Before Mr. Justice Sulaiman and Mr. Justice Sen.

1929 March, 12.

MIRZA MAL BHAGWAN DAS (PLAINTIFF) *v.* RAMESHAR AND OTHERS (DEFENDANTS).*

Act No. IX of 1872 (*Indian Contract Act*), *section* 239—*Hindu law—Partnership entered into with strangers by a member of a joint Hindu family—Liability of other members—Presumption.*

The presumption in the case of a joint Hindu family, where a nucleus is proved, that property standing in the name of a junior member was acquired out of the family funds and belongs to the family cannot be extended to cases of partnership with strangers.

The joint family as a jural unit, or a member in his individual capacity, may enter into an agreement of partnership with persons outside the family. In each of these cases the nature and incidents of the partnership have to be determined by the evidence produced.

There can be no presumption that a business carried on by a coparcener in partnership with strangers is a family business.

Where a business is carried on by one of the members of a joint Hindu family, then until the rest of the members claim the benefits arising therefrom or until the business is in some way adopted as an asset of the joint family, it would be contrary to principle to fasten on the other members any liability for the debts of that business. It must be shown by the creditor who advances such a claim that the business carried on by an individual member has by some such method become the business of the family or is carried on for its benefit.

An agreement, express or implied, is essential for the creation of a partnership, under the Contract Act. A presumption in favour of such an agreement may be raised from the conduct of the parties, from their mutual dealings, and from the surrounding circumstances, but there is no presumption in law that a member of a joint Hindu family entering into a partnership with strangers is doing so in a representative or vicarious capacity. *Parbati Dasi* v. *Raja Baikuntha*

* First Appeal No. 180 of 1926, from a decree of Gauri Shankar Tewari, Subordinate Judge of Jaunpur, dated the 4th of January, 1926.

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Nath De (1), *Bandhu Ram* v. *Chintaman Singh* (2), *Lala Jagan Lal* v. *Mathura Prasad* (3), *Punnu* v. *Kousa* (4) and *Annamalai Chetty* v. *Subramanian Chetty* (5), distinguished. *Moti Ram* v. *Muhammad Abdul Jalil* (6) *Mewa Ram* v. *Ram Gopal* (7), *Gauri Shankar* v. *Keshab Deo* (8), *Anant Ram* v. *Channu Lal* (9) and *Kharidar Kapra Co.* v. *Daya Kishan* (10) referred to. *Gangayya* v. *Venkataramiah* (11), *Vadilal Lallubhai* v. *Shah Khushal* (12) and *Baldeodas* v. *Manekchand* (13), and *Palaniappa Chetty* v. *Official Assignee of Mardas* (14), followed. *Malaiperumal Chettiar* v. *Arunachalla Chettiar* (15), *Grey* v. *Lamond Walker* (16), and *Cox* v. *Hickman* (17), referred to.

Mr. *Mushtaq Ahmad*, for the appellants.

Mr. *N. P. Singh*, for the respondents.

SEN, J. :—This is a plaintiffs' appeal in a suit for recovery of Rs. 8,078-13-6 for the price of various articles, such as molasses, sugar, raw sugar, sesamum seed, grain etc., supplied to the defendants, together with commission and interest. The plaintiffs carry on the business of commission agency at Shahganj in the district of Jaunpur under the style of Mirza Mal Bhagwan Das. The suit was directed against nine defendants, seven of whom were sued as principals and the other two were sued as sureties.

The plaintiffs alleged that defendants Nos. 1 to 4 were members of a joint family and were originally residents of Salimabad in the Kishangarh State in the district of Ajmer; that the defendants Nos. 1 to 4 were related to the other defendants; that defendants Nos. 1 to 4 in partnership with defendants 5, 6 and 7 started a firm known as Kishori Lal Bhagwati Prasad at Kishangarh for carrying on trade; that defendant No. 1,

