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order detention in a Borstal School for any period which is legal under the provisions of sub-section (*1*) of section 25, irrespective of the length of the sentence of imprisonment which has been passed by the Magistrate from whose judgment the appeal is brought; and in ordering such detention there can be no question of an enhancement of sentence having been made.

In the present case, instead of the order directing that the respondent shall be sent to the Borstal School at Thayetmyo for a period of two years, I direct that he do be detained in the Borstal School for a period of four years, this period to be reckoned from the date of his conviction by the Magistrate.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

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Jan. 7.

V.R.C.T.V.R. CHETTYAR

v.

C.A.P.C. CHETTYAR.*

Hindu law—Relations of members inter se *of Hindu joint family carrying on family business—Members not partners governed by Partnership Act—Partnership Act (IX of 1932), ss. 5, 12, 30, 31, 42—Rights and obligations of co-parceners not regulated by Partnership Act—Misuse of language—Personal law—Duty of members to assist in family business—Hindu joint family carrying on family business not a "firm"—Adjudication in insolvency of members of Hindu joint family as partners—Presidency-Towns Insolvency Act (III of 1909), s. 99.*

The application of the term "partnership" to the relations *inter se* of the members of a Hindu joint family which owns and carries on a business involves a misuse of the term, and a misconception of the characteristics of such a family. There has never been any justification in law or common sense for holding that the members of a Hindu joint family who carry on business as such are partners governed by the Partnership Act. Section 5 of the Act merely restates the true legal position of the members of a Hindu joint family. The interest of the partners in a firm is determined by contract, the interest of the members of a Hindu joint family in ancestral business is acquired by status. An ancestral business devolves upon the members of a Hindu joint family as part of their inheritance, and their rights and obligations

* Civil Misc. Appeal No. 43 of 1935 from the order of this Court on the Original Side in Insolvency Case No. 249 of 1932.

in respect of it are not governed by any contract into which they have entered, but by the personal law to which they are subject. The rights and obligations of partners set out in the Partnership Act are inapplicable to the members of a Hindu joint family.

Fakirchand v. *Motichand*, I.L.R. 7 Bom. 438; *Official Assignee of Madras* v. *Palaniappa Chetty*, I.L.R. 41 Mad. 826; *S. C. Mandal* v. *K. Banerji*, 49 I.A. 108—*referred to.*

The misuse of language and the failure to understand the basic characteristics of a Hindu joint family have led to an injustice being done to the adult members of such a family who have taken an active part in carrying on the family business by making them personally liable for the obligations of the business. The rights and obligations of the members of a Hindu joint family are determined by the personal law to which they are subject. By their personal law as well as by the universal custom of the Hindus it is the duty of the other members of the family, whether they are adults or minors, to assist the *kurta* in managing the estate and/or business (if any) belonging to the family. In so acting a member of a Hindu joint family does not hold himself out as or become a partner of a "firm."

Dicta in *Joykisto Cowar* v. *Nundy*, I.L.R. 3 Cal. 738 and in other cases discussed.

It follows that a Hindu joint family carrying on an ancestral business or a business created out of family funds is not a "firm" within s. 99 of the Presidency-Towns Insolvency Act, and the members of the family are not "partners" of such a "firm" who can be adjudicated insolvent upon a petition for insolvency presented against, and in the name of, the said "firm."

Hay (with him *Chowdhury*) for the appellant. The order complained of adjudicated in effect a partnership firm. The three sons of Chidambaram other than Shanmugam admittedly were not partners of the firm. For over a year the proceedings in this case were conducted on the footing that the order of adjudication related to a partnership firm consisting of two partners Chidambaram and Shanmugam. In any case a joint Hindu family carrying on a family business as such cannot be adjudicated as a firm. Section 99 of the Presidency-Towns Insolvency Act contemplates a partnership as known to the law, that is, one arising from contract and not from status (see ss. 4, 5 of the Partnership Act).

The view that an undivided member of a Hindu family, upon taking an active part in the family business, becomes a partner in such "firm" is

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untenable. It is impossible to imagine a partnership of which all the members have by right of birth a vested interest, and some of them by participation in the business a special obligation as partners, neither created by contract nor by the volition of the parties, but by the mere performance of a right or duty. In this view, upon the participation of the eleventh or the twenty-first member the business will become illegal under s. 4 of the Companies Act.

