

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1909.

January 22.

RAGHUNATHJI TARACHAND, A FIRM (APPELLANTS AND DEFENDANTS), v.
THE BANK OF BOMBAY* (RESPONDENTS AND PLAINTIFFS).

Hindu law—Hindu family firm—Trade—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor coparcener—Liability of minor coparcener in suit on promissory notes.

One H. persuaded N. who was the only adult male member of a joint Hindu firm carrying on an ancestral trade to sign certain promissory notes in the name of his ancestral firm. N. signed the notes without the knowledge of the other member of the firm and without any advantage to the firm. The notes were subsequently endorsed by H. to B. who advanced monies on them to H.

On a suit by B. to recover the amounts due on the notes from N.'s firm K., a minor coparcener, pleaded that he was not liable.

Held, varying the decree of Heaton, J., that the minor's share in the firm was liable.

Per CHANDAVARKAR, J. :—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 at least 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.

Where a minor is a coparcener in a joint family his *share* in the family property is liable for debts contracted by his managing coparcener for any *family purpose* or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the terms *family purpose* or *purposes incidental to it* must have given way for the expression *trading purpose* or *purpose incidental to it* having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family, trading as a firm, necessary for its existence and its purposes.

* Original Suits Nos. 60 and 90 of 1908. Appeal No. 28 of 1908.

The minor's share is therefore bound by it since it constitutes an obligation of the firm.

Per BATCHELOR, J. :—In establishing the legal relations of a joint firm the Courts treat it as a kind of partnership and apply the principles of that law. The test to be applied in cases of this kind is rather the apparent authority of the manager than the actual necessity of the family, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade.

THERE were two Summary Suits filed by the Bank of Bombay on two promissory notes or Hundis against the firm of Raghunathji Tarachand in the name of which the notes were made and by whom they were dishonoured and the heirs of the person by name Hirabhai Ghellabhai to whom or to whose order the notes were payable, who endorsed them to the Bank of Bombay and obtained money from the Bank.

The latter defendants did not appear. The first defendant obtained leave to defend and pleaded in substance that, though the notes were signed by one Narottam, the son of Gordhandas, who was the only son of the original founder of the firm Raghunath, yet that Narottam had no authority to sign with the name of the firm, and did not sign them for the firm; that the notes were signed by Narottam only when entreated by Hirabhai; that he received no consideration and did not know he was incurring any liability; that they were obtained by fraud and that the Bank through their agent had notice of the fraud.

The firm of Raghunathji Tarachand was the name of a firm belonging to a Hindu family, of which Narottam was the only adult male member. The two notes sued on were signed by Narottam in the name of the firm.

Heaton, J., found *inter alia* that the notes in question were signed by the firm of Raghunathji Tarachand; that the firm of Raghunathji Tarachand was a joint family firm; that Narottam, at the time he signed the notes, was the manager of the joint family firm; that the making of the notes was a clandestine transaction in fraud of the firm of Raghunathji Tarachand, and that the making of the notes was neither in the course of the business, nor in the interest of, nor in any way connected with

1909.

RAGHU-
NATHJI
TARACHAND
c.
THE BANK
OF BOMBAY.

1909.

RAGHU-
NATHJI
TARACHAND
v.
THE BANK
OF BOMBAY.

the affairs of the firm, but that the joint family firm was liable under the notes signed by its manager.

The Court passed a decree against the firm of Raghunathji Tarachand and against the second defendant as the representative of Hirabhai Ghellabhai to the extent of the funds of Hirabhai Ghellabhai which had come to their hands.

The defendant firm of Raghunathji Tarachand appealed.

Raikes (with him *Padshah*) for the appellants.

Lowndes with *Strangman*, *Advocate-General*, and *Inverarity* for the respondents.

