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**(1936) 04 CAL CK 0024**  
**In the Calcutta High Court**

Ram Gopal Luchminarain

APPELLANT

Vs

Bajnath Prasad and Others

RESPONDENT

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**Date of Decision :** 09-04-1936

**Acts Referred:**

Income Tax Act, 1961 — Section 25A

**Citation :** AIR 1937 Cal 396

**Hon'ble Judges :** Lord-Williams, J

**Bench :** Division Bench

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## Judgement

Lord-Williams, J.—This is a suit for the recovery of the sum of Rs. 31,983-5-9 being the balance of the amount due and owing to the plaintiffs in respect of money lent in the year 1934. There is no real dispute about the loans or the amount. As so often happens the pleadings do not fully and clearly set out the real dispute between the parties, but a number of particular issues were raised and settled. It is, however, necessary to consider only three, namely: (1) Was the originally joint family business of the defendants being carried on by them as a partnership business at the time when the loans were made? (2) Were the loans contracted in the ordinary course of business and for the benefit of the business so carried on? (3) Did the defendants hold out the managers of the branch of the business carried on under the firm name of Kishorilal Mukundlal as accredited agents and managers of the business carried on by the defendants?

2. The main question to be decided is whether all or some only of the defendants are liable for this debt. The defendants were members of a joint Hindu trading family under the Mitakshara law, and are descendants of one Lala Ramdayal, the founder of the family and of a number of businesses carried on by and on behalf of the family in various parts of India, the head office being at Jhusi in the District of Allahabad. Lala Ramdayal had two sons, one of whom died without issue; the other Lala Dwarkaprasad, who died some fifty years ago had five sons, Lala Harnandas, Lala Mohanlal, Lala Kishorilal, Lala Kanhyalal and Lala Mukundilal; and each of these had sons and other descendants, who formed five

groups or parts of the joint family which have been referred to throughout for convenience as groups 1, 2, 3, 4 and 5, and are set out in the genealogical table exhibited to the plaint. Each group or part carried on a part of the joint family business on behalf of all the members of the joint family, which parts consisted of one business or a number of associated businesses, in various parts of India, and under various firm names.

3. Thus group 3, consisting of the descendants of Lala Kishorilal, carried on a part of the joint family business at Calcutta and Jhusi (Allahabad) and other places under the firm name of Kishorilal Mukundilal; and group 4, consisting of the descendants of Lala Kanhyalal, similarly carried on another part under the firm name of Mohanlal Kanhyalal at Madras and Naini (Allahabad), and under the firm name of Beniprasad Kedarnath at Bombay, (though this group contends that the business at Bombay is not and never was a part of the joint family business). Written statements were filed by the members of group 4 and by guardians-ad-litem on behalf of those defendants who were minors. But the only serious defence was raised on behalf of group 4, though at the last moment when the final speeches were being delivered Mr. Das of Counsel asked leave to appear for the members of groups 1, 2 and 5, and was allowed to address the Court on their behalf.

4. Some of the members of group 3 have supported the plaintiff's claim, and all the members of that group, including the minors, contend that all the defendants are jointly liable for the debt, and this is denied by the members of all the other groups. It is admitted that all these businesses (except that at Bombay) once belonged to and were carried on by the various groups on behalf of the joint family. But it is contended by the members of groups 1, 2, 4 and 5 that the joint family ceased to exist prior to the date when the loans were advanced, and thereafter no member or group of members of the formerly existing joint family had either power or authority to act for or on behalf of, or to pledge the credit of, any other member or group of members. On 2nd January 1926, Pratapchunder, a member of group 2, filed a suit for partition at Allahabad, and a preliminary decree was made on 14th February 1927. There was an appeal to the High Court, and eventually, on 13th January 1931, an order by consent was made embodying a settlement between the parties in the following terms inter alia:

In the proceedings relating to the preparation of the final decree the tentative valuations of the various items of the properties in dispute as given in the plaint should be ignored and the actual value of each item of property which exists should be ascertained by means of a Commission, The properties given in list A are shops with the business and not only the buildings; the true valuation of those shops should be according to the present existing net assets as disclosed by the account books of those shops which will be produced by the parties in whose possession they may be.