Further, the adjudication of a Hindu joint family as such might involve the wholesale adjudication of the undivided family.

Chari for the respondent. It has been held by some of the High Courts in India that the members of a Hindu joint family who are adults are personally liable for the debts incurred in the conduct of any joint family business if they take part in it. This liability is neither based on estoppel nor on the principle of holding out, because if it is based upon either of those principles the member who takes part in the management of the family business would be liable only to those persons who have been induced to lend money in the belief that he was a partner. But the authorities make it clear that such member is liable for all debts incurred by the family business. This liability is based on the principle that the members of the family who take part in the business become partners in that business.

Samalbhai v. *Someshvar* (1); *In the matter of Ha'roon Mahomed* (2); *Vadilal* v. *Shah* (3); *Lutchmanen Chetty* v. *Siva Prokasa* (4); *Bishambhar* v. *Sheo Narain* (5); *Nagasubrahmania Mudaliar* v. *Krishnamachariar* (6).

(1) I.L.R. 5 Bom. 38.
(2) I.L.R. 14 Bom. 189.
(3) I.L.R. 27 Bom. 157.
(4) I.L.R. 26 Cal. 349.
(5) I.L.R. 29 All. 166.
(6) I.L.R. 50 Mad. 981.

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If all the members of a joint Hindu family have attained majority, as in the present case, and if all of them are personally liable for the debts of a joint family firm on the ground of having taken part in the management of the business there is no reason why the firm should not be adjudicated in its firm name. It would cause great hardship to creditors otherwise, because a creditor, generally, is not in a position to know the names of all the partners of the firm. This difficulty is greater in Burma as the proprietors of a joint family firm as a rule do not reside in Burma.

If the members of a joint Hindu family firm combine their labour and skill to carry on a business they form a "partnership" as defined in the Partnership Act, and they also come within s. 99 of the Presidency-Towns Insolvency Act. It is not necessary to adduce evidence of any agreement between them to divide the profits. The intention to divide the profits may be inferred from the circumstances of the case.

PAGE, C.J.—This case raises a question of interest to the commercial community, namely, whether a Hindu joint family which owns and carries on an ancestral business, or a business created out of family funds, is a "firm" within section 99 of the Presidency-Towns Insolvency Act (III of 1909).

Section 99 runs as follows :

"99. (*1*) Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm :

Proceedings in partnership name.

Provided that in that case the Court may, on application by any person interested, order the names of the persons who are partners in the firm, or the name of the person carrying

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on business under a partnership name, to be disclosed in such manner and verified on oath or otherwise, as the Court may direct.

(2) In the case of a firm in which one partner is an infant, an adjudication order may be made against the firm other than the infant partner."

The facts are fully set out in the order of my learned brother Braund J. under appeal, and need not be reiterated. It appears that on a creditor's petition so irregular in form as pointed out by Braund J. that, in my opinion, with all due respect, it ought not to have been made the basis of an adjudication order against the firm, " the C.A.P.C.T. Firm other than minor partners if any " was adjudicated insolvent by Sen J. on 14th December 1932.

In the events that have happened, however, the adjudication order has become conclusive and binding against Chidambaram and his son Shanmugam, and its validity cannot be, and is not, now challenged by either of them.

Now, C.A.P.C.T. Chidambaram Chettyar and his four sons, each of whom had reached majority at all material times, were the members of a joint Hindu undivided family governed by the Mitakshara school of law. Part of the assets of the joint family was an ancestral money-lending business, or at any rate a money-lending business created with the aid of joint family funds, that was carried on at Kemmendine near Rangoon.

On the 19th September 1932, one of the creditors in the insolvency had obtained a money decree against Chidambaram and his four sons in the Subordinate Judge's Court at Devokottai in the Madras Presidency, and the judgment-creditor subsequently attached certain immovable property within the jurisdiction of that Court in execution of the money decree.

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On the 18th December 1933, after the "firm" had been adjudicated insolvent in Rangoon, four-fifths interest in the property under attachment was sold by order of the Court at Devokottai, one-fifth share thereof having been excluded from the sale upon the footing that it had passed to the Official Assignee on the insolvency of Chidambaram, who had been adjudicated insolvent by the order of Sen J. on the 14th December 1932. The insolvency Court subsequently stayed the confirmation of the sale.

