

(1961) 12 OHC CK 0007

In the Orissa High Court

Case No : First Appeal No's. 82, 83 and 84 of 1958

Tulsiram Sanganerla and Another

APPELLANT

Vs

Smt. Anni Bai and Others

RESPONDENT

Date of Decision : 22-12-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, Order 7 Rule 5
Income Tax Act, 1922 — Section 54
Orissa Money Lenders Act, 1939 — Section 26
Orissa Money Lenders Rules, 1939 — Rule 11 , 12
Partnership Act, 1932 — Section 42

Citation : AIR 1963 Ori 11

Hon'ble Judges : R.K. Das, J;G.C. Das, J

Bench : Division Bench

Advocate : Sidhartha S. Roy, M.S. Rao, M.K.C. Rao and S.C. Roy, for the Appellant; N. Mukherji, R.N. Patnaik and S.B. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

G.C. Das, J.—Five different plaintiffs filed five different suits against certain defendants including the present appellants basing their claim on 5 different pronotes. The suits were: Money Suit No. 20/235 of 1952; Money Suit No. 461/234 of 1952/55; Money Suit No. 75; Money Suit No. 84 of 1952 and Money Suit No. 110 of 1952. In the first two suits the two handnotes were executed by Manilal on behalf of Surajmal Manilal Firm whereas in the latter three suits the pronotes were executed in favour of the different plaintiffs by Pannalal, another partner of Surajmal Manilal firm. All the 5 suits were heard together and were governed by one common judgment. In respect of the first 2 suits, the valuation being low appeals were preferred before the District Judge. In the latter three suits, the value being appealable to this Court, three appeals were filed before this Court. First appeal No. 82/58 arises out of money suit No. 75/52; First appeal No. 83/58 arises out of Money Suit No. 84/52; First appeal No. 84/58 arises out of the Money Suit No. 110/52. All these three appeals in this Court were made

analogous and were heard together, and will be governed by this common judgment.

2. The plaintiffs in the three suits before us, though different, the defendants were common to all the suits. Defendant No. 1 in all these suits is a firm Surajmal Manilal. The other defendants being members of the family of Surajmal and Manilal are said to be partners of the above firm. Surajmal died in 1946 and Manilal died on the date on which the Money Suit No. 75 of 1952 was filed, and before Money Suits Nos. 84 and 110 of 1952 were filed in 1952. Surajmal's son Bajranglal and his brother Pannalal are defendants. Tulsiram and Biswambar Dayal are the brother's sons of Manilal. They along with the sons of Manilal were added as defendants. All the three suits were based on three pro-notes, Exts. 4, 6 and 10, each for Rs. 5,000/- in respect of the three different plaintiffs and all the suit-pro-notes were executed by Pannalal on behalf of Surajmal Manilal Firm in the year 1949, Exhibit 6 was executed on April 21, 1949. Exhibit 10: was executed on July 20, 1949 and Exhibit 4 on May 26, 1949.

3. The plaintiffs' case in all the suits was that Surajmal Manilal firm which is a partnership firm between the two joint families of Surajmal and Manilal, contracted the suit-loan by executing the aforementioned suit-pronotes by one of the partners of the firm for the necessities of their Firm. Since the dues remained undischarged, the suits were filed.

4. The son and brother of Surajmal and the sons and widow of Manilal did not contest the suits. Only Tulsiram and Biswambar Dayal who were the sons of subhakaran, the brother of Manilal, contested the aforesaid suits. In essence, their defence was three-fold; (i) They had separated from Manilal long before the suit pro-notes were executed; hence they were not members of the joint family with Manilal at the time of the suit-transactions; (ii) They were never partners of Surajmal Manilal Firm and had no connection with the same; and (iii) The loans transacted by Surajmal Manilal even if true, did not benefit them in any way, and as such they cannot be made liable.

5. The learned Subordinate Judge, Cuttack, on a careful analysis of the evidence on record decreed the plaintiffs' suit finding that the suit-transactions were genuine, execution on behalf of the firm and the passing of the consideration having been duly proved. He further found that the contesting defendants were joint with their uncle Manilal in 1949 and they were partners of the Firm Surajmal Manilal being members of the trading family and the contesting defendants are liable for the suit-claims to the extent of assets of the joint family in their hands, it is against this decree that the present First appeals were preferred.

