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In the result, the judgment and decree passed by the learned District Judge are set aside, the decree of the trial Court is restored and the appeal is allowed. The respondent will bear his own costs as also the appellant's costs of this appeal and also of the appeal before the District Court.

Appeal allowed.

K. B. S.

APPELLATE CIVIL

1955
Sept. 14

Before Mr. Justice Dixit and Mr. Justice Vyas.

SHIVRAMSA BENKOSA MERWADE (ORIGINAL DEFENDANTS NOS. 1 TO 3, HEIRS OF 4, 6 AND 7), APPELLANTS v. GURUNATHSA BHAVANSA KABADI AND OTHERS (ORIGINAL PLAINTIFFS NOS. 1, 2, 4 TO 7 AND DEFENDANTS NOS. 8 TO 10 AND 5) RESPONDENTS.*

Hindu Law—Joint family—New business—When family business—Manager's powers of borrowing—Mortgage of joint family properties by Manager partly for debts of ancestral business and partly for debts of new business—How far binding on minor members of the joint family.

Minor members of a family which has an ancestral business are bound by the debts contracted by its manager for the purpose of the business, but not by the debts contracted for a new business started by the manager even if he be their father.

Where a manager of a trading joint Hindu family whose ancestral business was a grocery shop starts the new business of a cotton commission agency, the new business cannot be regarded family business.

The important test is whether the new business is a legitimate extension of the ancestral business and whether there are any hazards in the starting of the new business. If it is a hazardous business, then it cannot be regarded as a legitimate extension of the ancestral business. Again, if the business started is a new business in the sense that it is not a legitimate extension of the ancestral business, it is not a family business.

Brij Narain v. Manla Prasad,⁽¹⁾ Applied. *Benares Bank Ltd. v. Hari Narain*,⁽²⁾ *Sanyasi Charan Mandal v. Krishnadhan Banerji*,⁽³⁾ followed.

Prabhu Dayal v. Basant Lal,⁽⁴⁾ *Hayat Ali v. Nem Chand*,⁽⁵⁾ distinguished.

Where the manager of a joint Hindu family executed on January 30, 1936 a mortgage of joint family properties for a sum of Rs. 8,000, comprising (i) a debt of Rs. 4,142 due in respect of ancestral business of the

*First Appeal No. 483 of 1950.

1. (1923) 26 Bom. L. R. 500.

2. (1932) 34 Bom. L. R. 1079.

3. (1922) L. R. 49 I. A. 108.

4. (1938) A. I. R. Lah. 622.

5. (1945) A. I. R. Lah. 169.

family, (ii) a debt of Rs. 2,000 incurred in 1935 in respect of a new business started by him, and (iii) a sum of Rs. 1,858 being the cash advance at the time.

Held, (i) that major members of the family were bound by the mortgage;

(ii) that all the minor members of the family were bound to the extent of Rs. 4,142 the debt being in respect of family business;

(iii) that the minor members of the family were not bound to the extent of Rs. 2,000 being the debt in respect of the new business except that the sons of the manager were bound even to that extent as it was an antecedent debt; and

(iv) that the minor members were not bound to the extent of Rs. 1,858 in the absence of evidence of necessity for such advance.

FIRST APPEAL against the decree passed by S. S. Alur, Esquire, Civil Judge, (Senior Division), Dharwar.

Suit to recover mortgage-money.

The facts are fully stated in the Judgment.

R. A. Jahagirdar with D. R. Manerikar and N. M. Shanbhag, Advocates for the appellants.

K. G. Datar, Advocate for respondent No. 1.

Dixit J.—This appeal arises from a suit to enforce a mortgage. The facts leading up to the suit may be shortly stated.

The mortgaged property, which is house property, is more particularly described in paragraph 2 of the plaint. This property originally belonged to the family of defendants Nos. 1 to 7 and of which one Putosa was an ancestor. He died in or about the year 1934. The family had an ancestral grocery shop which was in the name of Putosa. In 1934 Benakosa, the father of defendants Nos. 1 and 2, started a cotton *dalali* business in the name of defendant No. 7 who was then a minor. On January 30, 1936 a simple mortgage was executed in order to secure a sum of Rs. 8,000, the security for that amount being the house property in suit and some seven mortgage deeds which the family held as a mortgagee. The mortgage was executed by Benakosa for himself and as guardian of defendants Nos. 1 and 2, by Devansa for himself and as guardian of his brothers, defendants Nos. 4, 5 and 6, and by Benakosa as guardian of defendant No. 7. The amount secured was a sum of Rs. 8,000 consisting of four items: (1) Rs. 2,600 due to mortgagee Nagosa, (2) Rs. 1,542 in respect of a promissory note executed in favour of Nagosa by Benakosa, (3) Rs. 2,000 which was a sum borrowed for the purpose of the Dalali shop and (4) Rs. 1,858 received before the Sub-Registrar for payment of sundry debts.

