

ALLAHABAD HIGH COURT

Ram Nath

Vs

Chiranji Lal

(Sulaiman, J.)

03.10.1934

JUDGMENT

Sulaiman, C.J.

1. A suit was brought on the basis of a mortgage deed dated 9th December 1918 executed by the deceased father of the defendants-appellants in favour of the deceased predecessor of the plaintiffs, whose executors the latter are. In the mortgage deed it was recited that money was required for the payment of a certain antecedent debt and for the purposes of two shops located at Muttra and Delhi respectively. On 28th June 1922 a sum of Rs. 3,000 was paid by the mortgagor to the mortgagee without specifying any part of the mortgage debt to which it was to be appropriated. It is now found that the shop in Muttra was a lace shop and was an ancestral business; but that the shop at Delhi was a cloth shop and was not ancestral, though it was a family business. There is no finding as to how long this shop had been in existence before the mortgage deed was executed, but there is a finding that it had been in existence for a number of years. The defence inter alia was that, there was no legal necessity for the loan. Both the Courts below have decreed the claim.

2. The second appeal came up for hearing before, a Division Bench of this Court, which has referred two questions to the Full Bench for consideration. These may be formulated as follows : (1) Whether where the business to finance which money has been borrowed is a family business and the loan is for the benefit of the family, the sons are liable for the repayment of the loan contracted by the father; and (2) whether the payment of Rupees 3,000 should be considered, to be repayment partly of the debt incurred for the benefit of the ancestral property and partly of the debt for advancing the Delhi business and appropriated accordingly.

3. In earlier cases of this Court a wider meaning was attached to the expression "benefit to the estate." For instance in *Tula Ram v. Tulshi Ram*¹ Sir Promoda Charan Banerji, an eminent Judge of this Court, in delivering the judgment held that the mortgage debt was binding because it was for the benefit of the estate and the family, although that could not be a case of pressing

necessity. This view was followed in several cases. On the other hand, there were some later cases in which a narrower view was taken that the alienation should be only for the purpose of saving the estate from some threatened injury. There was also some conflict of opinion as to the extent to which the members of a joint Hindu family are bound by alienations made by the father as manager in connection with the requirements of a business run by him.

4. In *Jagat Narain v. Mathura Das*² a Full Bench of this Court came to the conclusion that in order to sustain an alienation of joint family property made by the managing member of the family the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him at the time. Transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are of a "defensive character." The previous cases were reviewed at some length and principal reliance was placed on the rule laid down by their Lordships of the Privy Council in *Hanuman Prasad Panday v. Mt. Babooee Munraj Koonwaree*³ that: The power of the Manager for an infant her to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.

5. The authority of the case of *Sahu Ramcharandra v. Bhup Singh*⁴ was also relied upon and the following passage from p. 443 (of 39 All) was quoted: In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction.

6. Another passage from p. 444 (of 39 All) also may be quoted:

Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of the an antecedent debt.

7. It was held by the Full Bench that the benefit to the estate was something distinct and different from pressing necessity.

8. After this pronouncement, in many cases of this Court it was held that even where pressure of legal necessity is not established, a transaction may be upheld on the ground, that it was for the benefit of the estate and the family which an ordinary prudent manager would enter into, e.g., *Raj Kumar v. Mohan Lal*⁵ and *Mahesh Prasad v. Jagannath Chowbe* 1931 All. 743.

9. In *Benares Bank Ltd. v. Har Narain*⁶ their Lordships of the Privy Council then made it perfectly clear that money borrowed by the father as manager of a joint Hindu family for the purpose of a business which was not ancestral was not borrowed for legal necessity and a mortgage granted as security for such a loan was not binding on the minor members of the joint family, as it was invalid. In that case a business of taking contracts from P.W.D. (apparently a business of a sporadic character in which fresh risk would be incurred as each new contract was taken) had been started by two persons as managers of the family and it was not their ancestral business. As the business had been started by two members as managers, it might possibly have been started with joint funds, but it is not quite clear whether the bank had suggested that even if the business had not been an ancestral business, it had become joint family property by being blended with other joint properties. One thing however is perfectly clear that on behalf of the bank it was not contended that the particular transaction had been for the benefit of the joint family and the family estate and the claim does not seem to have been defended on any such ground. Their Lordships, applying the principle laid down in *Sanyasi Charan v. Krishnadhan Barerji*⁷ held that, the manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him and that a new business is not within the purview of the verses 27 to 29 of Ch. 1 of the Mitakshara. In that case the bank had failed, to prove that it had made reasonable and bona fide enquiries as to the ancestral character of the business which had led it to believe that the business was ancestral, even though in point of fact it had not been so. Accordingly the amount, raised by the managers for the purposes of the new business was not considered to create a charge on the joint family property.