CHANDAVARKAR, J. :—The facts of this case, material for the purposes of this appeal, are undisputed and may be shortly stated :—

One Raghunathji Tarachand started a firm in Bombay in that name for carrying on business in cloth. On his death in 1902, his son Govardhandas continued the business. Govardhandas having died in March 1904, leaving his widow Parvatibai, two minor sons Narottam and Keshavlal, and five daughters, the cloth business was carried on for some time by the Munim of the firm under the orders of the widow. When Narottam came of age, he looked after the business. Narottam was a friend of one Hirabhai Ghellabhai, a pearl merchant, who had been in the habit of getting others to draw promissory notes in his favour for the purposes of his business and negotiating them. Towards the end of 1907, the friends, who had so accommodated him, having refused to give notes in that way any further, Hirabhai persuaded Narottam to sign the promissory notes now in dispute and two more in the name of his ancestral firm, Raghunathji Tarachand. Narottam signed them without the knowledge of his mother and of his Munim and without any advantage to his own firm. The notes were endorsed by Hirabhai to the Bank of Bombay, who thereupon advanced moneys to the former.

The notes having been dishonoured, the suit was brought by the Bank to recover the moneys of the two notes from the firm of Raghunathji Tarachand. The first point made before us in sup-

port of this appeal from Heaton J.'s decree is of a purely technical character. It is urged that the suit was wrongly brought against the firm Raghunathji Tarachand, and that, having regard to the Rules of this Court, it should have been filed against the individuals constituting the firm. Section 578 of the old Code of Civil Procedure, replaced by section 99 of the new Code, is a sufficient answer to the objection. It provides that no decree shall be reversed or modified in appeal for error or irregularity not affecting the merits of the case or the jurisdiction of the Court which passed the decree.

The second point urged is conceded by Mr. Lowndes, counsel for the respondent. Heaton, J., has given a decree against the firm Raghunathji Tarachand, and the result of that is a personal decree against the minor Keshavlal, who is a partner in the firm, entitling the Bank to attach and sell in satisfaction of the decree any property of the minor apart from his share in the firm. Mr. Lowndes agrees that the decree goes further than the law warrants and must be modified accordingly.

The really important question argued in this appeal is as to the liability of the minor in respect of his share in the firm. It is conceded by the learned counsel for the respondent that the notes in dispute were given by Narottam in fraud of his firm. Heaton, J., has found on the evidence that the plaintiff Bank are indorsees for value in *good faith*, and that finding is not impugned on appeal. At the same time it is clear and conceded by Mr. Lowndes that the Bank had made no inquiry as to the constitution of the firm and the purpose of the liability.

On these facts the argument for the appellant is, shortly, this:—The defendant firm is not a partnership in the legal sense of the term, because it consists of the members of a joint family, governed not by the Indian Contract Act, but by the Hindu law. Those members were coparceners, who carried on an ancestral trade in the name of the family firm. Their relations, whether *inter se* or with the outside world, must be regulated by the rules of Hindu law applicable to the joint family system. One of those rules is that laid down by the Judicial Committee of the Privy Council in the leading case of *Hunoomanpersaud v.*

1909.

RAGHU-
NATHJI
TARACHAND

THE BANK
OF BOMBAY.

1909.

RAGHU-
NATHJI
TARACHAND
v.
THE BANK
OF BOMBAY.

Mussumat Babooee Munraj Koonweree (1). There it was held that no debt contracted by the managing member of a joint family, consisting among others of minor coparceners, can bind the minor members, unless it was for some family purpose, or unless at least the creditor is able to prove that on proper enquiry he honestly believed that it was for such purpose.

Applying that rule to the facts of the case, it is urged that the Bank are not entitled to a decree even against the share of the minor Keshavlal in the family firm, since the promissory notes in question were given by the other partner, Narottam, in fraud of the firm, and the Bank had made no enquiry as to the necessity for, or purpose of, the notes before becoming indorsees for value.

