M.N. Aryamurthy And Anr. vs M.D. Subbaraya Setty (Dead) Through L. ... on 20 September, 1971

Equivalent citations: AIR1972SC1279, (1972)4SCC1, 1972(4)UJ84(SC), AIR 1972 SUPREME COURT 1279, 1972 4 SCC 1

Bench: S.M. Sikri, D.G. Palekar, A.N. Ray

JUDGMENT

1. These are appeals by the plaintiffs on a certificate granted by the High Court of Mysore which, in Regular Appeals Nos. 120 & 121 of 1956, modified the decree of the learned District Judge, Mysore in Original Suit No, 4 of 1954. The suit was originally filed by one Nagappa Setty in the Court of the District Judge, Bangalore, on 29th March, 1948. It was then numbered as Original Suit No. 61 of 1947-48 Nagappa Setty died on 20th February, 1949. His heirs and legal representatives were brought on record and they prosecuted the suit and the appeals. For administrative reasons, the suit was transferred to the file of the Distt. Judge. Mysore in 1954 & there it was re-numbered as O.S No. 4/1954. That Court only partially decreed the plaintiffs' claims. Aggrieved by that decree both sides went in appeal to the High Court of Mysore. These appeals were R.A. Nos. 120 and 121 of 1966. A Division Bench of the High Court heard these appeals together and, by a common judgment, modified the decree of the trial Court by its judgment and decree dated 9th July, 1962. The plaintiffs filed two applications for the grant of the certificate under Article 133 of the Constitution Since two certificates were granted, we have two appeals before us, but both of them are by the plaintiffs.

2. As already stated, the suit, out of which these appeals arose, had been filed by Nagappa Setty. His suit was for partition of the family properties. To start with, there were nine defendants to the suit, defendants 1.8 being Nagappa's younger brothers and defendant No. 9 being their mother. On an objection raised by the defendants that necessary parties were not on record, the other defendants, who were members of the defendants' family, were joined as parties. The Chief contest was between Nagappa Setty, on the one hand, and defendants 1-9, on the other.

3. The plaintiff Nagappa Setty based his claim principally on the will dated 1st January 1933(Ext. A A) made by his father Lachiah Setty. He claimed that the properties in suit were, in accordance with the will, the self-acquisitions of Lachiah Settey which he was entitled to dispose of at his sweet-will and pleasure, Under that will, the plaintiff alleged, his father had given him a four-anna share in the family properties and, hence, he was entitled to the same; in the alternative, a claim was made that, if the suit properties were found to be joint family properties, the aforesaid will should be regarded as embodying a family arrangement and must be given effect to as such. The defendants challenged the documents as being inoperative either as a valid will or a valid family arrangement. They claimed that the properties were ancestral joint family properties which Lachiah Settey was incapable of disposing of by will. There was no occasion also for a family arrangement and, hence, the will could not be regarded as a family arrangement.

4. Both the Courts held that the properties in suit were the ancestral joint family properties which could not be disposed of by Lachiah Settey by will. The Courts also held that there was no family arrangement, and, even if it were to be deemed to be a family arrangement, it was void, because, one of the sons, Dasratha Settey, who is supposed to have accepted that arrangement by signing below the will, was a minor at the time. The learned District Judge, who tried the suit, therefore held, that the plaintiff Nagappa Setty was entitled to only a 1/9th share in the family properties. The High Court disagree with the District Court on the question of Nagappa Setty's share. In its opinion, the severance of the joint status had taken place on 30th March, 1940 when the sons referred their disputes to the Arbitrators under an Arbitration Agreement. Under the Mysore Hindu Law Women's Rights Act (Misore Act No. X of 1933), the mother on a partition was entitled to 1/2 of the share of a son. Since Nagappa Setty had pre-deceased the mother, his heirs were not entitled to share along with their uncles, the present defendants 1-8, in the share of the mother, defendant No. 9, and hence, Nagappa's heirs could claim what Nagappa Setty could claim at the time of the suit, viz., only 2/19th share in the family properties. The High Court, therefore, held that the plaintiffs were entitled to have partition of 2/19th share and nor 1/9th share as held by the trial court. Some other minor modifications were also made in the decree of the trial Court.

