APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

VENKATASAMI NAIKER (4TH DEFENDANT), APPELLANT,

1928, August, 28.

v.

PALANIAPPA CHETTIAR AND OTHERS (PLAINTIFFS AND DEFENDANTS 2, 3 AND 5), RESPONDENTS.*

Hindu Law—Trade, started by the father in a joint family composed of himself and his sons, one of whom was a minor —Mortgage deed, executed by the father—Amount borrowed for trade purposes—Trade, not inherited by the father—Ancestral trade—Liability of sons for such debts—Mortgage, whether binding on sons.

A Hindu father, governed by the Mitakshara Law, can start a new trade with the aid of family funds and make that a family business binding on his sons. In such a case, an alienation made by the father for raising funds for carrying on that business, is binding on the sons, on the ground that it was for legal necessity. It would make no difference whether the moneys are borrowed for starting a new trade or for carrying on a trade which had been already so started.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 11 of 1924.

The material facts appear from the Judgment.

T. R. Ramachandra Ayyar with *K. S. Venkatarama Ayyar* for appellant.—The appellant, who was the minor son of the first defendant, is not bound to pay the mortgage debt. The trade was not an ancestral trade. The family never traded in cotton. It was started by the first defendant for the first time. It was a purely speculative business and father has no power under the Hindu Law to start a speculative trade (which was not

*Appeal No. 363 of 1926.

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an ancestral trade inherited by him) and alienate, by way of sale or mortgage, ancestral property for the purpose of such trade. The alienation (sale or mortgage) is not binding on the sons. There is no pious obligation to pay a speculative debt. There was here no antecedent debt. The alienation is in no way binding on the appellant. Though the debt may be binding as a mere money debt of the father, it will not form a proper consideration for a mortgage or a sale. If the father starts a new trade, the sons are not liable; there is no necessity for the alienation.

T. M. Krishnaswami Ayyar for respondent.—The trade in this case was ancestral, though started by the father. It is ancestral as against the sons. See *Sanyasi Charan Mandal* v. *Krishna Dhan Banerji*(1), *Mahabir Prasad Misr* v. *Amla Prasad Rai*(2), *Ramlal Thakursidas* v. *Lakhmichand Muniram* (3), *Sakrabhai* v. *Maganlal*(4), *In the matter of Radhakrishniah Chetty*(5), *Rajagopal Pillai* v. *Veeraperumal Pillai*(6). The decision in *Brij Narain* v. *Mangal Prasad*(7) explains *Sahu Ramchandra* v. *Bhup Singh*(8)." The debt is binding on the sons, as it is not an illegal or immoral debt of the father. The alienation was for a necessity of the family, as it was a trade started for the benefit of the family. The trade was started in 1917–18, and the mortgage was executed in 1920, for trade necessity.

JUDGMENT.

RAMESAM, J.

RAMESAM, J.—This appeal arises out of a suit to recover a sum of Rs. 63,000 and odd due to the plaintiffs on a mortgage bond, dated 26th March 1920 (Exhibit A), executed by the first defendant. Defendants 2, 3, and 4 are the sons of the first defendant. The fifth defendant is the Official Receiver of Coimbatore representing the first defendant who has become an insolvent. The Court below gave a decree as prayed for. The fourth defendant alone appeals.

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(1) (1922) I.L.R., 49 Calc., 560 (P.C.).
(2) (1924) I.L.R., 46 All., 364.
(3) (1861) 1 Bom. H.C., Appd., 51.
(4) (1901) I.L.R., 26 Bom., 206 (at 220)
(5) (1924) 19 L.W., 415.
(6) (1927) 53 M.L.J., 232.
(7) (1923) I.L.R., 46 All., 95 (P.C.)
(8) (1917) I.L.R., 39 All., 437 (P.C.).

The deed of mortgage, Exhibit A, was executed for Rs. 40,000 consisting of Rs. 30,000 borrowed for the purpose of paying the branch of the Madras Bank at Coimbatore and Rs. 10,000 received at the time of registration. The learned vakil for the appellant argued that neither of the items is binding on the fourth defendant so as to form consideration for a mortgage. Taking the first item of Rs. 30,000, the existence of the prior debt to the Bank of Madras at Coimbatore and the payment of Rs. 15,000 by the first plaintiff and another Rs. 15,000 by the second plaintiff on the 30th March 1920 to the Bank of Madras in diminution of the debt of the first defendant is proved by Exhibit D, the account of the Bank, and also Exhibits B, B-1, C and C-1, chalan and receipt for each payment. The learned vakil for the appellant contends that the first defendant was speculating and the debt of the Bank was in connexion with some other person as security. Exhibit D shows that it was his own debt. The first defendant says as D.W. 1 that Rs. 30,000 was for money due on a promissory note debt negotiated by himself and drawn by his brothers-in-law in his favour. Whatever the origin of it may be, Exhibit D shows it was his own debt and it is binding on him.