10. This authoritative pronouncement of their Lordships of the Privy Council was the subject of interpretation by another Full Bench of this Court in *Amraj Singh v. Shambhu Singh*⁸ The majority of the Judges constituting the Bench held that the pronouncement of their Lordships of the Privy Council finally settled the question, that money required for the purposes of a non-ancestral business is not sufficient in itself to justify alienation of family property and that the money for a new business started even by the father as manager of the family involving, as it does risk and liability on the minor members of the family, cannot justify an alienation. The majority however took the view that although the requirement of a new business was not in itself sufficient to justify alienation, their Lordships ruling did not overrule the decision of the Full Bench of *Jagat Narain v. Mathura Das*⁹. It was accordingly held that where the transaction was not speculative but was in the best interests of the family and for its benefit which an ordinary prudent manager would have made, it would be open to a Court to hold that the transaction is binding on the other members of the family though the loan was secured by an alienation of the family property. It was pointed out in that case that in *Benares Bank Ltd. v. Har Narain*¹⁰ it had never been suggested on behalf of the bank that the business had been started for the benefit of the family or that it had been necessary for its support and maintenance or was necessary to save the family from starvation or ruin, and that accordingly their Lordships pronouncement did not necessarily imply that such considerations were altogether irrelevant. The question as to whether that particular transaction was necessary for the family or was for the benefit of the family or the

family estate was a question of fact depending on evidence and could not be pressed in appeal, if it had not been raised at the trial.

11. The view that the Full Bench ruling in Jagat Narain v. Mathura Das 1928 All. 451(SUPRA) has not been overruled by their Lordships of the Privy Council when delivering the judgment in Benares Bank Ltd. v. Har Narain 1932 P.C. 182(Supra). It is further strengthened by the circumstance that although the case of Inspector Singh v. Kharak Singh 1923 All. 403 was cited by counsel before their Lordships, as appears from the report on p. 301 (in 59 I A) this Full Bench ruling which had partially overruled the view expressed in Inspector Singh v. Kharak Singh 1923 All. 403(Supra) was not cited before their Lordships at all. It seems clear that if any question had arisen as to there being a benefit to the family or the estate, it is most likely that the Full Bench ruling also would have been referred to.

12. It seems to me that the recent pronouncement of their Lordships of the Privy Council in P.K.P.S. Pichappa Chettiar v. Chokalingam Pillai 1934 P.C. 192(Supra) also does not even indirectly over-rule the Full Bench ruling. Their Lordships have laid down that where a managing member of a joint family enters into a partnership with a stranger the other members of the family do not ipso facto become partners in the business so as to clothe them with all the rights and obligations of a partner; in such a case the family as a unit does not become the partner but only such of its members as in fact enter into a contractual relation with the stranger.

13. It has always been, a settled law that money borrowed for the purposes of an ancestral family business is per se a good justification for alienation of family property. In such a case the presumption is that the carrying on of the ancestral business is necessary and no further enquiry on the part of the creditor is required. As a result of their Lordships' pronouncement, it is now finally settled that the mere fact that money has been required for a business newly started by a manager or the father is not in itself sufficient to justify an alienation of the family property. But it has never so far been held that the need of a newly started business taints the transaction with illegality so much that even if there be other circumstances they would be of no avail in validating the transaction. It seems to me that the question whether a particular transaction, even though the money was required for the purposes of a new business, was for legal necessity or for the benefit of the estate in the family is a somewhat distinct question. Where the new business is the separate property of individual members of a joint family, it is quite obvious that money required for its purposes can never be for the benefit of the family or of the family estate at all. In such an event an alienation of the, family property would be wholly unjustified. On the other hand, if the business, though not ancestral, had previously become the joint family business, then there may be circumstances under which money required for such business may either be for legal necessity or for the benefit of the family and the family estate.

14. The interest of the members of the family in a business is property just as the rights in any other kind of property. It has been laid down by their Lordships of the Privy Council in many cases that separate property of a member of a family can by blending become joint family

property and that for such an effect to be produced it is not necessary that the consent of all the other members of the family, some of whom may be minors and therefore incapable of giving consent, must be obtained as a condition precedent. See : Lal Bahadur v. Kanhaiya Lal (1907) 29 All. 244(Supra), Suraj Narain v. Ratan Lal 1917 P.C. 12(Supra), Radha Kant v. Nazma ¹¹Begam and *Rajani Kant Pal v. Jaga Mohan Pal*¹²

15. In *Metharam Ramrakhiomal v. Rewa Chand Ramrakhiomal* ¹³ their Lordships of the Privy Council remarked as follows: The question whether a man who happening to be a member of a joint family carried on his business, whatever it was, personally for his own personal benefit without detriment to the joint family fund, or carried on such business as a member of the joint family for the benefit of the joint family, is a question of fact to be determined on the evidence.

16. This undoubtedly implies that even an apparently new business carried on by a member of a family may be a joint family property. In *Niamat Rai v. Din Dayal* 1927 P.C. 121(Supra) their Lordships of the Privy Council explained that a joint family business is a business carried on with joint family funds for the benefit of the joint family and the properties of the joint family, both moveable and immovable including the shares of minor members of the family, are liable for the debts incurred in carrying on the business. But in that case, as the minor plaintiffs had apparently succeeded to the business, it might be said that so far as they were concerned, it was an ancestral business, though possibly not so in the case of some of the other members.

17. In the case of a joint family business where it is necessary for its proper conduct that money should be borrowed from time to time, it is within the authority of the karta to borrow money for the purposes of the family business : See *Abdul Majid Khan v. Sharaswati Bai*¹⁴.

18. The cases in Bengal are generally under the Dayabhaga law, which confers power on each coparcener to transfer his share. In the Madras Presidency also the interest of the mortgagor is regarded as being validly transferred. In the Punjab, cases are governed mostly by the Customary law. In the Bombay Presidency also, cases under the Mitakshara law are rare. It is only in these Provinces that the question assumes an acute form inasmuch as hundreds of cases are decided every month by the subordinate Courts in which the question of the authority of the father as manager to raise money for a joint family business as distinct from an ancestral business and his separate business, is almost invariably raised.