5. Exhibit AA is the will of Lachiah Setty. The will does not specify the several movable and immovable properties of the testator; but it says that all the properties of the family standing in the name of either himself or his sons were his self-acquired properties which he was in a position to dispose of by a testamentary document. A mere look at the schedules to the plaint would go to show that the properties are numerous and extensive, indicating thereby that the family was one of the wealthiest families in Mysore State. Evidence has been led to show that Lachiah Setty belonged to a family which carried on extensive business in coffee and other commodities from about the year 1860. The family owned coffee estates After the death of Lachiah's father, Lingappa Setty, there was a partition of the family properties between Lachiah, his younger brother, Manjiah, and the two sons of a pre-deceased elder brother, Sidd-anna. The partition deed is Ext. VII dated 18th July, 1910. In this partition, Lachiah received a large amount of cash, considerable movable and immovable properties, including coffee estates, and also a running business in cloth at Chiekmangalure. Lachiah's eldest son, Nagappa Setty, had already come of age and had joined his father in the family business. The other sons were minors at the time; but there is no dispute that, when the sons came of age. they all joined the father in the family business which, after 1910, was carried on in the name of "Lachiah Setty & Sons". The family expanded its business. A Branch was opened at Mangalore in 1921 or 1922 for direct export of coffee and, altogether, the family became a very wealthy family having amassed wealth in trade and business. In the course of this business, several houses and immovable properties were acquired, including coffee estates. The family rose to high political & social status in the old Mysore State, and Nagappa Setty was given the title of Dharampravartha by the Maharaji of Mysore and was on friendly terms with the Dewan of the Mysore State, Sir Mirza Ismil. In short, at the time of the execution of the will on 1st January, 1923, Lachiah and his sons formed a joint Hindu family which, with the help of the ancestral nucleus, had been able to acquire large estates and properties during the course of joint family business. Both the Courts, therefore, were right in holding that the properties were joint faintly properties and not self acquired properties of Lachiah Setty as stated in the will.

6. Since the Plaintiff has claimed that effect should be given to the document Ext. AA either as a will or a family arrangement, we shall have to consider what Lachiah intended to do by executing this document. The draft of the document was prepared by P.W. Vasudeva Murthy, the family lawyer, who, later on, became a Judge of the old Mysore High Court. The document consists of 22 paragraphs. It begins with the following words:

> Will dated 1st Jnnuary, 1933, executed by Mysore Lachiah Setty, son of Mysore Lingappa Setty, resident of Chickmangalur is as follows:
>
> It ends with the words:-
>
> I got the above Will read and have affixed my signature, with my free-will. Om. Om. Om.
>
> At the end of the will, there is the signature of Lachiah Setty and the signature is attested by two witnesses, one of whom was the aforesaid lawyer, Mr. Vasudeva Munhy. Below this will, there is an endorsement by the ten sons of Lachiah Setty, including the plaintiff and defendants 1-8, The endorsement reads:
>
> We have read the above Will and have attested it whole-heartedly agreeing to act accordingly.
>
> Out of the ten sons, M.L. Vasudeva Muny, defendant No. 8, had just attained majority and the other son, M.L. Dasaratha Setly, was a minor of 16 years of age.

