CHAPTER - VIII

JOINT HINDU FAMILY BUSINESS

A. ANCESTRAL BUSINESS

Section 5 of the Indian Partnership Act, 1932\(^1\) specially lays down that the members of the Hindu undivided family carrying on a family business as such, are not partners in such business. There is a distinction between the incidence of joint ownership in a trading business created by the operation of Hindu law between members of an undivided Hindu family and a partnership arising out of contract\(^2\). The relation of partnership cannot arise from status, as mutual agreement is one of the essential elements of partnership. The Hindu law regards ancestral business as a distinct heritable asset. The relation of partnership does not

---

1. Section 5 reads:

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 ... are not partners in such business.

2. See Somalbhag V Someshwar (1881), 5 Bom. 38; Mahabir Ram v Ram Krishnar Ram, A.I.R. 1936 All. 855; Ball Nath Prasad v Ram Copal Lachmi Narayan, A.I.R. 1939 Cal. 92.
subsist between members of an undivided Hindu family who carry on a family business as coparceners. A business conducted by a Hindu descends on his death to heirs like male any other property. If one dies leaving behind issues, his business becomes joint family business in their hands; and the business in the hands of the male issues becomes joint family business or family business. Interest passes by survivorship. But joint ownership, thus created arises by operation of law and is not the result of a contract between the parties, so that the relation inter se of the members constituting the business are regulated in accordance with the general principles of Hindu law governing such transactions and not by the provisions of the Indian Partnership Act, 1932. Therefore, the rights and liabilities of coparceners carrying on the family business are not to be determined by


exclusive reference to the provisions of Indian partnership Act, 1932, but must be considered also with regard to the general rules of Hindu law which regulate the transactions of joint families. A joint family business does not cease to be so if in addition to the heirs of the deceased owner, it is also owned by his daughter married to a Gharjwadi and by other members and relations who are de facto members of the family provided the proceeds of such business are utilised for the legitimate expenses of the family. Joint family business is a business carried on with joint family funds for the benefit of joint family. The special rules governing the joint family business presupposes the existence of a joint family; these rules have no application where there is no joint family at all. Thus where the business is carried on by the uncle and the nephew who are not members of joint family, that business will be governed by the ordinary rules of partnership. So is the case


6. Ibid. See also Nibaran Chandrashaha V Lalit Mohan Brindaben Shaha (1936) 1 Cal. 389.


where some members of the joint family enter into partnership to the exclusion of other members of the family.

It is submitted that it is only when the family as a whole or through any of its members, continue an ancestral trade out of its joint family funds, that is subject to the law of joint family. In respect of trading families, ordinarily it is the Karta, unless some other coparcener is associated with the management of business, in that case acts of both will bind the joint family.

(i) New Business

The Karta of a joint family cannot impose upon a minor member of the family risk and liability of a new business started by him and adult members. The Karta cannot impose such risk and liability even on the adult members without

their consent\textsuperscript{12}, express\textsuperscript{13} or implied\textsuperscript{14} or though started by the manager only, joint funds were afterwards utilised for the business to the advantage of the joint family or its continuance was found beneficial to the family\textsuperscript{15} or it was adopted as a family business by the other members who continued to enjoy the benefit of the same\textsuperscript{16}. The rule of law laid down in \textit{Benares Bank Ltd V Hari Narain}\textsuperscript{17} and in other cases of a like nature cannot apply to a new business started by the sole surviving coparcener of a Mitakshara

\begin{itemize}
\item \textbf{12.} Sanyasi Charan Mendel V Krishnadhan Banerji, A.I.R. 1922, P.C. 237 (Dayabhaga Case); \textit{Benares Bank Ltd V Hari Narain} (Mitakshara Case); A.I.R. 1932 P.C. 182; (former decision was applied equally to Mitakshara families also and has been applied by the Indian High Courts in \textit{vithal V Shivappa}, A.I.R. 1923 Bom. 265; \textit{Inspector Singh V Kharak Singh}, A.I.R. 1928 All. 403; commented upon in \textit{Jagat Narain V Mathura Dass}, A.I.R. 1928 All. 454; \textit{Wishwenath Singh V KaVastha Trading Corporation}, A.I.R. 1929 Pat. 422; but see also \textit{Official Assignee V Palaniappa}, A.I.R. 1919 Mad. 690; \textit{Ram Nath V Chiranjilal Lal}, A.I.R. 1935 All. 221; \textit{Jagmohan V Ram Chhodhas} (1945) Nag. 892; and the same decision was followed in the later case by the Judicial Committee.
\item \textbf{13.} Tammireddi V Gangireddi, ... (1922) 45 Mad. 236; Nathubhai V Chhotubhai, A.I.R. 1962 Guj. 68.
\item \textbf{14.} Mahabir Prasad V Amla Prasad, A.I.R. 1924 All. 379 (consent of adults to be presumed if family maintained out of the profits).
\item \textbf{15.} Ram Nath V Chiranjalal Lal, A.I.R. 1935 All. 221.
\item \textbf{16.} \textit{Pach Karam Chaukhani V Thakur Prasad Shah}, A.I.R. 1942 Cal. 311.
\item \textbf{17.} A.I.R. 1932 P.C. 182. See also supra f.n. 12.
\end{itemize}
Such business becomes from its origin a family business and the minor members of the family born subsequently are not competent to say that the risk of the new business cannot be imposed on them. The risk and liability having been already taken by the family, the newcomers must share them along with other assets and liabilities of the family. It was held in Venkatsami v. Pali, that where a joint family consists of a father and sons, and the father starts a new trading business, the business must be deemed to be ancestral, and the sons whether they be adults or minors are liable for debts incurred in the business to the extent of their shares in the joint family property; and, further, that even if such business be not regarded as ancestral, the sons shares are liable for the debts incurred by the father in the business and this liability arises out of the pious obligation of the sons to pay their father's debts. If this decision is deemed to be authority for the proposition that a new business


19. A.I.R. 1929 Mad. 153 (suit on mortgage and as to a portion of the amount there was no antecedent debt).
started by a father is ancestral for all purposes as regards his sons, then, it is submitted it is no longer a good law.  