6. Several contentions were raised before this Court by Mr. Sidharthe Roy, learned counsel on behalf of the appellants. They are as follows: (i) There is no evidence to show that Manilal had entered into the partnership as the Karta of the joint family of Manilal and Tulsiram; (ii) There is nothing to show that

Surajmal acted as the Karta even if Manilal had entered into partnership as such; (iii) Assuming both Manilal and Surajmal were the Kartas of their families and had entered into the partnership, the partnership stood dissolved u/s 42 of the Indian Partnership Act, 1932, immediately after the death of Surajmal in 1946. Accordingly, Pannalal by executing the suit-pronotes cannot bind the other partners; (iv) The course of dealings and the books of account show that the partnership was on individual basis; (v) Failing everything the defendants do not become ipso facto partners even if it is a trading family. The plaintiffs can only recover the amount due from the assets of the joint family in the hands of the defendants, (vi) The suits were not properly framed inasmuch as the Kartas were not sued as such; and (vii) The suits are hit by Rules 11 and 12 of the Orissa Moneylenders Rules, 1939, framed under Orissa Act (III of 1939).

7. The finding of the learned Subordinate Judge that the contesting defendants were joint with their uncle Manilal in 1949, was not seriously challenged before this Court. The learned Subordinate Judge relied upon the evidence of one of the contesting defendants, Tulsiram D. W. 3, though wrongly recorded as D. W. No. 2, and the evidence of Bajranglal Choukhani, D.W. 2, a common relation of Manilal and the contesting defendants. All the relevant witnesses on behalf of the plaintiffs had deposed that the contesting defendants were joint with their uncle Manilal in the year 1949 when the suit transactions took place. Tulsiram (D.W. 3) was examined on commission. In his deposition except certain fatal admissions he has not spoken the truth and his evidence does not inspire confidence. There is, however, an admission that he and his brother Biswambar Dayal were joint with their uncle Manilal until the year 1949. He stated in his examination-in-Chief; "In 1949 Magh or Falgun I was separated in mess from Manilal". Admittedly, the partition took place between the two branches of the family on June 9, 1951 (Ext. U).

Mr. Roy argued that there was an unequivocal expression of the intention to separate, Accordingly he argued that there was separation between Manilal and the contesting defendants before the suit-transactions took place. For this purpose reliance was sought to be placed on a decision of this court in the case of Pramod Kumar Pati and Another Vs. Damodar Sahu and Others, . A Division Bench of this court in that case held that it is well-settled that when a co-parcener communicates his unequivocal intention to separate to the other co-parceners, there is immediately severance of status in the family and there is no presumption that the others continue to remain united. As far as the principle decided in this case is concerned, there is absolutely no dispute. The whole question is whether there was an expression of unequivocal intention to separate. All the evidence that is there is to the effect that they were separate in mess in about Magh or Falgun of 1949. Mere separation in mess does not amount to an unequivocal expression of intention to separate. In the partition-deed, Ext. U it is stated that ill-feelings having been cropped up among the members, they have been living in separate mess only since two and half years.

The learned Subordinate Judge referred to Ext. H-1 filed by the contesting defendants which was a notice given to Sinclair Murry and Company on November 7, 1950, In that notice Tuisiram and Biswambar Dayal along with Manilal informed Sinclair Murry and Company that there was going to be a partition amongst themselves, and it is bound to take sometime to get the partition-deed executed and registered. Reference was also made to Ext. W, another notice to the same Company dated October 1, 1951. In that notice, they stated that all the properties held in jointness have been partitioned by a registered partition deed executed on June 9, 1951. Thus, there being no evidence of an unequivocal expression of intention to separate, the parties are deemed to be joint until the date of separation on June 9, 1951. Rightly the Subordinate Judge came to the conclusion that the contesting defendants were joint with their uncle Manilal in 1949 to the knowledge of the out-side world including the plaintiff-creditors.

