

(1992) 12 KAR CK 0026
In the Karnataka High Court
Case No : Regular First Appeal No. 469 / 1990

Dandappa Rudrappa Hampali and others	APPELLANT
Vs	
Renukappa alias Revanappa and others	RESPONDENT

Date of Decision : 11-12-1992

Acts Referred:

Citation : AIR 1993 Kar 148 : (1993) ILR (Kar) 1182 : (1993) 1 KarLJ 138

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : B.S. Keshava Iyengar, for the Appellant; R.H. Chandangouder and C.S. Hiremath, for the Respondent

Judgement

Shivashankar Bhat, J.—This appeal is by defendants 1 to 8 and 17. The first respondent is the plaintiff. The suit is one for partition on the ground that all the properties described in the schedule to the plaint belonged to the joint family of the plaintiff, the first defendant, 9th defendant and 13th defendant as well as the children of some of the defendants.

2. To appreciate the facts, it is necessary to note that Rudrappa was the father of the plaintiff, the first defendant, 9th defendant and 13th defendant. The plaintiff asserted that the joint family earlier represented by Rudrappa had some properly and family business and he died in the year 1936. The Hindu undivided family continued even after his death enjoying the joint family properties and that the family business was extended at Hirekerur, Shimoga and Haramaghatta. According to the plaint, a capital of over Rs. 2 1/2 lakhs has been invested for the business. The plaint also asserts that out of the joint family business and the property, several other properties were acquired. Para 4 of the plaint states that defendants 1, 9 and 13 continued to possess 100 tolas of gold and other movables valued at about Rs. 25,000/- as well as the articles connected with the family business. They also continued to carry on the business of money lending. According to the plaintiff, his elder brothers are clever and therefore some of the properties were purchased in the names of their wives and children. Plaintiff

claims partition and allotment of his 1/4th share in the entire properties.

3. The first defendant is the main contesting defendant. He denied that Rudrappa was carrying on any family business and that Rudrappa was also carrying on any money lending business. Rudrappa had left only one item of property described in item 1-D, that is to say a house property in Thumminakatte (hereinafter referred to as the "house property"). According to the first defendant, this property did not yield any income and that the children of Rudrappa were eking out their livelihood by doing coolie work. First defendant came to Hirekerur without any ancestral property with him, and with the help of some people started his business in areca and tobacco. This business he was carrying on, according to him, in weekly shandies. With great difficulty he was living in Sunakalbidri village of Ranebennur taluk for 4 years and thereafter, as he could not improve, he shifted to Hadiyal village where he was living for about 8 years. Again, he had to shift from the said village to Hirekerur and continued to carry on the business as hitherto, but he was finding it difficult to maintain his family comprised of his wife (2nd defendant) and 3 children. According to him, his children (defendants 3 to 8) carried on the business intelligently and out of this, some properties were acquired. This included about 15 acres of agricultural land. These were acquired out of the earnings of his children. The first defendant asserted that he did not receive any property (whether moveable or immovable) or income left by Rudrappa. The property standing in his name and in the name of his children were acquired out of their respective earnings and therefore none else has any right over those properties. The second defendant is the wife of the first defendant and she had purchased a vacant site from her own funds and the first defendant built a house on the said site by spending about Rs. 3,000/-. According to the first defendant, his sons also had the benefit of the jewellery brought by their respective wives. It is the case of the first defendant that the 9th defendant came to Hirekerur village to carry on his livelihood and he was residing in a rental house obtained from one Rajanna Ganji. The 9th defendant was carrying on the business in areca and tobacco independently. Since he could not prosper there, 9th defendant went to Davangere and thereafter shifted to Shimoga and continues to live in Shimoga carrying on his trade. 9th defendant has built two R.C.C. buildings in Shimoga valued by the first defendant at rupees one lakh to one-and-a-half lakhs. According to the first defendant, the 13th defendant has been carrying on the business independently in Haramaghatta village in Shimoga District since about 1970-71. The first defendant stated that the plaintiff was never employed, though he was clever, intelligent and educated and that he was projecting himself as a man of letters and was deceiving the people to earn money. The plaintiff's case in its entirety was denied by the first defendant.

The 2nd defendant is the wife of the first defendant and defendants 3 to 8 are their children. 14th defendant is the wife of 13th defendant and defendants 15 and 16 are their children. Defendants 10 and 11 are the children of 9th defendant. 17th defendant is the wife of 4th defendant.

4. The 2nd defendant supported the case of her husband. She also stated that in the year 1951, she purchased plot No. 740 for a sum of Rs. 1,000/- out of her earnings and in the year 1958, the first defendant built a house on the said site. According to this defendant, she was also earning by carrying on minor works and she had also some jewellery given to her by her parents at the time of her marriage and her savings and her jewellery were utilised for the purchase of the vacant site. Defendants 3 to 8 are the sons of the first defendant whose case is substantially the same as that of their parents.

5. The 13th defendant set up his own case. He asserted that the immovable properties and the business carried by him at Haramaghatta village belonged to him exclusively. Similarly, the immovables and the business carried on by the 9th defendant belonged to the said defendant exclusively and these did not belong to the joint family. 13th defendant also stated that the house standing in the name of the 9th defendant belonged to the 9th defendant. Except the movables and immovables claimed as belonging to defendants 9 and 13 all other properties described in the plaint belonged to the joint family of these brothers -- plaintiff and others and therefore, to that extent, the 13th defendant supported the case of the plaintiff. In para 11 of his written statement, he clearly stated that after the death of Rudrappa, defendants 1, 9 and 13 continued to carry on the family business as well as the agricultural operation and that the family was a rich family and the family business included money lending. The family had considerable silver and gold apart from cash. The various business carried on by the first defendant and his children and the property standing in their names are asserted as belonging to the family acquired out of the family funds or by using the family assets. In para 5 of the written statement of the 13th defendant, it is stated that the 9th defendant was suffering from epilepsy and therefore he was not capable of carrying on any responsible work; in this circumstance, it was the first defendant who was representing the family in all the joint family business and affairs.

6. The 9th defendant filed a memo adopting the written statement of the 13th defendant.

7. The trial court framed the following issues :--

(1) Whether the plaintiff proves that the suit properties are joint family properties of himself and defendants and they have been acquired out of joint family income and nucleus?

(2) Does the plaintiff prove that he is entitled for 1/4th share in the suit properties and he is entitled for separate possession and share?

(3) Whether defendant No. 1 proves that the suit 1(c)(6) property bearing Hirekerur TMC No. 745 A is his self acquired properly?

(4) Does defendant No. 2 prove that suit 1C(1) IMC No. 739 and suit 1C(1) properties are her self acquired properties?

(5) Does defendant No. 3 prove that suit 1C(3) TMC B1, 736 and suit 1(c)(9) TMC No. 589 (c) are his self acquired properties?

(6) Does defendant No. 4 prove that suit 1 B(1) Channalli village R. S.No. 245/2A+2B/ 1 suit 1C(4) TMC No. 734 suit 1 F(2) Suyoga Motor Cycle and other movables she has pleaded in his written statement are his self acquired properties?

(7) Does defendant No. 5 prove that suit 1A(5) R.S. No. 73/1 + 2/B of Kalavihalli land and pump set unit and ten tolas of gold and other movables are his self acquired properties?

(8) Does defendant No. 6 prove that suit 1 C(5) TMC property No. 733, suit 1 A(4) land R.S. No. 73/1+2/ A1 of Kalavihalli and 9 tolas of gold and other movables as pleaded by him are his self acquired properties?