On April 18, 1947, the plaintiffs filed this suit to enforce the mortgage. The first plaintiff is the younger brother of Nagosa; the second plaintiff is Nagosa's son; plaintiffs Nos. 3, 4 and 5 are the sons of Pandurangasa, another younger brother of Nagosa; plaintiff No. 6 is the widow of Nagosa, while plaintiff No. 7 is the widow of Pandurangasa.

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The plaintiff's case, as set out in the plaint, was as follows. After referring the particulars of the mortgage, the plaintiffs went on to state in paragraph 3 as follows :

"Benakosa died a few days subsequent to the execution of the mortgage deed when he was joint with the defendants. At the time of the execution of the simple mortgage deed and at the time of the incurring of the debts mentioned therein he and all the present defendants were living jointly. Benakosa was the manager of the said undivided family. There were shops belonging to the joint family of theirs, that is, there were grocery and commission agency shops in the name of the deceased Putosa, the father of Benakosa, and in the name of defendant No. 7. The deceased Benakosa had entered into transactions in connection with the said shops for the family as the manager and 'Karta' (head) of the undivided family and had (also) entered into transactions and incurred debts mentioned in the mortgage deed. The debts had been contracted for the proper necessities of the defendants. Thereby the joint family of the deceased Benkosa and the defendants is benefited. There was no other means of paying off the said debts. Therefore, for paying off those debts and for paying off the sundry debts incurred for meeting the expenses of the family necessities the deceased Benakosa and Devansa who was then a major on the day on which the suit mortgage deed was to be executed, took some amount in cash and after properly considering the matter passed the suit mortgage deed which is kept herewith for Rs. 8,000 in favour of the deceased Nagosa, for themselves as well as for the remaining defendants who were then minors."

By the plaint, they sought to recover Rs. 8,000 as principal and Rs. 7,700 by way of interest, in all a sum of Rs. 15,700, after deducting a sum of Rs. 300 which was received from the defendants.

The Plaintiff's suit was resisted principally by defendant No. 7 and the material defences were these. It was stated in the written statement that the family was a well-to-do family and there was no reason for contracting debts. In paragraph 3 of the written statement it was stated that Benakosa opened a cotton and ginned cotton commission agency shop in 1943 by naming it as "Arjunsal Lakshmansa Merawade", and in 1935 he opened a "Tumali" leaves tobacco shop styled as "Benakosa Putosa", in partnership with a stranger. In paragraph 4-A of the written statement it was further stated that the cotton and ginned cotton and the tobacco shops were not the family business and finally, it was contended that the plaintiffs were not entitled to any relief. Written statements were also filed by the other defendants. Defendants Nos. 1, 3 and 4 adopted the written statement of defendant No. 7. Defendant No. 5 was *ex parte*. Defendant No. 6 adopted the contentions of defendant No. 7, but he took two further points. The first of them was that the second plaintiff had three sons and that the deceased brother of Nagosa had a widow by name Godubai. The second of the two points was that Benakosa had left a widow, Tejubai, who had an interest in the mortgaged property. It was accordingly contended that the suit could not go on

without joining these persons as parties to the suit. Subsequently, defendants Nos. 8 to 10 were joined as party-defendants and they supported the plaintiffs' claim. Defendant No. 7 filed a further written statement and it was contended that the plaintiffs' suit was not in time as the necessary legal representatives of deceased Nagosa had not been made parties to the suit within time.

The learned trial Judge gave the plaintiffs and defendants Nos. 8 to 10 a decree for Rs. 15,700 with 6 per cent future interest on the principal sum from defendants Nos. 1 to 7 together with costs to be received within six months from the date of the decree. In default of payment, the learned Judge directed a preliminary decree to be drawn up in form A, Schedule I, Appendix D, of the Civil Procedure Code, and also made an order directing defendants Nos. 1 to 7 to bear their own costs. From the decree made in the suit defendants Nos. 1 to 4, 6 and 7 have come up in appeal.