When the sons merely give some help to the father in business, it does not become joint family business but after the sons grow up, the father and sons by their conduct may make it apparent that it has become a joint family business.

The question is whether the so called new business is really a new business or extension of the old business? Any extension of business, ejusdem generis, is not a new business. For instance, when the class of persons engaged in a business of one type of goods usually manufacture other types of goods, then the extension of business of the manufacturing of other goods is not a new business. Similarly, when the family is engaged in a hazardous or speculative business of one kind, extension of another business equally hazardous or speculative would not amount to new business.


Similarly, the Madhya Pradesh High Court said that starting of a flour mill cannot be regarded as extension of an old money lending business. Whether a particular business is an altogether new business will depend upon the fact and circumstances of each case. The decision in the Bank's case was considered by a Bench of the Allahabad High Court. The Bench said that in the case of trading families the so-called new business may, in fact, be a transaction or extension of the old business which may be justified on the ground of legal necessity or benefit, and cannot be thus regarded as a new business. The tendency in recent decisions seems to be to widen the powers of Karta of trading families, so that they are able to cope with the challenges of the trade business of the modern times. The only limitation that may be justified seems to be that joint family should possess necessary skill for new ventures.

(ii) Elements of a joint family business

To constitute a business, as a joint family business, the following elements must be present:

1. There must be a joint Hindu family.
2. The capital must be drawn from the family property.
3. The business of the joint family should be carried on in the interest of all the members of the joint family.
4. The benefit of the business should be confined to the members of the joint family only.

(iii) Joint family business or partnership

Since the members of a joint Hindu family can form a partnership between themselves, the question whether a particular business carried on by them is joint family business or that of partnership is a question of fact to be decided on the facts and circumstances of each case. Where there is an agreement to carry on business on certain terms, which are inconsistent with the status of the persons as members of a joint Hindu family, in which, according to ordinary principles, all the income should be brought into hotch-pot
and be dealt with by each member according to his needs, and no account of the amount spent over the necessities of any particular member need be kept so as to make him chargeable in the future — the relation is that of partnership and the business is not joint family business. So, an agreement amongst the members of a joint family that the accounts of a banking business, carried on by them, should be kept on the understanding that the profits, when realised, should be divided amongst the individual members in certain proportions, and that the expenses of each member should be credited and charged in the name of each member, has been held to be in the nature of partnership.

Coparceners may convert a joint family business into a partnership business even to avoid the payment of income-tax. The mere fact that they agree to carry on the same business in partnership with a view to avoid the payment of income-tax at a higher rate, does not make their venture sham or fictitious or illegal.

(iv) The distinction between Hindu joint family business and ordinary partnership

(1) A joint Hindu family business does not become

29. See O.P. Aggarwala, The Indian Partnership Act, 1932, 6th Edn., 1965, pp. 73-75; See also Chidambaram V Muttayya (14 Rang. 12) 1936 Rang. 160, wherein Page, C.J. has clearly brought out the distinction between Hindu joint family and ordinary partnership.
dissolved by the death of one of the members\textsuperscript{30} though an ordinary partnership, subject to contract between the partners, is dissolved by the death of the partners\textsuperscript{31}.

(2) The manager who may even be junior member of the family is not accountable for past profits and losses to the other members\textsuperscript{32}.

(3) Any partner of an ordinary firm may in the absence of special restrictions bind by his act the other members of the partnership\textsuperscript{33}. But in the case of trading family unless a special agreement exists it is the manager alone who has authority to incur debts and pledge the credit and property of the family for the ordinary purposes of

\begin{itemize}
\item\textsuperscript{30} Samalbhai V Someshwar (1861) 5 Bom. 38; Haroon Mahomed in the matter of (1896) 14 Bom. 189, 194; Lala Baijnath Parsad v Ram Gopal Lachminaryan, A.I.R. 1939 Cal. 92; Raghumal v Lachman Das (1915) 20 C.W.N 708, 721.
\item\textsuperscript{31} See Section 42(c) of the Indian Partnership Act, 1932.
\item\textsuperscript{32} Samalbhai V Someshwar (1881) 5 Bom. 38; Ganpat v Anjali (1897) 23 Bom. 144; As to the rights of minor coparceners, See Damodadas v Utterram (1893) 17 Bom. 271, 279.
\item\textsuperscript{33} See Section 19 of the Indian Partnership Act, 1932 (implied authority of the partner).\end{itemize}
family business. In this respect, the Manager of the trading family has wider powers than those of the manager of a non-trading family.

This implied authority of the manager to contract debts on behalf of the family business does not make the other coparceners personally liable on the debts so contracted, but makes them liable only to the extent of their family assets except when they can be treated as having ratified the transaction or as parties thereto by virtue of their conduct. But the manager will be personally liable, and not merely to the extent of his share in the family property. In the case, however, of ordinary partnership not only will the share of each partner be liable for payment of partnership debts but also the separate property of each partner.

34. Ramaswami Chettiar v Srinivasan Ayyar, 1936 Mad. 94; see also Ram Lal v Lakshman Chand (1857) 1 Bom. H.C. App. li, Pemola v Mohun (1868) 5 Cal. 792; Ram Partap v Foolibai (1896) 20 Bom. 767, 777, 779; Sakrabbai v Kasahal (1902) 26 Bom. 206, 216; Harrison v Verschayle (1907) 6 C.W.N. 429; Ram Krishna v Ratan Chana (1931) 58 I.A. 173; Bishan Singh v Kishor Nath (1921) 2 Lah. 59; Ram Nath v Chichhali Lal (1935) 57 All. 605; Krishna v Krishnaswami (1900) 24 Mad. 597, 600 (Manager alone has the authority to bind the minors' interest in the family property, no other coparcener has this authority).