(9) Does defendant No. 7 prove that suit 1 F(1) MES 8089 Ambassador car and 8 tolas of gold are his self acquired properties?

(10) Does defendant No. 8 prove that suit 1A (2) and (3) R.S. No. 74/2 and 73/ A+2/A2 lands of Kalavihalli are his self acquired properties?

(11) Whether the defendants Nos. 9 to 12 prove that suit 1E, house and movables in his house and shop are their self acquired properties? Do they further prove that they are entitled for 1/4th share in other suit properties of joint family?

(12) Does defendants 13 to 16 prove that the movables found in VFC No. 60(2) of Haramaghatta village are their self acquired properties? Do they further prove that they are entitled for 1/4th share in other suit properties of joint family?

(13) Whether the plaintiff and defendants 9, 12 and 13 to 16 are entitled for 1/4th share each group in the joint family properties and are they entitled for partition and separate possession?

(14) What order and decree?

Additional issues:

(5a) Does defendant No. 3 further prove that suit 1(c)(7) Hirekerur TMC No. 589-D and suit 1(A) (1) R.S.No. 20/2 are his self acquired properties?

(7a) Does defendant No. 5 further prove that suit (1)(c)(8) Hirekerur TMC No. 104 is his self acquired property?

(10a) Does defendant No. 8 further prove that suit i(c)(10) Hirekerur plot No. 15A in R.S. No. 236A/2B is his self acquired property?

12(1): Does defendant No.17 prove that suit 1(c)(12) TMC No. 723 is her self acquired property?

12(2): Does defendant No. 3 prove Rs. 18,000/- loan as contended in his written

statement?

12(3): Whether the defendant No. 4 proves that Rs. 3,000/- outstanding loan as pleaded in his written statement?

12(4): Whether the defendant No. 5 proves that gold pledge loan of Rs. 10,000/- in the State Bank of India, Hirekerur as pleaded in his written statement?

12(4)(a): Whether defendant No. 5 proves that Rs. 13,500/- outstanding loan for construction of borewell and. installation of pump set as contended by him in his written statement?

12(4)(b): Does defendant No. 5 further prove Rs. 30,000/- outstanding loan for his business as contended in his written statement?

8. The trial Court has accepted the plaintiff's case and decreed the suit. Defendants 9 and 13 have not filed any appeal questioning the decree which affects the properties claimed by them as belonging to them exclusively.

9. From a reading of the pleadings, it is clear that the parties have put forth three different versions. While the plaintiff has claimed that all the properties described in the plaint belonged to the joint family, the first defendant, his wife and children asserted that the joint family possess only one house property at Thumminakatte. Defendants 9 and 13 contend that the property standing in their respective names belong to them exclusively and excluding these properties, other properties are pitiable as belonging to the joint family.

10. The basic question for our consideration is whether the first .defendant had the benefit of any joint family property from which he could have acquired the several properties and whether the properties standing in the names of defendants 1 to 8 belong to. the joint family of the plaintiff and his brothers as well the children of some of the brothers?

11. The trial court has assumed that there was a family business at the time of the death of Rudrappa and that the first defendant had the benefit of the stock-in-trade which he took with him when he left Thumminakatte and therefore, the business carried on by the first defendant was with the aid of the joint family assets; consequently, the earnings therefrom and the assets acquired by the first defendant and his children should belong to the joint family.

12. Mr. B. S. Keshava Iyengar, learned Counsel appearing for the appellants contended that the trial court has missed the real question. It was contended that the trial court has not noted that there was no link between the business assets of the first defendant and the alleged assets left by late Rudrappa, On the other hand, the material on record shows that the agricultural lands belonging to the family had been sold long ago and there was nothing to indicate that there was any surplus available in the family. The nature of the business at Thumminakatte is not clear and the books of accounts produced by the plaintiff indicate that it is not possible to hold that the family business was prosperous in

any manner and in fact, there is nothing to indicate that the family business was continued after the death of Rudrappa. While the khata books produced and a few bills indicate that there may have been some business till 23-5-1933, thereafter, the existence and the nature of the alleged business was shrouded in mystery. Rudrappa died on 1-2-1934 (as per Ex. D5); thereafter, the earliest document produced is Ex.P.51 which shows that the defendant purchased some medicine on 4-9-1942 and Ex.P.48 dated 12-10-1937 is a postcard written to M/s. Rudrappa Basappa Harpali, complaining that the 1st defendant failed to return some money and cloth; post-card is written to the 1st defendant; this does not take the case of the plaintiff anywhere. The learned counsel submitted that the plaintiff has utterly failed to discharge the onus cast on him to show that acquisitions of the 1st defendant, his wife and children were with the aid of joint family funds. Defendants 1, 9 and 13 have been carrying on separate business at different places for nearly forty years, acquiring separate properties in the respective names without seeking any assistance from each other and not claiming any share in the profits earned by other; even, the plaintiff kept quiet all these years and came forth with the present claim when he was about 50 years of age and he has not proved that all these years he was living with and participating in the business done by his brothers.

13. Mr. Chandangoudar, the learned counsel for the plaintiff pointed out that the family of Rudrappa (father of the plaintiff) was a rich family, possessed of moveable and Immovable properties (including 100 tolas of gold) and the material on record justify such an inference at least till May 1933 and if so, burden is on defendants 1, 9 and 13 to prove as to what happened to this wealth of the family, since, plaintiff was about 2 years old at the time of his father's death.

14. For considering the respective contentions, it is necessary to state the relevant law governing particular fact situation before us.

15. All properties inherited by a male Hindu from his father, father's father or father's paternal grand father, is "ancestral property". A person may possess ancestral property as well as his self acquired property; it is permissible for a coparcener to blend his self acquired property with that of the ancestral or joint family property. A property acquired with the aid of the joint family property also becomes joint family property. The person acquiring a property if has command over sufficient joint family property, with the aid of which the new property could be acquired, there is a presumption that the acquired property belongs to the joint family. In such a case the acquiesce has to show that his acquisition was without the aid of any joint family assets. However the initial burden is on the person who asserts, that the newly acquired asset is of the joint family to prove, that the acquiesce had command over sufficient joint family assets with the aid of which he could have acquired the new asset.

16. Existence of a joint family does not lead to the inference that property held by any member of the family is joint. In Appalaswami v. Suryanarayanamurti AIR

1947 PC 189 the Privy Council held at p. 192:

"Proof of the existence of a joint family does not lead to the presumption that properly half by any member of the family is joint, and the burden rests upon any one asserting that any item of property is joint to establish the fact. But there it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

17.1 Therefore the initial burden is to establish the existence of some joint family property, capable of being the nucleus from which new property or asset could have been acquired; it is not sufficient to show that the joint family possessed some assets; it is necessary to prove that the assets of the joint family may have formed the nucleus from which the disputed assets may have been acquired. Whether joint family assets could have formed the nucleus, again, depends upon their nature and relative value. Existence of such joint family property which could have formed the nucleus for the acquisition of new assets, by itself would not lead that the new assets acquired by any member of the family would be joint family property, because, such a member may not have control or command over the joint family assets. The idea is that the member who acquired the new assets may have utilised the joint family assets to acquire further assets; this is possible only if the said member was in a position to utilise the joint family asset to acquire further asset or assets.