19. Although the alienation of joint family property merely for the purposes of a newly started business is not justifiable, there is really no prohibition against a manager of a joint family in respect of starting a new business. Indeed, it is the commonest thing in this Province to start such new businesses. It may be started with the joint family funds or with separate funds and may possibly at the outset be the separate property of the manager, but if other kinds of properties can, by the conduct of the parties and by the blending of their income with the income from the joint properties, become joint property, there seems to be no good reason for holding that the interest

of a particular member of a family in a business or a mill or a factory can never become joint property by being thrown into the common stock. A business started by a father might have been run for decades and the members of the family may in fact be taking part in its conduct and the family may even be maintained solely with its income, and joint funds might have been utilised for its purposes from time to time. In such an event it may be impossible to hold that the business still remains the separate property of the manager who started it originally and can never form the subject of partition between him and the other members. Such a view would amount to holding that a manager can appropriate joint funds and start a business of his own which he can keep separate and over which he can always possess full disposing power with the right to alienate or gift it to anyone he likes, without his right being questioned by the other members of the family, and can also prevent it from being brought into the common stock at the time of a partition. It would become impossible for a manager to invest any surplus joint fund, that there may be, in stocks or shares in any concern, or the other members can take all the gross assets, without undertaking the liabilities.

20. If there were an absolute prohibition against the starting of a new business or newly taking shares in an existing business, the family may have to be tied down to the ancestral business only, which may cease to be profitable, and therefore so long as there is some minor member of the family alive, it would be impossible to divert the activities of the family to any other line. As sons and grandsons are in being, there may almost always be some minor member of the entire family existing and accordingly it may for many generations become impossible to start a new business. But as laid down by their Lordships of the Privy Council, alienation for money required for such a new business is not justified merely because it is a business started by the manager. The want of authority really is as regards the alienation of family property for the purposes of a new business, and not that there is any absolute prohibition against the starting of a new business.

21. It is contended that the expression "for the sake of the family" occurring in the Mitakshara is ejusdem generis with what precedes it, and must be confined to the case of "compelling necessity only." Now the text of Brahaspati quoted in the Mitakshara was not confined to the father or manager only, but would apply to any coparcener described as "a single individual." Taking the text literally, it would authorise a junior member to alienate property for the purposes behind the back of the manager. The learned Counsel for the appellant concedes that the judicial interpretation put on the text in some cases has not been to follow the words literally and give to a junior member any such authority. The expression "for the sake of the family" occurring in this text has been judicially interpreted to have a wider meaning than mere pressure of necessity. Taken literally it is more comprehensive than even "benefit to the estate." The expression is wide in scope, and even if it has been too widely interpreted, there are many other matters in the Hindu law wherein a long course of decisions have established propositions perhaps not in strict accordance with the Hindu texts if taken literally. For instance, a distinction has been drawn between a voluntary alienation by the father which may be impugned on the ground of want of necessity and an involuntary auction sale to a third party which can be impugned only on the

ground of the debt being tainted with illegality or immorality; or again, the non-liability of Hindu sons for the payment of their father's debts which are incurred after separation; as also alienation in lieu of an antecedent debt. Reliance is next placed on the commentary on this text by the author of the Mitakshara and it is urged that the illustrations given therein are exhaustive, and therefore exclude the plea of benefit of the family as distinct from compelling necessity. But illustrations are seldom intended to be exhaustive, e.g., *Girdhari Lall Roy v. Bengal Government*¹⁵ (where the enumeration of bandhus in the Mitakshara was held to be illustrative and not exhaustive). The statement of the law in *Hanuman Prasad Panday v. Mt. Babooee Munraj Koonwaree*¹⁶ was based on a liberal interpretation of the words "kutumbarthe" (for the sake of the family) and although that was a case of a manager of a minor, the law has always been understood to apply and; has been invariably applied to managers of joint families.

22. That the words "for the sake of the family," have a wider meaning than mere compelling of a necessity would also appear from the following consideration : It is now well settled on the authority of the ruling of their Lordships of the Privy Council that money required by a manager for an ancestral business is justified and alienation in lieu of it is binding on the other members. There is no text of the Mitakshara which specifically refers to the needs of an ancestral business. Accordingly its justification rests entirely on the same verses 27 to 29 of Ch. 1. There can be numerous occasions where there may be no compelling necessity to raise money for an ancestral business. There may be plenty of funds in hand and yet the manager may borrow more money for the business, or it may be that he may feel it beneficial to enlarge the business though not unduly. In such circumstances it may be most difficult to hold that there existed a compelling necessity which acted as a pressure and which was tantamount to legal necessity. Borrowing on such occasions can only be justified on the supposition that the transaction was for the benefit of the family inasmuch as it was carried out in connection with the family business which a prudent owner would continue. To hold therefore that the words "for the sake of the family" have not a wider scope would be almost destroying the very basis of the rulings under which money required for an ancestral business is considered to be fully justified.