7. In the very first paragraph, Lachiah Setty says that he was eighty years old at the time and, on account of illness, he was growing weak. The reason given by him for making the will is that, owing to his old age and possible accidents of life, he was executing the Will, when, he was of sound mind and body, in order to express his desire regarding disposal of his vast properties and the manner in which the members of his family should conduct themselves after him This leaves no doubt that Lachiah Setty intended to make a testamentary disposition of his properties to take effect after his death. In para 2, he names the several numbers of his family and says that all of them, including their wives and sons were under his care and protection. He further says that all the sons had great regard and affection for him, for his eldest son Nagappa Setty, and their mother, Rukminiamma, defendant No. 9 and the relations between all of them were harmonious. Then, in para 3, he says that, in the family partition with the brother and brother's sons (referring to the partition of 1910), he had obtained only a few properties for his share. All the properties which he now possessed were his self acquired ptopeities, having been acquired by trade, money transactions and coffee cultivation. Then he says that it was possible for him to acquire such vast properties only after his eldest son, Nagappa Setty, on his attaining majority, took over the management of the entire business and "conducted the affairs of the family with the help of his intelligence, enterprise, skill, etc." Even so, he is particular to point out that, though some of the acquisitions stood in the name of Nagappa Setty or in the names of other sons, the acquisitions are his own and "he was fully entitled to dispose them of as he desired." He further observed that all his sons had unanimously consented

to such disposal by him and had attested the Will in token of their consent. Then, in para 4, he says: "All my sons have conducted themselves with great affection and harmony with me, my eldest son Nagappa Setty and amongst themselves. It has been my extreme desire that even in future, they should in the same way continue to live harmoniously, united and without any differences. All have agreed to do so." Then follow in paras 5 to 15 several bequests in favour of charities and near relations. By para. 16, he says that, after payment of the bequests as aforesaid, all the remaining properties, movable and immovable, shall be disposed of as detailed hereunder. The family house will go to his wife, Rukminiamma, for her life and the sons shall pay to her a monthly allowance of Rs. 50/-. In case there was a partition amongst the children, his wife would be entitled to a share as mentioned later in para 19. In para 17, he directs that a sum of Rs. 1000/-should be paid to each one of his present and future daughters-in-law. Then follow paragraphs 18, 19 and 20 which, being important, are reproduced below :

> 18. Even after my demise, my sons should remain joint and undivided as at present and manage and enjoy the properties, leading a virtuous and pious life. Further after my demise, my eldest son Nagappa Setty should remain the manager of the joint family, as at present and should look after all the management. And my other sons should continue to evince the same regard and devotion to him, in the same manner as they are showing towards me towards him and towards their mother. All my sons should conduct themselves in this manner. It is my firm conviction that there will be scope for our family to rise into a greater status and prosperity, even in furture, if they remain united and conduct themselves as such.

But by providence, if by any reason it becomes unavoidably necessary to effect a partition amongst my sons, all my movable & immovable properties, assets and liabilities should be divided as hereunder.

19. Out of the entire movable and immovable properties that I own at present and the properties that might be acquired by the family in future, the liabilities that might be exist in respect of the entire properties at that time, should be deducted and the remaining properties, movable and immovable should be divided into 16 parts and out of which four anna share should be given to my eldest son Nagappa Setty or if he is not alive, to his sons. Two annas shares should be given to my second son Subbaraya Setty or if he is not alive, to his sons. Two annas share should be given to my Dha-ramapathni Sowbhagyavathi Rukminiyamma. The remaining eight annas share should be divided equally amongst the remaining eight sons. After the death of my wife, the share given to her and all her jewels, movable and immovable properties should be divided equally amongst all my sons. But the house given to my wife for her residence for her life-time should not be divided. She should be in enjoyment of it, during her life-time and after her death, my sons shall be entitled to share it, in proportion to their shares as aferesaid. But, the said house of our family shall only be enjoyed jointly by my sons and should not be division unavoidably in future, the entire house has to be given to my eldest son's share, for lawful consideration.

20. With a view that no differences all ill-feelings of any kind should arise as amongst themselves, even in future all my children having solicited to make suggestions when I am bodily fit, in respect

of the disposal of my vast properties and future conduct, in the m inner that I consider just and properties, and having promised to implicitly carry out the same, with the filial affection, as hither to, I have made this Will at the inspiration of God, for their own prosperity.

Paragraph 21 shows that he had decided to give up all interest in wordly affairs and was devoting himself to the worship of God. In para 22, he appoints his two sons Nagappa Setty and Subbaraya Setty as executors of the Will.