17.2 In the case of the manager of the joint family or any other member who was in management of the family affairs or in possession of sufficient joint family assets, it is likely that the joint family property or part thereof, formed the nucleus from which he acquired other assets and in such a case, burden will be on him to prove that the acquisition by him was without the aid of the joint family property.

18. The Supreme Court referred to the decision of the Privy Council in Appalaswami's case, with approval, in Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, . Supreme Court held that though the joint family owned lands of the extent of 56 acres, there was no satisfactory evidence about the income which those lands are yielding at the material period, when the disputed property was acquired. At page 382, the Supreme Court observed that Siddananjappa (who acquired the disputed properties) was a Tahsildar and that though there was no precise evidence as to what salary he was drawing, it could not have been negligible, "and salary is the least of the income which Tahsildars generally make".

As to the proof of facts, Supreme Court observed at page 383 :

"Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out

of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income when may well form the foundation of the subsequent acquisitions. These are not abstract questions of law, but question of fact to be determined on the evidence in the case."

In *Chattanatha Karayalar Vs. Ramachandra Iyer and Another*, , the question was whether the business started by the father was in family concern. At p. 800. the Supreme Court held:

"Under the Hindu law, there is no presumption that a business standing in the name of any member is a joint family one even when that member is the manager of the family, and it makes no difference in this respect that the manager is the father of the coparceners."

Supreme Court remanded the case as there was no finding whether the new business was started on behalf of the joint family; the question being one of fact and not of law.

19. Ordinary presumption is that the eldest member of the family is its manager; this presumption has to be rebutted by cogent evidence, to be adduced by the person who asserts that the family was being managed by a junior member (vide *Varada Bhaktavatsaludu and Another Vs. Damojipurapu Venkatanarasimha Rao (dead) and Others*,

Mr. Chandangoudar relied on a decision of a learned Judge of Bombay High Court in *Karsandas Dharamsey Gangabai* (10 Bom LR 184). The observation relied is at p. 194;

"Where it is known or admitted that some at least of the property of a joint family has come down to them the presumption is that the whole property is ancestral, and any member alleging that it is not will have to prove his self acquisition."

The observation has to be read in the context of the facts of the case. This observation cannot be accepted as an absolute proposition of law, because, it is too wide and sweeping. The link between the new acquisition and the joint family property forming a nucleus for such an acquisition has to be read into this observation.

20. In *Lal Bhadur v. Kanhai Lal*, 34 Indian Appeals 65, on the basis of the evidence, it was held that the person who acquired new properties, was already in possession of joint family assets, considered as "considerable nucleus of ancestral estate" and that he and his sons lived as members of a joint Hindu family and that he had blended the income received from the new assets with

the joint family income.

21. In *Amritrao v. Mukundrao* (53 1C 866), the Privy Council negated the claim that some of the properties acquired by one Amritrao belonged to the Joint family. This decision relied upon by Sri Chandangoudar indicate the approach to be adopted while appreciating the evidence. From the year 1870 till 1911. Amritrao had been asserting his exclusive ownership of the properties. At p. 872, the Privy Council observed:

"Those who dealt with him in his business transactions treated him as acting and entitled to act for himself alone, his debts being his own separate debts and not the joint debts of himself and others. In the course of years, from 1870 till the institution of the present suit in 1907. none of the members of his father's family ever asserted a legal claim to a share of his increasing wealth."

22. The decision of the Privy Council in AIR 1927 230 (Privy Council) is not relevant to the issue before us. It was held that it was the duty of a party personally knowing the whole circumstances of the case, to give evidence and his failure to do so would discredit his case.

23. *K.V. Narayanaswami Iyer Vs. K.V. Ramakrishna Iyer and Others*, and *Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh*, were also cited, which, again reiterated the principle referred to by us already.

24. In *Baikuntha Nath Paramanik (dead) by his LRs. and Baikuntha Nath Paramanik (Dead) by his L.Rs. and Heirs Vs. Sashi Bhusan Pramanik (Dead) by his L.Rs. and Others*, the joint member admitted that he acquired the property standing in his name with the aid of the usufruct of the lands belonging to the family. Possession of nucleus sufficient to make the acquisition was proved.

Narendrakumar J. Modi Vs. Commissioner of Income Tax, Gujarat II, Ahmedabad, states that, even a junior member of a family may function as the Kartha of the family by consent of other members.

25. Same principle is found in *Krishne Gowda Vs. Ningegowda*, the Bench observed :

"Of course in the case of acquisition by a junior member of a joint family in fact that the joint family possessed considerable nucleus capable of yielding income sufficient to enable acquisition of property is not by itself sufficient to hold that acquisition by a junior member of such joint family is with the aid of the joint family and the presumption to that effect cannot also be drawn. It shall have to be proved either by showing that it was acquired by the joint family funds or by proving that such junior member was in charge or management of the joint family property or business, though not the kartha of the family, capable of yielding income so as to enable him to purchase the property. In the latter case, if such junior member was not able to show that he had independent source of income or the consideration to the acquisition of the property had flown from the particular source not connected with joint family property, a presumption shall

have to be drawn that such acquisition of property was with the aid of joint family funds inasmuch as in such a case the junior member being in possession and management of the joint family property or business, his position will be akin to that of kartha."

A few others decisions, cited by the learned counsel are:

- (i) Shrinivas Ramchandra Nadig v. Vishnu Nagesh Nadig 1971 (2) Mys LJ 619;
- (ii) M.R. Rajasekharappa Vs. H.N. Siddananjappa, and
- (iii) Jandhyala Sreerama Sarma and Others Vs. Nimmagadda Krishnavenamma and Others (Presumption is that the eldest member is the manager of the family.)
- (iv) Lakshmi Ammal Vs. Meenakshi Ammal and Others,

The Madras High Court held at page 295 :

"It is now well settled that there is no presumption in Hindu Law that a business standing in the name of a member of a Hindu family is joint family business even when that member is the manager or the father, and that unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family or the joint family funds the business remains separate."

At page 297, it was held :

"There must be proof that the ancestral property was sufficient and productive enough and the income from the property was utilised for the purpose of the business."

(v) Binod Jena and Another Vs. Abdul Hamid Khan and Others, pertained to the acquisition of properties by the joint efforts of the brothers and it was presumed to be the property of joint family.

26. In the light of the above principles, we have to find out (i) the nature and extent of the joint family assets at, the time of the death of Rudrappa (father of the plaintiff); (ii) whether, joint family business was continued and if so by whom; (iii) to what extent the 1st defendant could and would have availed of the joint family assets, when he left the ancestral house at Thumminakatte and shifted his area of business to elsewhere; (iv) whether the four brothers though living separately, were, in fact, continued to function and conduct themselves as members of a joint family in relation to their business at various places.