23. The view that "benefit" is something, different from "compelling necessity" finds some support from the remarks of their Lordships in *P.K.P.S. Pichappa Chettiar v. Chokalingam Pillai*¹⁷. While considering the argument that the defendant's liability to the extent to which the family benefited, their Lordships did not simply reject the contention, but thought it fit to examine the evidence and came to the conclusion that the evidence was very meagre and that there was no evidence as to the extent of such benefit. It seems to follow that the question whether the particular transaction in dispute was for legal necessity or was for the benefit of the estate and the joint family, is something more than the mere question whether the money borrowed was required for the purposes of a new business. The fact that it was required for a new business would not be any justification. If in addition thereto, it could be shown that there was either a pressure of necessity to continue that business, as it was the mainstay of the family or that the particular transaction was at the time beneficial to the family and the family estate, the

transaction would be supported but, of course, on the latter ground. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of the case, and it is for the Court to decide whether it was so beneficial and was such as an ordinary prudent manager would have entered into in the interest of the family.

24. The second Question is how the payment of Rs. 3,000 towards the mortgage debt is to be appropriated. The contention on behalf of the defendants is that the whole of it should go towards the discharge of that part of the debt which was binding on the mortgaged property and that no portion of it should be set off against the other part for which the family property was not liable. On the other hand, it is contended on behalf of the plaintiffs that if the whole of this sum is not to go towards the payment of the unsecured portion of the debt, then there should at least be an apportionment.

25. So far as the English Law is concerned, it seems to be well settled that a creditor is entitled to make an appropriation even during a pending action : see the case of *Seymour v Pickett*¹⁸ It was held by a Bench of this Court in *Kundan Lal v. Jagannath*¹⁹ that an appropriation of payment must be made by the debtor at the time of paying and by the creditor at the time of receiving the money. If neither of them makes the appropriation the law appropriates the payment to the earliest debt. The facts of that case were somewhat different, and it was the debtor who was insisting that the payment should go towards the earliest debt. But this view has been expressly dissented from in the other High Courts, and the various cases are summarised in a judgment of the Calcutta High Court in *Kunjamohan Shaha Poddar v. Karnnakanta Sen*²⁰

26. Reading Sections 59, 60 and 61 together it is clear that so far as the right of the debtor to make the appropriation under Section 59 is concerned, it can be exercised only when a debtor makes the payment with the express or implied intimation that the payment is to be applied to the discharge of a particular debt. It would follow that this intimation, express or implied, must be made at the time when the payment is made. On the other hand, under Section 60 it is only when the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied that the creditor may apply it at his discretion to any lawful debt. This discretion obviously is to be exercised if the debtor has omitted to give an intimation and where there are no other circumstances. It seems to me that the creditor need not exercise this right at once, but he can at his discretion exercise it even later. There is nothing in the section particularly as a past perfect tense "has omitted" has been used, to indicate that the creditor loses this right if he does not exercise it at the very time when the payment is received. In many cases it may be impossible to make the appropriation there and then, for instance, when the payment is made at a time when the amounts due under the various heads are not known and the account books are not easily accessible. Now, when neither the debtor nor the creditor has made any appropriation, then under Section 61 it is a duty of the Court to apply the payment in discharge of the debts in order of time, and if the debts are of equal standing, in discharge of each proportionately.

27. It is contended on behalf of the defendants that Section 61 in terms cannot apply to this case because here there are not more than one debt, but there was one debt only. But although the loan was one, the purposes for which the amounts were taken were different. Even though the section may not in terms apply to the present case, there can be no doubt that the principle underlying that section must apply. This principle has been applied by their Lordships of the Privy Council to the appropriation by the Income-tax Commissioner of certain payments towards the interest which accrued on the amount due, although the principal and interest would strictly speaking constitute only one debt : vide Commissioner of Income-tax, Bihar and *Orissa v. Maharajadhiraj of Darblianga*²² It is also clear from that case that the Income-tax Commissioner could not possibly have made the appropriation immediately the amount was paid. It was only when the accounts for the year were made up that credit was given for the sum and the interest due was reduced.

28. In the present case, although on the one hand this money appears to have been raised by a sale of a part of the mortgaged property, which was ancestral, there is nothing to show that the creditor was informed of the sources at the time when the payment was made. Again one part of the debt was due from the mortgagor personally and another part from him in his representative capacity as manager of the family. Therefore, it might well have been, argued that the creditor was entitled to appropriate the payment towards the discharge of the debt due personally from the person who made the payment rather than the debt due from him in his representative capacity. Again one part of the debt was so to say an unsecured debt; whereas the other was a secured debt. The period of limitation for the unsecured debt would have expired in about two years time; whereas the period of limitation for the other debt would not have expired till after about eight years. The mortgagee did not in fact bring any suit for recovery of the unsecured debt before the expiry of the prescribed period. This also might well have been made the basis of an argument that the creditor would be justified in making the appropriation towards the unsecured debt in preference to the secured debt.

29. But this position was not taken up in the Courts below, and the learned advocate for the plaintiffs before the Division Bench confined his argument to the proportionate appropriation of Rs. 3,000 towards the two parts of the mortgage debt. It is therefore unnecessary to consider the larger question whether there would be any presumption as to the way in which the mortgagee should be deemed to have made the appropriation in the eye of the law. On the principle underlying the provisions of Section 61 it seems that the Court should in the absence of any appropriation by either the debtor or the creditor, direct that the payment should be applied in discharge of the debts in order of time if there be such, and if they are all of the same date, in discharge of each of such debts proportionately.