8. On reading the document as a whole, there can be hardly any doubt that Lachiah was wanting to make a will. It was drafted by his family lawyer. The whole form of the document is of a will. It is attested by two witnesses. Executors are appointed and a number of bequests have been made which were to take effect after his death. In the beginning and at the end, Lachiah described the document as his Will which he was making in his old age, while in good mental state. The will shows his awareness that, if the family properties were regarded as joint family properties, he would not be in a position to make any disposition of the same by a will. So, although two of his elder sons had contributed largely to the family acquisitions, all those acquisitions, he insisted, were his self-acquired properties, over which, he claimed, he had absolute power of disposition, As a matter of fact, if the properties as claimed by him had been self-acquired, there is no doubt that the document would have absolutely operated as the last will and testament of Lachiah Setty. But unfortunately, Luchiah, though a father, could not, under the Hindu law, dispose of, by will, joint family property or any part thereof and as a will it was clearly inoperative on the various dispositions made by him (See Paryatibai vs Bhagwant, Vishwanath Patak 39 Bom. 593, and Subbarami Beddi v. Ramamma) 43 Mad. 824. This latter case has questioned the correctness of a previous decision of that Court in Appan Patra Chariar v. V.S. Snnivasa Chariar and Ors. 40 Mad. 1122. The decisions proceed on the principle which was well-settled in Vittla Bulten v. Yamenamma (1874) 8 M.H.C.R. 6, and Lakshman Dada Naik v. Ramachandra Dada Naik 5 Bom. 48 P.C. that a coparcener cannot devise joint family property by will, because, on the date of his death when the will takes effect, there is nothing (or the will to operate on, as, at the moment of his death, his interest passes by survivorship to the other coparceners.

9. It is true that, in some cases, the Privy Council had given effect to a "will" by a coparcener when the dispositions had been made with the consent of the other coparceners (See Brijraj Singh and Anr. v. Sheodan Singh and Ors. 40 I.A. 161, and Lakshmi Chand v. Anandi and Ors. 53 I.A. 123, But, in both these cases the will was given (fleet to not as a will but as a family arrangement which was acted upon.

10. The plaintiffs have, therefore, clutched at the above decisions and submitted that, since the sons had agreed to the dispositions made in the will, the will should be given effect to as a family arrangement. When a document which is unexceptionable as a will that is to say, a testamentary document, revocable by the testator at his sweet-will is supposed to embody a family arrangement, we are transported into a different realm where the intentions and objects of the maker or makers of the document are quite different. As pointed out in Halsbury's Laws of England, 3rd Edition, Vol. 17, at p. 215:

A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

This view of a family arrangement has been approved by this Court in Maturi Pullaiah and Anr. v. Maturi Narasimham and Ors. where it is pointed out that:

though conflict of legal claims in present or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice. Members of a join Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular arrangement than to avoid it.

It will be, therefore, seen that, in the first place, there must be an agreement amongst the various members of the family intended to be generally and reasonably for the benefit of the family. Secondly, the agreement should be with the object either of compromising doubtful or disputed rights, or for preserving the family property, or the peace and security of the family by avoiding litigation or for saving its honour. Thirdly, being an agreement, there is consideration for the same, the consideration being the expectation that such an agreement or settlement will result in establishing or ensuring amity and good-will amongst the relations (See Ram Chaian Das vs Giris Nandini Devi and Ors. . The question, therefore, is whether the father and sons in this case had been really motivated by the above objects when the father purported to make the "Will" which would then be a misnomer for an agreement embodying a family arrangement. As to this, we are constrained to say there is very little either in the will or the pleadings or the evidence led in the case. In construing a document, whether in English or in vernacular, the fundamental rule is to ascertain the intention from the words used. The sum ending circumstances are to be considered. But that is only for the purpose of finding out the intended meaning of the words which have actually been employed (See Ram Gopal v. Nand Lal and Ors. 1950 S.C.U. 766. The Will here does not show that there was any occasion for making a family arrangement The Will itself discloses that all the sons were on amicable terms, there were no dissensions, no contrary claims and no reasonably anticipated disharmony. On the other hand, the father exhorts the sons to continue to remain joint and undivided for the greater glory of the family as one unit. It is true that in para 20 he states that all his children had solicited him to make suggestions with a view that no differences or ill-feelings should arise amongst themselves. But that is only a manner of speaking, because such forebodings of diff lenses and ill-feelings are in here not in every joint family. In the absence of any evidence of even a whisper of disharmony in the family, the statement that the children had solicited him to make suggestions is, to our m nds, only a flourish. But what is important to note is that the father does not