8. The main question thus is whether the contesting defendants were partners of the Firm Surajmal Manilal. The learned Subordinate Judge, as I have stated earlier, came to the conclusion that the appellants were partners of Surajmal Manilal Firm. In order to come to that conclusion, he had, amongst others, relied upon certain assessment orders Exts. E-1, F-1, Ext. P-1, Ext. E-1 is an assessment order of the Additional Income Tax Officer, Cuttack, dated November 8, 1946, in respect of Surajmal Manilal of Kendupatna for the assessment year 1944-45. Exhibit F-1 similarly is an assessment order by the Income Tax Officer, Cuttack dated March 26, 1943, in respect of Mangalchand Manilal of Kendupatna changed to Surajmal Manilal of Kendupatna for the assessment year 1942-43. Exhibit P-1 is another assessment order by the Income Tax Officer, Cuttack dated April 29, 1948 in respect of the assessee Manilal Tuisiram for the assessment year 1947-48. Mr. Roy contended that these various assessment orders are not admissible in evidence. For that purpose he sought to rely upon certain decisions. His whole argument was, that notwithstanding anything contained in the Indian Evidence Act, 1872, u/s 54 of the Income Tax Act, no court is entitled to require any public servant to produce the record of any assessment proceeding before it, or to give evidence in respect thereof except as provided in the Act.

Accordingly, he argued that these documents being confidential in nature, nobody is entitled to a certified copy thereof and they are not admissible under the Evidence Act, He mainly relied upon a decision reported in 1938 6 ITR 663 : AIR 1938 Ran 276, Ma Hia Mra Khine v. Ma Kra Pru. What was decided in that case was that the object of Section 54 of the Income Tax Act is to make Income Tax returns confidential as between the assessee and the Income Tax department and against the whole world except for certain limited purposes provided by the section itself. It would clearly be an evasion of the prohibition contained in the section were the defendant in a court of law entitled to force the plaintiff to obtain and furnish any information from the Income Tax Officer against his Interest which the defendant was unable to obtain for himself. Where

such copies are obtained by the defendant, they are inadmissible in evidence unless the plaintiff himself wants their retention. Such copies do not come with the provisions of section 76 of the Evidence Act.

The same view expressed by the Rangoon High Court in an earlier case has been disapproved by the Nagpur High Court in *Buchibai v. Nagpur University*, AIR 1946 Nag 377. It may be remembered here that it is not the contesting defendants who have produced those documents. It is the son of Manilal who was the assessee that had produced the aforesaid documents. The other decisions cited by Mr. Roy are : *PROMATHA NATH PRAMANICK Vs. NIRODE CHANDRA GHOSE.*, , at page 657 of the same volume : AIR 1940 Mad 161, *Promatha Nath Pramanick Vs. Nirode Chandra Ghose.*, , was not approved by the Nagpur High Court and the view expressed by the Madras High Court reported at p. G57 (of ITR) AIR 1940 Mad 161, stated above, was also overruled by the same High Court in a later Full Bench decision reported in AIR 1940 Mad 768, *Venkata Gopala Narasimha Rama Rao v. Venkataramayya*. The only other decision cited was the case of *Devidatt Ramniranjan Das v. Sriram Narain Das* ILR 56 Bom 324 : AIR 1932 Bom 291. But the view expressed in this case was considered in a later decision of the Bombay High Court and the assessment orders were held to be admissible. The view taken by the Calcutta and the Madras High Courts is that the assessment order is a public document.

The Bombay High Court in a later decision reported in *Emperor Vs. Osman Chotani*, , held that certain assessment orders seized by a police officer and produced in a criminal case were admissible in evidence. *Beaumont, C. J.* held that Section 54 does not expressly enact that the documents referred to therein are to be inadmissible. Section 54 only provides that the document specified shall be treated as confidential; and that no court shall require a public servant to produce them. In providing that the documents are to be treated as confidential the Legislature only meant that they are to be treated by the Income Tax authorities as confidential and not that the documents are confidential in whosoever's hand they may be. There is nothing in the section to prevent an assessee from disclosing the contents of documents referred to in Section 54, if he is able to do so. All that the Section 54 means is that the Income Tax authorities are to regard communications made to them for the purposes of the Income Tax Act as being confidential, the object being to enable people to feel that they can freely state the facts relating to their income, facts which may often involve confidential matters relating to their business, without fear of the matters being disclosed. But as long as there is no disclosure by a member of the Income Tax staff, the direction to treat them as confidential cannot be said to be infringed.

