

(2013) 08 BOM CK 0235

In the Bombay High Court

Case No : Notice Of Motion No. 166 of 2013 in Suit No. 75 of 2013

Gopal Bhagwandas Ahuja

APPELLANT

Vs

Jagdish Bhagwandas Ahuja and Others

RESPONDENT

Date of Decision : 27-08-2013

Acts Referred:

Citation : (2013) 7 BomCR 885

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Shailesh Shah, assisted with Mr. S.U. Kamdar, Ms. Mamta Sudh, Mr. S.K. Srivastava, Ms. Manorama Mohanty and Mr. Gunjan Shah instructed by S.K. Srivastav and Co, for the Appellant; Aspi Chinoy and Mr. D.D. Madon Mr. Zal Andhyarujina, Mr. R.V. Gandhi, B.S. Damodar, Mahek Karanbar, B.P. Pathak instructed by y M/s. Kanga and Co. for Defendant No. 1, Mr. Girish Godbole, Vishal Kanade and Mr. Sandip Dhangar instructed by y Jayesh R. Vyas for Defendant Nos. 2, 4, 5, 7, 9, 10 and 11, Mr. Kalpesh Nansi for Defendant No. 6., Mr. Bharat Vaishnawa for Defendant No. 8, Mr. P.K. Dhakephalkar and Mr. Vijay Nair, instructed by . Ravi Talreja, for Defendant No. 3, Mr. Kedar Desai instructed by y Desai Desai Carrimjee and Mulla for Defendant No. 12, Ms. Kaushika Muthukumar Along and Ms. Reema Barve instructed by y R.G.M. Law Associates for Defendant Nos. 13 and 14, Mr. Virag Tulzapurkar for Defendant No. 15, Mr. Chirag Balsara and Fatima Diamondwala, Ashraf Diamondwala, Hamza Tatli instructed by y M/s. Diamondwala and Co. for Defendant No. 17 to 19, Mr. Janak Dwarkadas and Mr. Devitji, For Defendant No. 16, for the Respondent

Judgement

R.D. Dhanuka, J.—Plaintiff who has filed suit for declaration that the plaintiff is entitled to 1/10th share of the assets and properties set out in the plaint, and for partition of the said properties by metes and bounds on the ground that all such properties were properties of the joint family, has prayed in this notice of motion for appointment of the Court Receiver in respect of the properties described in Exh. B and injunction in respect thereof. Some of the facts which emerge from the pleadings and documents filed by both the parties and which are relevant for the purpose of deciding this notice of motion are as under:

CASE OF THE PLAINTIFF:

(a) Plaintiff and defendant nos. 1 to 8 are children of one Mr. Bhagwandas Ahuja who expired on 14th April, 1996 (hereinafter referred to as the "said deceased"). Defendant Nos. 1 to 4 are the brothers of the plaintiff. Defendant nos. 5 to 8 are sisters of the plaintiff. Defendant no. 9 to 11 are the children of the deceased sister of the plaintiff and defendant nos. 1 to 4 and defendant nos. 12, 13 and 14 are the son, daughter in law and daughter of defendant no. 1 respectively. Defendant nos. 15 to 19 are the companies in which plaintiff and/or defendants are share holders.

(b) During the period between 1942 and 1946, the said deceased was carrying on business of spices and dry fruits at Chaman in Pakistan. During the period between 1948 and 1969, the said deceased carried on business in partnership in the name of M/s. Moolchand & Co. at Bhat Bazar, Maszid Bundar, Mumbai 400 009. In the year 1948, the said deceased took a flat at Malad. In the year 1950, defendant no. 1 was born. In the year 1958, plaintiff was born. In the year 1969, M/s. Moolchand & Co. stopped its business as its partners were likely to face insolvency. The said deceased was one of the partners in the said firm M/s. Moolchand & Co. On 5th December, 1969, the said deceased started the firm "M/s. Kanayalal Rameshkumar" with defendant no. 1 who was his eldest son and had just attained majority, as partner. It is the case of the plaintiff that since the said deceased was likely to face insolvency proceedings he did not become partner of the said firm, however, was in control thereof throughout. On 20th February, 1970, the said firm M/s. Kanayalal Rameshkumar was reconstituted with effect from December, 1969 when other children of the said deceased who were then minor, were admitted to the benefits of the firm. The other partners in the said firm were Mr. Kanayalal and Ramchandra Lokram. The said firm started business of grocery at 257, Narsee Natha Street, 201, New Anant Bhavan, Mumbai 400 009. On 9th October, 1973 the said deceased was adjudicated insolvent. In the year 1976, from the earning of kirana commission business carried on by the said firm M/s. Kanayalal Rameshkumar partly and partly from the moneys advanced by Mr. Kanayalal to the said firm, flat at Jolly Maker Apartment at Cuffe Parade, Mumbai was purchased in the name of four brothers who had attained the age of majority. It is the case of the plaintiff that the said firm had directly made payment for consideration for purchase of the said flat. On 13th April, 1982, the said flat at Jolly Maker Apartment was sold for Rs. 12,50,000/-.