RE. THE FAMILY ASSETS AND BUSINESS:

27. Several old documents were produced to show that the family had extensive agricultural lands and that the family was lending money. These documents are of the last decade of the 19th century and early decade of this century. Those documents are of not much significance in view of the partition deed dated 24-2-1928 in the larger family. Rudrappa and Veerabhadrapappa took one share

under this particular deed. The very next day there was partition between Rudrappa and Veerabhadrapa. Certified copies of these documents were produced before us along with I.A. No: II filed under O. 41, R. 27 of the C.P.C. by the appellants. These partitions were admitted as true facts, even before the trial Court. I.A. No. II was filed on 21-12-1990 and the respondents have not opposed the same. To have a clear picture of the family background and in view of the non-contest against allowing this I.A. No. II, we allow the same and admit these documents in evidence. They are marked as Exs. "A" and "B" respectively. Under Ex. "A", there was a partition between Rudrappa and Veerabhadrapa on one hand, and Basettappa and Mudiappa on the other; all of them were brothers. For the last ten years they were living separately. Immovable properties were divided under this deed (Ex. "A"); some agricultural lands and the house property were allotted to the share of Rudrappa and Veerabhadrapa. However, the very next day, there was a further partition between Rudrappa and Veerabhadrapa (vide Ex. "B"). It recites that they have been living separately for the past 5 years and movables had been partitioned earlier and the immovables were partitioned as per Ex. "B". Rudrappa was allotted western half of the house property in Thumminakatte and this half measured 10 1/2 x 45 cubits house and 10 1/2 x 18 back yard; further he was allotted agricultural lands measuring in all 2 acres 26 guntas (Sri Salur village of Shimoga Taluk). Veerabhadrapa was allotted quite a large extent of agricultural lands arid eastern half in Thumminakatte house. To compensate for the excess given to Veerabhadrapa, he paid Rs. 200/- to Rudrappa. The part of the house property allotted to Rudrappa had a wall bending and he had to repair it; if it is not repaired and it results in damage to Veerabhadrapa, Rudrappa shall have to pay him compensation. In Ex. "B", parties are referred to as agriculturists. Ex. "A" also refers to the parties as agriculturists.

28. The books of account marked in evidence pertaining to the business of Rudrappa commences with 1-11-1929 (Ex. P. 10; Ex. P11) and ends on 14-5-1932 (Exs. P. 36 and 37). Ex. P. 118 is the Roz book of the year 1902 to 1905 in respect of a business in the name of Basappa Dandappa Hampali, an ancestor of the parties. Ex. P. 114 is a similar book for the period 15-11-1923 to 16-10-1926 in the name of Rudrappa Basappa Hampali (obviously, father of the plaintiff). Exs. P. 2, 10, 36, 11 and 37 are the other similar books. These books indicate the existence of some business carried on by Rudrappa, but it is not possible for us to infer the quantity of business, Plaintiff has produced several bills under which purchases were made by Rudrappa; a few refer to the receipts of monies.

29. A few earlier documents indicate that the family has been advancing monies to others. But, these are all quite old documents and from them, it cannot be inferred that even at the time of Rudrappa's death in the year 1934, he was carrying on money lending business. None of the books prove any outstanding recoverable by Rudrappa.

30. It is quite probable that Rudrappa was carrying on business at Thumminakatte and the family also was a prosperous family earlier. However, the partition deeds Exs. "A" and "B" in no way aids the case of the plaintiff that Rudrappa possessed considerable wealth. The agricultural land allotted to his share was only 2 acres 26 guntas and a small house (part of the house at Thumminakkatte) requiring repairs, the only other immovable property which came to his share. There is no reference to his business at all Surprisingly, the parties are referred as agriculturists and not as traders. If the dominant activity of Rudrappa was business, normally, a reference to it would have been found in those two documents. It was quite likely that the earlier, larger family was quite prosperous with extensive agricultural lands.

31. The business of Rudrappa had no name and it is not even proved before us the location of his business. Plaintiff produced several documents/books, which he found at Thumminakatte. None of them cover the period subsequent to May, 1932. Ex. P. 47 shows that on 23-5-1933, the 1st defendant purchased four bags of rice, for Rs. 24/-. The next document is dated 12-10-1927 (Ex. P. 48) under which 1st defendant is shown as having purchased 10 bags of parched rice, in the name of 9th defendant on 12-10-1937. Ex. P. 49 is a post card dated 6-7-1938 written to 1st defendant by M/s. Devaru Chennabasappa and Sons complaining that some saree and money have not been returned.

32. According to the plaintiff, Ex. P. 50 dated 6-7-1938 is the money order form filled up by the 9th defendant to send Rs. 6-50 to the said ChennaBasappa and Sons, but not sent. We do not have any document or book showing that these brothers carried on any business between May, 1933 to 1938. The post card Ex. P. 49 does not show that defendants 1 and 9 were carrying on any considerable trade; in fact, it indicates that the defendants 1 and 9 were not prompt in returning some money due to the written of the post card, which in turn indicates that they were not prosperous at all.

33. Plaintiff got Commissioners appointed to take inventories of the moveable including books of account etc., with other defendants. The Commissioners were appointed ex parte. None of the seized books indicate the continuation of the business of Rudrappa by the defendants 1, 9 and 13, after Rudrappa's death. In fact, the books marked in evidence, as already noted by us, show that the entry in the books, end a few months prior to Rudrappa's death. The 9th defendant who has written many of the entries, stated that there were no other books. The 9th defendant, has practically supported the plaintiffs case to claim a share in the business and properties standing in the name of 1st defendant. He is the eldest of the brothers.

34. Ex. D 6 shows that the ancestral agricultural land of Rudrappa was sold within a few years of his death. The learned counsel for the appellants pointed out that it was a revenue sale and contended this sale of the family property established that the family was undergoing financial crisis. The case of the alleged prosperity of the family stood demolished by this sale.

35. The initial burden to prove the existence of sufficient family property which could form a nucleus for other acquisition or for the business carried on by the brothers, is on the plaintiff. Mr. Chandangoudar contended that, plaintiff was a child at the relevant time and he cannot be attributed with any knowledge of the family's affairs; the proved circumstances are such that it is for the defendants 1, 9 and 13 to prove that the family lost its vast assets and the business carried on by them in their names, were, without the aid of any family asset.

36. Existence of sufficient family asset so as to form a nucleus for further acquisition is a question of fact. Such a fact can be proved by direct evidence or circumstantial evidence. However, circumstantial evidence should be clear, unequivocal and clinching, as otherwise, there is every danger of the self-acquisitions of a person being lost to another who claims a share in it, based on the past prosperity of the family. Suit is filed nearly 48 years after the death of the father. All these years defendants 1, 9 and 13 and the children of the 1st defendant have been working hard, and in the process they were able to acquire some properties. The plaintiff, though, was nearly 50 years of age has not contributed anything for the savings of these defendants. He has taken shelter under a vague plea that he was assisting his brothers in their business; a plea, which we would presently show cannot be accepted. Obviously, the plaintiff realised that with the crossing of middle-age, time has come for him to prepare for his old age. The need for security in life has persuaded him to look at the green pastures developed by his brothers, who spent their entire life in hard toil and industry, while, the plaintiff seems to have spent a bachelor's leisurely life as a social worker.

37. The first of the acquisition of property attributed to the 1st defendant, is a site purchased in the name of his wife, the 2nd defendant, in the year 1951, for Rs. 1,000/-; the site is at Hirekerur. A house was built thereon, in the year 1958. According to the defendants 1 and 2, site was purchased out of the saving of 2nd defendant and by the sale of her jewellery. Even assuming that the 1st defendant paid for the purchase of this site, it cannot be inferred that, the purchase money came from the joint family asset. Sixteen years had elapsed after the death of the father (Rudrappa) by the time, this site was purchased and it took another 7 years for him to build house on it.

38. The second aspect of the main question is, whether the 1st defendant had availed of the benefit of any family assets to carry on any trade in this name, after he left the ancestral house at Thumminakatte. This, mainly depends upon the oral evidence.