(5) There is no limit of a Hindu joint family members who own and carry on business in contrast to companies Act, 1956 and Indian Partnership Act 1932 wherein limit of members has been laid down.36

(6) In the case of an ordinary partnership where a partner is a minor his share alone in the partnership property is liable for the partnership debts. His separate property is not liable unless he accepts the partnership on attaining the age of majority.36 The same rule applies to the case of minor coparceners. This is to say manager can pledge the family property including the minors' interest therein for the purpose of family business.39 But the minor is liable to the extent only

---

36. No partnership consisting of more than ten persons can be formed for the purposes of carrying on a business of banking or of more than twenty persons can be formed for doing any other business for gains unless it is registered as a Company under the Indian Companies Act or is formed in pursuance of some other Indian Law. In case of a public company there is no restriction as to the number of its members but in case of private company the number of members must be not more than fifty.

37. The share of which Section 247 of the Contract Act speaks is no more than a right to participate in the property of the firm after its obligations has been satisfied; Also see Sanyasi Charan Mandal v Krishnadhan Panerji, A.I.R. 1922 P.C. 237.

38. Section 30, Indian Partnership Act, 1932.

39. Ram Lal v Lakhmichand (1861) 1 Bom. H.C. Appl.71; Radhunath v The Bank of Bombay (1910) 34 Bom. 72; Senka v The Bank of Mursh (1911) 35 Mad. 692, 694-696; Sanyasi Charan v Asutosh (1915) 42 Cal. 225, 233.
of his interest in the family property; his separate property is not liable for the payments of debts contracted by the manager, unless the minor accepts the partnership on attaining majority.

(7) In a joint Hindu family business, no member of the family can say that he is the owner of one half, one third or one fourth. The essence of joint Hindu family property is unity of ownership and community of interest and the share of members are not defined.

(8) The pattern of the accounts of a joint Hindu family business maintained by the Karta is different from that of a partnership. In the case of the joint Hindu family business, the share of the individual members in the profits and losses are not worked out, while they have to be worked out in the case of partnership accounts.

41. Bishambhar v Sheo Narain (1907) 29 All. 166; Bishambhar v Fateh Chand (1907) 29 All. 176; Joykiste v Nittyamund (1878) 3 Cal. 736; Rampartab v Boolbali (1896) 20 Bom. 767, 777-779 (Business inherited by a minor carried on by his guardian); Lutchmanen v Siva (1899) 26 Cal. 349; Nunda v Chidaraboina (1903) 26 Mad. 214; See for liability for torts, Amba Lal Khora v Bihar Hosier Mills Ltd., A.I.R. 1937 Pat. 657 (The sons who inherited a mining lease from their father were held liable for damages to the buildings above the mine caused by the working of the mine by the father, but only to the extent of the effects of the joint family property in their hands).
43. Ibid.
These are some, by no means all, of the characteristics in which a partnership differs from a Hindu joint family which owns and carries on a business.\(^44\)

Coparcener of a trading family neither stand as partners inter se nor do they stand as partners with outsiders. The cases holding that they stand as partners in respect of outsiders are wrong. At the same time it is well established that the Karta and other coparceners who take an active part in the business are personally liable, though other coparceners, including minors, are liable only to the extent of their interest in the joint family property.\(^45\)

---

\(^44\) For details, see O.P. Aggarwal, The Indian Partnership Act, 1932, 6th ed. 1965 pp. 75-95; see also State Bank of India v Ghamandi, A.I.R. 1969 S.C. 1330 (Hindu joint family business does not arise out of contract between the members but it comes into existence by operation of law); Chidambaran v Mutaya 1936 Rang., 160; Nanak Chand v Mallappa, A.I.R. 1976 S.C. 835 (It would be wrong to compare the joint family business with partnership business and it would be incorrect to say that it has many incidents of partnership); Ramaaswami v Srinivasa (1935) 70 M.L.J. 214 at p. 216 (True legal position is that, as between coparceners the fact that the family is engaged in trade does not convert it in relation to that trade into a partnership); Chuni Lal v Kalu, A.I.R. 1966 Raj. 208 (In respect of trading families, ordinarily, it is the Karta alone who acts on behalf of the family and represents the business, unless some other coparcener is associated with management of business, in that case acts of both will bind the joint family).

\(^45\) Alogamma v Palaniappa (1940) 1 M.L.J. 469 (The junior coparcener's liability is fully discussed).
Similarly, when a coparcener holds himself as a partner, he will be liable to third person on that footing, but thereby he cannot have any authority to bind other members. In case a partition takes place, but the business is carried on by some coparceners, then it will become an ordinary partnership business, an agreement to carry on business will be implied.46

The expression "Joint Hindu Family Firm" or "Hindu Undivided Family Firm" is a technical expression which has a special meaning. The firm does not become a joint Hindu family firm merely because the coparceners of a Hindu undivided family have an interest in it. In the case of an ordinary partnership firm, there must be an agreement to form a partnership. No such agreement is needed to constitute a joint Hindu family firm. But if the firm has all the elements of a joint Hindu family firm as stated before, the firm does become a joint family firm, but every firm run by a Hindu undivided family does not necessarily become joint Hindu family firm.47

(v) No Presumption

Because a person is a coparcener in a joint family, it does not follow that all his coparceners are his partners in a business carried on by him. There is a presumption that a Hindu family is joint, but there is no presumption that a business carried on by certain members of a joint family is a joint family business. The mere circumstances that some of the coparceners in the family are carrying on a certain business does not make the business a joint family business. So, where a member of a joint family carries on a business himself, or in partnership with a stranger, and contributes the capital from his separate funds, then he alone is interested in the business and the profits are exclusively his own. There can be no presumption that a business carried on by a coparcener in partnership with a stranger is a family business. Such a presumption cannot arise, unless it is shown that other members, who are competent to judge for themselves, by participating in the conduct of business or its profits, or by long course of acquiescence have treated it as a business in which all the coparceners are interested.