The reason of the rule that partners in trade have authority, as regards third persons, to bind the firm by bills of exchange or a promissory note is stated in Tudor's Selection of Leading Cases on Mercantile and Maritime Law (3rd Edn., p. 477) to be that, in the case of mercantile partnerships, the circulating of negotiable instruments is necessary. The drawing and accepting of bills and the giving of promissory notes is "part of the ordinary course of such a partnership," because, having regard to its nature, that power is essential and is incidental to its purposes: see the judgment of Cockburn, C. J., in *Nicholson v. Ricketts* (2). The rule has been adopted and enforced in the case of trading partnerships in the interests of trade and the necessities of commerce, and has become a rule of the trade.

It is true that neither any Smriti nor authoritative commentary on Hindu law expressly recognises any such law with reference to a joint Hindu family carrying on a trade in the capacity of a firm or to any other trading firm. But it follows, I think, from certain general principles laid down by some of the Smriti writers and their commentators that, where such a family embarks on a trade for the purposes of its livelihood, it is bound by all the rules and laws applicable to that trade.

According to Hindu lawgivers, from Manu downwards, traders formed a part of the Hindu polity, and the profession of trade was meant for the third and last of the twice-born castes, namely,

(1) (1856) 6 Moo. I. A. 203.

(2) (1860) 2 E. & B. 497 at p. 523.

Vaishyas. The Bráhmíns and the Kshatrias were allowed to trade only in case of necessity and in times of distress. There are special rules laid down for traders. Where a caste or a joint family takes to trading and that is handed down from one generation to the next and so on, it is called a trading caste or a trading family and trade becomes its duty or practice. In that case the duty or practice is called *kulachara*. The Smriti writers and the commentators all lay down the injunction that the king should see that *kulachara*, meaning the duty of every family or caste, is properly preserved. [See Smriti No. 313 of Yajnyavalkya in the Acharadhya of the Mitákshara, Moghe's 3rd Edn., p. 100.]

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 Vyavahára Mayukha and the Mitákshara is that where several persons, such as traders, etc., carry on business jointly it is *sambhūya samu!hanam*, i.e., partnership. Vijnaneshvara uses the same expression, *sambhūya samu!hanam*, i.e., partnership, in explaining Yajnyavalkya's smriti relating to an undivided family. The smriti is that "if the common stock be improved, an equal division is ordained." On this Vijnaneshvara's gloss in the Mitákshara (as translated in Stokes's Hindu Law Books) is:—"Among unseparated brethren, if the common stock be improved or augmented by any one of them, through agriculture, commerce or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer." (Stokes's Hindu Law Books, page 390, s. 31.) This translation, I venture to think, does not bring out the force of the original. It ought to be as follows:—

"If the common stock of undivided brothers be collectively augmented in partnership for (the purposes of) agriculture, trade, or the like, by one of them, the partition shall be equal and a

1909.

RAGHU-
NATHJI
TARACHAND
v.
THE BANK
OF BOMBAY.

1919.

BAGHU-
NATHJI
TARACHAND .
v.
THE BANK
OF BOMBAY.

double share shall not be allotted to the person augmenting." The gloss shows that coparceners in a joint family become partners, when they trade in union. I say it shows that because Vijnaneshvara speaks of their union in that respect as *sambhuga samathanam*, which is also the expression used in his Chapter on Partnership at p. 253 of Moghe's 3rd Edn.

There is a Smṛiti of Brihaspati, according to which companies of tradesmen "should adjust their disputes according to the rules of their own profession." (Sacred Books of the East, Vol. 33, Part I, p. 281, para. 26). Nilakantha in his Vyavahāra Mayukha cites Bhṛigu as ordaining that "traders, cultivators of land and artisans must be made to pay" (their debts), "according to the custom of the country." (Mandlik's Translation, p. 107.) That includes mercantile usage. The same commentator cites Vyāsa as laying down that "the decision of a dispute among merchants . . . is impossible to be made by others (*i.e.*, persons of other persuasions); but it should be caused to be made by those who know those pursuits." (Mandlik's Translation, p. 6.) The reason of this must be that it is merchants alone who know best what the rules of their profession, adopted in the interests of trade, are. The implication is that such rules must be followed in the interests of trade. Nowhere is it stated that these rules do not apply to a joint family carrying on a trade as its *kulachara* or family business merely because it occupies also the status of a joint family. If then our Courts have held that, in the interests of commerce, one member of a trading firm has power to bind the other members, whether they be minors or adults, by means of a negotiable instrument given in the name of the firm in favour of a *bond fide* holder for value, and if that rule has become a necessary incident of that trade, or part of its mechanism, the authority of the texts above-cited supports the view that all members of the firm are bound by a promissory note given by one of them in the name of the firm.