30. The learned Counsel for the defendants-appellants has relied strongly on *Buaha Mal v. Bhagwan Das*²³ But in that case no question of appropriation really arose, the main question

being whether there should be a deduction on account of the fact that part of the rents of the estate had been received by the agent of the plaintiff. Apparently there was along with the mortgage another transaction of lease and the plaintiff's principal man of business had received on account of the arrears of rent a sum of Rs. 10,000. Their Lordships held that this sum should be deducted from the amount claimed by the mortgagee on account of the payment of the Government revenue and maintenance allowance to the widow in the account and that the balance could be recovered. I do not think that that' case in any way helps the appellants.

31. In my opinion therefore the sum of Rs. 3,000 which was paid by the mortgagor should be split up into two portions of Rs. 2,000 which should be assumed to have gone to discharge a part of the secured debt, and a sum of Rs. 1,000 which should be deemed to have gone towards the discharge of the unsecured portion of the debt.

Thom, J.

32. I concur. Had the decision in *Jagat Narain v. Mathura Das*²⁴ stood alone, there could have been no question that the mortgage executed by the manager of the joint family was binding upon the minor members of the family. It was contended however that this decision has been by implication over-ruled by the Privy Council in their decision in *Benares Bank Ltd. v. Har Narain*²⁵ In that case however the question of whether the money was borrowed for the benefit of the family does not appear to have been raised. The plea that the money was borrowed for the benefit of the family was not taken in the pleadings and no evidence was led upon the point. The matter therefore was not considered by the Privy Council.

33. The decision in *Jagat Narain v. Mathura Das* 1928 All. 451(Supra) followed the decision of the Privy Council in *Hanuman Prasad Panday v. Mt. Babooee Munraj Koonwaree (1854-57)* 6 M.I.A. 393(Supra). That decision is clear authority for the proposition laid down in *Jagat Narain v. Mathura Das* 1928 All. 451(Supra).

34. The decision in that case is by a Full Bench of this Court. In my judgment in the Benares Bank case the Privy Council never intended to lay down the general proposition that a loan taken by the manager of a joint Hindu family for the purpose of starting a new business could never be binding upon the minor members of the family. There is ample authority, not only in the original texts but in the decisions of the Privy Council and of this Court, for the proposition that where the starting of a new business is a prudent step taken by the manager of the family for the benefit of the family a loan taken for this purpose or for the carrying on of the new business is a valid loan and is binding upon the minor members of the family. Indeed it would be most unfortunate if the law were otherwise. In the present economic and social state of the development of this country it must often be absolutely necessary in the interests of the joint Hindu family and for the purpose of conserving the estate of that family not only to discontinue an old ancestral business but to embark upon a new business, and for that purpose to negotiate loans.

35. I agree that the sum of Rs. 3,000 repaid should be in this case appropriated proportionately to the discharge of the secured and the unsecured debt. The point raised in this branch of the case is not in terms covered by Section 61, Contract Act, but in my judgment the principle underlying that section should be applied. Learned Counsel for the plaintiffs has not contended, as in my view he could reasonably have contended, that the sum repaid by the borrower should be applied in the first instance to the discharge of the unsecured debt. He has contented himself with the claim that the sum of Rs. 3,000 should be applied proportionately to the discharge of both the secured and unsecured debt. We therefore do not decide the general question as to whether where no appropriation is made either by the borrower or the lender sums repaid should be applied in the first instance to the discharge of that part of a debt which may be unsecured.

Rachhpal Singh, J.

36. I agree. My Lord the Chief Justice has considered the principal question involved in this case in his elaborate and exhaustive judgment and I am in entire agreement with him in holding that the view taken in the Full Bench ruling in *Jagat Narain v. Mathura Das* 1928 All. 451 has not been overruled by the ruling of their Lordships in *Benares Bank Ltd. v. Har Narain* 1932 P.C. 182.

37. In *Amraj Singh v. Shambhu Singh* 1932 All. 632(Supra) the question which has been re-agitated before us had come up for consideration before a Full Bench. The majority view was that the *Benares Bank Ltd. v. Har Narain* 1932 P.C. 182(Supra) had not overruled the Full Bench case reported in *Jagat Narain v. Mathura Das* 1928 All. 451(Supra).

38. In a recent ruling of their Lordships of the Privy Council *P.K.P.S. Pichappa Chettiar v. Chokalingam Pillai* 1934 P.C. 192(Supra), there are observations which support the view taken by the Full Bench in *Jagat Narain v. Mathura Das* 1928 All. 451(Supra). These observations go to show that where a creditor seeks to enforce his claim against a minor member of a joint family in respect of money due from the manager of the family, the question as to whether or not the loan benefited the joint family will be the deciding factor in the case.

39. A perusal of the ruling of their Lordships of the Privy Council in *Benares Bank Ltd. v. Har Narain* 1932 P.C. 182, shows that there were three points on which their Lordships gave their decision. These points were : (1) It was contended that a new business, which had been started by two managers of the joint family, was ancestral and therefore, the minor members of the family were liable for the debt due. Their Lordships, after a consideration of the evidence in that case, came to the conclusion that the business in that case was not ancestral. (2) Another point taken by the appellants in that case was that a business started by the father as manager, even if new must be regarded as ancestral. Their Lordships rejected this contention. (3) Another point urged was that even if the business was not ancestral, the transaction was binding because the appellants had made reasonable and bona fide enquiries which led them to believe that the

business was ancestral, and that there was necessity for raising the money for the purpose of the business. Their Lordships, on the evidence produced in that case came to the conclusion that the appellants had failed to prove that they had made reasonable enquiries as to the character of the business.