50. Vadilal v Khushal, 4 Bom. L.R. 968.
If the adult members are shown to have treated it as a joint concern of the family, it is sufficient to constitute the trade, a joint family business, so as to make infant members also sharers therein. The use of family funds for the purposes of business with the knowledge and concurrence of the adult members would ordinarily be strong evidence that the business was joint. And when the evidence makes it clear that the coparceners are undivided, that the joint family assets are devoted to finance the business of the firm, and that all the coparceners take more or less an active part in the management of that business, the contention that the business is a joint family business will be justified. But where the family consists of only one adult and the other a minor member, there is neither a presumption nor a rule of law that a business started and carried on by the former is ipso-facto the joint business of the family. A different view has also been taken and it has been held that there is such a presumption. The interest of the minor may weigh with the court in deciding whether or not the presumption should be made. In the case of

52. Ibid.
a family, whose ordinary occupation is trade, much less proof than in other cases to prove that the business is a joint family business is required.  

There is no presumption that a business carried on by a member (even a Karta) of a Hindu undivided family is a joint family business.  

When the member of a Hindu undivided family contributes specific sums of money to the capital of a firm the onus is on the Income-tax department to prove that the amounts were paid out of the funds of the joint family.

(vi) Partnership with strangers

In case of the trading families the Karta has power, on behalf of the joint family to enter into partnership with strangers. In such a case the Karta or any other member as provided in the agreement, becomes partner with the stranger and not the family as a unit. The other coparceners are not partners in the partnership, though the Karta is accountable to the family. It is possible for the Karta of two joint families to enter into a partnership business. This does not

make other members of the joint families as partners, though the Kartas will be liable to the members of their respective families. Such a partnership is governed by the Partnership Act, 1932, and in the event of the death of the Karta it will stand dissolved. The surviving coparceners cannot claim to continue it. In *Gangayya v Venkatramiah*, the court said that where a Karta properly enters into a partnership with a stranger pledging the entire credit of the family, the creditors of the firm can have recourse against the entire assets of the joint family, they have the same interest in the assets of the business as they have in the other joint family property and have the same remedies against the Karta. This view has been approved by the Supreme Court. The members of the Joint family who are not partners in the partnership business cannot interfere with its management so long as it is a going concern. But if dissolution of the firm takes place, they can participate in it.

60. (1918) 51 Mad. 555.
As between the company and the Director or Managing Director, the relationship is contractual and is regulated in a manner provided by the provisions of Company Act. Where a Karta of a joint Hindu family is a Director or a Managing Director, the Joint family has nothing to do with the company in relation to it. But the acquisition made by the use of family funds, directly or indirectly, the income therefrom is that of the family and not of the individual member thereof and it has to be assessed in the hands of the family. In C.I.T. (W.B.) v Kalu Babu Lal Chand, one Rohatgi, Karta of a Hindu undivided family had taken over a business as a going concern and promoted a company, the articles of which provided that Rohatgi would be the first Managing Director on a remuneration specified in the articles. The shares held in the name of Rohatgi and his brother were acquired with funds belonging to the joint family and the family was in enjoyment of the dividend paid on those shares. The company was floated with funds provided by the family and Rohatgi made no contribution in this regard. It was claimed

that the Managing Director's remuneration was the personal earning of Rohatgi and should not be added to the income of the Hindu undivided family. The Supreme Court negatived the contention and held that the Managing Director's remuneration received by Rohatgi was as between him and the Hindu undivided family, the income of the family and should be assessed as Hindu undivided family income. Coming to this conclusion the S.C. observed:

"It is now well settled that a Hindu undivided family cannot as such enter into a contract of partnership with another person or persons. The Karta of the Hindu undivided family, however, may and frequently does enter into partnership with outsiders on behalf and for the benefit of his joint family. But when he does so, the other members of the family do not vis-a-vis the outsiders, become partners in the firm. They cannot interfere in the management of the firm or claim any account of the partnership business or exercise any of the rights of a partner. So far as outsiders are concerned, it is the Karta who alone, is and is in law recognised as, the partner. Whether in entering into a partnership with outsiders, the Karta acted in his individual capacity and for his own benefit or he did so as representing his joint family and for its benefit is a question of fact. If for the purpose of contribution of his share of the capital in the firm the Karta brought in monies out of the till of the Hindu undivided family, then he must be regarded as having entered into the partnership for the benefit of the Hindu undivided family and as between him and other members of his family, he would be accountable for all profits received by him as his share out of the partnership profits and such profits would be assessable as income in the hands of the Hindu undivided family".

The same principle has been applied to the case of a Karta appointed as a treasurer of the bank and the remuneration received by him for services rendered as such treasurer has been treated as the income of Hindu undivided family of which he was the Karta and was assessed in his hands. The same principle has been extended to the remuneration received by a Karta as the Managing Agent of a company with limited liability.\(^65\) In Haridas Purushottam, in re\(^66\) there were three brothers one of whom was Haridas Purushottam and they were separate, but each of them was joint with his sons. The three brothers formed a partnership and it was admitted that Mr. Hari Das Purushottam held his shares as Karta. In the year 1918, the three brothers and five other persons purchased Hubli Mills in partnership. There is no deed of this partnership but again there was no doubt and it was not disputed that Mr. Haridas Purushottam held his share in his partnership as Karta of the joint family. In the year 1920, the three brothers and five other persons promoted a company, the Bharat Spinning and Weaving Co., Ltd., to take over the Hubli Mills and on the 8th March, 1920, the

\(^{65}\) See Haridas Purushottam, in re, (1947) 15 I.T.R. 124 (Bom.).
\(^{66}\) Ibid.
mill was in fact taken over—the three brothers received, by way of consideration Rs.1000/- in the new company. Stone, C.J. with Chagla, J., held:

"that as the Managing agency was derived from or acquired with the assistance of the joint family property, that is the mills in which the assessee as Karta was beneficially interested, the income from the managing agency received by the assessee must be treated as income of the family to which he was Karta." 67

This position of law applies equally to a case in which a member or Karta of a Hindu undivided family is a Director or Managing Director of a company. So far as the company is concerned, the Karta is the shareholder and the joint family will have nothing to do with it. But, as between the Karta and the joint family, the relationship between them vis-a-vis, the shareholders in the company is one of the fact depending on whether the Karta acquired the shares on behalf of and for the benefit of the family by utilizing or not the funds belonging to such family. It is not correct to say that the applicability of the doctrine of detriment should be confined to the stage of original acquisition. It is not possible to see why a case of driving

income by a member of a Hindu undivided family by utilizing directly or indirectly of its funds or assets is not within the doctrine. In any case, where it is shown that, though the acquisition of the office of a Director in a company by an individual was not by means of qualification shares owned by his Hindu undivided family, he could not continue to be a Director without the qualifying shares and the shares after purchase were thrown by him into family hotch-pot and thus came to be owned by the family. In such circumstances the qualifying shares, which are owned by the family, being the very basis for continuing to hold the office of a Director which yields sitting fees, the fees so earned should be regarded as earned by utilizing the family assets and that in as much as in that way the family suffered deteriment, the fees partake the character of income of the family. 68

The answer to the question whether the remuneration received by the Managing Director as between him and his Hindu undivided family was the income of the family, will depend on whether the remuneration or profit was earned with the help of joint family assets.

The true view is that the manager of a joint family cannot gain a pecuniary advantage by utilizing the family assets or funds, and claim that advantage as his own separate property, merely on the ground that in the process of gaining that advantage an element of personal service or skill or labour is involved. The character of the income has to be determined taking into account the basic foundations from which it emanates and in all cases where the income is traceable to the family property, it must partake of the joint family character, and it would not be open to the manager or any other member of the family to claim it his own individual and separate income.69

To sum up, fees or other remuneration received by the Karta as Director of a company should not be necessarily treated a joint family income merely because the qualifying shares had been purchased out of the family funds. In such cases the fee, salary or other remuneration received by the Karta.

69. C.I.T. v Palaniappa Chettiar (1964) 53 I.T.R. 581 (Mad.) wherein a Karta of joint Hindu family became Managing Director of a company received sitting fees where the main qualification for Directorship was holding 25 shares; see also T.T. Rathnasekharapathy Pillai v C.I.T. (Mad.) (1966) 62 I.T.R. 36(S.C.); see Raj Kumar Singh Hukam Chand v C.I.T. (1970) 78 I.T.R. 33 (S.C.) for distinction - shares acquired in a company out of family funds, Karta being managing director received remuneration; held individual income of Karta.
Karta as a director or partner, though it may be partially traceable to the personal exertions of the member should be held taxable as the income of the family if: (1) it is earned by detriment to the family funds, (2) it is earned with the aid or assistance of those funds, or (3) there is a real connection between the income and the investment of the family funds.

B. ANCESTRAL BUSINESS CONVERTED TO PARTNERSHIP

It was held under section 25A of the 1922 Act that income from properties which were actually divided among the members by way of partial partition could not be taxed as the income of the family, although an order under this section could be possessed only upon total partition, by physical division wherever possible, of entire family property. Section 171 simplifies the position by making a provision under section 171(a)(ii) of the explanation which reads:

"Where the property does not admit of a physical division, then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition".

Section 171 of the 1961 Act applies to a case of partial partition also. Whether a particular asset of a family is capable of physical division or not will depend upon the nature of asset. It may be that a business or a share cannot be divided partially. It does not follow that no single item can be subjected to a partial partition. For instance, the family may easily divide the whole or part of the capital standing to its credit in business.

Where the members of Hindu undivided family agree to carry on the family business in partnership, the question arises whether such a partnership can be registered under section 185. The agreement purported to be executed by the Hindu undivided family members is not binding on the department. If the partnership agreement is put up merely by way of pretence in order to escape liability to tax, registration is to be refused as it is in the case of any

other firm under such circumstances. A disruption of Hindu undivided family is not essential to the validity of the partnership. There is nothing in the Income-tax Act which prohibits the members of Hindu undivided family, while remaining joint, from entering into partnership irrespective of a business, being a part of the joint family, which they have partitioned among themselves and that registration of such a partnership should not be refused merely because the Hindu undivided family as such still continues to exist.

Thus where the members divide the Hindu undivided family, business, and agree to carry on in partnership and the firm is found genuine and in existence, registration should be granted under section 184 irrespective of whether Hindu undivided family, continues to exist or is deemed under section 171(1) to exist and whether an order has or has not been made under section 171(3) recording a partition of the


Hindu undivided family properties. The conversion of Hindu undivided family business into partnership business may be effected by a deed of partition and appropriate entries in the books e.g., dividing the book balances in the names of the persons to whom the shares have been allotted, without a deed transferring the business assets from the Hindu undivided family to the firm and without a formal assignment of the book debts by notice to the debtors.

Validity of Partnership

If the I.T.O. finds as a fact that the firm is not genuine he should be justified in refusing registration. He would also be justified in refusing registration if he finds as a matter of law that the partnership purported to be constituted under the instrument is not valid or has no existence in law - The I.T.O., is only empowered to register


the firm with the constitution specified in the instrument of partnership which has been made to him. Therefore where minors or other persons who are incompetent to be partners are partners of the firm according to the instruments, the partnership cannot be treated as one between the remaining partners and registered as such. If the joint family business is converted to partnership, and all the formalities regarding the executing the partnership deed and appropriate entries in the books etc., are made the partnership is valid and it will be registered by the I.T.O.