The entire property is to be divided into five lots of equal value. In case of deficiency in value of the properties in any lot the deficiency should be made

good by a cash amount.

One lot out of these five lots will be drawn by the Court in the presence of the counsel for the parties and be allotted to the branch consisting of the descendants of Mohanlal which lot will not be subdivided in this suit. In case there is any other property left out from the schedules attached to the plaint which has since been discovered to be joint property it will be included in the division provided it is proved that it is joint property.

Any temple or dharamsala or properties appertaining thereto which are proved to be dedicated properties will not be partitioned and any joint interest in the same which any of the parties to the suit may possess will remain unaffected by the decree.

There will be no accounting 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, the exact amount to be ascertained by reference to the books of accounts..... All the parties further agree that the Court below should pick out one separate lot out of the five lots prepared for the branch represented by Lala Baijnath Prasad, another lot for the branch represented by Beniprasad, another lot for the branch represented by Banwarilal and others leaving the last lot for the branch represented by Bansilal.

5. There can be no doubt and it is not seriously denied that the effect of these proceedings was to cause a partial disruption of the joint family. The filing of the partition suit by Pratap caused an immediate severance of the joint status: *Girija Bai v. Sadashiv Dhundiraj* AIR 1916 P C 104. But the consent decree provided that the joint property was to be divided into five equal lots, one lot being drawn and allotted to each of the five groups in agreed rotation, which indicates that the members of each group intended to remain joint inter se. The debts in suit were contracted in 1934 in the firm name of Kishorilal Mukundilal, and it is contended by the members of all the groups, except group 3, that at that date no member of group 3 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.

6. It is in my opinion 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: 50 Mad 866 *Sri Ranga Thathachariar*, late a minor by next friend Komalathammal, but now declared major and next friend discharged Vs. *Srinivasa Thathachariar* alias *Srinivasa Raghavachariar*, .

7. No such agreement was made expressly (apart from the terms of settlement) and the ultimate question for decision, therefore, is whether any such agreement

arises by implication by reason of the terms of settlement, or the conduct of the parties, or the surrounding circumstances. After very careful consideration of all the facts I have come to the conclusion that such an agreement must be implied and that the adult parties agreed and intended that all the businesses should be carried on upon similar terms and conditions as, theretofore, until the final 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 but a preliminary decree, and that of the final decree making a final division and allotment. 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, theretofore, until the time arrived for such division and allotment.

8. The reasons for the conclusion to which I have come are various and of varying weight and importance. In the first place, it is to be observed that the suit is still pending. The appeal was against a preliminary partition decree, and the terms of settlement were embodied in a preliminary partition decree by consent of all parties.

9. Secondly, there has been as yet no adjustment of the books of the various branches of the business, and apparently, there has been no adjustment between the various branches for many years past, if at all.

10. Thirdly, it is to be remembered that partition in Hindu law according to the Mitakshara means both a division of title or status, and a division of property: Appovier's case, Appovier v. Ramasubba Aiyar (1866) 11 M I A 76. There is nothing to prevent divided members of a joint family from holding their assets jointly: AIR 1936 103 (Privy Council) , and in my opinion the facts show that the defendants intended that their assets should remain joint until the final division by metes and bounds. Fourthly, no express provision was made in the terms of settlement for dealing with the property pending the final division, for example, the care and upkeep of cattle of the value of nearly Rs. 20,000, the upkeep and repair of buildings and machinery, and the management of zamindari and other property both movable and immovable. Fifthly, the terms of settlement referred 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. They are inappropriate in connexion with any of the other kinds of property owned by the family. Sixthly, income tax always has been and still is assessed upon all the family assets as a whole, including the Bombay business which was started only in 1928. Payment on behalf of the whole family is made by Kishorilal at Jhusi which was the head office of the joint family business. Beniprasad (group 4) asserted in evidence that the payment is adjusted in the books of the various branch businesses, but he produced no books in support, and no such adjustment appears in the Jhusi books.