If a document can be given in evidence, without requiring a public servant to produce it, there is nothing in the section to preclude that from being done. A Full Bench of the Madras High Court in the case reported in AIR 1940 Mad 768, overruled the decision in *MYTHILI AMMAL Vs. JANAKI AMMAL AND ANOTHER.*, .

What their Lordships held in that case was that while Section 54 prohibits the disclosure, except on specified occasions of matters connected with an assessment to Income Tax and prohibits a Court from requiring a public servant to produce the documents mentioned in the section or to give evidence in respect of them, it does not follow that the court may not admit in evidence a document which falls within Section 54(1). This will depend on whether the document is admissible under the provisions of Evidence Act. Section 54 does not make the issue of certified copy of an Income Tax return to an assessee unlawful. The return is a confidential document and cannot be disclosed to a third party, but there can be no objection to the maker of the return having a copy for his own purposes if he so desires. So far as the assessee is concerned, he is not bound to treat the document as confidential.

There is nothing in Section 54 which prohibits a party from putting in evidence a certified copy of an Income Tax return if that return is a public document. It is now well settled that the assessment order is a public document. I have referred to a decision of the Nagpur High Court in which the earlier decision of the Rangoon High Court and the decisions of the Calcutta and Madras High Courts reported in *PROMATHA NATH PRAMANICK Vs. NIRODE CHANDRA GHOSE.*, and *MYTHILI AMMAL Vs. JANAKI AMMAL AND ANOTHER.*, were not approved. They relied upon the Full Bench decision of the Madras High Court cited above. Thus a Division Bench of the Nagpur High Court in the case of AIR 1946 Nag 377, held that the statements recorded or orders passed by Income Tax officers are public documents u/s 74. u/s 76 it is not necessary that the public generally must have a right to inspect. It is sufficient if there is any single person who has a right to inspect. An assessee has a right to inspect statements recorded or orders passed by Income Tax officers and consequently certified copies of such documents granted by the Income Tax Department will be admissible in evidence u/s 65 to prove the contents of these documents.

To the limited extent the observations of their Lordships in the above case, that is, "It is sufficient if there is any single person who has a right to inspect" was doubted in a subsequent Patna decision reported in *Banarsi Devi Vs. Sm. Janki Devi*, wherein a Division Bench of the Patna High Court held that any person other than assessee is not entitled to inspect the documents characterised as being confidential in Section 54 (1) of the Income Tax Act and to obtain certified copies thereof u/s 76 of the Evidence Act. Apart from the assessee such documents cannot be produced in evidence by any other person unless they come within the exceptions laid down in Sub-section (3) of Section 54 of the Income Tax Act. The position of the assessee may be different and on the principle that a person entitled to an advantage can very well waive the same and the assessee, if he so likes, can make use of such documents at the risk of disclosing matters which have to be kept confidential for him. Section 76 lays down that every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it. Therefore, if the person seeking to obtain a copy got no right to inspect that

document, he cannot have a copy thereof under this section. If that be so, a copy obtained by such a person is a copy obtained illegally and against the provision of this section and is, therefore, inadmissible in evidence.

On the principle underlying in the provision of Section 54 of the Income Tax Act making documents confidential as between the maker thereof and the Income Tax department, it is obvious that apart from the maker thereof no one has got a right to inspect the same, and that being the position, certified copies obtained thereof on behalf of a person other than the maker thereof cannot be treated as certified copies within the meaning of Section 75, Evidence Act, and will not, therefore, be admissible in evidence. Thus, the consensus of opinion is that if a copy of the assessment order or a certified copy thereof is produced by the assessee waiving his privilege, it will be admissible in evidence. Accordingly, there is no force in the contention of Mr. Roy and the assessment orders are admissible in evidence.

9. * * *(Then after discussing evidence His Lordship held as follows:) Manilal, Pannalal, Bajranglal, Tulsiram and Biswambar Dayal were partners of Surajmal Manilal Firm carrying on business in partnership in Jute at Kendupatna. Plaintiffs' witnesses have consistently deposed that Tulsiram and Biswambar Dayal were partners of Surajmal Manilal along with Manilal and Surajmal's branch. The partition-deed makes it clear that Surajmal's joint partners Pannalal and Bajranglal were the partners of Surajmal Manual's Firm. Surajmal died in the year 1946 and at the time of the suit-transactions his son Bajranglal and his brother Pannalal were the partners of the firm.