40. These are the only three points decided by their Lordships of the Privy Council. I am clearly of opinion that the question, as to whether or not the transaction was for the benefit of the family, was never decided in *Benares Bank Ltd. v. Har Narain* 1932 P.C. 182(Supra). As remarked by King, J., in *Amraj Singh v. Shambhu Singh* 1932 All. 632(Supra), (at p. 908), in *Benares Bank Ltd. v. Har Narain* 1932 P.C. 182(Supra)It was not even argued and presumably therefore it was not even arguable upon the facts that it was a prudent transaction, or for the benefit of the estate.

41. It appears to me that there is no justification for the contention that the Full Bench case *Jagat Narain v. Mathura Das* 1928 All. 451(Supra), has been overruled by implication as a result of the decision of their Lordships in *Benares Bank Ltd. v. Har Narain* 1932 P.C. 182.(Supra)

42. In my opinion, the real question actually decided by their Lordships in *Benares Bank Ltd. v. Har Narain* 1932 P.C. 182 (Supra)is that a Hindu father, acting as a manager of the joint family, cannot make an. alienation which might bind the minor members, when money is advanced to him for the purpose of starting a new business and which business is non-ancestral. The ruling of their Lordships will have no application to a case where the father, acting as manager, borrows money by alienating family property, for the purpose of financing a business which is ancestral property and which has been in existence as family business antecedent to the date on which the alienation is made. Before proceeding further I wish to point out that there is a clear distinction between transactions made by a manager of a joint Hindu family which does not carry on any trading business and the transaction entered into by the manager of joint Hindu family carrying on an ancestral trading business. Where a manager of a joint Hindu family, which does not carry on any trade, takes a loan or makes an alienation, the creditor has to prove that the transaction was either for family necessity or for the benefit of the family. But on the other hand, where a joint family is carrying on an ancestral business as traders, then, the creditor has only to prove that the money was lent or alienation made for the purpose of carrying on the ancestral business. It is not necessary for him to prove further that the transaction was made for the benefit of the family.

43. One of the earliest cases on the point is *Ramlal Thakursidas v. Lakhshnichand* (1862-65) 1 B.H.C.R. App. 51(Supra). It was held there that ancestral trade descends like other Hindu property upon the members of an undivided family. It was further held that:In carrying on such a trade infant members of the family will be bound by the acts of the manager which are necessarily incidental to and flowing out of the carrying on of that trade and that the manager can pledge the property and credit of the family for the ordinary purpose of that trade, and third persons dealing bona fide with such manager are not bound to investigate the status of the family, minor members being bound by the necessary acts of the manager.

44. This proposition of law has been quoted by Sir D. Mulla in his Hindu Law, Edn. 7, p. 282. He has how ever in his book substituted the words "mortgage or sell" for the word "pledge" used in the above cited ruling. I find myself in agreement with the following observations made in *Ramlal Thakursidas v. Lakhshnichand (1862-65) 1 B.H.C.R. App. 51*(Supra)The general benefit of the undivided family is considered by Hindu law to be paramount to any individual interest and the recognition of a trade, as inheritable property, renders it necessary for the general benefit of the family that the protection, which the Hindu law generally extends to the interest of a minor, should be so far trenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property; but that infringement is not to be carried beyond the actual necessity of the case.

45. The next case to which I wish to refer is *Raghunathji Tarachand v. Bank of Bombay Chandavarkar, J.*, in his judgment expressed the following opinion: The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other member 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.

46. The law on the subject is discussed with much learning in this ruling by Chandavarkar, J. The reason for vesting the manager of a joint family ancestral trading firm is stated by him to be this:Under the Hindu law a joint family which carries on a trade handed down from its ancestors becomes a trading family; trade being one of its Kulachar it attracts to itself all the necessary incidents of trade.

47. The learned Judge cites several texts of Hindu Law in support of his view. At one place in his judgment the learned Judge observes:The reason of this must be that it is merchants alone who know best what the rules of their profession, adopted in the interest, of trade, are. The implication is that such rules must be followed in the interest 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 Ahe status of a joint family.

48. In *Malaiperumal Chettiar v. Arunachalla Chettiar 1918 Mad. 706*, Sadasiva Aiyar, J., held that the ordinary presumption in the case of a trading caste or family is that the entire family credit and all the joint family properties are embarked in the business even as regards the minor members. It appears to me that when a joint family carries on an ancestral business it gives out to the world that the manager of the family has the power to carry on the business on its behalf. If this were not so, then, it will be difficult for the manager to carry on the trade as other people would not have dealings with it. In my opinion, it is not open to minors in such a family to say

that the transactions made by the manager in the ordinary course of business are not binding on them. The reason is that the business is carried on the credit of the family property. The family property is held by the profits earned in the business and it would therefore be unjust to hold that members who were being maintained by the profits made out of the business should not be liable for the debts incurred for the carrying on of that very business.