propose a partition or a severance of status. On the contrary, he exhorts the sons to live united as members of a joint family on the same cordial terms which prevailed till then, A father in a Mitakhshara joint family has the undoubted right to divide the family property at any moment during his life, whether his sons consent or do not consent to the division. The only limitation on his powers is that the division directed by him must be a fair one in which he gives his son an equal share with himself. The will does not show that he wanted to exercise any such power and, since a partition was very far from his mind, he merely made his own "suggestions" as to what he would regard as proper if, in some remote future, the members of the family thought about severance of status These suggestions, if acted upon, would have given plaintiff Nagappa a 4-anna share, defendant No. 1 a 2-anna share and his wife Rukminiamma a 2-anna share, while the other eight sons would have got only an anna share each. This would have been a very unequal partition. Two of the sons would have got much more than they were entitled to on a partition and the mother, who was not entitled under the Hindu Law as it prevailed in Mysore in 1933 to any share on partition in the family, would have got a 2-anna share If these suggestions had been acted upon voluntarily by the various parties perhaps there would have been some point in the contention raised on behalf of the plaintiff. The father Lachiah died in January, 1936 and the family continued to be joint till a submission was made to the Arbitrators in 1940. But as long as the suggestions were not acted upon, they remained more suggestion of the father and, in our opinion, paras. 18 and 19 of the Will can only be read as embodying the exhortations and recommendations of an affectionate father to his dutiful sons to act in a particular circumstances. The father, it is obvious, did not contemplate a severance of the joint family status in the foreseeable future. Deaths of sons were not unlikely to occur which would have completely upset the shares suggested by him in para. 19 Secondly, a situation, like the one we have in this case where only one of the members of the family wanted to separate from the others, was bound to create a difficult problem. A son, in disregard of his father's exhortation to remain joint, desires to separate, while the other sons, in obedience to the father's wishes, do not desire to separate. In such a case, the latter would be able to retort to the former. "Since you disregard the father's wishes that we should continue to be join, we are discharged from the necessity or obeying father's wishes with regard to shares in partition." A problem of this kind would inevitably create difficulties in the matter of sharing the family property as suggested by the father and, for that reason also, the contents of para, 19 are better construed as "suggestions" of the father as expressly stated by him in para, 20. In short, the contents of paras 18 and 19 are merely in the nature of exhortations or recommendations, not binding like a contract for want of mutuality or consideration, though the sons have endorsed under the Will that they had read the will and had attested it whole heartedly agreeing to act accordingly.

11. In the plaint also, Nagappa Setty has not stated what was the occasion for the father to make a family arrangement. In para. 6 of the plaint, he stated:

The father and the sons alike were desirous that the father, during the life-time, should make arrangements for the division of the properties among his sons so as to avoid all squabbles and misunderstandings between them after his life-time.

And, then in para. 23, the plaintiff says:

The plaintiff father submits that the "WILL" really embodied a family arrangement agreed to by all the parties after full consideration and with full understanding of the terms and dispositions as just and proper in all the antecedent circumstances referred to in the "WILL" itself.