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 at least one important exception. According to a text of Yajnyavalkya, "among herdsmen, vintners, dancers, washermen, and hunters,

the husband shall pay the debts of his wife," and the reason is stated to be that "the livelihood of the family depends" upon the wife. [Mandlik's Translation of the Vyavahára Mayukha, p. 114, ll. 35 & 36.] In his gloss upon this text Vijnaneshvara in the Mitákshara points out that the reason assigned in the text for this exception shows that the rule applies to similar cases. Apararka⁽¹⁾ states that this is an exception to the general rule relating to families. Balambhatta⁽²⁾ in his commentary on the Mitákshara points out that the specified cases in the text are not exhaustive but illustrative and that the principle applies to all alike—Bráhmíns and others similarly situated. That is, the term 'wife' in the text stands for the *karta* or manager of the family and the terms 'herdsmen, etc.,' stand for its members carrying on a family business. From this text it follows that 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 to bind the whole family thereby, because that power is necessary for the very existence of the family. Whether the debt was contracted for the purpose of the family profession or not, it binds the members.

And this is substantially in accordance with the dictum in *Ramlal Thakursidas v. Lakhmichand Muniram* ⁽³⁾, where it was said at page 52:—A minor, who is a member of a joint Hindu family carrying on an ancestral trade as a firm, is bound by such acts as are necessarily incident to the carrying on of a trade. According to the law merchant, the drawing of a bill of exchange or the giving of a promissory note is a necessary incident of the carrying on of trade. The dictum in *Ramlal v. Lakhmichand* ⁽³⁾, strictly speaking, was not necessary for the purposes of its actual

(1) See Apararka's Yajnyavalkya Smriti, A'nandáshrama Series, Vyavaháradhyaya, p. 649.

(2) नेदं परिगणनं कित्पलक्षणाभिस्यनेनैव सूचितमित्याह यस्मादिति ॥
अन्येपि एतद्विन्नाः सर्वे ब्राह्मणादयोपि. [Ms. Copy of Balambhatti which is in this Court.]

(3) (1861) 1 Bom. H. C. R. Appx. li,

1909.

RAGHU-
NATHJI
TARACHAND
v.
THE BANK
OF BOMBAY.

decision. And the decisions of the Calcutta High Court in *Johurra Bibee v. Sreegopal Misser* ⁽¹⁾ and *Bemola Dossee v. Mohun Dossee* ⁽²⁾ and *Sakrabhai v. Magantal* ⁽³⁾, in which *Ramlal v. Lakhmichand* ⁽⁴⁾ is approved and followed, do not exactly touch the point of law arising in the present case. I should have declined to act upon the dicta in these cases had I found no support for them in the Hindu law books. I am of opinion that they correctly express the Hindu law on the subject, having regard to the texts to which I have referred in this judgment. In *Samalbai Nathubhai v. Someshwar* ⁽⁵⁾ it has been held by this Court that a joint family carrying on business as a firm is not exclusively governed either by the principles applicable to joint families as such or by the Contract Act. It is, I think, a necessary inference from that decision that those principles will apply to such a firm only so far as they are not opposed to but are consistent with the necessary incidents of trade and the paramount interests of commerce.