49. I wish to emphasise, even at the risk of repetition, that there is a difference between transactions to which a manager of a joint Hindu family which has no ancestral trading business is a party and transactions made by the manager of a joint Hindu family which is doing ancestral trade business. The reason is obvious. When a creditor lends money to or accepts an alienation made by a member of a joint Hindu family, he is aware or ought to be aware that the manager is dealing with the property owned by several coparceners. He is supposed to know that under the Hindu Law, the karta of the family can borrow money or make alienations only where there is a family necessity or where money is required for the benefit of the estate. If he lends money to the karta of the family without satisfying himself whether there is a necessity for the loan, he does so at his own risk. If it is found that the loan taken by the karta of the joint family was not for the benefit of the joint family or for family necessity, then, he must lose. But different considerations will prevail when the manager of an ancestral joint family business, acting as manager of the business, enters into a transaction with a third party. Here, the income of the trade is the only source which maintains the joint family. When the joint family carries on an ancestral business it gives out to the world that it will carry on business exactly on the same terms as any other firm. In the words of Chandavarkar, *J. Raghunathji Tarachand v. Bank of Bombay* (1910) 34 Bom. 72: The implication is that such rules must be followed in the interest of trade and nowhere is it stated that these rules do not apply to a joint family carrying on a trade as its Kulaehara or family business merely because it occupies also the status of a joint family.

50. The manager in the case of a joint ancestral trading business, has an implied authority to contract debts for its purposes, and the creditor is not bound to enquire into the purpose of the debt in order to bind the whole family. It will be impossible for a joint family doing ancestral trading business to carry on the business, if its manager is not to have authority to contract debts for the purpose of the business the reason being that that power is necessary for the very existence of the family. In such a case all that a creditor has to prove is that the family was doing ancestral trading business and that the money was required for the purpose of that business.

51. There may be cases in which an ancestral joint family business which at one time was yielding a handsome income which maintained the entire family in comfort might have to be run at a loss. It may be necessary for the manager to take a loan for establishing the business, but the effort may prove to be futile. In such a case it will be wrong to hold that the other members of the joint family would not be bound by the loan taken by the manager. If the business had become profitable once again, all the members of the family would have been benefited by it. It would not be right to hold that as the attempt to improve it had failed so the other members of the joint

family were not h> able for the loan contracted by the manager. A recent ruling of their Lordships of the Privy Council reported in *Niamat Rai v. Din Dayal* 1927 P.C. 121(Supra) may be referred to in this connection. Their Lordships held that in an ancestral joint family business which is carried on for the benefit of the joint family, the entire property of the joint family is liable for the debts incurred by the manager in carrying on the business. It was further held that where a joint family business had resulted in a loss, it was for the manager to decide whether it would be better to raise more money to put into the business, or to close it down, and a lender or purchaser was not bound to enquire into or prove the reasonableness or soundness of the manager's decision and action. Another case on the point is *Ramakrishana Muraji v. Ratan Chand* 1931 P.C. 136(Supra). A very recent case on the point is reported in *Abdul Majid Khan v. Sharaswati Bai* 1934 P.C. 4. (Supra)On a consideration of all the cases cited above, it will appear that a manager of an ancestral joint family trading business has full authority to take loans and make alienations to raise money for the purpose of that business. Such a transaction will be binding on the entire joint family including the minor members. The creditor is not bound to enquire into the finances of the business so long as the business forms the purpose of the debit. All that is necessary for him to see is that the money is really required for the proper purpose of the business and there is no element of speculation or gambling in the transaction.

52. In the case before us, it appears that the joint family carried on two businesses. One at Muttra and the other at Delhi. It has been found that the Muttra business was ancestral. If the creditor can establish that money was advanced to the manager for the benefit of the ancestral joint family business at Muttra, then, in my opinion the mortgage made by the manager will certainly bind the minor members of the joint family. I would go further and hold that the transaction will be binding without the proof of "benefit to the estate" provided that the creditor can prove that the loan was taken by the manager of the joint family business for the proper purpose of financing the ancestral joint family business. To a case of this description the ruling of their Lordships of the Privy Council will have no application.

53. As regards the business at Delhi the lower appellate Court has not given any finding whether this business was. ancestral. All that we know is that this, business was not inherited by the joint family as an ancestral business. It appears that it was started by the father of the minors some years before the date on which the mortgage in question was created by him and a part of the loan taken was transferred by the mortgagor to the accounts of this Delhi business. If this, business was new business started by the manager of the joint family, then, the ruling in *Benares Bank Ltd. v. Har Narain* 1932 P.C. 182(supra) would apply and a loan taken for financing a new business will not bind the minor members of the joint family. Before the Bench hearing this appeal can decide the question as to< whether or no-the loan taken for the purpose of this Delhi business is binding on the minors, it will be necessary to determine whether this was a new business started by the manager or whether it was an ancestral business. The decision of this question will depend on the evidence which the parties might have produced or may be permitted to be produced in the case. It was argued; before us on the authority of *Benares Bank Ltd. v. Har*

Narain 1932 P.C. 182(Supra) that every business started by a manager of joint Hindu family which does not descend by inheritance as ancestral business, should be deemed to be a new business which can never be ancestral. I find myself unable to agree with this contention. The learned Counsel for the appellant relied on the following observations made by their Lordships of the Privy Council, in Benares Bank Ltd. v. Har Narain 1932 P.C. 182(Supra)It was urged on behalf of the Bank that this-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 Jagannath and the family had no interest in it. Their Lordships have examined the evidence, and they consider that the business was started by Jagannath and Raghunath 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 debts.