Upon this appeal, Mr. Jahagirdar for the appellants has raised three points. The first contention taken on behalf of the appellants is concerning the liability of the minor defendants at the date when the mortgage deed was executed. In order to appreciate the contention it is necessary to set out some introductory facts. It appears that Putosa had two brothers and there was, between Putosa and his brothers, a partition. This partition has been deposed to by Kusosa, a brother of Putosa. Putosa and Kusosa had another brother by name Krishnasa and according to Kusosa, these three brothers divided their property in 1933, the partition being oral. Kusosa's evidence is that the business of the family was weaving, dyeing and grocery shop and Kusosa stated that while the three brothers were joint there was no *dalali* shop and also that there were no debts of the family. Further, the evidence of Kusosa is that Putosa was given property of the value of Rs. 70,000 or Rs. 80,000 and a *yadi* was prepared. Kusosa also stated that at the partition two grocery shops were given to Putosa. He also stated that the shop started by Benakosa was not an ancestral shop but it was a shop started personally by Benakosa and he added that he did not know from where Benakosa brought the capital for his *dalali* shop. Now, there is no dispute that the grocery shop was ancestral and an ancestral business is like any other heritable property. Benakosa was admittedly the manager of the family of defendants Nos. 1 to 7 in 1936 when the mortgage deed was executed and the grocery business being ancestral, it would be within the power of the managing member to borrow money for the purpose of carrying on the ancestral business. But so far as the new business which was the *dalali* business is concerned, different

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considerations will apply and before I deal with the arguments raised by Mr. Datar, it would be convenient to trace the history of the loans which merged in the mortgage. The first of these is the sum of Rs. 2,600. The mortgage deed recites that the amount of Rs. 2,600 was in connection with an account which was kept with the plaintiffs' Bombay shop, the account being in the name of Benakosa. The mortgage deed recites that the account was kept in connection with the business of the said grocery shop. If, therefore, the debt was incurred by Benakosa for the purpose of carrying on the ancestral business, the debt would be binding upon the members of the family. Mr. Jahagirdar suggested that the debt was incurred not in connection with the ancestral grocery business but was incurred in connection with the *dalali* shop started by Benakosa himself. But it is clear that there is no reliable evidence to show that the debt of Rs. 2,600 was incurred in connection with the *dalali* shop. It follows that the item of Rs. 2,600 is binding upon the members of the family of defendants Nos. 1 to 7. The second item is an item of Rs. 1,542 and that was in connection with a promissory note for a sum of Rs. 1,500 executed on the April 16, 1934 by Benakosa as the *vahivatdar* and owner of the shop styled as Putosa Ishwarsa Merwadi Grocery shop. The promissory note recites that the sum of Rs. 1,500 was taken in connection with business necessities of Benakosa. It is obvious that the promissory note was executed by Benakosa as the *vahivatdar* and owner of the grocery shop. It follows, therefore, that the sum of Rs. 1,542 which is in connection with the carrying on of the business of the grocery shop is also binding upon the members of the family of defendants Nos. 1 to 7. The next item is a sum of Rs. 2,000 and this item has been the subject of controversy between the plaintiffs on the one hand and defendants Nos. 1 to 7 on the other. The history of this item is as follows. On March 29, 1935 a promissory note was executed by Benakosa, by Devansa (defendant No. 3) and by Arjunsu (defendant No. 7) for a sum of Rs. 1,000. The promissory note recites that the amount was taken for business necessities. It is curious that although Arjunsu was then a minor, the promissory note was executed also by Arjunsu (defendant No. 7). The promissory note was executed in favour of Chanveerappa Kallappa Nandargi. Nagosa paid the amount of Rs. 1,000 to the creditor Chanveerappa and the sum of Rs. 1,000 represents a part of Rs. 2,000 which is mentioned as the third item in the deed of mortgage. It would also appear that a *khata* was kept in the names of Benakosa, Devansa and Arjunsu in the books of the lender and the extract from the ledger appears at page 112 of the record which shows Rs. 1,000