There are no antecedents circumstances referred to in the will, except those to which reference has been already made. Those circumstances, far from furnishing an occasion for a family arrangement, go to show just the contrary. Nagappa's son Arya Murthy, P.W. 12, whose was the principal evidence on behalf of the plaintiffs, tried to suggest that his father Nagappa was thinking of separating himself and beginning his trade separately before the Will, that his brothers were jealous of him as he was a greater favorite of Lachiah Setty than the other sons, and that there were misunderstandings in the family because Nagappa's and defendant No. 1's daughters had been married at great expense to the family. It is obvious that this evidence is of really no value, not only because nothing about it is stated in the plaint, but also because it is against the whole tenor of the father's will. Mr. Vasudeva Murthys who was examined as a witness on behalf of the plaintiffs, on the other hand, says that, on the event of making the Will, Lachiah had told him that his son Nagappa wanted to take whatever property Lachiah gave him and separate from the family and start his own business and, therefore, he was intending to make an arrangement to keep Nagappa in the family, for, otherwise, the family as a whole would suffer if Nagappa had decided to sever his connection with it. This evidence also has not been accepted by both the Courts and we think there is good reason to think that the story now given at the time of the hearing is an after-thought. In short, there is nothing in the Will, the pleadings, or the evidence which goes to show that there was any occasion for agreeing to a family arrangement, or that the motivation, which is necessary or a family arrangement, was ever present to the minds of Lachiah and his sons when the will was executed.

12. Technical objections were also raised to the alleged family arrangement embodying Ext. A A on the ground that one of the sons, M.L. Vasudeva Murthy, defendant No. 8, had just attained majority when he had signed the acceptance of the Will and the other son, Dasaratha Setty, who was then a minor, had also signed the Will. There is no evidence to show that Vasudtva Murthy who was a callowlad at the time, had independent advice when he had signed along with his brothers; and, so far as the minor Dasaratha Setty is concerned, his signature below the Will has absolutely no voluet Lachiah was the guardian of Dasartha Setty at the time and, as pointed out in Subbarami Rfddi v. Ramamma (supra), the arrangements made in the will could not have been supported as against Dasaratha Setty on the ground that his father Lachiah was also a party to it. And, when one of the

sons of the family shown to have not accepted or participated in the family arrangement, the family arrangement as a binding agreement between the several coparceners must fail (See Mohammed Amin v. Vakil Chand 1952 S.C.R. 1133).

13. Attempts were, however, made to show that Dasaratha Setty had accepted the arrangement. Reliance was placed on two documents Exts. BB and DD. Exhibit BB is said to be an agreement between the ten sons and their mother and is dated 30th March 1933. The High Court suspected the origin of this document but we do not think that there is anythings auspicious about it. It was not seriously contested before us that the ten sons and the mother executed this document at one time. This agreement amounts to nothing more than a reiteration that they were admitting the Will of the father and the correctness of its recitals and embodies an undertaking by them to act up to the wishes of the father. In this agreement, the minor Dasaratha Seity is represented by his mother as his guardian. In law, the mother was not his guardian at the time and she was incompetent also for the reason that her interests were in conflict with that of the minor. She, who had, under the law, no share in the property, was to get a 2-anna share in the property and Dasaratha Setty, whose share was much more than 1-anna, was to be content with a very much reduced share. The reduction was partly due to a share being given to Rukm-iniarnma. Therefore, this agreement also would be of no avail.

14. Reliance was then placed on a photographic copy of a document Ext. DDl dated 12th March, 1936. It is stated that the original document was signed by Dasaratha Setty and there by he had ratified the agreement referred to earlier. The original of this document, which would normally be in the possession of Nagappa Setty, has not been produced and both Courts have refused to regard the photographic copy Ext DDl as admissible in evidence and, in our opinion, rightly. The whole trouble arose, because Dasharatha Setty died afterwards in November, 1938 and the original document was neither produced nor its loss properly accounted for. The circumstances, under which the original of Ext. DDl was signed are also very suspicious. In short, there was no legal acceptance of the alleged arrangement by Dasaratha Setty and for that reason also the alleged family arrangement must fail. But even assuming that all the sons had accepted the arrangement the acceptance means no more than merely agreeing to abide by the suggestions made by their father in the will and since, as already pointed out, there was no consideration for such acceptance, the document must fail as a family arrangement. It was suggested in the course of arguments that the will was acted upon and reference was made to certain payments alleged to have been made in pursuance of the father's directions. Both the Courts have found that the Will was not acted upon and we see no good reason to take a different view. In our opinion, the High Court was right in holding that the document Ext. AA was inoperative as a Will and ineffective as a family arrangement.

