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KHIMJI VASSONJI v. NARSI DHANJI.

Attorneys for the plaintiffs : Messrs. *Madhavji, Kamdar and Chhotubhai.*

Attorneys for the defendants : Messrs. *Bhimji & Co.*

Suit dismissed.

M. F. N.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

1914. *November* 26.

JOHARMAL LADHOORAM, A FIRM, PLAINTIFFS *v.* CHETRAM HARISING AND OTHERS DEFENDANTS.*

Hindu Law—Joint Hindu family and joint family business—Contracts by certain members of the family for the benefit of the family—Managing members—Liability of the joint family for contracts entered into by managing members.

A joint Hindu family firm must be regarded like any other joint family asset if it in fact belongs to the joint family.

If a business be carried on by the members of a joint Hindu family for the benefit of the entire family and there are members of the family who do not actively participate in the conduct of the business, particularly if such business has been originally established to the detriment of the family property and handed down hereditarily, then the resultant liability of all the members of the family would be referable to the notion of managership by one or more members for the benefit of the rest in the usual sense in which the relations of the manager and other members of the family have often been accepted and defined in all the Courts and the liability of those members of the family not actively engaged in the conduct of the business would probably be restricted to the share of each such member in the joint Hindu family property.

In a case where one or more members of a joint Hindu family start a business of their own not at the expense of the joint Hindu family nor with the intention of sharing its profits and losses with the other members, the position of the members so carrying on a joint family business and their liabilities to the other members have to be regulated to the extent to which the conduct of such a firm and the resulting profits fall within the legal notion of self acquisition.

O. C. J. Suit No. 899 of 1912.

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THIS was a suit to recover monies due in respect of certain transaction in wheat and linseed. The plaintiffs who do business in Bombay as pukka adatias alleged that under instructions from the fourth defendant, Hakamchand, who was a member of a joint Hindu family carrying on business at Barela in the name of Harising Chetram they, in or about the month of Aso Maru Samvat 1968, entered into various contracts as pukka adatias for sale and purchase of wheat and linseed for forward delivery with the said joint family firm. Hakamchand, from time to time, received from and paid to the plaintiffs monies in respect of the said contracts on behalf of his firm. On or about the 9th of the First Ashad Sud Maru Samvat 1969 the plaintiffs made up an account of their dealings with the defendants and the said account showed a sum of Rs. 6,625-12-9 payable by the defendants to the plaintiffs. The defendants did not pay this amount, hence the suit.

The first defendant in his written statement alleged that the business of the firm of Harising Chetram was carried on by himself and the second defendant on their own individual account and not for the benefit of any joint family. He denied that the third, fourth and fifth defendants were partners in the firm of Harising Chetram. As to the fourth defendant, Hakamchand, the first defendant alleged that he was a minor under the age of eighteen when these contracts were supposed to have been entered into; that he had no authority to engage the plaintiffs as pukka adatias of the firm, nor to instruct the plaintiffs to open an account in their books in the firm's name. He denied that Hakamchand had paid to and received from the plaintiffs moneys on behalf of the firm of Harising Chetram and finally without prejudice to the foregoing he alleged that the transactions in any event were gambling transactions and therefore void.

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The other defendants did not file written statements.

In evidence it transpired that the fifth defendant was the son of the first defendant and that the other four defendants were brothers.

Wadia and *Taleyarkhan* for the plaintiffs.

Mirza for the defendants.

BEAMAN, J.:—The plaintiffs sue the five defendants as members of a joint Hindu family, trading for the purposes of these contracts in the name of Harising Chetram, for a sum of Rs. 6,625-9-6, the differences due to the plaintiffs for sales of linseed. The contracts sued upon were entered into by the fourth defendant, Hakamchand, on account, as contended by the plaintiffs, of the other defendants in the month of September 1911 for the September settlement. First and second defendants, Chetram Harising and Beniram Harising, resist the plaintiffs' claim on the ground that the family was divided shortly before these contracts were made in September 1911 and that they, the said first and second defendants, are the only partners in the firm of Harising Chetram. They deny that the fourth defendant, Hakamchand, had any authority to enter into contracts on their behalf or that they are bound by any contracts so entered into by the said Hakamchand. They further deny liability on the ground of their constituting a joint Hindu family with the other two defendants, Khubchand and Hakamchand, although they admit that the fifth defendant Kapurchand is the son of the first defendant, Chetram, and a partner in the firm of Harising Chetram. It is further admitted that Chetram, Beniram and Kapurchand now constitute a joint Hindu family as they reunited after the partition of 1911. The defendants further contend that Hakamchand was a minor at the date these contracts were made with the plaintiffs and as such he was not competent to represent

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the joint family even assuming that it had then been a joint undivided Hindu family, nor had he received any express authorisation from the managing members of the firm of Harising Chetram and Co., to act as their agent in Bombay. Lastly, the defendants contend that the contracts sued upon are wagering contracts unenforceable at law.