as having been received from Nagosa on account of the promissory note executed by those three persons. The ledger entry is to be found at page 110 of the record and the ledger entry show a sum of Rs. 1,090 consisting of Rs. 1,000 and Rs. 90 by way of interest paid on the February 2, 1936. Then there is another item of Rs. 1,000 and that is to be found from an extract which appears at page 107 of the record. It would appear that Rs. 800 were debited to the account of Arjunsalaxmansa Merwadi, a commission agency shop, on July 31, 1935, and also a sum Rs. 225 was debited to the same shop on September 1, 1935. An entry relating to the day book will be found at page 108 and that shows that Rs. 1,000 were received from Nagosa, the mortgagee, in respect of the two items mentioned above. Benakosa himself paid Rs. 25, so that the entire debt of the creditor was satisfied. A ledger entry is to be found at page 106 of the record and that ledger entry shows three debits : (1) Rs. 800, (2) Rs. 225 and (3) Rs. 50, and the credit entry shows a sum of Rs. 1,075. An amount of Rs. 1,000 was paid by Nagosa and a sum of Rs. 75 was paid by Benakosa and in that way the entire debt was satisfied. Therefore, the sum of Rs. 2,000 represents the amount of the loan received by the family of defendants Nos. 1 to 7 in connection with the business of the commission agency shop and the question for decision is whether this debt is binding upon defendants Nos. 4, 5 and 6 and also upon defendants Nos. 1 and 2, the sons of Benakosa. So far as defendants Nos. 1 and 2 are concerned, the position is, we think, simple. The debt of Rs. 2,000 was incurred in the year 1935 and the mortgage deed is dated January 30, 1936. Therefore, so far as defendants Nos. 1 and 2 are concerned, the sum of Rs. 2,000 would constitute an antecedent debt for the purpose of the mortgage and defendants Nos. 1 and 2 would be bound by this debt. The liability of defendants Nos. 1 and 2 is, we think, clearly established in view of a decision of the Privy Council in *Brij Narain v. Mangla Prasad*.⁽⁶⁾ The sum of Rs. 2,000 is antecedent in fact as well as in time and is truly independent of the transaction of mortgage. In our view, therefore, defendants Nos. 1 and 2 are bound by the debt of Rs. 2,000. With regard to defendants Nos. 4, 5 and 6, the position is different. This debt was incurred by Benakosa as manager of the family of defendants Nos. 1 to 7. Defendants Nos. 4, 5 and 6 are the nephews of Benakosa. They cannot, therefore, be held liable on the footing of an antecedent debt. Defendants Nos. 4, 5 and 6 would be liable only if the sum of Rs. 2,000 was borrowed by Benakosa for the purpose of carrying on an ancestral business or a family

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6. [1923] 26 Bom. L. R. 500.

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business which has become an ancestral business. Now, the business having been started by Benakosa cannot be considered to be an ancestral business. The evidence is clear that the business was started by Benakosa in the year 1934. It cannot, therefore, be urged that this cotton commission agency business was an ancestral business and the debts incurred in connection with that business would be binding upon defendants Nos. 4, 5 and 6. But Mr. Datar has argued that the cotton *dalali* business is a family business and Benakosa as the managing member of the family has an implied authority to bind the members of the family by the borrowings he had made. Before I deal with this point, it may be pointed out that so far as defendants Nos. 3 and 7 are concerned, they are bound by this debt. Defendant No. 3 was, at the date when the mortgage deed was executed, a major. Moreover, he was one of the executants of the promissory note of the March 29, 1935. Although defendant No. 7 was a minor at the date when the mortgage deed was executed, defendant No. 7 subsequently passed a consent deed giving his assent to the mortgage transaction of the January 30, 1936. Therefore, defendants Nos. 3 and 7 are both liable in respect of this mortgage debt.

In dealing with the liability of defendants Nos. 4, 5 and 6, we have first to consider as to whether the cotton *dalali* business was a family business. The plaintiffs in the plaint stated that the commission agency shop in the name of defendant No. 7 was a shop belonging to the joint family of the defendants. Mr. Datar's contention, therefore, was that the commission agency shop was a family shop. This was disputed by defendant No. 7. It was pointed out by him that the shop was started in the year 1934 and that the shop was not a family shop. Mr. Datar found himself in a difficulty. He said that no proper opportunity was given to him to show that this agency shop was a family shop. It is, however, to be remembered that it was the plaintiff's case that the commission agency business was a family business. Defendant No. 7 disputed this assertion. If, therefore, the contention of the plaintiffs was that the commission agency shop was a family shop, it was up to the plaintiffs to ask for an appropriate issue upon the question. But Mr. Datar suggested that it was for the Court to frame an appropriate issue. With great respect, I demur to that suggestion. Issues are, no doubt, to be framed by the Court, but issues are framed in the presence of parties. Issues are framed by the Court with the assistance of the Advocates appearing for the parties upon a perusal of the pleadings and upon a perusal of documentary evidence. We are not, therefore, prepared to accept the contention of Mr. Datar that prejudice has been caused to plaintiffs because

a proper issue was not framed upon the point. We must, therefore, proceed upon the footing that the commission agency shop which was started in the year 1934 in the name of defendant No. 7 was a new shop. It was neither a family shop nor an ancestral shop. The topic of ancestral business and its incidents has been dealt with in Mulla's Principles of Hindu Law, 11th edition, s. 234 (1), page 270, as follows :

"In Hindu law a business is a distinct heritable asset. Where a Hindu dies leaving a business, it descends like other heritable property to his heirs.