We now come to the second item of Rs. 10,000 as to which it appeared at first that the appellant had got a better case than the other item. The facts relating to this item and bearing on the history of the family may be stated as follows:— The first defendant's family was a money-lending family from the time of his grandfather. They had a bank called Rukmani Vilas which ceased to work some years ago. Sometime about 1917–18, the family started a ginning factory at Ondiputtur. Originally the first defendant intended to take other partners and he took from the second plaintiff Rs. 1,000

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towards his share of the capital and other amounts from the other intended partners. Ultimately he retained the factory entirely for himself and returned the amounts collected from the other intended partners. But in the case of the second plaintiff, he lent a pair of earrings to him (second plaintiff) and afterwards, according to the second plaintiff, asked him to take the earrings towards the amount paid for the second plaintiff's share of the capital of the partnership. The first defendant says nothing about Rs. 1,000 owing to the second plaintiff, but merely says that the price of the earrings, is still due to him. In the matter of the earrings, the Subordinate Judge believed the second plaintiff's evidence and we see no reason to differ from him. Then in 1920 Rs. 10,000 was borrowed under the suit mortgage bond for the needs of the ginning factory. The second plaintiff says "They wanted the balance for the needs of a ginning factory which their family was running." I take this to mean that the ginning factory had been started some time before the borrowing of Rs. 10,000. The first defendant does not give any definite evidence as to when the factory was started. According to the statement made by the second plaintiff (P.W. 1) in cross-examination, it must have been started in 1917–1918. Now it is contended before us by the learned vakil for the appellant that the cotton trade was not an ancestral business and therefore money borrowed for the ginning factory is not binding on the fourth defendant. Incidentally I may observe that defendants 2 and 3, who were majors at the time of the execution of Exhibit A, not only attested the document but afterwards executed Exhibits E and F admitting their liabilities under Exhibit A. The fourth defendant happened to be a minor not only in 1920 but up to 1923. It is true that the family had no cotton trade before the time of first

defendant and that the trade was started by him for the first time. There is no principle of Hindu Law prohibiting a person from starting any trade he likes. If the trade which a person who is the manager of a family is carrying on can be regarded as an ancestral trade, it will be binding not only on his sons but also on his brothers and other collaterals; but if the trade is not an ancestral trade in his hands but a trade started for the first time by himself, it will not be binding on his brothers and other collaterals, though he is the manager of a joint family, unless perhaps it can be shown to have been profitable at least for some time and that the collaterals have participated in such profits; but as against his sons, certainly, it is an ancestral trade in the sense that the father is an ancestor though it is not an ancestral trade in the hands of the father himself. Whether one may call it ancestral or not, the debt borrowed for the needs of the trade cannot stand in a worse position than any other debt contracted by the father which is not illegal or immoral, in the matter of its binding the sons. From the point of view of the son's liability, I do not see what difference it makes whether it is a trade started by their father or a trade started by their grandfather. Mr. Ramachandra Ayyar contends, while conceding that such trade debts may be binding on the sons as mere money debts, that they will not form proper consideration for a mortgage or sale. But that question depends simply upon whether there was an antecedent debt or necessity at the time of the mortgage. Now if there is a family trade carried on by the father for the benefit of himself and his children and in the course of the family trade he finds that he is in need of money for meeting the purposes of the trade, I do not see why a debt borrowed on mortgage should not be regarded as a debt for necessity. Here we find that the ginning