Now, the order of Braund J. from which the present appeal has been presented disposed of four applications, the substantial questions that arose and were decided by the learned Judge in insolvency being (1) whether the three sons of Chidambaram, other than Shanmugam, were partners of the C.A.P.C.T. Firm that had been adjudicated insolvent and (2) whether as such they were bound to file their respective schedules and submit themselves for public examination. Braund J. decided both questions in the affirmative, and passed appropriate orders to give effect to his decision.

Now, so far as Chidambaram is concerned no question arises because it is common ground that he was properly adjudicated insolvent upon the petition that was presented, and at the hearing of the appeal the learned advocate who appeared for Shanmugam, the eldest son, stated that his client did not raise any objection to the adjudication order operating also against him. Both Chidambaram and Shanmugam have applied for their discharge, and by an order of the 6th February 1934 Sen J. in each case suspended the insolvent's discharge for two years. In these circumstances it is unnecessary to consider further the position of Chidambaram or of Shanmugam. The question that falls for determination in this

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appeal is whether the other three sons of Chidambaram were respectively adjudicated insolvent by the order of Sen J. of the 14th December 1932 upon the ground that each of them was a partner of the C.A.P.C.T. Firm that had been adjudicated insolvent under that order.

Now, having regard to the petitions and affidavits that were before Sen J. when he passed the order of 14th December 1932 I respectfully agree with Braund J. that under that order the learned Judge in insolvency intended and purported to adjudicate insolvent the members of the Hindu joint family (other than minors) who were carrying on the business of money-lending under the style and in the name of the C.A.P.C.T. Firm. It is conceded and plain that, if the effect of the order of 14th December 1932 was to adjudicate the C.A.P.C.T. Firm as a "firm" in the sense in which that term is used in the Indian Partnership Act (IX of 1932), there was no evidence (1) that such a firm existed, or (2) that the three sons of Chidambaram were "partners" of any such "firm."

But it is contended on behalf of the respondents that section 99 of the Presidency-Towns Insolvency Act includes not only firms to which the Partnership Act is applicable, but also an association of those members of a Hindu joint family who have under the principles of the school of Hindu law to which they are subject become personally liable to strangers for debts incurred in the course of carrying on a joint family business.

Such an association, it is urged, is deemed to be "a firm" and such members of the family as are personally liable "partners" of the firm, within section 99 of the Act.

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In my opinion, however, a Court could only so hold if it was prepared to give the go-by to some obvious and basic features of a Hindu joint family. I go further for, with all due deference, it seems to me that the application of the term " partnership " to the relations *inter se* of the members of a Hindu joint family which owns and carries on a business involves a misuse of the term, and a misconception of the characteristics of such a family. It sometimes happens,—I speak with all respect,—that Judges to support a thesis or to illustrate a proposition loosely make use of a term with a technical meaning and of peculiar significance in circumstances in which, applied in its true sense, it is out of place and *nihil ad rem*, thus sacrificing accuracy to rhetoric. Indeed, it is not only in connection with a Hindu joint family that the term partnership has been misused. In *Ma Paing* v. *Maung Shwe Hpaw* (1) a Full Bench of this Court erroneously held that in respect of the property of the marriage a Burmese husband and wife were "partners." Since the passing of the Partnership Act in 1932, however, there is no excuse for any one to labour under such a misconception, for by section 5 (which the learned advocates do not appear to have brought to the attention of the learned trial Judge) the Legislature provided that :

Partnership not created by status.

> The relation of partnership arises from contract and not from status ;
>
> And, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

The Legislature in enacting section 5 did no more, in my opinion, than restate what had previously

(1) (1927) I.L.R. 5 Ran. 296.

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been the true legal position in which the parties concerned stood.

How it could ever have been supposed that the members of a joint Hindu family merely because they carried on a family business were "partners" of a "firm" in the sense in which those terms are used in legal parlance I am bound to say that I am at a loss to understand. Of course, a member of a Hindu undivided family is at liberty to enter into a partnership with a stranger or with other members of his own family, but in such circumstances the rights and obligations of the partners are determined by the Partnership Act and not by the personal law by which the parties may be governed. Again, it is obvious that the doctrine of estoppel by "holding out" is as applicable to a Hindu as to any one else. But, in my opinion, with all due deference, there has never been any justification in law or common sense for holding that the members of a Hindu joint family who carry on business as such are partners governed by the Partnership Act. The only substantial resemblance between the two forms of association would seem to be that in each case the members carry on business together. In other material respects the two forms of association appear to me wholly dissimilar.