39. The evidence discloses that 1st defendant has been struggling hard to stabilise in any particular place and he was moving from place to place to eke out his livelihood. If actually he had taken any sufficient family assets (either by way of gold or trade-in-stock) to carry on business at Hirekerur (while leaving Thumminakatte), it is inconceivable that he had to struggle so hard; he would have started a good business at Hirekerur from the very beginning.

40. Circumstantial evidence nowhere links the business started by the 1st defendant, with the family business of Rudrappa or with any of the assets left by Rudrappa. In the absence of such a link, Court cannot infer that the 1st defendant (a junior member of the family, as he was younger to the 9th defendant) started business on his own, by availing of any aid from the family.

41. Plaintiff asserts that the 9th defendant has been suffering from epilepsy and therefore management of the family affairs was with to 1st defendant.

42. Admittedly, the 9th defendant was helping his father, writing the books of account. No evidence has been placed to show that 9th defendant's ailment caused in him any serious disability. Admittedly, the 9th defendant also carried on business at different places and he has been quite successful in his life. He is married and has children; he has acquired properties at Shimoga. From these factors, inference is irresistible that the 9th defendant was quite capable of leading a normal life and could engage himself in income generating business. It is not the case of the plaintiff that some miracle cured the 9th defendant of the epilepsy. If history could be referred we may refer to the story of Julius Caesar, who was not deterred in any way by the epilepsy suffered by him.

43. According to Mr. Chandangowdar, while appreciating the oral and documentary evidence, it is necessary to note that the first defendant set up a specific plea to the effect that the father, Rudrappa, had no other immovable property except the house property at Thumminakatte which was not yielding any income and that the grown up children of Rudrappa were eking out their livelihood by coolie work. This case on the face of it cannot be accepted and therefore, it was contended, that the first defendant tried to suppress the truth from the Court which in turn would prima facie supports the case set up by the plaintiff.

44. The specific case pleaded by the plaintiff was that defendants 1, 9 and 13 and their late father Rudrappa including the plaintiff belong to a Hindu undivided family and the family was carrying on agricultural operation as well as business in grocery and cloth and that the family was quite rich; there was money lending business also. The family had sufficient gold, silver and cash as well as Immovable properties. Rudrappa died when plaintiff was two years old in the year 1936/1934. The joint family continued to carry on the business and continued to carry on the business including the business at Hirekerur, Shimoga and Haramaghatta. The capital invested in this business was about Rs. 2 lakhs (plaint is dated 16-4-1982). The family also had purchased Immovable properties. According to the plaint averments defendants 1, 9 and 13 continued to be joint and continued the business in grocery, textiles and money lending. However, they have purchased some properties in the names of their respective wives and children.

45. In June, 1982 the Commissioners appointed by the Court filed their reports. It is obvious that they were appointed ex parte. They have also taken inventories

and we have already noted that there is no document to substantiate the plaintiff's claim that the family business was continued after May, 1933 and that as per Ex. D5 Rudrappa died on 1st February, 1934. In his evidence plaintiff as P.W. 1 asserted that Rudrappa died in the year 1936. It may be a case of mistake or may be a case to bring the date of death closer to Ex. P48 (dated 12-10-1937) and other subsequent documents. As P.W.-1 he asserted that more than hundred tolas of gold articles and more than Rs.25,000/- in cash as well as the capital employed in the grocery business were available to the family at the time of the death of Rudrappa. Several properties standing in the name of various defendants were claimed by him as belonging to the HUF, and that the joint family business in grocery, cloth and money lending were continued by all the children after the death of the father. However, the management was with the first defendant because the 9th defendant was suffering from epilepsy from his childhood. In addition to this the first defendant was clever. Therefore, according to P.W. 1, after the death of the father, defendant No. 1 took the management of the entire family properties, gold, cash and business. P.W. 1 had asked first defendant and others to partition the properties but he was asked to go to the Court. He speaks to the various documents produced, most of which pertains to the purchase of areca during the life time of Rudrappa. No substantial evidence is forthcoming as to other business allegedly carried on by Rudrappa, at least after the year 1920. As to the money lending business, it seems to be a case of ancient history. The documents produced in respect of the period after 1937 are of not much avail to the plaintiff because there is no dispute that the defendants 1, 9 and 13 were carrying on separate business in their names at different places. According to P.W. 1 all the brothers were afraid of first defendant and they have been treated as ordinary employees by him and the entire gold jewellery of the family was kept by the first defendant. When the first defendant purchased the properties in the name of his sons at Hirekerur taluk, all other brothers including the plaintiff protested and that they have been asking for their due share for the last 10 to 12 years; this statement was made by P.W. 1 in the year 1985 that means the demand for partition was there at least since the year 1975. However, the suit was filed only by the plaintiff in April, 1982.

Defendants 9 and 13 left for Shimoga and Haramaghatta and started separate business, being disgusted by the conduct of the first defendant, says P.W. 1. If that is so, we fail to understand as to why they never asserted themselves by seeking partition of the alleged family properties. According to P.W. 1, even these defendants 9 and 13 were paid by the first defendant to start their new businesses. However, P.W. 1 states that he had not seen as to how defendants 9 and 13 started their business. According to him the jewellery, found on the body of the daughter-in-law of the 9th defendant also belong to the joint family. P.W. 1 states that he had studied first part B.A. and Pre-Law course and that he came of age in the year 1950. He gave up Pre-LLB. in the year 1964. It is quite likely that P.W. 1 was born in the year 1932. P.W. I asserts that he has been working in the family business since the year 1964 and continues to be so and that he has been

visiting Hirekerur, Thumminakatte, Davanagere, Haramaghatta and Shimoga for the purpose of business at the directions of the first defendant. However, we don't find any independent material to substantiate this assertion of P.W. 1 that he has been working or doing business at the behest of first defendant. He admits that his name is in the voters list at Hirekerur but it is not found along with other members of the family of the first defendant. He has been staying in a room belonging to one Thambaku, who has been his friend. P.W. 1 admitted that he was not in a position to give the details of the family properties during the time of his father Rudrappa. He was also not in a position to state the movables available at the time of Rudrappa's death. However, there was only one immovable property being the house at Thumminakatte belonging to the family. He is not aware of the sale of the agricultural land under a public auction. This question was asked with reference to the only agricultural land allotted to Rudrappa in the partition deed and we find that it was sold in a public auction during the years 1936-37 as entered in the revenue records dated 25-7-1937 (vide Ex. D6). The fact that the only ancestral agricultural land was allowed to be sold in public auction shows that the family was in financial distress during the year 1936- 37. This fact is also corroborated by the fact that on 6-7-1938 a letter was written to the first defendant by M/s. Devarmani Channa Basappa and Sons complaining of the family's failure to return a small amount of Rs, 8/- or so. The said letter was in a post card marked Ex. P49.

P.W. 1 at a later stage of his evidence stated that the cloth business was closed after the death of the grandfather and the father started the business in areca, tobacco and grocery. He admitted that he has not produced any evidence in support of the fact that the capital of the money lending business was over Rs. 25,000/-. In para 29 of his deposition (recorded on 5-2-86) P.W. 1 stated that When the father died, the family had only grocery and jaggery business at Thumminakatte. Grocery business was looked after by defendants 1, 9 and 13, while jaggery business was looked after by 13th defendant. Both these businesses were being carried on in the family house at Thumminakatte. According to him the grocery business at Hirekerur was started in the year 1968 and the first defendant and his children stayed permanently at Hirekerur to look after the said business. The 9th defendant started to reside at Shimoga since the year 1968 and he built a house at Shimoga and has been carrying on big grocery business. Earlier to going to Shimoga, 9th defendant was in Davanagere for about 4 to 5 years; earlier thereto he was at Hirekerur, residing in the house of one Badigera. He was carrying on the business in areca and tobacco; 9th defendant was in Hirekerur for 15 years. From this statement it is clear that according to P.W. 1 the 9th defendant came to Hirekerur in or about the year 1948. 9th defendant was residing separately at Hirekerur by paying rent and at that, time defendant 1 and his children were residing at Halakatti's house. In other words, the inference is that, between the years 1948 and 1963, defendant 1 and his children were residing separately in the house belonging to one Halakatti. P.W. 1 states that they were also carrying on the business in areca,

tobacco and jaggery.