It is not altogether easy perhaps to define with precision what is usually meant in these Courts by a joint Hindu family firm. It appears to me that a firm must be regarded like any other joint family asset if it, in fact, belongs to the joint family; and nothing is really gained by insisting upon the peculiar character of the property and then introducing many legal notions which are appropriate rather to partnerships in the common sense than to the special concept of the joint Hindu family. It may be, and very often is, the case that a business is carried on by the members of a joint Hindu family for the benefit of the entire family. In such cases there may be many members who do not actively participate in the conduct of the business; there may be many members who are minors; and it is only by a confusion of ideas that these can be associated with those who are actively carrying on business as partners in the ordinary commercial sense. Nevertheless, if it be found, as a fact, that such a business was being carried on by any one or more members of a joint Hindu family for the benefit of the other members, particularly if such business had been originally established to the detriment of the family property and handed down hereditarily, then the resultant liability of all the members of the family would be referable, I think, to the notion of managership by one or more members for the benefit of the rest in the usual sense in which the relations of the manager and other members of the family have often been accepted and

defined in all the Courts. Again, it may be, and often is, the case that one or more members of a joint Hindu family start a business of their own, not at the expense of the joint Hindu family nor with the intention of sharing its profits and losses with the other members. Here it becomes clear at once that the position of the members so carrying on a joint family business and their liabilities to the other members have to be regulated with reference to the extent to which the conduct of such a firm and the resulting profits fall within the legal notion of self acquisition. Great difficulties would likely be here introduced by the nucleus doctrine but with those I am not now concerned. Assuming that a joint Hindu family carries on a business by one or more of its members for the benefit of the rest of the family, which is the common case, then the liability of the other members not actively concerned in the conduct of the business would, I take it, be referable, as I have just said, to the theory of managership and would probably be restricted to the share of each such member in the joint Hindu family property. It might be doubted whether any personal liability beyond that can be attached to members of the family not actively carrying on the business, not in the commercial sense partners and, therefore, not parties to any contracts made with the firm as a firm. That is one point in which a distinction might well be drawn between what is commonly called a joint Hindu family firm and a firm in the true commercial sense. The difficulty in all cases of the kind, with which I am now dealing, arises where firms so called are started by members of a numerous joint Hindu family, many of whom afterwards repudiate liability, although if the concern turns out successful they would probably be willing enough to share in the profits. In all such cases it becomes difficult to define with precision the limits of liability attaching to members of a joint

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Hindu family who may not themselves have had any connection with the business carried on by the other members in other parts of the country in a name which is afterwards assigned by creditors to a joint family firm. And there is this distinction too, no doubt, that these family firms are very often handed down, as long as they continue to be profitable, from father to son and are really regarded in much the same light as any other joint family ancestral property.

In the present case it is not denied that the firm was established, say, thirty years ago, or thereabouts, and was carried on as a joint family concern up to the year 1911. Whether every member of the family, then alive, was actively associated with the conduct of the business, might be difficult to prove; and assuming that some were not, then the question would arise whether they were personally liable as partners in the ordinary sense, or whether taking them to be members of the family represented in the conduct of the business by the managers, they would not at least be bound by the acts of such managers to the extent of their share of this and all other joint family property in which as coparceners they had a share. I do not think that it is necessary in the present case to pursue this process of analysis further, because there does not appear to me to be any practical difficulty to be surmounted. There can be no question but that the first and second defendants used at any rate to manage the business while it was admittedly a joint ancestral family business and are still carrying it on and managing it as a firm in the same name. If, then, it can be shown, that the fourth defendant, Hakamchand, represented them in Bombay for the purposes of making these contracts with the plaintiff firm, it would necessarily follow, waiving, for a moment, the question of Hakamchand's minority, that they would be answerable to the plaint-