We have been asked by Mr. Raikes, in his argument for the appellants, not to apply this law to the facts of this case, because the law, so far as it has been applied to partnerships formed under the Indian Contract Act or to partnerships falling within the English law, has its origin in mercantile usage but no such usage was pleaded by the respondent Bank and indeed it could not be pleaded as the suit was filed as a summary action under the rules of this Court. The answer to this contention is simple. "The law merchant, it has been observed, forms a branch of the law of England, and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them." [Broom's legal Maxims, 7th Edn., p. 705.]

Then comes the question as to the nature and extent of the liability of the minor Keshavlal. We have been referred by

(1) (1873) 1 Cal. 470.

(3) (1901) 26 Bom. 206.

(2) (1880) 5 Cal. 742.

(4) (1861) 1 Bom. H. C. R. Appx. II.

(5) (1880) 5 Bom. 38.

Mr. Raikes to the decision of the Judicial Committee of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose* ⁽¹⁾, that a minor is incapable of contracting. And he argues that section 247 of the Indian Contract Act is inapplicable here, because the minor is governed by the principles of Hindu law.

Assuming that it is so, what is the Hindu law on the subject? Where a minor is a coparcener in a joint family, his *share* in the family property is liable for debts contracted by his managing coparcener for any *family purpose* or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the term *family purpose* or *purposes incidental to it* must here give way to the expression *trading purpose* or *purpose incidental to it*, having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family trading as a firm, necessary for its existence and its purposes. It is a necessary incident of the carrying on of the trade. Without it the firm could not gain credit in the market and prosper. The minor's share is, therefore, bound by it, since it constitutes an obligation of the firm. This conclusion arises, in my opinion, from the principles of Hindu law with which I have dealt in the earlier part of this judgment. It is unnecessary, therefore, to invoke the aid of either section 247 or any other provision of the Indian Contract Act.

For these reasons I am of opinion that the conclusion of law arrived at by Heaton, J., is correct. His decree, however, goes further than the law warrants and must be modified by striking out the words "against the firm of Raghunathji Tarachand", and substituting for them the words:—"Against the share of the minor defendant Keshavlal in the firm of Raghunathji Tarachand." In other respects the decree must be confirmed. As to costs, the variation we have made in the decree appealed from appears substantial but in name. It is admitted by Mr. Raikes that the minor has no property of his own. The respondents understood the decree to apply only to the minor's share, and when the appeal was opened, their counsel at once

1909.

RAGHU-
NATHJI
TARACHAND
v.
THE BANK
OF BOMBAY.

1909.

RAGHU-
NATHJI
TARACHAND
v.
THE BANK
OF BOMBAY.

conceded the point as to the personal liability of the minor. The argument in appeal was confined to the minor's share in the firm, and on that point the appeal fails. The decree must, therefore, be confirmed with costs.

BATCHELOR, J. :—This appeal raises a question of the liability of the appellants in respect of two promissory notes executed by one Narottam Gordhan in favour of one Hirabhai Ghellabhai, who indorsed them over to the Bank of Bombay and received the money for them from the Bank. The facts necessary for the decision of the appeal are either admitted or are found and not contested. Narottam was the adult manager of a joint Hindu family, the only other coparcener being his brother, Keshavlal, an infant, now about four years of age. Among the assets of the undivided family was a joint firm trading in the name of Raghunathji Tarachand, who was the grandfather of Narottam and the original founder of the business. The promissory notes in suit were executed by Narottam in the name of the firm, Raghunathji Tarachand, but no consideration passed from Hirabhai Ghellabhai. Hirabhai was a friend of Narottam, who executed the notes on the faith of the mere assurance by Hirabhai that he would not be called upon to pay. In fact Hirabhai was unable to meet the notes and appears to have committed suicide. The notes were dishonoured, and the respondents, who are holders for value without notice of any fraud, seek to come upon the firm Raghunathji Tarachand, including the minor Keshavlal's share therein. The only material question for decision is whether the minor's share in the firm is liable. It is admitted by Mr. Raikes that Narottam is liable, and it is admitted by Mr. Lowndes that the decree under appeal cannot be sustained in so far as, being a decree against the firm, it would be enforceable against the minor personally.