The manager of a joint family has an implied authority to contract debts and pledge the credit and property of the family for the ordinary purposes of the family business. Such debts, if incurred in the ordinary course of business, are binding on the family property including the interest of the minor coparceners therein."

With regard to a new business, that subject is dealt with by the learned author in s. 234 (2) at page 273. In view of the arguments urged in support of the contention of the plaintiffs, it will be convenient to set forth the law as summarized at that place :

".....A family carrying on trade in a particular commodity may legitimately extend it to another commodity and whether such extension would amount to a new business or not depends upon the nature and type of the extended business and not on the particular commodities it deals with. If the family is a trading family and the extended business is not more hazardous or speculative than the one previously existing, it may not be regarded as a new business. In a Dayabhaga case the Judicial Committee held that the manager of a joint family cannot impose upon a minor member of the family the risk and liability of a new business started by himself and the other adult members. On the ground that the reasons for the decision equally govern Mitakshara families also, this principle has been applied to them by the Indian High Courts and by the Judicial Committee".

Upon this statement of the law certain principles emerge and they are these. An ancestral business is heritable property. A managing member of a joint family which carries on an ancestral business has an implied authority to contract debts for the purpose of the business and to pledge the credit of the family. With regard to a new business, a managing member has no power to start a new business, unless it is a legitimate extension of an ancestral business. It is in the light of these principles that we have to decide the dispute in this case. Now, the family of defendants Nos. 1 to 7 had an ancestral grocery shop, which means that the family was dealing in the business of grocery. Benakosa started a new business in 1934 which was a commission agency business. The question is whether it can reasonably be urged that this commission agency business is a legitimate extension of the family business of grocery. Mr. Datar asserts in the affirmative, while Mr. Jahagirdar disputes that position, and, in our opinion,

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Mr. Jahagirdar is right. Suppose, the ancestral business of a family was cloth and the family was dealing in foreign goods, it would be within the power of the manager to extend this business by dealing in Indian piece-goods. That, we think, is a legitimate extension of the ancestral business. Suppose a trading family was dealing in certain articles of grocery and the family was minded to deal in certain other articles of grocery and if the managing member were to start a business, it would again be a legitimate extension of the old business. But we are not prepared to accept the contention of Mr. Datar that the commission agency business would be a legitimate extension of the business of the family which was a business in grocery. There is also another principle and that is that one test to decide whether the business is a legitimate extension or not is to consider the risk involved in the starting of a business. If the business is of a speculative or of a hazardous character, it would not be right to hold that the business would be a legitimate extension of the family business. But we think this question has been put beyond the pale of controversy by a decision of the Privy Council in the case of *Benares Bank Ltd. v. Hari Narain*.⁽⁷⁾ In that case it was held by the Privy Council as follows :

“In the case of a joint Hindu family, whether governed by the Daya-bhaga or the Mitakshara, the father or manager has no power to impose upon a minor member of the family the risk and liability of a new business started by him. A business started by the father as manager cannot, if new, be regarded as ancestral so as to render the minor members' interest in the joint family property liable for debts contracted in the course of the business”.

If a business started by the father as manager cannot, if new, be regarded as ancestral, it is, I think, legitimate to say that a business started by a managing member, who is not a father, if new, can, in no circumstances, be regarded as ancestral. In a way, a father has a dual capacity. As a father, he has certain rights to contract debts on behalf of his minor sons and as a manager he has certain other rights. But in the case of a managing member who is not a father, different considerations apply and the present case is clearly covered by the ratio in the Benares Bank case. In the present case, the commission agency business was started by Benakosa, who is the uncle of defendants Nos. 4, 5 and 6. In the Benares Bank case the mortgage was executed by two adult members of the family and the question was whether the minor sons of those members were liable in respect of the debt. One of the items was an amount of Rs. 3,658. It was a borrowing made by the father for a business known as 'Theka business'. The Subordinate Judge came to the conclusion that the Theka business was a

7. [1932] 34 Bom. L. R. 1079.

family business. The High Court, upon appeal, considered that the *Theka* business started by the father was not a family business and their Lordships of the Privy Council deal with this question at page 1084 as follows :

"The only other question is as to the item of Rs. 3,658 borrowed for the *theka* business. It was urged on behalf of the bank that the business was ancestral and that the minors were liable for the debt to the extent of their interest in the joint family property. On the other hand it was contended that the business was the personal business of Jagdish Narain and the family had no interest in it. Their Lordships have examined the evidence, and they consider that the business was started by Jagdish Narain and Raghbir Narain as managers of the family. The business, therefore, cannot be said to be ancestral so as to render the minors' interest in the joint family property liable for the debt".