(c) In June, 1982, another firm was constituted for carrying out kirana business in the name of M/s. Rameshkumar Gopaldas at the same address where M/s. Kanayalal Rameshkumar was carrying on the business. Defendant Nos. 1, 3 and 4 and plaintiff became partners of the said firm. It is the case of the plaintiff that the funds of the said partnership firm came from the surplus sale proceeds of the flat in Jolly Maker Apartment from the amount left after purchase of the said flats at Versova. In the year 1985, plaintiff and defendant nos. 1 to 8 started

construction business in the name of United Development Agency at Vardhaman Market, Sector 17, Vashi. Kirana Merchants Association allotted plot at Navi Mumbai to the said firm M/s. United Development Agency in view of M/s. Kanayalal Rameshkumar and M/s. Rameshkumar Gopaldas being its members. The said firm started its first project for construction on the said plot allotted to the said firm and also started other business of Marble processing, spice business etc. In the year 1985, flat No. 601-B at Versova Woodland Coop. Hsg. Andheri was purchased in the name of plaintiff out of the funds of Kirana commission Agency run by M/s. Rameshkumar Gopaldas. On 21st November, 1985, M/s. Rameshkumar was reconstituted. Defendant nos. 3 and 4 voluntarily retired from the said firm. In the year 1989, partnership firm M/s. Cams Developers was constituted which was carrying on business from 5th Floor, Persee Polis, Vashi, Mumbai and was carrying out constructions activities in which defendant no. 1 was one of the partner. The said firm M/s. Cams Developers had borrowed sum of Rupees two Crores from the State Bank of India. Consequent on the said loan taken by the said firm in which plaintiff was not partner, plaintiff mortgaged his flat no. 601B, at Versova with the said bank. In the year 1991, M/s. Ahuja Construction firm was established with the plaintiff and defendant no. 1 as equal partners at the same place where M/s. Rameshkumar Gopaldas was carrying on business.

(d) On 4th January, 1992, M/s. Ahuja Construction purchased office No 102 and car parking space on first floor, in Perse polis building situated at Vashi. M/s. Ahuja Construction then carried on business from the said address. On 25th June, 1993 M/s. Ahuja Developers and Ahuja Builders were constituted for running construction activities of the joint family with the plaintiff and wife of defendant no. 1 as partners. In the year 1994, M/s. Top Aim Properties Pvt. Ltd. was constituted. Plaintiff had 50% shares in the said company. The remaining 50% shares were held by defendant no. 1. Defendant no. 4 also became share holder later on. In the year 1995, office No. 102 and car parking space of M/s. Ahuja Constructions was sold. Out of the sale proceeds of the said office and car parking, office premises at A-1, Rajpipla, Santacruz, Mumbai 52 was purchased from which premises the construction business and kirana merchant agency business was also conducted. The said office premises was purchased in the name of Jaigopal Hire Purchase Pvt Ltd. also known as Jaigopal Consulting Services Pvt. Ltd. On 14th April, 1996, the said deceased expired.

(e) In the year 1997, M/s. Ahuja Developers was reconstituted by including M/s. Keepsade Properties Pvt. Ltd. as partner. In the year 1997, defendant no. 1 disclosed 32 Crores in the name of five firms/companies under the voluntary disclosure scheme. Defendant No. 1 created Jagdish Bhagwandas Ahuja (HUF) overnight without knowledge of the plaintiff. The said amount of Rs. 32 Crores was utilized to fund the Slum Rehabilitation Project called Ahuja Towers (Prabhadevi) and also for implementation of construction of building known as "Ahuja L'Amor" Tower at Lokhandwala Extension.