(1) (1913) 12 A. L. J., 79.
(2) (1921) 20 A. L. J., 495.
(3) (1917) 39 Indian Cases 493.
(4) (1916) 40 Indian Cases, 463.
(5) (1928) 33 C. W. N., 435.
(6) (1924) I. L. R., 46 All., 509.
(7) (1926) I. L. R., 48 All., 395.
(8) [1929] A. L. J., 204.
(9) (1903) I. L. R., 25 All., 378.
(10) (1920) I. L. R., 43 All., 116.
(11) (1917) I. L. R., 41 Mad., 454.
(12) (1902) I. L. R., 27 Bom., 157.
(13) (1901) 3 Bom., L. R., 144.
(14) (1916) 36 Indian Cases, 787.
(15) (1917) 41 Indian Cases, 224
(16) (1913) I. L. R., 40 Cal., 523.
(17) (1860) 8 H. L. C., 268.

Roormal, was the managing member of the said partnership concern; that on the recommendation of defendants Nos. 8 and 9, who carried on business in Nasirabad Cantonment under the name of Bhaniram Chhote Lal, and under a letter dated Asarh Badi 9, Sambat 1978, corresponding to 29th of June, 1921, and on their standing sureties thereunder, the plaintiffs supplied various articles to the defendants Nos. 1 to 7; that retrogressive interest at 12 annas per cent. and commission at 8 annas per cent. were settled between the parties; and that upon an account Rs. 6,586-4-3 principal and Rs. 1,452-9-3 as interest were due to the plaintiffs from the defendants.

Roormal and Ram Kishen who were defendants Nos. 1 and 2 admitted the plaintiffs' claim but contended that they had purchased various goods from the plaintiffs on their own responsibility. They denied that defendants Nos. 3, 5, 6, and 7 were partners in the firm styled Kishori Lal Bhagwati Prasad. They also denied that defendants Nos. 8 and 9 ever stood sureties for them or the other defendants and they finally pleaded that Rameshwar, defendant No. 3, who was the own brother of Roormal defendant No. 1 and son of Ram Kishen, defendant No. 2, had been taken in adoption by one Ladu Ram and had nothing to do with the joint family of defendants Nos. 1, 2 and 4. Defendants Nos. 5, 6 and 7 contended that they never carried on any business in partnership with defendants Nos. 1 to 4 nor were they partners in the firm styled Kishori Lal Bhagwati Prasad. They carried on business at Beawar in iron and not in sugar, grain etc.

Defendants Nos. 8 and 9 pleaded that they did not stand sureties for the other defendants in respect of any amount due to the plaintiffs nor did the plaintiffs give any goods on credit to the defendants on the recommendation of these defendants.

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The court below held that the firm styled Kishori Lal Bhagwati Prasad consisted of only four partners, namely, Roormal, defendant No. 1, Ram Kishen, defendant No. 2, Bhagwati Prasad, son of Roormal, defendant No. 4, and Kishori Lal, defendant No. 6, who was outside the family of Ram Kishen; that Rameshwar, defendant No. 3, had been adopted by Ladu Ram and did not belong to the family of Ram Kishen and was not concerned with the partnership firm; that Moti Lal, defendant No. 5, and Bhagwati Prasad, defendant No. 7, were not the members of that firm; and that the defendants Nos. 8 and 9 had not stood sureties for the other defendants. Upon these findings the court below passed a decree against defendants Nos. 1, 2, 4 and 6. These defendants have submitted to the decree and have preferred no appeal.

The plaintiffs in their appeal to this Court claim a decree against Rameshwar, defendant No. 3, Moti Lal, defendant No. 5 and Bhagwati Prasad, defendant No. 7, on the allegation that they are also members of the partnership firm styled Kishori Lal Bhagwati Prasad. They challenge the finding of the lower court that Rameshwar had been adopted by Ladu Ram and that the defendants Nos. 8 and 9 were not sureties for the other defendants.

The onus of proving that Rameshwar had been adopted by Ladu Ram lay heavily upon the defendants. [The judgement discussed the evidence on this point.] The evidence on the record is wholly insufficient to justify the finding that Rameshwar has been transferred to another family by adoption.

An attempt was made by the plaintiffs to fasten the liability upon Moti Lal, defendant No. 5, and Bhagwati Prasad, No. 7, on the allegation that they were also partners in the firm of Kishori Lal Bhagwati Prasad. No deed of partnership has been produced in the case.