With regard to Mr. Raikes's preliminary objection to the frame of the suit, I agree with my learned colleague that a sufficient answer to it is supplied by section 578 of the Civil Procedure Code of 1882; section 99 of the present Code is to the same effect.

This brings me to the principal question whether the minor's share in the firm is liable on the obligations undertaken by

Narottam in the name of the firm, Mr. Lowndes has invited us to decide the question on the principles of the law merchant, and has urged in forcible language, that the reversal of the decree would have the effect of paralysing a very important branch of trade throughout the length and breadth of the Presidency. But these considerations, though undoubtedly of great consequence in their proper place, do not, I think, assist a Court of Justice. It is our business to ascertain and declare what the law is; we have no concern with what it ought to be in reference to one standard or another. The law here and now actually is one way or the other: if it is in favour of the decree made, well and good: but if it is not, a Court cannot, I think, make it the law by showing that it would be for the convenience of merchants to have it so. As I understand the matter, no degree of commercial convenience can convert bad law into good. It is of course a satisfaction to a judge to find that the law, as he ascertains it to be, meets the requirements of an important class of the community; but further than that I do not see how the argument *ab inconvenienti* can properly be pressed. It may be observed, moreover, that here in India we are governed by our Codes, which are subjected to fairly frequent amendment whenever amendment is considered to be required; so that there should be the less temptation to judges to encroach upon the province of the legislature. And I am aware of no authority for supposing that, side by side with the recognised law, there exists in India today a separate set of valid, but somewhat undefined legal principles describable as the law merchant. I should rather suppose that those portions of the law merchant which the Indian legislature has seen fit to accept are to be found embodied in such provisions of that legislature as the Contract Act and the Negotiable Instruments Act; and that it is not competent to us to leave this firm ground and explore the uncertain regions which are imperfectly defined by the phrase, the law merchant. Some reliance was placed by Mr. Lowndes on *Goodwin v. Roberts* ⁽¹⁾, where Cockburn, C. J., lays down that the law merchant is not fixed and stereotyped, but is capable of being

1909.

RAGHU-
NATHJI
TARACHAND
v.
THE BANK
OF BOMBAY.

(1) (1875) L. R. 10 Ex. 337 at p. 346.

1909.

RAGHU-
NATHJI
TARACHAND
v.
THE BANK
OF BOMBAY.

expanded and enlarged so as to meet the requirements of trade in the varying circumstances of commerce. But in the same sentence the Chief Justice explains that this expansion is effected by the usages of merchants being duly proved and so becoming ratified by the decisions of Courts of law; and he refers to the dictum of Lord Campbell in *Brandao v. Barnett* ⁽¹⁾; that "when a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which Courts of Justice are bound to know and recognise." In this case no such usage was even pleaded; and the argument presupposes that, in the entire absence of evidence, we should pronounce, presumably of our own knowledge, that the interests of commerce require the rule of law to be in the respondent's favour and against the Hindu minor. Speaking for myself, I can only say that I have no such knowledge. There would of course have been no difficulty in giving effect to the alleged usage if it had been properly pleaded and proved, but since that was not done, I am of opinion that if the decree is to be affirmed, it must be affirmed by reference simply to the accepted principles of law, as the law has hitherto been understood in this part of India. That of course will still leave it open to us to refer for guidance to English decisions where they are properly applicable, but I do not think that we can, by a stroke of the pen, apply a principle of English law to a minor member of a Hindu joint family. Finally, on this part of the case, I am inclined to think that the liability of the innocent co-partner depends rather upon the general principles of agency than upon anything peculiar to the law merchant.