The 13th defendant was carrying on the grocery business at Thumminakatte. However P.W. 1 admitted that for the last 15 to 20 years 13th defendant was not carrying grocery business at Thumminakatte and for the past 15 to 20 years the 13th defendant was at Haramaghatta doing grocery business. In other words, according to P.W. 1 the 13th defendant was not in Thumminakatte but was at Haramaghatta since about the year 1966 or 1971. P.W. 1 asserted that 9th defendant was suffering from epilepsy from his childhood. No such assertion is made in the plaint. Plaint does not state that the first defendant was managing the family affairs after the death of Rudrappa. The plaint indicates that defendants 1, 9 and 13 continued to carry on the family business. If so, normal inference is that the managership of the family would be with the eldest son of Rudrappa, the 9th defendant. Obviously, to explain away the claim of the plaintiff that the first defendant had the benefit of the family funds, a new case that the 9th defendant was suffering from epilepsy was developed in the evidence. We have already noted that the 9th defendant has been a successful businessman and there is no independent material on record to show that the 9th defendant had suffered by the ailment attributed to him. Even assuming that he was suffering, from epilepsy, it looks to be of a minor type which did not cause any disability.

P.W. 1 further states that the capital invested at Shimoga was Rs. 25,000/- to 30,000/- while the investment at Hirekerur was about Rs. 1 lakh. He admits that he has no documentary proof in support of this assertion. P.W. 1 asserts that he used to take money from the shops as and when he required, though defendants 1, 9 and 13 did not share the income amongst themselves. While 9th defendant has been residing in Shimoga permanently the 13th defendant was at Thumminakatte earlier but now he is at Haramaghatta permanently.

P.W. 1 admits that the first defendant did not carry on any family business in the presence of the plaintiffs (vide para 31 of the deposition). He also admitted that the first defendant purchased the property for the first time in the year 1951 which was an open site in the name of his wife. The third defendant who is the son of first defendant was residing separately from his father. P.W. 1 also admits that even now third defendant has been doing business in areca, tobacco, sugar and tea in the weekly bazars.

In para 33 of the deposition we find a clear admission on the part of P.W. 1 that the defendants 1 and 9 were going to the village shandies week after week to carry on the business in the villages near about Hirekerur. He also admitted that the first defendant was staying with Andanappa Halakatti (a close relative), while studying in the school and there after to learnt the business. Most of the documents produced by him were in the family house at Thumminakatte and in the house of Hirekerur. P.W. 1 admitted that only 13th defendant was residing at Thumminakatte and no other brother. He admits that his relationship with 13th defendant was very cordial and affectionate. The distance between Hirekerur and

Thumminakatte is 15 miles. He is not in a position to explain as to how Exs. P103 to P119 are connected to the alleged family business. He admits having written something in Ex. P119. He also admits that first defendant was going to Sunakallabidri village for doing business which was 12 miles away from Hirekerur and Sunakallabidri was a small village. Hediya is adjacent to Sunakallabidri. First defendant was also going to Hediya for doing business from Hirekerur. He admits that defendants Nos. 3 to 8 obtained loan from the bank for the purpose of their business. He is not aware of the price paid for the car and the motor cycle. It was suggested to P.W. 1 that he was not doing any business but was engaged in social service after he completed his education. He denied the suggestion. According to him whenever he found time after the business he was doing social service. He was a member of a Committee constituted at Hirekerur to celebrate the fourth centenary celebrations of Sarvagna Murthy (a renowned Kannada Poet). P.W. 1 was also the editor of the magazine published on the said occasion.

46. From the above evidence of P.W. 1 it is clear that he is not in a position to point out that the family had sufficient assets at the time of the death of Rudrappa. No where he states that the first defendant had availed of any of the family assets to start a separate business, except some vague assertions. It is also clear from this evidence that the first defendant was moving from village to village to sell commodities at village shandies. The evidence of P.W. 1 does not establish the availability of sufficient nucleus, formed out of the family assets to enable any of the defendants 1, 9 and 13 to start fresh business or acquire properties. No definite statement is forthcoming that the defendants 1, 9 and 13 as well as plaintiff were celebrating any family functions jointly and that there was any continuous intermingling amongst the members of the family. No inter se connection between the respective business standing in the name of defendants 1, 9 and 13 is indicated. P.W. 1 though educated is not able to point out from the documents as to what extent the alleged family business was prosperous. He pleads complete ignorance of the sale of the only agricultural land which came to the family. He has not given the details of the gold and silver articles allegedly taken by the contesting defendants, which belong to the family.

47. P.W. 2, aged 90 years, was examined obviously to support the plaintiffs case. Earlier he was a businessman at Ranebennur. He knew Rudrappa. He was going to Thumminakatte every Wednesday and Thursday. He had seen the shop of Rudrappa. According to him Rudrappa's business had capital of several lakhs and defendants 1, 9 and 13 were looking after the business. Rudrappa's sister was married to a Councillor in the palace of Mysore Maharaja. The family of Hampali (that of Rudrappa and his brothers) had built a temple, well, etc. at Thumminakatte and this witness says Rudrappa had given several immovable properties to the temple. This statement seems to be highly exaggerated because even P.W. 1 does not speak to the same.

At one stage P.W. 2 stated that after the death of Rudrappa his three children,

defendants 1, 9 and 13 continued the family business. However, immediately thereafter, in the cross-examination he stated that he was not aware of the family affairs of Rudrappa after his death. The shop of P.W. 2 was closed in the year 1932-33. He does not remember whether Rudrappa died earlier to or thereafter. This witness is not aware of the extent of the lands that belonged to Rudrappa. His knowledge that Rudrappa gave lands to the temple was based on hearsay, even according to P.W. 2 (vide para 5 of his deposition). Again he says, that he is not aware whether Rudrappa had any property at Thumminakatte. On the face of it this evidence has to be read only to be ignored.

48. P.W. 3 is another businessman from Davanagere. He knew Rudrappa. He asserted that Rudrappa had agricultural lands and other business including money lending. He asserts that Rudrappa had silver and gold articles in his house weighing about two kgs; again he stated that the gold was two kgs. and silver was 480 tolas. He knew this because he was, for sometimes eating in the house of Rudrappa and during the festival days silver and gold articles used to be kept for pooja. He asserts that after Rudrappa's death the first defendant was managing the family affairs and in the year 1942 first defendant took the capital from the family and went to Hirekerur, thereafter defendants 9 and 13 continued the business at Thumminakatte. This witness belongs to Thumminakatte originally, subsequently he shifted to Davanagere. The brother of Rudrappa, according to him, was doing jaggery business and according to this witness Rudrappa's children sold the family lands. We may once again note here that the material on record shows that only one piece of land was allotted to Rudrappa which was sold in public auction obviously for arrears of revenue as per Ex. D6. He does not know anything about the several businesses that are being carried on by defendants 1, 9 and 13. He admits that he was not weighed the gold and silver articles with the family of Rudrappa. The basis of his assertion that the first defendant and his children availed of the family funds for their business is not forthcoming in his evidence. A statement of this sort could be made by any witness; though no particular suggestion is made as to why he should support the case of the plaintiff. In his re-examination, after the closure of the evidence, it was brought out that 9th defendant was suffering from epilepsy. At the most this witness could show that during the brighter days of Rudrappa the latter was quite prosperous.