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There is no evidence that any assets of the joint family to which Kishori Lal, defendant No. 6, belonged had been invested in the partnership firm. No account books have been produced to prove that the joint family shared profits and losses of the partnership firm. The plaintiffs examined two witnesses Baijnath and Sundar Lal in support of the alleged partnership. Baijnath stated that the *khata* in the plaintiffs' account books stands in the names of Kishori Lal, defendant No. 6, and Bhagwati Prasad, defendant No. 4, that none of the other defendants signed the plaintiffs' *bahis*, that the partnership was not entered into in the presence of this witness, that the plaintiffs sent no goods and received no money through defendants Nos. 5 and 7 and that no letters of demand were sent to them. Sundar Lal, the other witness, admits that the partnership was not entered into in his presence. His statement is pure hearsay. These witnesses were rightly rejected by the court below. Upon the evidence on the record it is not proved that the defendants Nos. 5 and 7 were members of the partnership firm.

It is contended by the plaintiffs appellants that Rameshwar being a member of the joint family with Ram Kishen, Roormal and Bhagwati Prasad, and Moti Lal and Bhagwati Prasad being members of another joint family with Kishori Lal, it must be presumed that Rameshwar, Moti Lal and Bhagwati Prasad were also the members of the partnership firm known by the name of Kishori Lal Bhagwati Prasad. A large number of authorities have been cited in support of this proposition. In *Parbati Dasi* v. *Raja Baikuntha Nath De* (1) the question now raised was not the question in issue. All that was decided in this case was that where property was purchased in the name of a junior member of a joint Hindu family, the criterion was to consider the

(1) (1913) 12 A. L. J., 79.

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source from which the purchase money was paid, and in the absence of evidence to prove that the junior member had any separate funds the presumption was clear and decisive that the property was acquired by the joint family and was not the self-acquisition of the junior member. In *Bandhu Ram* v. *Chintaman Singh* (1) the same rule of law was reiterated in different words and a bond held in the name of the managing member of a joint *Mitakshara* Hindu family was presumed to be the joint property of the family in the absence of evidence to the contrary. Their Lordships observed in this case that where the evidence on both sides was somewhat meagre, the presumption in favour of joint ownership was not displaced. *Lala Jagan Lal* v. *Mathura Prasad* (2) is a decision of the late court of Judicial Commissioners of Oudh and rests upon the same rule. The ordinary presumption of Hindu law is that property acquired, whether in the name of one member of the family or another, while the family is joint, will be deemed to have been acquired from the joint funds, where a joint nucleus was shown to exist, unless it was shown to have been acquired by any member from separate earnings of his own. In *Punnu* v. *Kousa* (3), a Bench of this Court enunciated the rule in this form:— "We think that if the family was found to be joint and if it was proved that there was joint family property belonging to the family, then the onus of showing that the money advanced on these mortgages was the self-acquired property of Govind would lie upon the defendant, his daughter." This view has not been departed from in *Annamalai Chetty* v. *Subramanian Chetty* (4).

The contracting capacity of the joint family as a whole or of an individual member of the joint family for himself is not disputed. The joint family as a jural

(1) (1921) 20 A. L. J., 495.
(2) (1917) 39 Indian Cases, 498.
(3) (1916) 40 Indian Cases, 463.
(4) (1928) 33 C. W. N., 435.

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unit may enter into an agreement of partnership with a person or persons outside the family either through its managing member or by the consensus of the members constituting the joint family. Likewise a member of the joint family may enter into such a contract in his individual capacity. The nature and incidents of the partnership in each of these cases have to be determined by a consideration of the evidence produced in each case. In *Moti Ram* v. *Muhammad Abdul Jalil* (1), it was held that where a partnership consisted of numerous individuals, some of whom were entered in the partnership deed as holding certain shares on their own behalf and in trust for certain minor members of their family, the partnership would be accountable to such individuals alone and the minor members should not for the purposes of section 4 of the Indian Companies Act be regarded as separate partners. In *Mewa Ram* v. *Ram Gopal* (2) it was decided that where a person representing a joint Hindu family or a firm lends his name to a partnership contract, he must be deemed to be one person within section 4 of Act VII of 1913. SULAIMAN, J., observed: "If each of the executants entered into the partnership in his own individual capacity, he admittedly counts as one. On the other hand, if he entered into partnership in his representative capacity on behalf of his family, then his joint family must be considered to be a unit and must be deemed to be one person within section 4 of the Indian Companies Act." It follows from this that the matter has got to be determined in each case with reference to the evidence produced therein and that no presumption necessarily arises either as a matter of law or of logic that the other members of the family should be deemed to be partners in the firm by reason of an individual member of the family entering into a contract of partnership with strangers. The same view is en-