(f) On 12th December, 1999 various family concerns executed MOU whereby defendant no. 15 company was empowered to act as common pool company for various companies. In the year 2001, M/s. Ahuja Construction was converted into "Ahuja Housing & Development Pvt. Ltd." Plaintiff had 40% shareholding of the said company. In the year 2002, plaintiff mortgaged his flat situated at 12th Floor Peri Cross Road, Bandra and A-3, Rajpipla CHS Linking Road, Santacruz West in favour of Cosmos Bank for creating working capital and settling slum dwellers in a joint family project being Ahuja Towers at FP No. 1087 and 1088 situated at Raja Bhawe Desai Marg, Prabhadevi. On 3rd December, 2002, Defendant No. 17 i.e. Shree Ahuja Properties Pvt. Ltd. addressed a letter to the slum dwellers at Prabhadevi making an offer to develop the property which was occupied by the slum dwellers. In the year 2003, defendant no. 1 firm formed 3 partnerships i.e. (1) Ahuja Properties, (ii) Ahuja Resources Management (iii) Ahuja Properties & Associates. In the year 2003, Defendant no. 1 got a letter of appointment from Prabhadevi Property issued in the name of M/s. Shree Ahuja Properties, the firm of which defendant no. 1 and defendant no. 12 (son of defendant no. 1) are partners, without plaintiff's knowledge and consent. Plaintiff was given an impression by defendant no. 1 that the project was being done by Shree Ahuja Properties Pvt. Ltd. i.e. Defendant no. 17 wherein plaintiff was a 40.01% shareholder at the time of inception.

(g) During the year 2003-2004 M/s. Top Aim incurred expenses to the tune of Rs. 39.95 lacs for the initial expenses on the project Ahuja Towers, Prabhadevi. Plaintiff was one of the share holder and director of the said Top Aim Properties Pvt. Ltd. The said firm took further facilities from Cosmos Bank through its partner Keepsade Properties Pvt. Ltd. For the said loan, plaintiff and his wife mortgaged their property in security for the loan of Rs. 16.50 Crores. On 21st December, 2004, M/s. Ahuja Housing and Development Pvt. Ltd. issued certificate informing about the merger of Ahuja Constructions with Defendant no. 19 from 2002-03 onwards. On 22nd March, 2007, Plaintiff transferred sum of Rs. 43,21,752/- to M/s. Ahuja Properties by cheque. By letter dated 13th December, 2007, Cosmos Bank addressed a letter to the plaintiff in respect of the flat No. 121 and 122 in Soona Villa, Peri Cross Road, Bandra which was held by the plaintiff and was held as collateral security for the facilities availed of by Ahuja Properties Pvt. Ltd. On 18th December, 2007, M/s. Cosmos Bank addressed a letter to M/s. Ahuja properties with respect to the over dues in their account. On 28th January, 2008, plaintiff addressed a letter through his advocate to M/s. Ahuja Properties Pvt. Ltd. calling upon the said bank to forthwith issue share certificates in respect of the shares held by the plaintiff and his wife and requested for inspection of various documents.

(h) In the year 2010 M/s. Ahuja Housing and Development Pvt. Ltd. was converted into Ashtavinayak Builders and Developers Pvt. Ltd. wherein plaintiff has 40% shareholding. In January, 2010, the said Kirana firm cleared outstanding of Tamilnadu Mercantile Bank in the sum of Rs. 8 Crores. On 19th February 2010, defendant No. 1 and his wife got the accounts of Kirana funds in

the name and style of Rameshkumar Gopaldas frozen where plaintiff and defendant no. 1 were partners and Ganesh international where wife of defendant no. 1 and plaintiff were partners. On 19th February, 2010, M/s. Tamilnadu Mercantile Ltd. addressed a letter to the firm M/s. Rameshkumar Gopaldas informing about the freezing of the account by defendant no. 1. By letter dated 1st June, 2010, addressed by plaintiff to defendant no. 1 and his wife, plaintiff called upon them to resolve the issues between them. By letter dated 2nd August, 2010 defendant no. 1 and his wife called upon by the plaintiff asking him not to deal or dispose of the properties of the firm Rameshkumar Gopaldas and also not to finalize the balance sheet as on 31st March, 2010 until the same was approved by them.