As the learned Judge below has pointed out, then, the problem is not to be solved merely on the authority of the law in England as to the liability of an infant partner, for the members of this joint Hindu firm are, in strictness, certainly not mere partners in the sense known to English law. The firm is not strictly a partnership, but is one of the assets of an undivided Hindu family in which Narottam and the infant are coparceners. On the other hand the analogy between such a joint firm in its

(1) (1846) 12 Cl. & F. 787 at p. 805.

relations with the outer world and an ordinary partnership is in many respects extremely close. It becomes necessary, therefore, to consider how the Courts have in the past dealt with these joint firms, and to what extent they have been taken out of the sphere of ordinary Hindu law and brought within the operation of the law of partnership: The leading decision on the subject is Sausse C. J.'s judgment in *Ramlal v. Lakhmichand* ⁽¹⁾, which has admittedly been accepted as good law ever since 1861. There the learned Chief Justice in discussing the question "to what extent a minor member of an undivided Hindu family will be held bound by the acts of the family manager with reference to an ancestral family trade" lays it down that "in carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager... which are necessarily incident to and flowing out of *the carrying on* of that trade... 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." And he goes on to point out that in the interests of the joint family itself, with which otherwise third parties would be unwilling to take the risk of dealing, it is necessary thus far to trench upon the protection which the Hindu law generally extends to the interests of a minor. This decision was followed in *Johurra Bibee v. Sreegopal Misser* ⁽²⁾, where Pontifex, J., says that persons carrying on a family business in the profits of which all the members of the family would participate must have authority to pledge the joint family property and credit for the ordinary purposes of the business. Then there is [the case of *Joykisto Cowar v. Nittyanund Nundy* ⁽³⁾, decided by Garth, C. J., and two other judges. The judgment was pronounced by Sir Richard Garth who after citing the provisions of section 247 of the Contract Act observes that "on principle there ought not to be

1909.

RAHUT-
NATHJI
TABACHAND
v.
THE BANK
OF BOMBAY.

(1) (1861) 1 Bcm. H. C. R. Appx. li at pp. lxx, lxxii. (2) (1876) 1 Cal. 470.

(3) (1878) 3 Cal. 738.

1909.

RAGHU-
NATHJI
TARACHAND
*
THE BANK
OF BOMBAY.

any difference between the nature of the liability of an infant admitted by contract into a partnership business and that of one on whose behalf an ancestral trade is carried on by a manager." This was quoted with approval in this Court in the Full Bench case of *Sakrabhai v. Maganlal* ⁽¹⁾, where Jenkins, C. J., also affirms the following extract from *Bemola Dossee v. Mohun Dossee* ⁽²⁾:—"In this case. Gour Churn certainly had an implied power to borrow on the credit of the joint family as partners in the firm; also we think, he had power to borrow on the credit of the joint family, as a joint family for the purposes of the firm. A joint family carrying on a business is necessarily a peculiar kind of partnership." I need not pursue the cases further: enough has been cited to show that in establishing the legal relations of a joint firm the Courts treat it as a kind of partnership and apply the principles of that law. Section 247 of the Contract Act appears to me to furnish distinct authority for this view, which so far as I can gather, is not in conflict with any text of the Hindu law dealing specifically with the legal position of an ancestral firm in its dealings with the outside world of commerce. It follows, I think, that the test to be applied in such cases is rather the apparent authority of the manager than the actual necessity of the family. And that to my mind is a perfectly reasonable position, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade. If this reasoning is right, we have taken what appears to me to be the really important step in the case, that is, the step from the ordinary Hindu law as to a manager's power of alienation to the law of partnership; and, that step taken, the decision of the appeal does not seem to present much difficulty. The law of partnership is laid down in the Contract Act, and for any further elucidation of its principles we are justified in referring—indeed counsel for appellant has insistently referred—to decisions of the Courts in England. The central facts are that the Bank had no knowledge of any fraud; that Narottam, who signed in the firm's name, had in fact authority to do so; and that