iffs for the moneys now claimed. I understand that the first defendant is really the only substantial member of the family. Therefore, if his liability were made out, it would not matter much, I apprehend, to the plaintiffs whether or not Khubchand or Hakamchand were also made liable. Nor does the question raised of the fourth defendant's minority affect the case, viewed in this light, in the slightest degree; for, assuming that he was a minor in September 1911, yet, if he were authorized by the firm of Harising Chetram to act for them in Bombay as their agent for the purpose of making these contracts and did so act, they would be equally bound and the minority of their agent would be immaterial. It is only on the assumption that Hakamchand was not authorised by and on behalf of the first and second defendants, and that his acts were not afterwards ratified by them, that, on the footing of being a member of the joint Hindu family to which this firm belonged, it might be material to determine whether he was a minor or not at the time he made the contracts which are now sought to be enforced against all his co-parceners on the ground of their collective responsibility for the acts of any member of the joint family assuming to act in that capacity. It would, then, doubtless have to be shown that the acts were done for the benefit of the family as a whole and that Hakamchand, in so acting, had legally assumed a character of manager with authority to bind all his co-parceners. Notwithstanding a passage in Trevelyan on Minors at page 18, I confess, I should feel some doubt in holding that a minor member of a joint Hindu family could possibly act as manager for adult members or that contracts entered into by him in that capacity for the benefit of the family as a whole would necessarily be binding upon all the other members. If, again, it were the case of a joint Hindu

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family, all the members of whom were minors, then it would be less difficult to hold that the oldest minor was managing for the rest; still it appears to me his minority would remain an insuperable difficulty in the way of holding that he was either competent to contract for himself or for other minors, as incompetent in their turn to enter into contracts. If, however, there be no joint family existing in the present case, and if the fourth defendant, Hakamchand, be held not to have been acting as the agent of the first and second defendants' firm, his minority would have little bearing upon the liability of these defendants one way or the other. It might, no doubt, serve to protect him but beyond that I do not think that the question would have any material bearing upon what is substantially in controversy in this case. All this, however, may be very briefly dismissed, upon a simple finding of fact, for I have not the very least doubt, but that in September 1911, the fourth defendant, Hakamchand, was not a minor. The evidence taken on commission is, speaking generally, of little value, but I cannot neglect the deposition of the School Master, Ramchand Rao Balaji, who was the master at the school at which Hakamchand, the fourth defendant, received his education. That witness swears that he was a Master from 1886 to 1899 and that the fourth defendant, Hakamchand, came to School, as shown by the school register, in the year 1897. Now, I cannot bring myself to believe that Hakamchand could have gone to school before he was at the very least five years of age. Nor can I entertain any serious doubt, notwithstanding the many defects appearing on these registers, that the entry, showing that Hakamchand was admitted into the school in 1897, is entirely trustworthy. If, in that year, Hakamchand was five years, it is clear that he would be nineteen when these contracts were made. I think it much more probable that he was two or three years older and

that the plaintiffs are right in saying that he was at least twenty-one when he made these contracts ostensibly on behalf of the firm of Harising Chetram.

There is next to be answered the question whether or not this firm of Harising Chetram was a part of the joint family property when the contracts were entered into, and whether, if so, those responsible for the conduct of the business were managers in the sense that their acts would bind all the other co-parceners. The defendants have set up a partition alleged to have been effected shortly before the contracts now sued upon were entered into. The evidence taken on commission is largely directed to proving this allegation. It is, in my opinion, altogether untrustworthy and deserves no credit. In the first place, all the witnesses speak to the partition or rather to the terms of the partition having been embodied in a writing. This writing was made in one of the books belonging to the firm of Harising Chetram. It is not forthcoming, and although I accepted the evidence of the first defendant for the purpose of letting in secondary evidence, I do not really, now, that all the remaining evidence in the case has been taken, believe a word of it. I do not believe that any partition of the kind alleged was made: still less do I believe that the terms were written out in a book, belonging to the firm of Harising Chetram, which has since mysteriously disappeared. Indeed, this defence is one of those characteristically dishonest defences with which every Judge sitting on this side of the Court and having experience of Marwari suits must be only too familiar. These Marwari firms whether taking the form of commercial partnerships or admittedly joint family businesses, almost invariably have recourse to repudiating liability, when their ventures turn out unfavourable, on the ground that this or that member or group of members did not belong to