Then they say at the same page :

"Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is in direct opposition to the ruling of the Board in *Sanyasi Charan Mandal v. Krishnadhan Banerji.*"⁽⁸⁾

In the face of this pronouncement, it is impossible to contend successfully that defendants Nos. 4, 5 and 6 are liable for the debt of Rs. 2,000 which is the third item in the mortgage deed. But Mr. Datar relies upon a passage in Mayne's Hindu Law, 11th edition, page 384. The passage is as follows :

"It is however not unreasonable to distinguish between a family whose hereditary avocation or *Kulachara* is trade or commerce and a non-trading family. In the latter case, of course, the starting of a new business cannot be within the powers either of a father or other managing member. In the former case, the usage of the family must be held to modify the ordinary rules relating to the joint family so far to empower the managing member to start a new business either in place of the old or in addition to it. Hindu law does certainly recognise the usages of a trading family. And the distinction in the case of such families between an ancestral and a new business appears, so far as the risk and liability are concerned, to be more formal than substantial. An inherited business may involve quite as much risk as a new business and apparently there is no duty on the part of a manager to close down an ancestral business notwithstanding its evident risk. The element of risk, incident in varying degree to all kinds of trade or business, is necessarily assumed by trading families. But a speculative business or one attended with unusual risk will be beyond the powers of a managing member to start or continue. There is however nothing to prevent an ordinary non-trading Hindu family consisting only of adults from starting a business with their joint family funds which becomes on their death an ancestral business".

However, Mr. Datar did not quite realise the importance of a passage which occurs at the next page, i. e. at page 385. That passage is as follows :

"Another important question is whether a particular business is a continuation or an admissible extension or change of the ancestral business or an altogether new business. Whether it is the one or the other

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can only be an inference of fact from all the circumstances of each case. One good test is whether the new line of business entails larger and new kinds of hazards than the old business, for it is against these fresh hazards that the minor's interests are protected by law. Once an exception is made to the strict law of the joint family by admitting the usual risk of a joint family business, it would seem that any *bona fide* extension or reconstruction of the business cannot make it a new business; and this would be so whether the business was exclusively a joint family business or whether it was carried on in partnership with a stranger".

In our opinion, therefore, the important test is whether the new business is a legitimate extension of the ancestral business and whether there are any hazards in the starting of the new business. If it is a hazardous business, then it is clear that it is not legitimate extension of the ancestral business. Again, if the business started is a new business in the sense that it is not legitimate extension of the ancestral business, it is not a family business. In the present case we are satisfied that the commission agency business is not a legitimate extension of the ancestral business of the family which was a business grocery. This is made amply clear by the evidence of Kusosa himself. Kusosa's evidence was that the business of the family was weaving and dyeing and a grocery shop. In our view, therefore, the business started in the name of defendant No. 7 by Benakosa in the year 1934 cannot be regarded as a legitimate extension of the ancestral business. Mr. Datar relied upon two decisions of the Lahore High Court. The first of these is reported in *Prabhu Dayal v. Basant Lal*.⁽⁹⁾ But we think that case is of no assistance to him. The two distinguishing features of that case are these: (1) The business started by the father was a business upon which the family was maintained and if the income derived from the business went towards the maintenance of the family, different considerations may apply. That is not the case here. And (2) the son had in that case himself participated in the business after attaining majority and the Court inferred that the son must have, therefore, accepted the business as a family business. That also is not the case here. The next case relied upon by Mr. Datar is reported in *Hayat Ali v. Nem Chand*.⁽¹⁰⁾ In that case the family had, as its ancestral business, a provision shop. That shop was abandoned and a cycle shop was started. As in the previous Lahore case, so in this case, the family was maintained upon the income derived from the cycle shop. The case was, therefore, decided more upon the footing of 'benefit to the family'. In the present case there is no evidence that the family had to depend upon the commission agency shop for its maintenance. It is not suggested that that was the only source of maintenance for the defendants and in the absence of evidence,

9. [1938] A. I. R. Lah. 622.