(1) (1924) I. L. R., 46 All., 599. (2) (1926) I. L. R., 48 All., 395.

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dorsed by MUKERJI, J., but in different words: "Where a person lends his name to a partnership contract, he is a 'person' constituting the total number of partners. Behind his back there may be a joint Hindu family or he may be representing a firm consisting of himself and several other members. In either case, so far as the other partners are affected, the party joining in the contract is the only person with whom they are concerned. The share owned by the individual member may have to be, in the case of a partition in the family or dissolution of partnership, divided among certain parties. But that fact cannot affect the other members in the partnership in question. In this view the party joining constitutes only one person and not more than one person." This observation leaves count of the fact that it may be permissible for an individual member of a joint family to enter into a partnership with persons who are strangers to the family on his own personal account and not as a member of the family at all. The matter was considered by this Court in a very recent case in *Gauri Shankar* v. *Keshab Deo* (1), and it was held that a joint family can enter into a partnership and that where a joint family carries on a trading concern there is no dissolution of partnership amongst the various members of the concern by reason of the death of its managing member.

In the case of a joint family ancestral trade the various members are not only coparceners but also copartners of the trading firm. A member of the family becomes a co-partner by operation of law and the partnership can suffer no dissolution from the death of an individual member. The law on the subject has been thus stated by Mayne (Hindu law and Usage, 9th edition, 398):—"Where a managing member of a joint Hindu family enters into a partnership with a stranger,

(1) [1929] A. L. J., 204.

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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 as defined by the Indian Contract Act. In such a case, the family as a unit does not become a partner but only such of its members as, in fact, enter into a contractual relation with the stranger; the partnership will be governed by the Act." The distinction between an ancestral Hindu family firm and a partnership between certain members of a joint family and strangers to that family has been recognized and acted upon in a number of cases. In *Anant Ram* v. *Channu Lal* (1), this distinction was emphasized in the following terms:—"Now in dealing with this contention it is most essential to bear in mind that the firm Channu Lal, Lalman was not an ancestral Hindu family firm belonging to the members of a joint Hindu family and, as such, subject to the peculiar rules by which such a firm is governed. The relationship between the persons who established this firm was not that created by the personal law and arising out of the status of the members of a Hindu joint family, but that which takes its rise from a contract between partners as defined in section 239 of the Contract Act. The firm was an ordinary commercial trading firm, consisting of several persons who had agreed to combine their property and skill in the business of purchasing and selling cloth at a profit, dividing the profits among themselves in certain proportions. Whatever may be the rules which govern an ancestral joint Hindu family partnership, they cannot, in our opinion, affect a firm such as that which we have before us in this case." In *Kharidar Kapra Co., Ltd.* v. *Daya Kishan* (2), a Bench of this Court endorses the view laid down by the Madras High Court in the Full Bench case of *Gangayya* v. *Venkataramiah* (3). In the latter case the following rule has

(1) (1903) I. L. R., 25 All., 378 (381). (2) (1920) I. L. R., 43 All., 116.
(3) (1917) I. L. R., 41 Mad., 454.

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been enunciated:—"It is well settled that a contract of partnership between a member of a joint family and a stranger does not make every member of the joint family which the managing member represents a partner so as to clothe him with all the rights and obligations of a partner as defined in section 239 of the Indian Contract Act."