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factory was started some time in 1917–18 and it was going on up to 1920. The presumption is that it was going on as family trade for the benefit of the whole family, just as property acquired by a member of the family, particularly the father or manager, will be presumed to be property purchased on behalf of the joint family, where the family had a nucleus of ancestral property, and it is for members who claim it to be self-acquired property to show that it is self-acquired. Similarly, where the father builds a factory for ginning and other evidence shows that the father was in possession of ancestral property (here we have got evidence that the family had lands annually yielding Rs. 8,000) the presumption would be that the factory was built with joint family funds, and it is for those, who want to assert that it has nothing to do with the joint family, to prove that the factory was erected by means unconnected with the joint family. There is no such evidence here. Thus we start with the position that the family had run a ginning factory with the joint family funds from 1918 to 1920. In 1920 further materials were needed for the factory. The father then borrowed Rs. 10,000 from the plaintiffs. Coimbatore is a cotton-growing district. Cotton trade is a legitimate trade for trading families in that district. We cannot say that building a ginning factory was of such a speculative kind that money borrowed later on for its needs should not be regarded as for necessity from the point of view of the sons. I am therefore of opinion that there was a family necessity in 1920 supporting the mortgage Exhibit A. This is the view I took in *In the matter of Radhakrishna Chetty*(1). In that case I merely expressed an opinion to this effect

(1) (1924) 19 L.W., 415 at 417.

on the first point and stated it was unnecessary for me to give a decided opinion having regard to my decision on the second point. However it is necessary here to decide the point and I adhere to the opinion I then expressed. I think the mortgage is binding on the fourth defendant also. It is clear that every member of the family *sui juris* thought at the time that it was a good venture and they were going to be profited by it.

The result is the appeal fails and is dismissed with costs.

VENKATASUBBA RAO, J.—This is a suit on a mortgage executed by the first defendant. Defendants 2, 3 and 4 are his sons. When the mortgage was executed, defendants 2 and 3 were adults and approved of the transaction. To indicate their consent, they attested the mortgage deed in the first place and subsequently passed two documents in which their approval was expressed. The fourth defendant was a minor and is the appellant before us. He contends that the mortgage is not binding on his interest in the property.

The mortgage was executed on the 26th of March 1920 for securing repayment of Rs. 40,000 advanced to the first defendant. In order to make it binding on the other members of the family, it must be shown either that there were antecedent debts, not illegal or immoral, or, that there was a legal necessity. To the extent of Rs. 30,000 the appellant has clearly no case, for, it is beyond doubt that there were antecedent debts amounting to that sum and that the money was utilized for discharging those debts. As regards the balance of Rs. 10,000 the alienation is supported on the ground that there was legal necessity. The family of the defendant was a wealthy one. It owned lands yielding an annual income of about Rs. 6,000 and there was an ancestral business which consisted of money-lending on

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a large scale. The first defendant deposes that when he assumed the management, the family had dealings in money-lending to the extent of about Rs. 70,000. About the year 1917, the first defendant built a ginning factory and started a trade in cotton. This was not an ancestral trade and the case must be decided upon the footing that it was started for the first time by the first defendant. Money was required in connexion with this trade and the sum of Rs. 10,000 referred to above was borrowed for the needs of this business. It is contended for the appellant, that the needs of the trade started by the first defendant cannot be regarded as the needs of the family and the purpose is therefore not, what may be described, as legal necessity under the Hindu law. The contention is broadly, that a Hindu father governed by the Mitakshara Law can only carry on an inherited business, but can, on no account, commence a new trade, in the sense that it can become a family concern and that its debts are binding upon his sons. I cannot assent to this proposition. In *Rajagopal Pillai* v. *Veeraperumal Pillai*(1), I expressed the opinion that this is not a sound proposition, though it did not become necessary to give a ruling on the point (see pages 239 and 240). That a son is liable under the pious obligation for his father's trade-debts is, I think, a proposition that hardly admits of doubt. (See the same case.) But when the creditor is trying to support an alienation, the question is not: Is the son under a pious duty to pay the debt? but it arises in a different form: Was the debt incurred for family necessity or benefit? If the carrying on of the trade can constitute a legal necessity or family benefit, the debt must be held binding on the sons. It is agreed on all hands, that if

(1) (1927) 53 M.L.J., 232.