Formerly under the 1922 Act registration was allowed only for a year and a fresh application for renewal had to be made every year in cases where there was no change in the constitution of the firm and shares of the partners remained unchanged. In such cases no application for renewal is required to be made under the 1961 Act, but the registration once granted has effect for every subsequent assessment year, provided that the firm furnishes alongwith

78. Supra f.n.77.
79. Section 184(7).
the return of income for the assessment year, a declaration that there is no change in the constitution of the firm or in the shares of partners. In such cases the registration would have effect for subsequent years even if there is a defect in the partnership deed which was not noticed in prior years. If and when any change in the constitution or in the partners takes place in an accounting year the firm must apply for fresh registration.

I. SUCCESION TO OR DISCONTINUANCE OF FAMILY BUSINESS

Section 170(1) applies to cases of succession to a business, profession or vocation and not of succession to any other income-producing source. It is clear from the heading of the section 170 that the provisions apply to succession to business "otherwise than on death". This is the distinction between the Act of 1961 and section 26(2) of the 1922 Act.

80. In cases of such defects I.T.O. could refuse renewal of registration under the 1922 Act and now also the position is the same under the 1961 Act. Registration will be cancelled under section 186 under the circumstances given thereunder.

81. Section 184(8).
which applied even on death of the predecessor. Succession on death is governed by the provisions of sections 159 (legal representatives) and 168 (executors).

Section 170(1) prescribes not merely liability to tax but also the process of computation of tax. Along with the recording of a finding that such and such predecessors' such and such business, profession or vocation has been succeeded to by such and such person, the Income-tax Officer had to record the date from which the succession took place.

For the previous year wherein the succession has taken place, there will be two assessments. One of the predecessor for the part of the previous year from the commencement of the year up to the date of succession, and a second on the successor from the date of succession to the end of the previous year.

(a) Succession - What it is?

Succession to a business implies that there is the end of an entity carrying on the business and its place has

82. C.I.T. v F.R.A.L.M. Muthukaruppa Chettiar (1939) 7 I.T.R. 29 (Mad.).

been taken by an entirely new entity to run, in continuity and a going concern, the same business. The mere fact that one or more of the old partners have retired and the business is being carried on by the remaining partners or partners with or without the addition of some other new partner or partners is not a case of succession but mere reconstitution of the partnership. But where the succeeding firm was carrying on more than one line of business and the successor or firm continues with some of the lines leaving out others, it is still a case of succession. "succession" connotes a transfer of ownership and the businessman who succeeds another must have by such succession become the owner of the business which his predecessor was carrying on and which he after the succession carries on in 'such capacity', that is, the capacity as owner.

It is well established that where there is a change of ownership, e.g., where the business devolves on an heir or is transferred to a purchaser, it is a case of succession. In the case where a Hindu undivided family, disrupts and the members or

---

some of them continue the family business in partnership, or the family business is allotted on partition to a member of the family who continues the business, or where without effecting a complete partition the members form themselves into a limited company and the company carried on one of the separate and distinct business of the family, or where the business of a partnership between two kartas representing their joint families is taken over and continued after partition of both the families by a partnership of the separated members of the two families; there is no discontinuance of the business, generally speaking, but there is succession. However, it would not be a case of succession where the business of a joint family devolves on a coparcener by survivorship under Hindu law while the family remains joint. Succession occurs


only where the same business is carried on by a different
person. There is no succession where a business terminates
and a different though similar business is carried on by
another person or by a newly constituted firm. Succession
pre-supposes the preservation in substance of the identity
and continuity of the business.

(b) Succession to Hindu undivided family business

Under Section 170(4) the business of a Hindu undivided
family may be succeeded to by a person or a group of persons,
if along with or after such succession there is a partition of
the joint family property between the members or group of
members, section 170(4) lays down that the tax due in respect
of the income of the business succeeded to shall be assessed
and recovered in the manner laid down in section 171. The
words "but without prejudice to the provisions of this section"
occurring at the end of section 170(4) imply that in such a case
the provisions of sections 170 and 171 shall have equal
application.

92. *Industrial Development & Investment Co. v. C.P.F.T.*

(c) Test of Succession

The expression "succession" in income-tax law has acquired a somewhat artificial meaning. The decisions have laid down some tests, though not exhaustive, to ascertain whether there is succession in a given case or not. The test of change of ownership, integrity, identity and continuity of a business have to be satisfied before it can be said that a person "succeeded" to the business of another. Under the facts found by the Tribunal satisfy the said tests the finding cannot be conclusive. The tests crystallized by the decisions have given a legal content to the expression "succession" with the meaning of the Income-tax provisions and whether facts proved satisfy those test is a mixed question of law and fact.

II. DISCONTINUANCE

(a) Object of section 176

Section 176 deals with the discontinuance of business. This is a special provision and has been designed to meet a

particular exigency, namely in cases of discontinuance of business which is a source of income, in the middle of an accounting year. In such exigency the revenue authority can make an accelerated assessment in its own interest even before the expiry of the accounting year. From the standpoint of section 4, this provision is an exception to the general rule that the charge to tax is on the income of the previous year and to be made after the end of the accounting period at the rate to be prescribed by the relative Finance Act. 95

(b) Discontinued Business

The word "discontinuance" in relation to business means "cessation of business" and not merely a change of ownership. 96 The words "discontinued" and "discontinuance" in this section do not cover mere change of ownership or a change in the Constitution of the firm, but refer to a complete cessation of


business. Change of ownership may involve succession as explained in Section 170. The business must be regarded as being continued despite the successive changes in the ownership. Thus where there is a succession there cannot be discontinuance, for the two are mutually exclusive concepts. The net result is that whenever these two words are used in relation to business, it had been uniformly decided in number of cases that they did not cover a mere change of ownership but referred to complete cessation of the business. Section 176 applies to cases of discontinuance of business and not to cases of succession of business. Section 176(3) specifically provides that any person discontinuing the business or profession shall give the Income-tax Officer a notice of such discontinuance within a period of fifteen days from the date of discontinuance.