15. The learned Trial Judge thought that the plaintiffs' share in the family property was 1/9th, but the High Court, for reasons which are not challenged before us in the arguments has come to the conclusion that the plaintiffs' correct share would be 2/19th. We agree with that finding.

16. One more point was touched upon the course of the arguments. It will be recalled that father Lachiah died in Jan., 1936, and the youngest son Dasartha Setty died in November, 1938. On 30th March, 1940, the mother and the remaining nine sons including Nagappa made a reference to three

arbitrators for a division of the family properties. It is common ground that the family no longer remained undivided as from that date. The three Arbitrators entered upon their work on 1st April, 1940; but the course of the arbitration proceedings was not at all smooth. Differences arose with regard to the management of the family properties and business, and Nagappa was disinclined to remain in the same family house along with the other brothers, At the instance of the Arbitrators, Nagappa was provided with a separate house belonging to the family and it appears that Nagappa with the members of his own family left the family house on 5th April, 1940 to live in the family bungalow names 'Sunder Vilas'. The other brothers and the mother lived together and were in possession of the coffee estates and other immovable properties of the joint family, On 11th July, 1940, the Arbitrate n made a special provision in agreement with the parties, with regard to the business. For that purpose, lists were prepared with a view to see how much stock-in trade and securities were in the custody of the brothers. Securities of the value of Rs. 1,49,833/-were found in the hands of Nagappa Setty and securities of the value of Rs. 1,45,616/21/-were found in the hands of his other brothers. The stock-in-trade was valued at Rs. 1. 32,495/-, Since it was impossible for the business being carried on jointly, a clear arrangement was made by the Arbitrators in writing to which the parties consented. There was no partition as such of the securities and stock-in-trade referred to above, but, on an ad hoc basis, the Arbitrators directed that Nagappa Setty should retain with him securities of the value of Rs. 55,397/-and hand over the rest the defendants. The defendants, on the other hand, who were in possession of the stock-in-trade, were directed to make over to Nagappa Setty stock-in-trade, worth Rs. 24, 840/-. The parties, however, failed to carry out these directions although, in the first instance, they had agreed to the arrangement. The course of arbitration was begged down by the quarrels between the sons. In the meantime, one of the Arbitrators died. The other co-Arbitrators were requested to continue with the arbitration, but they too could not make much progress Thereafter, allegations were made about partiality against one of the other of the Arbitrators and the matter went to Court and, since the arbitration was not completed by a certain date, all attempts at arbitration aborted. However, after 11th July, 1940, the plaintiff, on the one hand, and the defendants, on the other, continued to do business; and it is the plaintiffs case that the defendants had continued the family business with the help of family assets and, hence, that business with the help of family assets and, hence that business and the assets of that business must be all made available for partition. Both the Courts have held that the plaintiff was not entitled to get any share in the business, or in the properties acquired from the profits of that business. They have also held that on 11th July, 1940, the old family business in the name of Lachiah Setty & Sons and Giri Coffee Works had come to an end and that the plaintiff, on the one hand, and the defendants, on the other, had started their own new business and one had no concern with the other. It is true that although the defendants did new business, that new business continued to have the old names. The books of account were freshly opened for the same and we feel no difficulty in agreeing with the concurrent findings of both the Courts the business carried on by the defendants from 11-7-1940 in the name of Lachiah Setty & sons and Giri Coffee works was a new business having no connection with the old family business which had come to an end The directions given by the Arbitrators on 11-7-1940. to which the parties had agreed, were to the effect that, from 11-7-1940 onwards, the defendants shall be entitled to the profits made in the business and will be also liable for the losses in that business. In other words, the business was defendants' own after 11 7-1940 and the plaintiff would have no concern with it. The High Court has held that the Arbitrators had intended to close the family business and divide the stock-in-trade leaving to the

parties to carry on business, if they so chose, on their own exclusive responsibility.