11. The defendants, other than the members of group 3, say that this mode of assessment is inevitable because Section 25-A, income tax Act provides that separate assessment will not be allowed until the division of the joint property has been completed. But this is not the effect of the section. Separate assessment will be allowed if the income tax Officer after enquiry is satisfied that a separation of the members of the family has taken place, and that the joint family property has been partitioned among the various members or groups of members in definite portions. This in fact was the effect of the consent decree. None of the defendants have made any claim to be assessed separately. Further Section 25 provides that notice of discontinuance of any business may be given, and income tax thereon avoided. But none of the defendants gave any such notice, though in fact some of the branch businesses were discontinued after 1931. Seventhly, though all the defendants were aware that the various businesses were being carried on by the various branches as before, and liabilities were being incurred in the ordinary course of business, none of them applied to the Court for an injunction to prevent the carrying on of any of the businesses; or for the appointment of a receiver or receivers, and though demands were being made on the members of groups 3, 4 and 5, no notice of the dissolution of the joint family, or the discontinuance of its business, or the business of any of its branches, either public or private, was given by any of the defendants to the plaintiffs or any other of the firm's customers or creditors until October 1934, and then only by two members of group 2. That notice stated that all the businesses are joint family businesses.

12. In this connexion it is to be remembered that where a Hindu joint family carries on an ancestral or family business it is governed not by the rules of co-partnership alone but by those rules as modified by the incidents and exigencies of trade,-accommodated to the law of partnership: (Hindu Code-Gour, Edn. 3, pp. 736 and 737). Thus, in particular, the managing member or members, that is to say, the persons appointed and held out as accredited representatives, have all the powers necessary for carrying on the family trade and as such may pledge the credit of the family to its uttermost. The creditor need not prove that a debt incurred was for the benefit or necessity of the family. AIR 1927 121 (Privy Council) ; Raghunathji Tarachand v. Bank of Bombay (1910) 34 Bom 72. The contention of counsel appearing on behalf of the members of groups 1, 2, 4 and 5 has been that the meaning of the terms of settlement was that the parties agreed and intended either that all the various businesses should be forthwith liquidated and closed down, or alternatively, that each group should continue to carry on the business with which it had been immediately associated, but for its own benefit and at its own risk. The first objection to such a contention is that not a word was said in the terms of settlement about a provision which obviously was of the greatest possible importance. In my opinion both alternatives are so unlikely, so unreasonable and so impracticable that neither can have been intended by any of the parties.

13. The family property, a full description of which is set out in the lists annexed

to the plaint in the partition suit was valued at over one crore eighty six lakhs, and of this large sum the shops and businesses account for nearly a crore and thirty lakhs. To have closed down such valuable businesses forthwith, would have amounted to little short of lunacy. Apart altogether from questions of goodwill and future trade, some of the businesses consisted of or included valuable assets which could not be readily or easily realized. For example, the business carried on by group 3 included oil mills at Calcutta and a large sugar mill at Jhusi containing valuable machinery, and the business carried on by group 4 included sugar and flour mills at Naini. To have closed them down forthwith would have been a very stupid and wasteful policy. The trade of the mills would have been lost and the idle machinery would have rapidly deteriorated. Moreover, January, the month when the decree was made, is the middle of the sugar season, and large stocks of "gur" had been purchased to supply the sugar mills. On the other hand, it could not have been intended that each group should continue to carry on the business with which it had previously been associated, for its own benefit and at its own risk, because under the terms of settlement the final allotment was to be made by lots to be drawn by the Court, and no group could have more than a remote chance of obtaining upon allotment the particular businesses which it had previously been carrying on.