10. Some argument was advanced that Manilal and Tulsiram's family may be trading families, but there is no evidence that Surajmal's family was a trading family and as such was taken into partnership as a member of non-trading family. Whatever may be the position, at the time of entering into the partnership with Surajmal, the evidence is complete that after the death of Surajmal in 1946, his son Bajranglal and brother Pannalal the coparceners of Surajmal's family entered into a contractual relationship with Manilal and Tulsiram's family. The witnesses examined on behalf of the plaintiff were neighbours and caste-men of the contesting defendants. Their evidence goes unmistakably to show that Tulsiram, Biswambar Dayal were partners of Surajmal Manilal Firm along with Surajmal, Manilal. D.W. 2 Bajranglal Choukhani, a close and common relation of Manilal and Tulsiram and a neighbour of theirs does not say that Tulsiram and Manilal had no interest in Surajmal Manilal Firm. Doubtless in his cross-examination he has stated that till the date of partition on 9-8-1951 as to who were the partners of Surajmal Manilal Firm. From the various assessment orders and the documents referred to above it is fairly clear that Manilal Tulsiram had eight annas interest in Surajmal Manilal's Firm.

It is significant to note that the Khatas of Surajmal Manilal Firm were with Tulsiram. The explanation given by him in his deposition was that they were brought by Manilal for Income Tax purposes and were left there. The account

books of Surajmal Manilai's Firm were produced by Tulsiram. He had also stated that the account papers were left by Manilal in his house and they were mixed up with the account books of Manilal Tulsiram. It is very difficult to believe this explanation. The evidence of Tulsiram when read as a whole leaves an impression that he was intimately connected with Manilal in the management of the Firm Surajmal Manilal, though to all relevant facts he had stated that either he does not remember or he cannot say.

11. This being the position on evidence, the argument of Mr. Roy that even if it is held to be a trading family, the plaintiffs can only recover the amounts due from the assets of the joint family properties in the hands of the defendants assumes some importance. The law is quite clear that the junior members of a non-trading family are not personally liable, but only such properties of the joint family put into the venture and in their hands, are liable for debts. The position of a trading family is quite different. In a trading family, the creditor can pursue the entire joint family properties whether put into venture or not. The junior members ipso facto do not become members of the partnership and are not clothed with certain rights and obligations. Thus, in a trading family the creditors can obtain a personal decree against the Karta of the family and can proceed against the entire joint family assets in the hands of the junior members thereof.

Reference was made to Section 5 of the Indian Partnership Act, 1932. Section 5 states that the relationship 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. The learned Subordinate Judge in this connection had referred to a decision of the Privy Council reported in AIR 1934 192 (Privy Council) . Their Lordships in that case held that where a managing member of a joint Hindu family enters into a partnership with a stranger, the other members of the family do not ipso facto become partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Contract Act. In such a case the family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with stranger and the partnership will be governed by the Contract Act, and therefore, the other partners cannot be allowed as of course and without further investigation to follow the money, if any, which the partner who was managing member of his family drew as his share from the partnership business and used for the benefit of his family.

12. Mr. Roy referred to paragraph 308-A of Mayne's Hindu Law, 11th Edition, which deals with manager's powers of a trading family. In AIR 1934 192 (Privy Council) , the Chetties were doubtless the trading family and Virappa Pillai who was the manager of the family which was not a trading family was taken as a stranger into the partnership. That, however, does not make the position any different, nor does it affect the Full Bench decision of the Madras High Court in ILR Mad 454 : AIR 1918 Mad 37, Gangayya v. Venkatramiah, wherein a Full Bench of the Madras High Court held that strangers do not ipso facto make the

other members of the family partners, and not being partners, the other members whether divided or undivided cannot institute any suit in respect of partnership, i.e. a suit for dissolution of partnership. Thus, when the managing member properly enters into a partnership with a stranger pledging the entire credit of the family, the creditors of the firm can have recourse against the entire assets of the family. But as members of a joint family, they have the same interest in the assets of the business as they have in the other property of the family and the same remedy against the managing member or members.