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the firm, or that the transactions were unauthorizedly entered into by one single member of the firm, or if the transactions were entered into on the footing of the concern being a joint Hindu family property, that a partition had been effected and that they, the defendants, were in no way liable. This is the kind of defence which is constantly set up in these Courts in suits of this kind; and the present appears to me to be a very typical case. The first and second defendants doubtless thought that their best chance would be to deny what they knew to be a fact that this business was really a part of the joint family property and had been managed up to and including the time when these contracts were entered into by most, if not all the surviving members of the joint family. So we have this entirely incredible story of a partition opportunely effected just before the contracts were entered into, which have turned out to be unfavourable to the firm of Harising Chetram. It is to be observed that every member of the family, that is to say, all the five defendants were adults, and that the evidence leaves little real room for doubt but that they were all actively concerned in the conduct of the business of the firm of Harising Chetram. The fifth defendant Kapurchand, son of first defendant Chetram, is himself twenty-five years of age; and I have not the least doubt but that Hakamchand, the fourth defendant, was also an adult, and an active participant in the business of Harising Chetram in the year 1911. Now, if that were so, there would be no difficulty in making all these members of a joint Hindu family liable for the losses of the business not only to the extent of their share in the joint family property but personally as well. This is what I believe to have been the true state of affairs when the contracts were entered into.

But, assuming again for the sake of argument, that the firm of Harising Chetram was being carried on independently by the two elder brothers, Chetram and Beniram, with whom was associated the fifth defendant, Kapurchand, in the year 1911, and they were carrying it on, on the legal footing of self-acquisition, still it appears to me that they would be undoubtedly bound by the acts of Hakamchand and would be liable to the plaintiffs. The evidence is, and it is very good evidence on behalf of the plaintiffs, that Jethmal, the Moonim of the plaintiff-firm, first became acquainted with Chetram the first defendant, before these transactions had ever been entered into, in Jubbulpore. Jethmal says he goes to Jubbulpore every year to collect outstandings and he there met Chetram, the first defendant, and that he met also Hakamchand, the fourth defendant, who was with his brother Chetram, and apparently took part in such business talk as followed. It was there, according to this witness and I really see no reason to doubt him, that proposals were first made by Chetram on behalf of the firm of Harising Chetram to enter into business relations with the plaintiffs in Bombay. Naturally, seeing Hakamchand and Chetram together, the plaintiffs were the readier to entertain the proposals made in September to do business in forward linseed contracts by Hakamchand on behalf of the firm of Harising Chetram. Now, the evidence given by the plaintiff Joharmull Ladhooram on this point also appears to me to be entirely trustworthy. I see no reason to doubt the word of the two witnesses Joharmull and Jethmal when they say that Hakamchand came to them in September 1911, representing himself to be a member or agent of the firm of Harising Chetram and inviting business. The evidence is that in doing so, Hakamchand said that he would obtain ratification of the contracts from the head quarters of the firm at Bareilly;

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and this ratification was presently received by the plaintiffs in two post cards, Exhibits D and E, dated the 6th and 10th September, respectively. These post cards purport to be written by the firm of Harising Chetram and signed for that firm. They recognize the contracts entered into by Hakamchand on behalf of the firm and ratify them. The evidence of Jethmal is to the effect that the plaintiffs' procedure was, after making the contracts with Hakamchand on behalf of the firm of Harising Chetram, to send a memorandum of the contracts to that firm's head offices. That may very well have been done and is quite consistent with the despatch of the two post cards of the 6th and 10th of September. In these the writer is made to say that he has been apprised of these contracts, that he has noted them in his own books, and that he confirms them. The first defendant now stoutly contends that both these post cards are forgeries. He even goes the length of saying that he never posted any post card or any other communication at Jubbulpore in the course of his life. This is apparently a falsehood. He had considerable business at Jubbulpore, as he admits he negotiated Hundies there for transmission to merchants with whom he admittedly had dealings in Bombay. And although he says that all this business was always done in the quarter of the city called Lath Ganj where there is a post office whereas these post cards bear the postal mark of despatch from Shroff or Saraf Bazaar; it is quite plain, I think, that the only Postal District recognized there is that of Saraf Bazaar and not Lath Ganj, and I have not the slightest doubt but that the first defendant, Chetram, did despatch these post cards from Jubbulpore to the plaintiffs in Bombay. The only alternative hypothesis is that Hakamchand procured the despatch of these post cards by some friend of his own in order to enable him to enter into