49. P.W. 4 is another witness from Ranehennur. According to him he knew Rudrappa and speaks to the business of Rudrappa. He asserts that first defendant brought the capital from Thumminakatte to start his business at Hirekerur and initially for two or three years first defendant alone was carrying on the business, subsequently he brought his brother the 9th defendant. He speaks as if he knows the purchases of first defendant, of immovable properties. He says, even Eswarappa, the 13th defendant, was participating in the business of the first defendant at Hirekerur, a case which we do not find even in the evidence of P.W. 1. He also says that he has not seen the properties of Rudrappa except the house and the shop at Thumminakatte. However, he states that

defendants 1 and 9 were residing separately at Hirekerur and subsequently both of them left Hirekerur and shifted to Davanagere. He denies that first defendant left Hirekerur and went to Sunakallabidri and thereafter to Hediya. He also states that his house was at Hirekerur and was the third one out of the five in the same lane. However this witness states that he could not give the name of the shop of the first defendant at Hirekerur and that he was not present when first defendant took the goods and other articles from Thumminakatte.

50. It is not necessary to refer to P.W. 5 because he is an advocate who was appointed as Commissioner.

51. 9th defendant examined himself as D.W. 1 In the written statement he had practically supported the case of the plaintiff except regarding the properties standing in his name. In fact he had not filed an independent written statement but adopted the written statement of 13th defendant. In the written statement of the 13th defendant, the business at Shimoga and Haramaghatta were not admitted as belonging to the family. It was denied that any family asset was used to start these trades. However, it was stated that the family had about 100 tholas of gold and Rs. 25,000/- cash at the time of Rudrappa's death. But, the money lending business was not continued after his death. Para 5 of this written statement refers to the epilepsy of the 9th defendant and, therefore, according to him, the first defendant was managing the family affairs and the entire family assets was with the first defendant and defendants 9 and 13 were deprived of the same and that they had not availed of the benefits of the family assets in any manner. D.W. 1 stated that the first defendant went to Hirekerur during the year 1940-41 and after three years he called this witness also to Hirekerur. According to him, this witness and the first defendant were residing together in a rented house, (a fact inserted in the evidence for the first time). In view of the epilepsy he could not move out and therefore he was writing the accounts of the shop at the behest of the first defendant. They were residing together for about four to five years. In view of the dispute among the women they were residing separately though business was being done jointly. He was at Hirekerur for about 20 years. In other words, between 1944 to 1964 this witness must have been in Hirekerur. Subsequently first defendant asked him to develop the business at Davanagere and every week first defendant used to go to Davanagere and collect the profits. After first defendant purchased the lands at Hirekerur he stopped assisting 9th defendant and thereafter 9th defendant continued the business by borrowing from other traders. After sometime he shifted to Shimoga, where he purchased a house in due course. He speaks to the several writings in the Roja books maintained during his father's time. According to this witness, his father was doing wholesale business at Thumminakatte and he had stock-in-trade worth about Rs. 45,000/- to Rs. 50,000/- (there is nothing to substantiate this figure in any of the books marked in evidence). He had given the key of the house to first defendant and while leaving Thumminakatte the first defendant had taken the entire gold and stock-in-trade, and out of the family assets the first defendant purchased the properties at Hirekerur. We are constrained to observe here that it

looks to be quite artificial that the first defendant would have been permitted to remove the entire gold and stock-in-trade, while defendants 9 and 13 continued to stay in the family house. Further, if the first defendant had carried goods worth Rs. 45,000/- to Rs. 50,000/- in the year 1940-41, he should have taken considerably a large building for his business at Hirekerur, but we don't find any material on record to justify such an assumption.

This witness (9th defendant) admits having written several entries in the roja books, but no where clearly and unequivocally speaks to the turnover of the business. He has not pointed out the surplus funds available to the family at the time of the father's death nor does he speaks to the basis for the inference that his father left goods worth about Rs. 45,000/- to Rs. 50,000/-. According to him his father's sister's daughter was married to the Councillor at Mysore. P.W. 2 had stated that Rudrappa had given in marriage his sister to the Councillor, a statement now contradicted by the statement of D.W. 1.

D.W. 1 again asserted that the entire family wealth was shifted by first defendant when he left Thumminakatte. According to him a temple was built in Thumminakatte by the family ancestors. He does not say that Rudrappa built the temple nor the well for the benefit of the public. The money lending business was carried on during the grandfather's time according to this witness. Most of the family properties were sold during the father's and grandfather's time, says this witness. The family house at Thumminakatte measured 15 ft. x 45 ft. to 50 ft. This measurement seems to be of the entire house. However, he could not say as to how many loads of goods were in the house at the time of his father's death. According to him the first defendant carried 7 to 8 cart loads of goods from Thumminakatte to Hirekerur. Immediately thereafter he stated that he was not in a position to give the number of cart loads. He repeats that he was residing with the first defendant at Hirekerur, which, we may point out once again is contradicted by other depositions. He says that he was at Hirekerur till about 1969. He could not state the extent of the business carried on by the first defendant in his shop at Hirekerur, which again shows that the 9th defendant obviously was not attending to the business of the first defendant nor was he writing the accounts of the said business. He admits that he was working in Veerashiva Samaja. He is not aware of the professions carried on by the children of first defendant. In para 24 of his deposition there is an interesting statement; he states that he was not aware of the advocate engaged for him and it was known to the plaintiff and that the plaintiff knew why a common advocate was engaged for 13th defendant and this witness. He admits that there was no cloth shop. It is on record that the 9th defendant was employed by a Veerashiva Samaj on a monthly salary of Rs. 30/- and subsequently it was increased to Rs. 35/-. The relevant proceedings book is marked as Ex. D18 and spoken to by D.W. 5, who was at the relevant time member of the Trust and President of the Samaj. The evidence of D.W. 5 and Ex. D18 shows that the 9th defendant was employed as Secretary on a monthly salary of Rs. 30/- which was increased to Rs.35/-. Though 9th defendant asserted that he returned the salary, there is no evidence

in support of the same.

52. The 13th defendant was examined as D.W. 2. He repeats the same story about gold and other alleged family properties. According to him the first defendant removed 5 to 6 cart loads of goods from the shop from Thumminakatte to Hirekeru. According to him 9th defendant was residing with the first defendant for 3 to 4 years at Hirekerur and that the first defendant himself was looking after the business at Thumminakatte though the shop was being run by the 13th defendant. First defendant refused to give any capital for the business at Thumminakatte after he purchased sites at Hirekerur. This witness closed the business at Thumminakatte and went to Haramaghatta to start a new business. According to him the business standing in the name of the 9th defendant belongs to the 9th defendant and the business standing in the name of the 13th defendant belongs to the 13th defendant. However, the business and the properties in the name of first defendant and his children belong to the entire family. He admits that the family house continues to be in his possession and at present it was standing in his name. He states that the account books of the business at Thumminakatte was taken away by the first defendant, a statement which is not found in the deposition of the 9th defendant. He started his business at Haramaghatta in the year 1970.