54. It was on the strength of these observations that it was contended that this was a rule of universal application; to the effect that a new business started by a manager of a joint Hindu family can never become ancestral property of the joint family. As I have already stated I find myself unable to agree with this contention. The above observations of their Lordships only mean this that there can be no presumption that a business started by a manager of the joint Hindu family becomes ancestral property. This proposition of law is well settled. There can be no presumption that a business started by a manager or a coparcener is to be treated as ancestral property. This is a point which is to be decided on the facts of each case. It is very necessary to bear in mind that the case of Benares Bank Ltd. v. Har Narain 1932 P.C. 182 (Supra)was one in which the joint family had not been carrying on any ancestral trading business. On the other hand, it was a case, in my opinion, of a joint family in which there was no ancestral business. It is further important to note that in Benares Bank Ltd. v. Har Narain 1932 P.C. 182, there was no plea taken by the Bank that new business had become ancestral because it had been acquired with the aid of the joint family funds. In my opinion Benares Bank Ltd. v. Har Narain 1932 P.C. 182 (Supra)is an authority for one proposition only and that is that a loan taken by a manager of a joint Hindu family for the purpose of starting a new business will not bind the other members of the joint family. There may be cases in which the manager of a joint Hindu family starts a new business with the aid of joint family funds. Then there may be cases in which a co-parcener starting a business may blend it with the joint family property. In both these cases the business will be treated as ancestral property.

55. As I have already remarked there had been no plea in Benares Bank Ltd. v. Har Narain 1932 P.C. 182 (Supra)that the new business started by the managers had been financed by the joint family income or had been treated by the co-parcener as a joint family business; therefore, their Lordships were not considering this aspect, of the case. It appears to me that the law on this point is well settled. Accumulations of income of ancestral property, property purchased or acquired out of the income or with the assistance of ancestral property, the proceeds of sale of ancestral property, and property purchased out of such proceeds are ancestral property: Mulla's Hindu Law, p. 246, Edn. 7.

56. In the case before us, if it be found that the Delhi business was started by the manager out of the income of the ancestral family business at Muttra then the Delhi business, according to Hindu Law, would be considered to be ancestral family business of the joint family. A loan taken for the purpose of financing the Delhi branch would be binding on the minors if the creditor is able to establish that the loan was taken for the purpose of the business. It is not correct to say that every new business started by the manager of a joint Hindu family carrying on an ancestral trading business is a new business which can never be : ancestral. There are in this country any number of trading families who have an ancestral business which has branches at various places. Take the following example: A joint family is carrying on an ancestral trading business at Allahabad. Its members decide to open a branch at Nainital, because they consider that if a branch is opened at Nainital, it will yield good profits. Stocks for the Nainital branch are purchased out of the assets held by the joint family business at Allahabad. Can it be said that the business started at Nainital is not ancestral family business? think not.

57. The real test for deciding whether a business is a new business wholly unconnected with the joint family ancestral business, or is an extension of that business is to determine the source which supplied the money with which the new business was started. If the assets or income of the joint family ancestral funds are utilized for opening a new branch, then, the new branch will form part of the old business. On the other hand, if the business is started by a manager without any aid from the ancestral family assets, then, it will be a new business. In that new business the other members will have no right nor will any liability attach to them in respect of it. But merely because a business has been extended it cannot be inferred that the extension was a new business started by the manager separately. In *Benares Bank Ltd. v. Har Narain 1932 P.C. 182 (Supra)* their Lordships have referred to one of their previous rulings, *Sanyasi Charan v. Krishnadhan Banerji 1922 P.C. 237*. In that case their Lordships held that the karta of a joint family cannot impose on a minor member of it the risk and liability of a new business, started by himself and the other adult members. In that case it was found that the money had been borrowed exclusively for the purpose of the orphanage business. Their Lordships further found that this new business was neither ancestral nor an extension of the ancestral business. These observations clearly go to show that the decision in the case would have been different if their Lordships had found that the money had been borrowed for the purpose of ancestral business or for the purpose of an extension of the ancestral business. They add further that there can be an extension of the ancestral business. I am therefore of opinion that the *Benares Bank Ltd. v. Har Narain 1932 P.C. 182 (Supra)* would not be applicable to a case in which money had been borrowed or alienation made by the manager of an ancestral joint family business for the proper purpose of financing that ancestral joint family business. The question as to whether in a particular case a business newly started or old is an ancestral family business will depend on the evidence produced in each case. I have discussed this aspect of the case at some length though for the purpose of answering the reference made to the Full Bench it was not altogether necessary to do so. My reason is that I wish to make it clear that the *Benares Bank Ltd. v. Har Narain 1932 P.C. 182 (Supra)* will have

no application to the case before us, in case it is found that the alienation was made by the manager for the purpose of the ancestral business carried on by the joint family. On the other hand, if the business for which the money was borrowed is a new and non-ancestral business started by the father, then, the sons are not liable for the payment of the loan contracted by the father unless it be established that the transaction was for the benefit of the family and estate or was for legal necessity.

58. As regards the second point about appropriation I agree with the view taken by the learned Chief Justice. For the reasons given above I agree with My Lord the Chief Justice that the two questions referred to the Full Bench should be answered as proposed by him.

59. Our answers to the questions referred to us are as follows:

(1) Where the business to finance which money has been borrowed is a new business, the sons are not liable for the payment of the loan contracted by the father for this business, unless the transaction was for the benefit of the family and to the benefit of the estate or it was supported by legal necessity. (2) The payment of Rs. 3,000 should be considered to be repayment of the debt incurred for the benefit of the ancestral property and party for advancing the Delhi business and appropriated accordingly.

Cases Referred.

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5 1931 All. 253
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