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a debt is borrowed for an ancestral trade, it is binding on the sons. Does it then make any difference that it is not such a debt? In many decisions, an ancestral trade was differentiated from a trade started for the first time by a manager of the family. There has been a great diversity of opinion on the point; not only have the views been conflicting, but even the reasons given in support of each view have not been uniform. But it is noticeable, that these cases relate to the powers of a manager, other than a father. In the case of such a manager, in some cases, it has been held that he cannot for the first time start a trade; in others, that to do so, is within his competence. I may illustrate the extreme conflict of views by citing two cases. In *Krishna Dhan Banerji* v. *Sanyasi Charan*(1), it was held that it was beyond the powers of a karta (in this case the eldest brother) not only to embark on a new trade but even to extend and enlarge a previously existing ancestral trade. I must point out that this extreme view has not received much support. The very opposite of this view was taken in *Malaiperumal Chettiar* v. *Arunachala Chettiyar*(2) where SADASIVA AYYAR, J. (AYLING, J., concurring) held that there is no distinction in principle, between an ancestral trade carried on by a father and a joint family trade begun for the first time, either by the father or by the elder brother. How varied and diverse between these two extremes, the opinions on this point are, may be seen from the judgments in the following cases:— *Narayana Sah* v. *Sankara Sah*(3), *Tammi Reddi* v. *Gangi Reddi*(4), *Abduraheman Kutti Haji* v. *Hussain Kunhi Haji*(5), *Laxmiah* v. *The Official Assignee, Madras*(6), and *D. McLaren Morrison* v. *Verschoybe*(7).

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(1) (1916) 51 I.C., 597.
(2) (1916) 6 L.W., 417.
(3) (1926) 51 M.L.J., 621.
(4) (1921) I.L.R., 45 Mad., 281.
(5) (1919) I.L.R., 42 Mad., 761.
(6) (1928) M.W.N., 576.)
(7) (1901) 6 C.W.N., 429.

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Turning to the decisions of the Judicial Committee, *Sanyasi Charan Mandal* v. *Krishna Dhan Banerji*(1) and *Sadasiva Mudaliar* v. *Hajee Fakeer Mahomad Sait*(2) seem to support the view that the manager's powers are limited, whereas *Niamat Rai* v. *Din Dayal*(3) seems to recognize that his powers are more extensive. The words in the judgment of their Lordships in the last-mentioned case at page 216 "even if there had been no joint family business" are relevant in this connexion. Whatever may be the state of the law, in regard to the powers in this respect of a manager generally, I find no case in which the father's power has been so restricted. Under the Hindu Law, the father stands, in certain respects, on a footing different from that of an ordinary manager. I am not prepared to hold that in regard to his power respecting alienations, he is under the same disability with reference to trade debts, as other managers are. In *The Official Assignee of Madras* v. *Palaniappa Chetty*(4) SADASIVA AYYAR, J., observed that the right of a Hindu father belonging to a trading community, to begin a lawful trade as a joint family business, cannot be disputed. *In the matter of Radhakrishna Chetty*(5) my learned brother made an observation almost to the same effect that it is open to a Hindu father to start a new family business. In *Mahabir Prasad Misra* v. *Amla Prasad Rai*(6), a mortgage by a Hindu father to secure moneys borrowed for a trade, which was not an ancestral one, was held binding on the sons.

I am of the opinion that a Hindu father, by starting a business with the aid of family funds, can make that a family business. In such a case, an alienation made

(1) (1922) I.L.R., 49 Calc., 560.
(2) (1922) 44 M.L.J., 396.
(3) (1927) I.L.R., 8 Lah., 597; 54 I.A., 211.
(4) (1918) I.L.R., 41 Mad., 824.
(5) (1924) 19 L.W., 415.
(6) (1924) I.L.R., 46 All., 364.

by the father, for raising funds for carrying on that business, is binding upon the son, on the ground that it was for legal necessity.

In the view I take, it would make no difference whether the moneys are borrowed for starting a new trade with the aid of joint family funds, or for carrying on a trade which had been already so started.

I agree that the appeal fails and should be dismissed with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss.

1928, April 19.

SREERAM RAMA KOTIAH AND SIX OTHERS (ACCUSED), PETITIONERS,

v.

CHINTALAPUDI SUBBA RAO AND FOUR OTHERS (ACCUSED), RESPONDENTS.*

Criminal Procedure Code (V of 1898*), ss.* 263, 264 *and* 265—*Bench of Magistrates—Judgment prepared by presiding officer—Not necessary others should sign—All to be present when judgment is prepared—Judgment reserved—Must be read to all before being pronounced—Judgment prepared and delivered by one in absence of others—Illegality—New trial.*

Where the judgment of a Bench of Magistrates is prepared by the presiding officer, it is sufficient if he alone signs it and it is not necessary that the other members should also sign it.

All the members of a Bench of Magistrates must be present, when a judgment is prepared. If a judgment is reserved, it must be read to them before it is delivered.

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* Criminal Revision Cases Nos. 969, 970 and 971 of 1927.