In *Vadilal Lallubhai* v. *Shah Khushal* (1) it was held that "although a person carrying on business is a coparcener in a joint family, it does not necessarily follow that all his coparceners are his partners in that business, entitled with him to its rights and responsible with him for its liabilities. The fact of partnership must be proved by evidence showing that the persons alleged to be partners have agreed to combine their property, labour or skill in the business and to share the profits and losses thereof." The following passage from the judgement may be usefully reproduced:—"In our opinion it is too broad a proposition of law to lay down that because a person carrying on business is a coparcener in a joint family, therefore all his coparceners are his partners in that business, entitled with him to its rights and responsible with him for its liabilities." "We are left to presume them" (surrounding circumstances) "from the mere fact that the plaintiff is joint with his father and his brother; but just as there is no presumption that a loan contracted by a manager of a Hindu family is for a family purpose . . . . so there can be no presumption that a business carried on by a coparcener is a family business." The same rule was enunciated in an earlier case by Sir LAWRENCE JENKINS, C. J., in *Baldeodas* v. *Manekchand* (2). The point argued in this case was that the members of a joint family whose assets comprised a business are *ipso facto* liable for debts that may be incurred by any member

(1) (1902) I. L. R., 27 Bom., 157. (2) (1901) 3 Bom., L. R., 144.

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of the family in any business carried on by him. His Lordship observed that this would be a most dangerous doctrine to accept. "Possibly under the rules of Hindu law, which regulate the relations between the members of a joint family, the rest of the members may under certain circumstances claim the benefits arising from a business carried on by one of their number, but until this is done, or until the business is in some way adopted as an asset of the joint family, it would be contrary to principle to fasten on the other members any liability for the debts of that business. Therefore, it must, in my opinion, be shown by the creditor who advances such a claim that the business carried on by an individual member has, by some such method as I have indicated, become the business of the family or is carried on for its benefit." It is respectfully submitted that the above contains the true statement of the law and ought to be adopted. In *Palaniappa Chetty* v. *Official Assignee of Madras* (1) ABDUR RAHIM, O. C. J., is reported to have made the following observations:—"It is said that there is a general presumption of Hindu law that a business carried on by the head of a Hindu family, although started by himself for the first time, is, without anything more being shown, the joint business of the family. I do not think that there is any such absolute presumption. In order that a presumption may arise it must be shown that the other members by participating in the conduct of the business or its profits or by a long course of acquiescence treated it as a business in which all the coparceners were interested." PHILLIPS, J., did not share his views. He says:—"No doubt the provisions of the Indian Contract Act must be read together with the provisions of the Hindu law, for the coparcenary of a joint Hindu family is of such a nature that it must modify to a certain extent some of the provisions of the Indian

(1) (1916) 36 Indian Cases, 787.

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Contract Act in regard to partnership, but this is no ground for contending that such provisions are not to be applied, as far as are consistent with Hindu law, to the partnership constituted by a joint family business." He was of opinion that given a joint family with the nucleus of ancestral property, the presumption of Hindu law was that the property acquired by the manager of the family was joint family property. This proposition cannot be controverted. But it is respectfully submitted that the proposition in question cannot be extended to partnerships between a member of the joint family and a stranger. Nor can a presumption be invoked in favour of the creation of such a partnership apart from the provisions of section 239 of the Indian Contract Act. The ruling enunciated in *Malaiperumal Chettiar* v. *Arunachalla Chettiar* (1) was with reference to the presumption which should ordinarily be raised in the case of a trading caste or family, and it would be most dangerous to extend the rule to a case like the present. An individual member embarking in a business on his own personal account cannot be permitted to involve the entire family's credit and all the joint family properties to the prejudice of the family as a whole including the minor members.

The rule of evidence laid down in *Grey* v. *Lamond Walker* (2) does not militate against the view that the character and constitution of the partnership in dispute have to be proved in each case upon a consideration of such evidence as may be forthcoming and cannot be decided merely upon a presumption of law one way or the other. There can be no doubt that in the case of trading families there is a presumption of jointness not only of their property but even as regards the business which they carry on.

(1) (1917) 41 Indian Cases, 224. (2) (1913) I. L. R., 40 Cal., 523.