53. The first defendant was examined as D.W. 3. According to him he learnt to do business from his uncle, a statement which is supported by the evidence of P.W. 1 also. When he came to Hirekerur he had taken a premises near a temple by paying Rs. 2/- per month. He started the business in areca and tobacco by going to weekly shandies. He started the business by borrowing the capital from others. The 9th defendant came to Hirekerur after two or three years and was residing separately. According to first defendant he was doing business for at least two to three years at Hirekerur and thereafter went to Sunakallabidri which was a bigger village. He had a shop of eatables. After two or three years, again he had shifted to Hediya village, where also he had a shop of eatables for about five to six years. Thereafter he returned to Hirekerur again. His second son was born at Hediya village. After shifting to Hirekerur again he started areca and tobacco business. He speaks of various trades in which his children were engaged. His eldest son has been residing separately. According to him he had not given any capital to his children to start their business. He denies having taken any stock-in-trade or movables while going to Hirekerur, leaving Thumminakatte. He denies that plaintiff or any of his other brothers worked in his shop. According to him the plaintiff does not reside in any place permanently. According to him the 9th defendant was quite healthy and capable of managing the family affairs. It is not necessary to refer to several of his statements found in his lengthy deposition. He had not maintained any account books because according to him he was going to various shandies to do the business. He admits having signed the money order form, Ex. P50. He was shown the post card Ex. P40. According to him his father's sister was married to a Councillor at Mysore. He denied that his father was carrying on the money lending business.

In his deposition nowhere he stated that the children of Rudrappa were eking out their livelihood by coolie work as averred in the written statement. However, nothing is elicited from him to draw the inference that he must have taken the alleged family gold and stock-in-trade.

54. D.W. 4 is the sons of first defendant and is a party as a third defendant. He speaks to his earnings. It may not be possible to accept the case of the first defendant and his children, that all their earnings or the properties standing in their names were obtained without the aid of the first defendant. However it is also not possible to infer that these defendants had availed of the benefit of any other family asset for their business or to acquire properties.

The first defendant had left the family house in or about the year 1940-41; a vacant site was purchased in the year 1950 and thereafter the properties in the names of his children were purchased on or after the year 1970. In the meanwhile the first defendant was carrying on his business and is quite likely that he helped his children to start independent business and acquired properties. An exaggerated case pleaded in the written statement cannot by itself be a ground to accept the plea of the plaintiff. The plaintiff will have to succeed on the strength of his case and not by the weakness of the case pleaded by the defendant.

55. D.W. 5 speaks to the employment of the 9th defendant as the Secretary of Veerashiva Samaj. D.W. 6 was examined to prove that the first defendant was carrying on the business in eatables in Hediyaala village.

D.W. 7 was examined by the first defendant. She was aged 75 years at the time her examination. She is a freedom fighter. According to her first defendant and his brothers were residing together and were carrying on the business jointly. She was not aware whether first defendant took any asset while leaving Thumminakatte. Though she stated that the brothers were carrying on the business together at Thumminakatte she also stated that she had not seen the said shop (Para 2 of her deposition). According to her when she came to Thumminakatte the family of the first defendant and the plaintiff was in difficulties. She has not gone to the house of the plaintiff or of defendants. However she states that no member of the family went to do coolie work. According to her it was not correct to state that first defendant took gold and silver and cash while going to Hirekerur. We don't think this witness knew anything which has a bearing on the issue before us.

56. A consideration of the entire evidence, and documentary, at the most, lead to the inference that once upon a time the family was quite prosperous. The nature of the business, however, changed from time to time. Even the plaintiff admits that the cloth business was closed during his father's time. Material on record also indicates (that money lending business was part of the family's ancient history. Rudrappa, no doubt, was carrying on some business in grocery during his lifetime. The 9th defendant was assisting him, at least in writing the accounts.

However, by the time Rudrappa died something must have happened to the family business because we don't have any clear picture either of the family's business or of the family's other assets. Obviously the family must have suffered loss. The only ancestral property was allowed to be sold in public auction; the family house was in a dilapidated condition even at the time of the partition between Rudrappa and his brother. The family business was being carried on in the same building. The first defendant was sent to a close relative to attend the school as well as to learn the art of business. However, immediately after the death of Rudrappa within a short period, the only agricultural land was sold in public auction and for the first time it looks that a creditor complained of the delay in making the payment by the family of Rudrappa (as indicated by Ex. P40, the post card). The fact remains that the first defendant left Thumminakatte in or about the year 1940-41; if the family was prosperous there is no reason as to why he should leave the family home. The plaintiff, as P.W. 1, admits that the first defendant was doing business by going to village shandies week after week. This is a strong circumstance indicating that the first defendant was not in command of any valuable assets and that he could not stick to a particular place to carry on the trade. The 9th defendant was employed for some time and he was not residing with first defendant at Hirekerur; even though there was no partition between the brothers after the death of Rudrappa, that does not mean that the business standing in the name of first defendant and his sons could be presumed to be that of the family. We have already noted that in the case of a business there is no presumption that it belongs to the joint family. That fact will have to be proved and established.

57. Even according to the plaintiff the first defendant started his business at Hirekerur in the year 1968 about 28 years after he left the ancestral home. Between these years he was obviously moving about from place to place. It is impossible to imagine that defendants--9 and 13 or even the plaintiff could have kept quiet, without demanding their due share in the family assets in case the assets with the first defendant and his children belong to the entire family. According to the defendants-9 and 13, the first defendant refused to help them and they started their own business. If so, it is unimaginable that they would have kept quiet without insisting upon their rights in the alleged valuables belonging to their family, such as gold and silver, etc.

58. The plaintiff has failed to show that the first defendant was actually in management of the family affairs. Admittedly the 9th defendant is the eldest brother. The presumption is that he continued to be the manager. It was he who was assisting their father in writing the accounts. Even according to the plaintiff, neither the 9th defendant nor the 13th defendant had with them any of the family valuables, though in the plaint he asserted that all the three elder brothers were managing the family affairs. At the time of the trial, the plaintiff, 9th defendant and 13th defendant joined together to claim a share each in the properties of the first defendant and his children by asserting that only the first defendant had obtained possession of the valuables belonging to the family.

59. The trial Court was impressed by the history of the family and the old account books produced before it. The trial Court missed the real point to be considered; the trial Court has not focused its attention as to whether there is any evidence, direct or substantial, to infer that the alleged family business was continued after the death of Rudrappa and whether the first defendant had availed of the benefit of using the alleged family assets to start his own venture at Hirekerur. Without a finding as to the requisite nucleus traceable to the family assets, it is not possible to hold that the earnings and the savings of the first defendant and the children would belong to the entire joint family. Since the approach of the trial Court itself was erroneous, naturally its other conclusions become faulty.

60. Regarding the house at Thumminakatte there is no dispute that it belongs to the joint family and consequently the plaintiff is entitled to claim his share, only to that extent the judgment and decree of the trial Court is affirmed. If the plaintiff so chooses he may move the Court for final decree in that regard, In other respects the judgment and decree are set aside.

61. In the result, appeal is substantially allowed; suit is dismissed except regarding the house at Thumminakatte.

62. However, parties shall bear (heir own respective costs throughout.

63. Appeal partly allowed.