gambling transactions with the plaintiffs' firm by deluding them into the belief that he had the firm of Harising Chetram at his back, while, in fact, that firm knew nothing of his proceedings. It cannot be supposed, and it is not contended on behalf of the defendants, that these post cards have been forged by the plaintiffs or that the plaintiffs have procured the forgery of them. Then, it appears to me, in the highest degree improbable that Hakamchand should have gone the length of committing forgery or inducing his friends to commit forgery at Jubbulpore merely to induce the plaintiff-firm to give him contracts, which they would not have otherwise given him, in the hope of making gambling profits upon them. It is true that the evidence, for the plaintiffs, of identification of handwriting is really worthless. Nor do I believe Chetram's denial of his own handwriting. But I think, looking to the surrounding circumstances and probabilities, that I am quite safe in concluding that these post cards were really written by Chetram.

Now, if that be so, they amount to a complete ratification and fix the defendants' firm, that is to say, admittedly defendants 1 and 2, with the liability they have so strenuously sought to evade.

Even apart from these post cards, I should have felt no doubt whatever but that Hakamchand was acting for, and was authorised to act for, the firm of Harising Chetram. It is proved up to the hilt that he has acted as their representative in dealings with the two other large and respectable firms of Gokaldas and Haridas Premji at or about the same time, and if he was so acting on behalf of the firm of Harising Chetram in 1910 and 1911 with other firms, the already strong probabilities are converted into practical certainty that he was acting in the like character in these dealings with the plaintiffs.

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There is the last point to be considered, but I can dispose of it in a very few words. The defendants have contended that even assuming the contracts were entered into by the fourth defendant on behalf of the firm of Harising Chetram, and that, therefore, all the five defendants, or at any rate the members of that firm, would be liable for them; yet, in the present case the contracts being wagers are unenforceable at law. The only defendants who contest the claim here are the first and second defendants. As they both deny that they ever made these contracts or authorised the fourth defendant to make them, I confess, I do not see how they can possibly be in a position to contest the character of the contracts. It hardly lies in the mouth of a person to say in one and the same breath: "I did not make a contract but if I did make a contract I am sure it was a wager." That is in effect the form the defence has taken here. But waving that logical difficulty, I may say that there is no evidence worth the name, led by the defendants, to prove that the contracts sued upon were wagers. I hold that the contracts were not wagers.

I, therefore, entertain no doubt whatever but that the firm of Harising Chetram is answerable to the plaintiffs for the amount claimed. And I further hold that when that firm became so liable every one of the five defendants was a member of the joint family of which that firm was an asset and was taking an active part in the business of the firm. I, therefore, hold that all the defendants are liable to the extent of their shares in the joint family property and also liable personally.

The plaintiffs' suit must be decreed in full, against all the five defendants, with all costs throughout including all costs reserved.

Attorneys for plaintiffs :—Messrs. *Tyabji, Dayabhai & Co.*

Attorneys for defendants :—Messrs. *Jamshetji, Rustamji & Devidas.*

Suit decreed.

M. F. N.

APPELLATE CIVIL.

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

VIRCHAND VAJIKARANSHET (ORIGINAL PLAINTIFF), APPELLLANT, *v.* KONDU VALAD KASAM ATAR, MINOR BY HIS GUARDIAN *ad litem* NAMBA VALAD HUSENBHAI ATAR, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1915. *June* 21.

Mortgage—Sale of mortgaged property—Suit against one of the heirs of the mortgagor—Subsequent addition of parties—Limitation Act (IX of 1908), section 22.

One K, a Mahomedan, effected a simple mortgage in favour of V on the 23rd of June 1899, the mortgage-debt becoming due on demand which was made on the 1st January 1900. K having died, a suit for sale of the mortgaged property was instituted by V against his minor son as a party in possession of the property on the 23rd of June 1911. The minor's guardian having alleged that K left other heirs, a widow and two daughters, V applied on the 29th of January 1912 to have them added as parties and they were so added on the 12th February 1912. It was contended by the added defendants that the suit was barred as against them under section 22 of the Limitation Act, 1908. This plea found favour with the lower Courts and the suit for sale was dismissed so far as the shares of the added defendants were concerned.

On appeal to the High Court by the mortgagee,

Held, that the money was specifically charged on the whole mortgaged property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage.

* Second Appeal No. 193 of 1914.