(1) (1901) 26 Bom. 206 at p. 213. (2) (1880) 5 Cal. 792 at p. 804.

the execution of such notes is an act necessary for, or usually done in the conduct of such a trade as the family here was carrying on. Therefore, under section 251 of the Contract Act, I am of opinion that Narottam bound the firm; and that, as Heaton, J., has pointed out, would be the law in England. If, then, the firm as a firm is bound, is Keshavlal's share in the firm exempt from liability because Keshavlal is an infant? In England, if the proper steps in procedure are taken, the infant's share becomes available for the benefit of the creditors: see *Lovell & Christmas v. Beauchamp*⁽¹⁾. But here occurs a difficulty which was urged upon us with much force by Mr. Raikes: in England a minor's contract is merely voidable at his election on attaining full age, whereas in India a minor's contract is void. That was laid down by their Lordships of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose*⁽²⁾, and the cases of *Joykisto Cowar v. Nittyānund Nundy*⁽³⁾ and *Rampartab v. Foolibai*⁽⁴⁾ were decided before it was settled that a minor was incompetent to contract, and while the general current of Indian decisions was in favour of holding such contract only voidable. But the answer appears to me to be that the statutory provision contained in section 247 of the Contract Act, which after declaring that the minor shall not be personally liable, goes on, "but the share of such minor in the property of the firm is liable for the obligation of the firm." I apprehend, therefore, that when once an obligation is held to attach to the firm, the minor's share in the firm must necessarily be liable. It may by a plausible conjecture, as suggested by Sir Frederick Pollock and Mr. Mulla in their edition of the Contract Act, that in framing section 247 the draftsman had either overlooked section 11 or had taken the earlier, but now impossible, view of it, namely that a minor's contract was merely voidable; but, however that may be, these are the words of the statute, which, as I understand them, are not the less imperative by reason of the now established interpretation of section 11. If this were a suit by the minor against the other members of the firm, say for an account, I can understand that some difficulty might be caused by the circumstance that under section 11 the

1909.

RAGHU-
NATHJI
TARACHAND
v.
THE BANK
OF BOMBAY.

(1) [1894] A. C. 607.

(2) (1878) 3 Cal. 738.

(3) (1902) L. R. 30 I. A. 114.

(4) (1896) 20 Bom. 767.

1909.

RAGHU-
NATHJI
TARACHAND
•
THE BANK
OF BOMBAY.

minor is not now competent to contract; but I am unable to see how, in a suit like the present, this construction of section 11 can destroy the force of section 247. Though Keshavlal is a minor, and as such not competent to contract, yet for the reasons already given, I think that the liability of his share is a question to be determined by the law of partnership, and it is in the Contract Act that that law is contained.

On these grounds I agree with the learned judge below that the minor's share is liable to the Bank. It is urged that this is a harsh conclusion, but considerations of that nature do not seem to me appropriate in such a case as this where unfortunately either one innocent party or another must suffer for the misconduct of a third.

For these reasons I agree that the decree should be affirmed subject to the slight variation not contested, and that this appeal should be dismissed with costs.

Decree confirmed.

Attorneys for the appellant: Messrs. *Payne & Co.*

Attorneys for the respondents: Messrs. *Crawford, Brown & Co.*

B. N. L.

CRIMINAL REVISION.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

EMPEROR *v.* NAGJI GHELABHAI.*

1909.

July 21.

Criminal Procedure Code (Act V of 1898), sections 195, 478—Sanction to prosecute—Subsequent order to prosecute passed under section 478.

The grant of a sanction to prosecute to a private individual under section 195 of the Criminal Procedure Code, 1898, is no bar to the subsequent institution of proceedings by the Civil Court itself under section 478 of the Code.

Queen-Empress v. Shankar⁽¹⁾, followed.

THIS was an application to revise an order passed by Devdat D., Second Class Magistrate of Pardi.

* Criminal Application for Revision No. 144 of 1909.

(1) (1888) 13 Bom. 384.