10. [1945] A. I. R. Lah. 169.

it is impossible to say that the family was benefited by this business. At any rate, the case is distinguishable on facts. Apart from the principle decided by these cases, I would, for my part, accept as sound the principle laid down by their Lordships of the Privy Council in the Benares Bank case. The principle is that minor members of a family which has an ancestral business are bound by the debts contracted by its manager for the purpose of the business, but a new business started by a managing member, even if he be a father, is not binding upon the minor members of the family. The principle is sound for the reason that if wide powers are given to a managing member to start a new business, the interest of minor members would be adversely affected since they would have no voice in the matter of starting a new business. We are not, therefore, prepared to accept the contention of Mr. Datar that the commission agency business was a family business and, therefore, the debts incurred in connection therewith would be binding upon defendants Nos. 4, 5 and 6. In our view, so far as defendants Nos. 4, 5 and 6 are concerned, they are not bound by the debt of Rs. 2,000. The remaining item may be disposed of very shortly. That is a sum of Rs. 1,858. The mortgage deed recites that it was for payment of sundry debts, but there is no clear or reliable evidence to show that there was any previous debt. Admittedly, it was a present advance, i. e. a cash item paid before the Sub-Registrar. If, therefore, the sum of Rs. 1,858 represents a present advance, it is not an antecedent debt within the principle of Brij Narain's case so as to make defendants Nos. 1 and 2 liable. If defendants Nos. 1 and 2 are not liable, so are defendants Nos. 4, 5 and 6 not liable for this item.

The result of the aforesaid discussion is that defendants Nos. 3 and 7 are liable for the amount of Rs. 8,000. So far as defendants Nos. 1 and 2 are concerned, they would be liable to the extent of Rs. 6,142 and so far as defendants Nos. 4, 5 and 6 are concerned, they would be liable to the extent of Rs. 4,142.

The second point made by Mr. Jahagirdar is that this mortgage debt is satisfied to the extent of Rs. 3,400. As I have already pointed out, the security for the debt of Rs. 8,000 was the house property and the seven mortgage deeds held by the family of defendants Nos. 1 to 7 as a mortgagee. The mortgage deed recites as follows :

"We shall recover the amounts in respect of the said mortgage deeds, regarding which the simple mortgage deed has been passed in our favour, through you and shall credit the entire amount thus recovered to your account and shall obtain your receipt. We have kept the above mentioned seven mortgage deeds which have been mortgaged to us

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with you and we have retained the aforesaid seven properties which belong to us personally in our possession”.

This shows that the mortgagors retained in their possession the house property, while the mortgage deeds were given into the possession of Nagosa, the mortgagee. Mr. Jahagirdar contends that it was up to the mortgagee to realise the mortgage amounts and pay himself the mortgage debt out of those recoveries and in this connection he relied strongly upon a notice given by a pleader, Mr. Kulkarni on the October 28, 1936. It was a notice given on behalf of Nagosa to one Madavva. This Madavva is referred to in the mortgage deed as being the holder of the equity of redemption of two mortgage deeds respectively for the sums of Rs. 400 and Rs. 200. The first of these two mortgage deeds is dated December 23, 1932, and the other is dated the May 31, 1933. In the notice in question Nagosa has stated that Madavva should pay to Nagosa the entire amount of principal and interest due in respect of the two mortgage deeds and if payment was not made accordingly, steps would be taken against Madavva according to law. It was hinted that if payment was already made in respect of the principal and interest or that if payment was made subsequently to Benakosa unauthorisedly, Nagosa would not be bound by the payment. Mr. Jahagirdar argues that this shows that Nagosa made it impossible for the mortgagors to recover the amounts of the mortgage deeds. In the first place, the mortgage deed says that it was the mortgagors, i. e. defendants Nos. 1 to 7 who were to recover the amounts of the mortgage deeds, though through the mortgagee Nagosa. Defendants Nos. 1 to 7 were to recover the amounts and to credit them to the account of the mortgagee and to obtain a receipt. Plaintiff No. 1 has given evidence upon this point and his evidence was that it was true that the seven mortgage deeds referred to in the mortgage were given to the plaintiffs. He was asked whether the claims were time-barred and he said that he could not say whether the claims had been time-barred. He admitted, when his attention was drawn to the account books, that notices of demand for payment of the mortgage amounts had been issued and he also said that defendant No. 7 had gone to him to take copies of the mortgage deeds and what is important is that he stated that the plaintiffs had given notice for transferring the mortgage deeds or taking back those deeds from the plaintiffs. The inference is that the plaintiffs had given to the defendants notice either that they should transfer, i. e. assign their rights in respect of these mortgages to the plaintiffs or that defendants Nos. 1 to 7 should receive the mortgage deeds to enable them to enforce the claims. This testimony is supported by a

notice given by the plaintiffs on the December 14, 1944. That notice was given to defendants Nos. 1 to 7 and it went on to state :

“Even though the responsibility of recovering and making payment of the amount in respect of the said deeds lies on you, you have not made any endeavour whatever in that behalf. You should pass a receipt in our favour and take away the mortgage deeds and institute suit etc. mentioning our mortgage right in that suit and pay to us the moneys recovered by way of that suit and obtain our receipt. Otherwise if the mortgage deeds become time barred or if any loss etc. is caused to you, no responsibility whatever shall lie on us in that connection”.