101. Emphasis supplied.


103. Default in giving Notice attracts penalty under Section 272.
If the business of Hindu undivided family is discontinued, an assessment may be made on the Hindu undivided family under section 176(1) which reads:

"Notwithstanding anything contained in section 4, where any business or profession is discontinued in any assessment year, the income of the period from the expiry of the previous year for that assessment year up to the date of such discontinuance may, at the discretion of the Income-tax Officer, be charged to tax in that assessment year".

If there is succession to Hindu undivided family business e.g., where the members of the family continue the business in partnership - Hindu undivided family would be liable under section 170 in respect only of the share of the profits of the year in which the succession occurs, and each member would be liable under section 171 for a share of the tax so assessed on the Hindu undivided family and other provisions of section 170(4) would also apply.

It is thus dear that there is no repugnancy, inconsistency or conflict between the provisions of sections 170, 171 and 176

---

for each section deals with a different set of circumstances.\textsuperscript{105}

(c) Distinction

(1) Discontinuance means a complete cessation of the business;\textsuperscript{106} succession is a mere change of ownership.\textsuperscript{107} The conception of Succession excludes the conception of Discontinuance.\textsuperscript{108}

(2) Where after several changes in the constitution the business of a firm is taken over by a company, this comes under succession and not discontinuance of business of the firm.\textsuperscript{109}

In Ram Gopal Ganpatrai & Sons v C.E.P.T.,\textsuperscript{110} where the facts were that D was appointed managing agent of M.Ltd. on


\textsuperscript{110} (1953) 24 I.T.R. 362 (Pom.).
13.7.1935. On 3.9.1937, a tripartie agreement was arrived at between M.Ltd.D and R by which D gave up the managing Agency and requested R to accept on certain terms. M.Ltd., thereupon, cancelled the Managing Agency of D and by a fresh agreement appointed R as its Managing Agent. On 23rd June, 1943, the assessee company was incorporated and the Managing Agency of R assigned to it by an agreement with effect from 1st July, 1943. This is a clear case of discontinuance and not succession to the business.

(3) In the case where Hindu undivided family business is partitioned and allotted to member or members and is taken over by him or them as an integral whole, and the allottee or allottees continue the business as a firm, there is no discontinuance but it is succession to the business.111

(4) Where original business is discontinued and then a subsequent business, identical with the former business started, that will not be its successor because a successor must not only do the same business but must also continue112


112. Emphasis supplied.
the business to which he had succeeded.  

(5) Where old business discontinued and a similar business is started on the same premises, even that will not be a case of succession of the former business.  

(6) In case where a partnership is dissolved and one partner takes over and continues the business of the partnership, it is a case of succession and not discontinuance.  

The statement that a partnership is "dissolved" does not amount to an admission that the business of the partnership is discontinued or create an estoppel against raising a contention that the business of the partnership was discontinued under a fresh partnership deed. 


When the assets of the business carried on by the family are divided on partition among different members, and the members unite and put together those assets to carry on a business, it depends on the facts of a particular case whether the family business has been succeeded to or has been discontinued and a new business has been started by the firm. In *Ramanantappa and Sons v. C.I.T.* 117, Mysore High Court held such a business, a new business but in *C.I.T. v. Ramanantappa and Sons* 118 the Supreme Court reversed the decision of the Mysore High Court.

It is a question of fact whether a man discontinues his business or suspends for certain reasons and it very largely depends upon the state of his mind. 119 When a business is divided into parts it is difficult to see how the part is identical with the whole. All the parts taken together no doubt constitute the whole, but when the unifying principle of that whole no longer exists, the parts gain their individuality and become separate and

117. (1968) 68 I.T.R. 35 (Mys.).
distinct. In such circumstances, if different parts are allotted to different persons — may be ex-partners of a firm or members of an association of persons — the old business is deemed to have been discontinued and the different persons receiving the parts are deemed to have set up a new business. Conversely, if two or more separate and distinct business are amalgamated, the business carried on thereafter is a new business because the identity of the separate and distinct amalgamating business ceases to exist and a new business springs up from their combination.

III. CHANGE IN CONSTITUTION (EFFECT)

Under the ordinary law governing the partnership modification in the constitution of the firm in the absence of a special agreement to the contrary amounts to dissolution of the firm. A firm at common law is a group of individuals who have agreed to share the profits of a business carried on by all or any of them acting for all, and supersession of the


121. George Humphries & Co. v Cook (1934) 19 T.C. 121.
agreement brings about an end of the relation. But the Income-tax Act recognises a firm for purposes of assessment as a unit independent of the partners constituting it; it invests the firm with a personality which survives reconstitution.

(a) Assessment

Sections 174, 175 and 176 constitute exceptions to the general rule that the subject of charge under this Act is the income of the previous year and not the income of the assessment year. A firm discontinuing its business may be assessed in the manner provided by section 176(3A) in the year of assessment. It may also be assessed in the year of assessment. In either case it is the assessment of the income of the firm where the firm is dissolved, but the business is not discontinued, there being a change in the composition of the firm, assessment has to be made under section 187(1), and if there be succession to the business, assessment has to be made under sections 170 and 185. Section 176 gives the Income-tax Officer an option to

122. See section 4 "Charge of Income-tax"; see also Kanga and Palkhivala, Income-tax, 6th Edn., Vol.I, 1969, p.78 "Tax is on income of previous year".

make a premature assessment on the profits earned up to the
date of discontinuance in the year of discontinuance itself
instead of in the usual financial year. The profits of the
previous year should be separate and distinct. Section 176
applies only to cases of discontinuance of business and not
to cases of succession.

The words of section 176 do not justify the proposition
that section 176 provides for cumulative assessment in cases
of discontinuance of business. They do not empower the Income-
tax Officer to make a cumulative assessment in respect of
profits earned in two different accounting periods or entitle
him to merge the profits of two years into one total sum and
apply to them the rate of one of the financial year. All that
the section authorises the Income-tax Officer to do is that
it gives him an option to make a premature assessment on the
profits earned up to the date of discontinuance itself instead
of the usual financial year. Such accelerated assessment is to
save loss of revenue by disappearance of an assessee.