14. In such circumstances it is inconceivable that group 3 should have borrowed to the extent of eight lakhs for the purposes of the Jhusi mill unless this liability was to be borne by the family as a whole. No group would be likely to find money or incur liability for the necessary carrying on and normal development of the business, or to prevent losses and deterioration, from which expenditure it might never derive any benefit, and for which it would obtain no compensation upon allotment, no such provision having been made in the consent decree. The money claimed in this suit was borrowed in order to meet liabilities arising from just such a necessary expenditure, in connexion with the Jhusi sugar mill. In 1932 group 3 decided to install a cane crushing plant in addition to the existing "gur" refining plant in order to take advantage of certain trade opportunities which were offered. Group 4 were consulted and the machinery was ordered with their knowledge and approval and largely at their instigation. This is confirmed by letters to Kishorilal from Kanhyalal (Ex. 1), and from Beniprasad Kedarnath (Ex. 10). The interest in the business of the Jhusi mill shown in those letters by the members of group 4 is wholly inconsistent with their contention that the mill was being carried on for the sole benefit and at the sole risk of the members of group 3.

15. These alterations in the Jhusi mill cost approximately eight and a half lakhs which sum was raised by borrowing from banks and others such as the plaintiff, in the Calcutta market. Towards these liabilities group 4 eventually found approximately three lakhs. It is true that group 3 signed hundies in respect of this amount and that group 4 therefore contends that this and the fact that interest was charged shows that it was a loan from one group to the other and that prior to the consent decree all sums transferred by one group to another

were accounted for merely by adjustments made in the books of each, and that hundis were never given or taken in respect of such transactions and no interest was charged. But the books of Kishorilal show a number of such entries as between groups 3 and 4, and large sums transferred from group 4 to group 3, amounting in all to nine or ten lakhs, and carried over year after year, and no charge entered for interest, and group 4 has refrained from disclosing its books, or from contradicting these facts by any documentary evidence. On the contrary in some cases there is evidence that such sums were so carried forward upon explicit instructions from group 4. Though the consent decree was made in 1931 it is admitted that no hundis were given and no interest charged before the latter part of 1933. It seems obvious from the somewhat confused evidence given by members of groups 3 and 4 that the method of hundis was employed as the most convenient, way of borrowing money from banks. This would account also for the stipulation regarding interest. Moreover, when group 3 in 1934 petitioned the Allahabad Court for leave to mortgage the Jhusi mill for six lakhs, that is to say, the interest of the whole family in the mill, groups 4 and 5 supported the petition. This again was wholly inconsistent with the present contention of these groups. The petition was opposed only by groups 1 and 2 but was rejected. It was necessary to petition the Court for leave because the whole of the family property was sub judice owing to the pending suit for partition.

16. In conclusion, I am satisfied that the loan which is the subject of the present claim was incurred in the ordinary course of business, and was necessary and a benefit to the defendants' family business. Further, there can be no doubt upon the evidence that the plaintiffs had no knowledge of the partition proceedings. They had dealt with the defendants family firm for many years, and it is admitted that no notice of the partition was given by any of the defendants until after the loans were made, and then only by two members of group 2, nor can there be any doubt that the defendants at all material times held out the managers of Kishorilal Mukundilal as accredited agents of the family business. Minors cannot be partners in a firm but with the consent of all the partners they may be admitted to the benefits of partnerships (S. 30, Partnership Act). On the facts disclosed in this case I have no doubt that the minors concerned were so admitted. The result is that there must be judgment for the plaintiff with costs against each and all of the defendants, but limited as regards the minor defendants to their shares in the family assets. Costs of J.N. Sharma, guardian-ad-litem, to be paid by the plaintiff in the first instance as between attorney and client, and added to their claim. Costs incurred by the members of group 3 to be paid by the members of groups 1, 2, 4 and 5.