It is significant that the notice is dated December 14, 1944, i. e. presumably well within time because the mortgage deeds mentioned in the mortgage were executed either in 1932 or in 1933. But Mr. Jahagirdar argues that the claims upon these mortgages had been time-barred, but we do not agree. Even if the original mortgage deeds were with the mortgagee Nagosa, it was easy for the defendants-mortgagors to obtain certified copies of these documents and it is not shown in the present case that any of the claims based upon the seven mortgage deeds had been time-barred on the December 14, 1944. The notice of the December 14, 1944 was the clearest intimation to defendants Nos. 1 to 7 that either they should receive the mortgage deeds and institute suits to enforce the mortgage claims or that the defendants should make an appropriate assignment in favour of Nagosa. We are, therefore, satisfied that there is no substance in this contention.

Then there is a small point about the suit being bad for want of necessary parties. It was contended that defendants Nos. 8, 9 and 10 had an interest in the mortgage security and they were not made parties to the suit, when the suit was filed. Now, defendants Nos. 8, 9 and 10 are the sons of Shankarsa who is the second plaintiff. Defendants Nos. 8, 9 and 10 being the sons of Shankarsa would be sufficiently represented by their father. Similarly, there is no substance in the contention that Tejubai, the widow of Benakosa, should have been made a party to the present suit. It is to be remembered that Benakosa represents one of the three branches of the family of defendants Nos. 1 to 7. There is no reliable evidence to show that this family was divided at the date when the suit was filed. Besides, defendants Nos. 1 and 2 are upon the record and they represent the branch of Benakosa. Tejubai would have a right under the Hindu Women's Rights to Property Act and that right is to obtain a share equal to that of her husband in the property which would fall to the share of Benakosa. So long as particular property has not fallen to the share of Benakosa's branch, Tejubai cannot get defined her interest in

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the property of the family represented by Benakosa's branch. Besides, defendant No. 1 would sufficiently represent the interest of the branch of Benakosa and it has been pointed out by Mulla that "where a suit is brought on a mortgage by or against the manager of a joint Hindu family in his representative capacity, the other members of the family are not necessary parties to the suit, and that the suit will not fail by reason of the non-joinder of those members." (See Mulla's Civil Procedure Code, 12th edition, Vol. II, page 1087). In our view, therefore, there is no substance in this contention either.

The result of the aforesaid discussion is that the decree of the trial Court will have to be modified and the appeal will be partially allowed and in place of the decree passed by the trial Court, we substitute the following decree :

(1) The plaintiffs and defendants Nos. 8 to 10 will be entitled to recover Rs. 15,700 with future interest at 4 per cent per annum on the principal sum of Rs. 8,000 from defendants Nos. 3 and 7 within six months from the date of this judgment. In default of payment of the aforesaid amount, the right, title and interest of defendants Nos. 3 and 7 as also the right, title and interest of Benakosa in the suit property is liable to be sold.

(2) The plaintiffs and defendants Nos. 8 to 10 are entitled to recover Rs. 12,284 with future interest at 4 per cent per annum on the principal sum of Rs. 6,142 from defendants Nos. 1 and 2 within six months from the date of this judgment. In default of payment of the aforesaid amount, the right, title and interest of defendants Nos. 1 and 2 in the suit property is liable to be sold.

(3) The plaintiffs and defendants Nos. 8 to 10 are entitled to recover Rs. 8,284 with future interest at 4 per cent per annum on the principal sum of Rs. 4,142 from defendants Nos. 4, 5 and 6 within six months from the date of this judgment. In default of payment of the aforesaid amount, the right, title and interest of defendants Nos. 4, 5 and 6 is liable to be sold.

(4) The plaintiffs and defendants Nos. 8 to 10 will be entitled to recover from defendants Nos. 1 to 7 $\frac{3}{4}$ ths costs of the suit as well as of the appeal and the amount of costs will be added to the mortgage amount.

(5) In no case will the plaintiffs and defendants Nos. 8 to 10 be entitled to recover more than Rs. 15,700 from the defendants.

A preliminary decree will be drawn up in the usual form.

Decree modified.

G. N. V.