Accordingly, where the manager on a dissolution of partnership of which he is a partner enters into an arrangement prejudicial to the interests of the family, the coparceners are not without a remedy and it is open to them to take steps to protect the interests of their family and for the realisation of what represents the share of the family in the assets of the dissolved partnership. They could sue the manager as well as persons who are in possession of their share of the assets. There is ordinarily no distinction between their family properties and their trade assets and the whole of the joint family property will therefore be assets of the business, in the absence of any special arrangement to the contrary by which particular properties are validly set apart. Reference may also be made to a decision in *Kharidar Kapra Co. Ltd. v. Days Kishan* 1984 43 All 116 : AIR 1921 All 306. .

AIR 1934 192 (Privy Council) , was referred to in a subsequent decision of the Board in the case of (1948) 16 ITR 35 (Privy Council) . That was a case which considered if one member of the family can enter into a partnership with the joint family, and their Lordships reiterated the view taken in AIR 1934 192 (Privy Council) . The Supreme Court cases reported in *Kshetra Mohan-sannyasi Charan Sadhukhan Vs. Commissioner of Excess Profits Tax, West Bengal* , *Firm of Bhagat Ram Mohanlal Vs. The Commissioner of Excess Profits Tax, Madhya Pradesh, Nagpur and Another* , *Bhagat Ram v. Commr. of Excess Profits, Nagpur*, being cases under the Excess Profits Tax Act, their Lordships of the Supreme Court were mainly concerned as to what was the chargeable accounting period. These do not refer to cases in which trading, families are concerned and they do not overrule the principles laid down by the Privy Council in AIR 1934 192 (Privy Council) or (1948) 16 ITR 35 (Privy Council) .

Thus, it appears to be well settled that a Joint Hindu family through its Karta can introduce a stranger into their family business and in view of the frequently changing nature of the joint family, there can be no partnership between a co-parcener and the entire joint family as one unit. In (1948) 16 ITR 35 (Privy Council) , the Privy Council treated the position of a co-parcener on the same footing as a stranger. The learned Subordinate Judge had also relied upon a decision of the Patna High Court reported in AIR 1938 Pat 377, *Debi Prasad v. Tara Prasanna*, as also a decision of the Madras High Court reported in AIR 1938 Mad 849, *Chockalingam Chettiar v. Muthukaruppan*, along with a decision of the Nagpur High Court reported in AIR 1937 Nag 237, *Bhagwansingh v. Beharilal*.

13. In AIR 1938 Pat 377, a Division Bench of the Patna High Court took the view that where a Karta of a trading family in the course of management of the family business, takes a stranger as a partner into the business, the other members of the family who were partners in the family-business upto that time do not cease to be partners and are liable for debts of business. While coming to this conclusion, the learned judges explained the decision in AIR 1934 192 (Privy Council) . Mr. Roy contended that the learned Judges of the Patna High Court did not refer to para, 308-A of Mayne's Hindu law cited above, which refers as already stated, to the manager's powers in trading family. But the said decision was taken on the facts of that particular case and AIR 1934 192 (Privy Council) , was considered by their Lordships.

In the case in AIR 1938 Mad 849, a similar view was expressed. True it is, that AIR 1934 192 (Privy Council) , was not referred to in that decision, but the principle underlying it was referred to. What was held in that case was that no doubt a contract of partnership by a Manager does not ipso facto make the other members of the family partners but where the manager of a trading family enters into a partnership with strangers for the purpose of carrying on the same kind of business, the members of the family, minor or otherwise, become liable to the extent of their interests in the family property for the debts binding on the manager in the partnership business.

In the case of AIR 1937 Nag 237, the Nagpur High Court following a decision in Ramkrishna Muraji v. Ratan Chand, AIR 1931 PC 136 , took the view that a joint Hindu family can carry on an ancestral family business with a stranger as a partner even when there are minor members in such family. The manager of a trading family has power to carry on the business and to do everything necessary for its proper conduct. He can pledge the credit of the family, sell or mortgage its property and therefore he can in certain circumstances introduce a stranger partner into the business. The mere fact that strangers were introduced as partners into the ancestral family business does not alter the nature of the business or the liability of the members of the joint family, when the manager is conducting the business in a proper way.