The interest of the partners in a firm is determined by contract, the interest of the members of a Hindu joint family in ancestral business is acquired by status. An ancestral business devolves upon the members of a Hindu joint family as part of their inheritance, and their rights and obligations in respect of it are not governed by any contract into which they have entered but by the personal law to which they are subject. A partnership is dissolved by death, but the death of a member

does not dissolve a Hindu joint family, the result of such an event merely being that an accession is made to the inheritance of the other members who survive. On insolvency a partner ceases to be a member of the firm, but the insolvency of a member does not prevent him continuing to be a member of a Hindu joint family. *Fakirchand Motichand* v. *Motichand Hurruck Chand* (1). Subject to section 30, which, I am disposed to think, does not apply to a minor member of a Hindu joint family the members of which carry on business as such, [*The Official Assignee of Madras* v. *Palaniappa Chetty* (2); *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (3)], and to the contract of partnership no person can be introduced as a partner into the firm without the consent of all the existing partners (section 31), but a member of a Hindu joint family acquires an interest in the business at birth and the other members cannot deprive him of it.

Under section 12 of the Partnership Act:

Subject to contract between the partners—

The conduct of the business.

(*a*) Every partner has a right to take part in the conduct of the business;

(*b*) Every partner is bound to attend diligently to his duties in the conduct of the business;

(*c*) Any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners; and

(*d*) Every partner has a right to have access to and to inspect and copy any of the books of the firm.

(1) (1883) I.L.R. 7 Bom. 438. (2) (1918) I.L.R. 41 Mad. 824.
(3) (1922) 49 I.A. 108.

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It would seem that none of the above rights or obligations, however, appertain to the members of a Hindu joint family that owns a family business, and the members are not entitled to claim payment of an equal, or indeed until partition any separate, share of the profits. Subject to the provisions of the Partnership Act "a partner is the agent of the firm for the purposes of the business of the firm." That however, is not the normal position of the members of a Hindu joint family who own and carry on a family business. Further, under the Companies Act 1913 (section 4) only ten persons for banking or twenty for any other business can form a partnership, but the members of a Hindu joint family which owns and carries on a business may be unlimited in number.

These are some, but by no means all, of the characteristics in which a partnership differs from a Hindu joint family which owns and carries on a business, and it is unnecessary to dilate upon them for the purpose of demonstrating how inapposite and misleading it is to apply the terms "partnership" and "firm" to the relations *inter se* of the members of a Hindu joint family which owns and carries on a family business as such. The result of this misuse of language has been, in my opinion, that a real and manifest injustice has been done to those members of the family who take an active part in carrying on the family business. So long as a member of the family which owns the business is a minor or takes no active part in the management or working of it his liability is limited to the extent of his interest in the family property; but if he takes an active part in carrying on the business after he has attained his majority he makes himself *personally* liable for

the obligations of the business contracted after he came of age. [*Joykisto Cowar* v. *Nittyanund Nundy* (1); *Samalbhai Nathubhai* v. *Someshvar, Mangal, and Harkisan* (2); *In the matter of Ha'roon Mahomed* (3); *Vadilal* v. *Shah Khushal* (4); *Chalamayya* v. *Varadayya* (5); *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (6); *Anant Ram* v. *Channu Lal* (7); *Bishambhar Nath* v. *Sheo Narain* (8); *Bishambhar Nath* v. *Fateh Lal* (9); *Sanyasi Charan Mandal* v. *Asutosh Ghose* (10); *Gangayya* v. *Venkataramiah* (11); *The Official Assignee of Madras* v. *Palaniappa Chetty* (12); *Mamayya* v. *K. R. Rice Mill Co.* (13); *Nagasubrahmania Mudaliar* v. *Krishnamachariar* (14); *Debi Dayal* v. *Baldeo Prasad* (15); *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (16); but see *Joharmal Ladhooram* v. *Chetram Harising* (17).]