It was observed by Lord Lindley. (The Law of Partnership, 9th edition, page 25) that where the legislature has provided a statutory definition of partnership, that definition, taken in connection with other sections, must be the ultimate test applicable to the determination of the question whether in any particular case a partnership does or does not exist. Regard has to be paid in particular to the contract and intention of the parties as appearing from the whole facts of the case: *Cox* v. *Hickman* (1). Section 239 of the Indian Contract Act defines partnership as the relation which subsists between persons who have agreed to combine their property, labour and skill in some business and to share the profits thereof between them. Partnership, therefore, is a relation resulting from the contract, and an agreement, express or implied, is the source of the said relation. The definition in the Indian Contract Act may be compared with the definition given by Watson. According to him it is a voluntary contract between two or more persons for joining together their money, goods, labour and skill or either of them or all of them upon an agreement that the gain or loss shall be divided proportionably between them and having for its object the advancement and protection of a fair and open trade. An agreement to share the loss is not a necessary ingredient of partnership under the Indian Contract Act. An agreement is essential for the creation of partnership under the Indian Contract Act. No evidence is forthcoming in this case that the defendants Nos. 3, 5 and 7 entered into such an agreement with the other persons against whom the decree has been passed by the court below. The agreement to constitute a partnership may be express or may be implied. A presumption in favour of such an agreement may be raised from the conduct of the parties, from their mutual dealings and from the surrounding

(1) (1860) 8 H. L. C., 268.

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circumstances, but there is no presumption in law that a member of a family entering into a partnership with certain persons who are strangers to the family is doing so in a representative or vicarious capacity. If a liability is sought to be fastened upon the other members of the family, it can be done either by evidence of consensus or by evidence to prove an agency through which the contract of partnership was brought into existence. These have not been proved in this case. The finding of the court below that the defendants Nos. 3, 5 and 7 are not the partners in the firm of Kishori Lal Bhagwati Prasad is correct and ought not to be displaced.

It is next contended that defendants Nos. 8 and 9 are the sureties of the remaining defendants and are liable for the plaintiffs' claim. [The judgement discussed this matter and concluded.] I therefore repel this contention. In view of the above findings I would, therefore, dismiss this appeal.

SULAIMAN, J. :—I entirely concur in the conclusions of my learned brother, including the view that there is no presumption in this case that the other members of the family of Kishori Lal are partners in the firm. No doubt it is well settled that where a property stands in the name of a junior member of a joint Hindu family the presumption, where the nucleus is proved, is that it was acquired out of the joint family funds and belongs to the joint family; but that presumption cannot be extended to cases of partnership. The acquisition of property stands on quite a different footing from the membership of a partnership, which involves not only an acquisition of an interest in a partnership concern but an assumption of liability also. My learned brother has referred to the case of *Vadilal Lallubhai* v. *Shah Khushal* (1), where it was clearly laid down that there was no presumption that a business carried on by a coparcener is a

(1) (1902) I. L. R., 27 Bom., 157.

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family business. In *Gangayya* v. *Venkataramiah* (1), it was conceded that as between the members of an undivided family and the coparcener who enters into a contract of partnership for the benefit of the family, they will be entitled to call upon him to account for the profits earned by him from the partnership and to share in such profits, but this will not place them in any position of direct contractual relationship with the other partners of the firm, even though the entire assets of the joint family might be available to the creditors of the family in certain circumstances. Similarly in the case of *Baldeodas* v. *Manekchand* (2), JENKINS, C. J., remarked that under certain circumstances the rest of the members of the family may claim the benefit arising from the business carried on by one of their number, but until this is done, or until the business is in some way adopted as an asset of the joint family, it would be contrary to principle to fasten on the other members any liability for the debts of that business, and, therefore, the creditor who advances such a claim must show that the business carried on by an individual member has by some such method become the business of the family or is carried on for its benefit. It follows, therefore, that the question is one of fact and not of presumption, and there is no initial presumption in favour of the plaintiffs that the entire family of Kishori Lal was a partner of this firm merely because Kishori Lal is now found to have been a partner, particularly when Kishori Lal was a junior member and not the *karta* or the head of the family.

(1) (1917) I. L. R., 41 Mad., 454. (2) (1901) 3 Bom. L. R., 144.