14. Mr. Roy argued that the partnership stood dissolved immediately after the death of Surajmal. He referred to Clause (C) of section 42 of the Indian Partnership Act;

"Subject to contract between the partners, a firm is dissolved by the death of a partner."

True, normally the partnership would stand dissolved on the death of a partner unless it is otherwise contracted for, but if it is found from the subsequent conduct of the parties that despite the death of a partner, the partnership business continued and functioned, then it would be taken that it continued by virtue of a contractual relationship. I am supported in my view by a decision of the Privy Council In the case of AIR 1945 91 (Privy Council) . In that case Sir

Madhaban Hair held that where a partnership with a firm has gone on as a living concern continuously since the time it was started, the separation or death of same members of the firm, others -- their sons or grand sons -- taking their place, cannot amount to dissolution as the other partners have presumably agreed to treat as partners the remaining members of the firm or such members as were added to it from time to time.

The same view was taken by the Allahabad High Court in *Lala Ram Kumar Vs. Kishori Lal and Others*, . The Madras High Court in the case reported in AIR 1959 Mad 283, *Narayanan Chettiar v. Umayal Achi*, expressed the opinion that on the death of one of the two partners, the legal representatives joining the survivors in the business creates a new partnership. Similarly the Calcutta High Court in the case of *Haramohan v. Sudarson*, reported in AIR 1821 Cal 538, held on the facts of that case that the partnership was not dissolved on the death of a partner.

15. Paragraph 308A of Mayne's Hindu Law, 11th Edition deals with the manager's powers in a trading family whereas paragraph 308 deals with cases of ordinary Hindu Undivided families. It is worthwhile to refer to a decision of the Circuit Court reported in 2 CLT 43 : AIR 1936 Pat 485, *Ghasiram Biseswar Lal Firm v. Otia Gauria Ota Basaraj Firm*, where Courtney Terrel C. J. held that where a member of a Hindu Joint family carries on a business which is appropriate to the caste to which he belongs it may be properly inferred that that business is a part of the joint family property and the member who manages, has an implied authority to contract debts for the purpose of that business and creditor supplying goods to the business of the class and character dealt with by the purchaser, is not bound to enquire into the necessity of the family and the share of the minor who is a coparcener in such a joint family is liable for the debts contracted by the managing coparcener for the purpose of such joint family business. In view of the evidence that Manilal and Tulsiram were Kartas of their respective joint family at the date of the suit transactions, it would not be wrong to pass a personal decree against each of them, or their representatives. The decree-holder can proceed against the junior members of their family in respect of the joint family assets.

16. Two technical grounds were raised by Mr. Roy; (1) That the suit is not properly framed and that they are hit by the provisions of Rules 11 and 12 of the Orissa Money Lenders Rules. With respect to the first, he argued that Manilal, Tulsiram and Biswambar Dayal have not been sued as Kartas. The law is well settled that they may not be sued as such in the cause-title, but if from the body of the plaint it could be gathered that they had been sued as Kartas then there is nothing wrong in the framing of the suit. In *Ani Bai's case* (Money Suit Ho. 75/52) in paragraph 1, it is stated that defendants 7 to 10 are sons of Manilal who are the members of a joint Hindu Mitakshara family and defendant No. 2 Manilal being the Karta, was the manager of the said family. It is contended that after the partition deed was executed in 1951, it is wrong to say that Manilal was

the Karta of the two branches, in the other two suits filed by Banarsi Devi and Kundanlal Madanlal (money suits Nos. 84 and 110/52), the son of Manilal Atmaram and Tulsiram and Biswambar Dayal have been sued as Kartas of their respective branches. Thus the provisions of Order 1, Rule 9 of the CPC seem to have been complied with. Accordingly, there is no force in this contention of Mr. Roy.

17. The only other contention seriously pressed was that the suit is hit by the provisions of Rules 11 and 12 of the Orissa Money Lenders Rules. Rule 11 is in the following terms:--

"Every plaint in a suit by a money-lender as defined in Sub-clause (1) of Clause (1) of Section 2 shall in addition to any other particulars that may be required by any law, contain the following particulars;

- (i) date and number of his registration certificate;
- (ii) maximum capital in respect of which he holds certificate; and
- (iii) a copy of the account referred to in Clause (a) of Section 7 of the Act relevant to the case."