Now, as I understand the authorities the personal liability of the member of a Hindu joint family who takes an active part in the family business is not based upon estoppel by holding out, but upon the doctrine that by his conduct he has become a "partner" in a "firm." Indeed, in my opinion it could not reasonably be founded on estoppel. And for this reason. It is well settled and must be treated as generally understood that the rights and obligations of the members of a Hindu joint family are determined by the personal law to which they are subject. By their personal law, as well as by the universal custom of Hindus, it is the duty of

(1) (1878) I.L.R. 3 Cal. 738.
(2) (1880) I.L.R. 5 Bom. 38.
(3) (1890) I.L.R. 14 Bom. 189.
(4) (1902) I.L.R. 27 Bom. 157.
(5) (1898) I.L.R. 22 Mad. 166.
(6) (1899) I.L.R. 26 Cal. 349.
(7) (1903) I.L.R. 25 All. 378.
(8) (1906) I.L.R. 29 All. 166.
(9) (1906) I.L.R. 29 All. 176.
(10) (1914) I.L.R. 42 Cal. 225.
(11) (1917) I.L.R. 41 Mad. 454.
(12) (1918) I.L.R. 41 Mad. 824.
(13) (1921) I.L.R. 44 Mad. 810.
(14) (1927) I.L.R. 50 Mad. 981.
(15) (1928) I.L.R. 50 All. 982.
(16) (1922) 49 I.A. 108
(17) (1914) I.L.R. 39 Bom. 715.

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the other members of the family, whether they are adults or minors, to assist the *kurta* in managing the estate and business (if any) belonging to the family; and no one ought to be misled, merely because a member of the family performs his duty to the family, into thinking that he has held himself out as a principal personally liable for any debts contracted for the purposes of the business. It is no more reasonable to allow a stranger to set up that he was misled in this way than it would be to permit a person who has contracted with a minor or a Hindu widow or any other person under disability by their personal law to contend that he did not know that they were subject to a personal law which regulated their rights and obligations. It is only, with all due deference, because the members of a Hindu joint family who take part in carrying on the family business have loosely and inaptly been deemed to be "partners" in a "firm" that those members have been held personally liable to liquidate the debts of the business. I cannot bring myself to believe, if the basic characteristics of a Hindu joint family had fully been understood, that such a doctrine would ever have been evolved or countenanced, or that the dutiful and diligent members of the family would have been penalized for the benefit of slothful members who have done nothing to assist the *kurta* in managing the family estate.

For these reasons I am firmly of opinion that a Hindu joint family carrying on a family business as such is not a "firm" within the meaning of that term as used in section 99 of the Presidency-Towns Insolvency Act, and that the members of the family are not "partners" of such a "firm." It follows, therefore, in my opinion, that the three sons of

Chidambaram, other than Shanmugam, were not and could not have been adjudicated insolvent as being "partners" of the "firm" of C.A.P.C.T., or upon a petition for insolvency presented against, and in the name of, the said "firm."

The result is that the appeal must be allowed, and the order of Braund J. varied. The declarations made by the learned Judge and the order that Natesan Subbaya and Arunchelan do file their respective schedules and submit themselves to public examination will be set aside. The petition of the C.A.P.C. Firm of the 21st February 1934 will be dismissed with costs, advocate's fee at the trial five gold mohurs. The order of Braund J. on the petition of 10th January 1934 will stand. On the appellant's petition filed on the 30th January 1934 it is ordered that the order of the 15th January 1934 staying the confirmation of the sale by the Court at Devokottai be vacated except in respect of the interest of Chidambaram Chettyar and Shanmugam Chettyar in the properties sold.

The appellant is entitled to his costs of the petition of the 30th January 1934 in the trial Court, advocate's fee five gold mohurs. The petition of Natesan Chettyar of the 19th June 1934 is in substance granted, and Natesan is entitled to his costs of that petition in the trial Court as against the respondents, advocate's fee three gold mohurs. The appellant is entitled to one set of costs in the appeal, advocate's fee ten gold mohurs.

MYA BU, J.—I have had the advantage of reading the judgment of my Lord the Chief Justice, and I concur not only in the orders proposed but also in the conclusions which his Lordship has arrived at and the reasons given in support of them.