17. That being the position, the question arises whether the defendants would, in law, be liable to account to the plaintiff for the profits earned by the defendants in their own business or for the acquisitions made by them in that business. We agree with the High Court that they were not so liable. On a partition by severance of the joint status, the members of the family become tenants in-common of the family property. If one of the members remains in possession of the entire properties of the family, there is no presumption that the property, which is acquired by him after severance of the status, must be regarded as acquired for the family, (see Gulabrao Fakirrao v. Baburao Fakirrao and Anr. A.I.R. 1960 Bom. 159 Where rents and profits are received by the member in possession, he would be liable to account for the rents and profits received by him, But the funde in the hands of that member do not become impressed with any trust in favour of the other member. (See John Kennedy v. Mery Annette De Trafford) and Ors. 1897 A.C. 180. Therefore, if such a member acquired some property with the funds in his possession, the other members could claim no share in that property. Hence we agree with the High Court that the business carried on by the defendants on and after 11-7-1940 should be considered as the exclusive business of the defendants, and the plaintiffs would have no right to claim any share in the profits or the acquisitions made out of that business. What is true about this business carried on by the defendants is also true of the business carried on by the plaintiff. The defendants have not claimed and cannot claim any share in the business run by the plaintiff after 11-7-1940 or in the profits and acquisitions made by him that business. This finding, however, is not to be understood to mean that the securities and stock-in-trade already referred to are not to be taken into account as family assets for the purpose of partition, nor can the parties declare the liability to account to each other for the income derived by the from the family assets in their possession.

18. We have dealt with all the points raised in the course of the arguments before us and, in our view, the findings of the High Court are quite unexceptionable. The appeals must, therefore, fail. It was however, brought to our notice that the wording of the decree as passed by the High Court is likely to be. mis-interpretated and misconstrued at the time of execution, and, hence the name should be properly clarified. We, therefore, propose to substitute a decree, as under, for the decree passed by the High Court:

> (1) It is declared that the original plaintiff Nagappa (now his heirs brought on record) was entitled to a 2/19th share in the joint family properties and liable for a similar share in the joint family liabilities.
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> (2) The joint family properties, as mentioned in the suit, shall comprise all the movable and immovable properties including stocks, shares and valuable securities in the possession and control of the plaintiff and defendants 1 to 9 as on 11th July, 1940 The family liabilities as on that date shall be accertained with a view to determine the net assets. The plaintiff shall have 2/19th share in the same.
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> (3) The parties are liable to account for the rents, income, profits and dividends received by them after 11-7-1940 till the date of final partition in respect of the joint

family properties in their respective possession on and after 11-7-1940. If, on taking accounts, the plaintiffs are found to have received less for their 2/19th share in such rents, income, profits and dividents. the deficiency shall be made good by the defendants.

19. It is however, clarified that the parties are not accountable for the profits or acquisitions made in the course of the separate business or business carried on by the parties after 11-7-1940. The business carried on by the defendants in the name of "Lachiah Setty and Sons" and "Gin Coffee Works" is to be regarded, after 11-7-1940, as the separate business of the defendants.

(4) The plaintiffs shall be put in separate possession of the properties coming to their share on partition by metes and bounds. The partition shall be effected by a commissioner appointed by the Court in respect of all properties not required under the law to be partitioned by the Deputy Commissioner. In respect of properties, partition of which is required under the law to be effected by the Deputy Commissioner, the partition shall be effected by the Deputy Commissioner or his Subordinate Gazetted Officer. The present possession of the parties shall be respected as far as possible.

(5) The order of costs made by the High Court is confirmed and the appellants shall pay the costs of the respondents in these appeals.