124. C.I.T. v Srinivasan & Gopalan (1953) 23 I.T.R. 87 at
p.97 (S.C.).
125. Ibid. See also C.I.T. v Sardar Singh & Sardar Singh (1946) 14
I.T.R. 152 at p. 164.
126. C.I.T. v The Hindu (1950) 18 I.T.R. 237 at p. 252 (Mad.) on
appeal C.I.T. v Srinivasan & Gopalan (1953) 23 I.T.R. 87
at p.97 (S.C.).
Section 176 imposes a liability of premature assessment on the assessee. It confers no benefit on him.\(^\text{127}\) This section contemplates the usual assessment in respect of the income of the previous year and a special and separate assessment in the same assessment year in respect of the income of the broken period between the end of the previous year and the end of the discontinuance it does not contemplate assessment in the same year in respect of two previous years.\(^\text{128}\)

(b) Notice in case of Discontinued Business

The provisions of Section 176(5) and section 284 are the same with the only difference that, unlike section 176(5), section 284 refers to the case of an association of persons discontinuing the business. Either a reference to the case of an association should be incorporated in section 176(5) and section 284 should be deleted, or, alternatively section 176(5) should be deleted.\(^\text{129}\)


Notice to Hindu undivided family be addressed to the Manager or any adult member of the family. Section 282(1)(2)(a) reads:

(1) "A notice or requisition under this Act may be served on the person therein named either by post or as if it were a summons issued by a court under the Code of Civil Procedure, 1908 (V of 1908);

(2) Any such Notice or requisition may be addressed:

(a) in the case of a firm or Hindu undivided family, to any member of the firm or to the Manager or any adult member of the family.

Section 283 deals with service of Notice in cases where Hindu family is disrupted. But the provisions of section 282(1) and (2) are permissive and not mandatory: The word used is "may" not "shall". Thus if a notice is not addressed to and served upon the Manager or any adult member of the family as provided in 282(2) section, the notice would not necessarily be

130 Section 283(1) reads:

"After a finding of total partition has been recorded by the Income-tax Officer under section 171 in respect of any Hindu family, notices under this Act in respect of the income of the Hindu family shall be served on the person who was the last manager of the Hindu family, or, if such a person is dead, then on all adults who were members of the Hindu family immediately before the partition."
bad. If the assessee is a Hindu undivided family residing outside the jurisdiction of the Income-tax Officer but carrying on business through an agent within the jurisdiction, service of a notice on the agent may be good service.\textsuperscript{131} Where a Hindu undivided family continued to carry on business under the names of certain members who had been dead for some years, a notice was held to be valid.\textsuperscript{132} The mode of service mentioned in section 282 is permissive and not exhaustive.\textsuperscript{133}

Notice under section 283(1) can only be issued if there is a disruption of the Hindu undivided family and in this case notice is issued after the finding of total partition has been recorded by the Income-tax Officer under section 171 in respect of the Hindu undivided family concerning the income of Hindu undivided family. Notice shall be served on the Karta of Hindu undivided family, or, if such person is dead then on all adults who were members of Hindu undivided family immediately before the partition.

\textsuperscript{131} Ramanathan Chettiar V C.I.T. 2 I.T.C. 474.
\textsuperscript{132} Sonulal V C.I.T. (1938) 6 I.T.R. 94.
Under section 282 notice may be served either by post or in any of the ways in which a summon is issued by a court under the civil procedure code.\(^{134}\)

(c) Service by Post

It should be by registered post\(^{135}\) only addressed to the assessee, and the acknowledgement signed by an employee of the assessee on his behalf or by the assessee's son, may be minor, who was living with the assessee and used to receive notices addressed to the assessee,\(^{136}\) the service was to be held a proper service of notice.\(^{137}\) If the notice comes back with the word "refused" endorsed by the postal authorities thereon, proper service may be presumed unless contrary is proved by the assessee.\(^{138}\) Ordinarily, it is the duty of the assessee who applies for adjournment to find out

\(^{134}\) These are alternative modes of service of the notice and it is the discretion to follow one or the other mode.

\(^{135}\) Emperor v Ram Charan, 1 I.T.C. 21; In re Kishori Lal Mukandilal (1941) 9 I.T.R. 193; See also section 27 of the General Clauses Act.

\(^{136}\) De Souza v C.I.T., 6 I.T.C. 130.

\(^{137}\) Whitney v I.R. 10 T.C. 88 (H.L.); I.R. v Huni 6 T.C. 466.

the date fixed for adjourned hearing. The Income-tax Officer's reply may not be by registered post because this is not a "notice or requisition" within the meaning of section 282.

(d) Service otherwise than by Post

Where a notice is served otherwise than by post, e.g., through a person or process server, the notice need not be served personally on the assessee. If the assessee is absent from the house and the notice is received by his adult son residing with him or if on refusal of the assessee to accept the notice or after all due and reasonable diligence to effect personal service has been used in vain, the notice is affixed on the assessee's premises in accordance with the provisions of the Code of Civil Procedure it would be good service under Section 282, where the notice is served on

the assessee's relative, or agent who is not authorised to accept service, and such person forwards the notice to the assessee, the service would be deemed to be effective with effect from the date when the notice reaches the assessee. 142

IV. RECOVERY OF TAX.

The tax due from the coparcener in respect of his personal income cannot be recovered out of property belonging to the joint family, 143 except to the extent of his undivided share in the property. 144 But in the case of total or partial partition the tax payable by the Hindu family for the pre-partition period can be recovered from everyone of the members to the extent of the family properties in their hands. 145 The tax assessed on a Hindu father in his individual capacity may be recovered out of the entire joint family property belonging to him and his sons, since under the Hindu law the sons' interests in the joint family property are liable for the debts of their father. 146