Therefore (sic) Rule 12 states that:-

"Every plaint filed in a suit by a money-lender as defined in Sub-clause (2) of Clause (j) of Section 2 shall in addition to any other particulars that may be required by any law contain the following particulars namely, the maximum amount of capital of the plaintiff's money-lending business."

Reliance was sought to be placed on an unreported decision of this court in *Harish Chandra v. Bansnidhar*, First Appeal No. 6 of 1954 disposed of on 26-7-60 and on a Division Bench decision in 27 CLT 230, *Anirudha Behera v. Dhanu Behera*. Before the matter came to be considered by the Division Bench in the case of 27 CLT 230, there were contradictory decisions of this Court which were set at rest by the decision of the Division Bench which held that mere omission to furnish the particulars required by a statute may not be a ground for throwing out the plaint unless the plaintiff is given a reasonable opportunity to supply the omissions and fails to avail himself of it. Rules 11 and 12 of the Orissa Money Lenders Rules cannot therefore be treated as mandatory. It was further held that if the Court fails to notice the omission and the defendant also does not raise any objection on this ground before the trial court, it will not be proper for the first appellate Court or the second appellate court or the court of revision to dismiss the suit merely on the ground of non-compliance with Rules 11 and 12 unless prejudice is shown to have been caused. In considering whether any prejudice has been caused to the defendants the question as to whether he has raised an objection on this ground at the earliest stage will be relevant.

The learned Chief Justice also referred to the unreported decision in First Appeal No. 6 of 1954, decided on July 26, 1960, where it was found that the copy of

accounts required by Clause (III) of Rule 11 had not been furnished with the plaint, but as the learned Judges held that it was the admitted case of both parties that no payment had been made since the date of their incurring the loan and there was no other term agreed to between the moneylender and the debtor, there was substantial compliance with the provisions of Rule 11. This decision, we are informed is the subject matter of an appeal before the Supreme Court (S.C.A. 89/60) in which leave has been granted by this Court. The facts in the instant case were that although it was stated in the plaint of Ani Bai and Kundanlal that they were registered money-lenders, the question that provisions of Rules 11 and 12 had not been complied with was not raised in the written statement, nor was there any issue framed. Even in the grounds of appeal to this court it was not raised. The evidence in Kundanlal's case is that he does not maintain any account so also Banarasi Devi's case. In Ani Bai's case she stated that her brother knows if the accounts were kept. She cannot state anything. Her brother is admittedly dead.

In the Division Bench case referred to above the loan was completely denied. But in the instant case, not only that the loan was denied, but the defence was that somebody else had incurred the loan with which they had no concern whatsoever. That being the position, there was no question of any part-payment or scrutiny of the accounts to find out if the various plaintiffs' claims were correct. Hence, non-compliance with the rules is wholly immaterial, particularly when the contesting defendants did not raise any objection at the first stage, as has been noticed in Anirudha Behera's case 27 CLT 230. The entire litigation was fought out on the footing whether the contesting defendants were partners of Surajmal Manilal, and as such were liable. This being the position, no prejudice seems to have been caused to the contesting defendants at all. Accordingly, there does not appear to be any force in the contention of Mr. Roy.

18. Since we have come to the conclusion that the defendants at no stage of the case had taken the objection, no prejudice has been caused. In view of the position in law as discussed above, there is no substance in the contentions put forth on behalf of the appellants. Now that the plaintiffs are legally entitled to a decree, the next question is the form in which the decree ought to be passed. There is ample evidence that Pannalal was the Karta of Surajmal's branch and Manilal and Tulsiram were the Kartas of their respective branches. It was properly conceded by Mr. Mookherji that Biswambar Dayal is not personally liable. Accordingly, the defendants Pannalal, Manilal being dead, the Karta of his branch Anantram who was sued as Karta in the two cases out of which First Appeals 83 and 84 arise and Tulsiram are personally liable as Kartas and the decree-holders can pursue the entire joint family properties in the hands of the other junior members of their respective families. Therefore, all the three suits are bound to be decreed in the above form. Thus, there being no merit in these appeals, all the three appeals are dismissed with costs.

Appeals dismissed with costs.

R. K. Das, J.

19. I agree.