and from Beni Prasad's admissions it is clear that as a general rule the practice of the pre-partition days continued and no promissory note or hundi was taken; the above considerations show that there were ample reasons in this particular instance for departing from the general rule. An interesting document in connexion with this loan is Ex. 11, a letter of 2nd August 1934, from group IV. (Long after Kanhaya Lal died letters appear as though written by him. It is explained that he was the head of group IV and his name is still used by persons writing on behalf of group IV.) The writer says that he is sending Kishori Lal Mukundi Lal their accounts for comparison and correction : among the corrections which the writer requires is the item of Rs. 1,25,000 borrowed by Sangam Lal on hundis. This amount, it is stated, should be included in the firm's and not in the personal accounts, and Sangam Lal's evidence (Qq. 88-89) is that the entries were transferred accordingly.

32. The oral evidence is scanty, but there is oral evidence that the members of other groups visited Calcutta from time to time to enquire into the business of this branch and there is no reason why this evidence should not be accepted. The letter of 2nd March 1932 (again said to be written by Kanhaya Lal but proved to have been written by Beni Prasad) (Ex. 1) strongly supports the case of the plaintiff firm that the other branches were intimately concerned in the affairs of Kishori Lal Mukundi, Lal. Beni Prasad writes acknowledging a letter from Sangam

Lal (that letter has not been produced) and agreeing to the purchase of more machinery for Jhusi at a cost of Rupees 65,000. "Further" says the writer : "You are thinking of having pan calandria; that is all right." These words, it is said, refer to the additional expenditure on the sugar-crushing machinery and the writer approves of Sangam Lal's views. It is not quite clear what is meant by "pan calandria" but it is admittedly machinery for the sugar mills and it is obvious throughout the letter that Beni Prasad is considering and approving expenditure to be incurred by the Calcutta branch. In the face of this letter it is impossible to accept Beni Prasad's statement that his group had ceased to have any interest in the business carried on by group III.

33. This letter refers also to income tax. Admittedly the various branches continued to be assessed as a single unit as a Hindu joint family. The assessment order for 1934-35 is Ex. 12 and the return of income for that year was filed by Shyam Sunder. The Bombay branch showed a profit of Rupees 28,629 but paid no income tax because the loss on the Jhusi Sugar Mill came to Rs. 2,10,349. In February 1936, group IV applied to the Commissioner of partition asking to be allowed to deduct from the value of the machinery the same depreciation as was permitted by the income tax Officer. Again in April 1935, Beni Prasad writes to Shyam Sunder, asking for information about the alleged losses in the Jhusi Mills. Finally, it appears that in August 1935, there were insolvency proceedings against Banwari Lal and other members of group III. Narayan Das, Beni Prasad's manager, swore an affidavit in which, while denying that the members of group IV carried on the joint family business under the style and firm of Kishori Lal Mukundi Lal in Calcutta, he stated that it was untrue that Beni Prasad and Kedar Nath were unable to pay their debts and set out a list of the assets in which they had an undivided one-fifth share. Those assets include the land at Jhusi containing the sugar mill and the house at 6, Sheo Thakur Lane, Calcutta, which is the Calcutta office of Kishori Lal Mukundi Lal. There is therefore a considerable body of documentary evidence showing that group IV were consulted in the finance of the Jhusi Mills and that they continued long after the partition to have an intimate connexion with, and to claim a share in, the business known as Kishori Lal Mukundi Lal.

34. The appellants rely on the proceedings in a suit filed by Kishori Lal Mukundi Lal in 1934 against the Popular Sugar Co., Ltd. The suit was originally filed in the firm name and members of the other groups were joined as defendants. The defendant company in its written statement objected that there was no firm of that name but it was a joint family. The plaintiff firm's gomasta, on 23rd February 1935, swore an affidavit, in para. 5 of which he stated:

That the members of the said joint Mitakshara family of Kishori Lal Mukundi Lal are Banwari Lal Agarwal, Mukandan Lal Agarwal, Sangam Lal Agarwal and Shyam Sundar Agarwal,

and it was prayed that the cause title of the plaint be amended by adding the names of these persons. It is argued that group III are bound by this statement,

which was to the effect that the members of the firm were confined to group III. Sangam Lal, in evidence, said that the gomasta was "merely giving the names of the descendants of Kishori Lal, one of the head members" and that he had, in any event, omitted one member of the family. The explanation is not convincing, but this item of evidence cannot outweigh the large body of evidence to which I have referred and which, in my opinion, amply justifies: the finding of the learned trial Judge that there was, after the partition, an agreement among the members of the family to carry on the family business on the same lines, as before. Such an agreement must in law become a partnership now that the joint family is dissolved.

35. Mr. S.N. Banerjee for the plaintiff-respondent argues that it is unnecessary for him to establish any particular legal basis in his debtor. There had been business dealings between these parties for more than 15 years. The plaintiffs were a firm carrying on business in Calcutta and their evidence is that they knew nothing of the partition suit in Allahabad, until they received the notice in October 1934, from the Indian Produce Association, after which business dealings between them ceased. There was nothing to suggest that the borrower's power to pledge the credit of the other members of the family had been in any way curtailed. The lender ascertained that the money was required to liquidate previous debts and to purchase molasses for the Jhusi and Naini mills. He says that he was satisfied about the necessity for the loan. The appellant argues that these matters are immaterial, for the joint family was at an end and the manager's powers had ceased. That no doubt is true, but the members of the severed family had agreed to allow the persons, who had been managing the joint family business, to retain the same powers of management as before. Even if such an agreement is not established by direct evidence, there is abundant evidence from which it can be inferred. If the legal status of the manager has changed, he is now clothed with the rights of a partner having an implied power to borrow on the credit of the firm. The other members of the family continued to have an interest in the business; they knew of and acquiesced in the raising of loans to finance it; they allowed group III to continue as manager of this branch; and they agreed to share in any profits it might earn. I have no doubt that the members of group III had power to pledge the family credit and it seems to me equally clear that the other members of the family held them out to the world as having that power.

36. Mr. Bose for the appellants refers to the words of Lord Tomlin in *Greenwood v. Martins Bank* (1933) A.C. 51 : "mere silence cannot amount to a representation," and he argues that the appellants have merely stood by and declined to interfere with any financial transactions entered into by group III. The circumstances, to which I have referred, show that in fact that was not the appellant's attitude. The evidence discloses definite acts and statements by members of the family outside group III, calculated to induce lenders to make advances on the credit of all the family assets. It has been argued that the cane-crushing factory is a new business, which cannot be divisible as a family asset.

There is no evidence to support such an argument : as I read it, Beni Prasad's letter of 2nd March 1932, agrees to the expenditure on new machinery for Jhusi and his evidence is that the machinery was put into the Jhusi mills. Such evidence, as there is, leads to the conclusion that there was a single factory, which was originally equipped for the production of gurh and was later remodelled so as to produce cane-sugar as well. Its scope was widened, but it remained the same factory. There is nothing to suggest that the minors were excluded from the arrangement come to after severance. I have no doubt that they were admitted to the partnership in the same shares as they held in the family business and to that extent they are liable on the plaintiff's claim. It follows from what I have said that, in my opinion, this appeal fails and must be dismissed.