(i) On 1st November, 2010, plaintiff addressed a letter to defendant no. 1 and his wife fixing the date of 4.11.2010 for meeting and resolving the issues pertaining to the family business of Kirana, Construction and marble by letter dated 3rd November, 2010, defendant no. 1 raised various excuses without disputing the plaintiff's right in the said family business of kirana commission agency, construction and marbles. On 16th February, 2011, plaintiff once again called upon the defendant no. 1 to sort out the issues by appointing Mr. Girish Dave for resolving their dispute. On 24th June, 2011, the Income Tax Appellate Tribunal passed an order in one of the appeal filed by one of the defendant recording a finding that there was a free flow of funds without interest inter-se amongst Ahuja Group Firms and companies. On 25th October, 2012, plaintiff addressed a letter invoking arbitration clause. On 15th January, 2013, plaintiff filed this suit inter alia praying for declaration that the Plaintiff is entitled to 1/10th of the estates and properties set out in Exh. B and Exh. C and also prayed for partition of the properties described in Exh. B by metes and bounds and for handing over to the plaintiff 1/10th share in the suit properties.

(j) Plaintiff applied for ad interim relief in Notice of Motion No. 166 of 2013. By an order dated 25th February, 2013, the learned Single Judge, observed that the Plaintiff would have to first show the joint family business and its income and held that pending such evidence, the residential flats of the plaintiff as also immovable properties in which the plaintiff is or was partner may be protected towards 1/10th of share claimed by the plaintiff. The learned Single Judge directed that the defendant shall not deal with dispose of, alienate, transfer or create any third party rights in respect of properties at item Nos. 1 and 15 to 20 in list annexed at Exh. B to the plaint pending the notice of Motion. Plaintiff filed an appeal against the said order dated 25th February, 2013 (148 of 2013). By an order dated 16th April, 2013 passed by the Division Bench, it is held that in the facts and circumstances of the case, nature of controversy and the observations made by the learned trial Judge, some protection is required to be granted to the plaintiff till the learned Trial Judge decides the nature of matrix and it was not necessary to give any reasons for the ad interim directions which the Division Bench proposed to give in the said order. It was made clear that the Division Bench was not inclined to grant any ad interim injunction against implementation

of the slum rehabilitation projects on the lands at item Nos. 5 and 26 and of the development project on the land at item no. 14. The Division Bench granted ad interim injunction against creation of third party rights in respect of the office premises at item Nos. 7, 11, 21, 23 and 25 and also the factory premises at item no. 10, over and above the ad interim injunction granted by the learned Single Judge. No ad interim injunction is granted in respect of the residential flat being occupied by other brothers and sisters. Defendant nos. 16 and 17 were directed to earmark those portions in the concerned plans and to place a copy of such plans on record of the notice of motion with an affidavit within one week from the date of the order. It was also directed that transferees of those portions of the properties will be informed in writing about the said order passed by the Division Bench. It was clarified that the said order was passed without prejudice to the rights and contentions of the parties keeping all the contentions open.

(k) By an order dated 10th May, 2013 passed by the Supreme Court in Special Leave to Appeal (Civil) No. 17155 of 2013 filed by Shree Ahuja Properties and Realtors Pvt. Ltd. impugning the order passed by the Division Bench on 16th April, 2013, Supreme Court declined to interfere with the order passed by the division Bench of this court since it was an ad interim order and dismissed the said Special Leave Petition. The Supreme Court however directed that the Notice of Motion be finally decided within a period of two months from the date of the order. By an order dated 10th June, 2013 passed by the Division Bench of this court, statement of defendant nos. 15 to 19 was recorded that they were not developing the property at Item No. 26 and if, any other defendants in the suit is developing the said property the concerned defendant shall file an affidavit on or before 20 June, 2013 as required by the order dated 16 April, 2013.

2. SUBMISSIONS OF MR. SHAILESH SHAH, LEARNED SENIOR COUNSEL FOR THE PLAINTIFF:

(a) Defendant No. 1 who was eldest son of the said deceased had just attained the age of majority when the father started the firm M/s. Kanayalal Rameshkumar. Since the partners of the said firm M/s. Moolchand in which the said deceased was partner were likely to face insolvency, the said deceased started the said firm M/s. Kanayalal Rameshkumar by making first defendant partner with other partners. Defendant no. 1 was not carrying on any other business and had no other source of income when the said partnership firm was started by the said deceased. Though the said deceased was not a partner of the said firm, the entire control of the said firm all through out was with the said deceased. On 20th February, 1970, the said firm M/s. Kanayalal Rameshkumar was reconstituted with effect from 5th December, 1989 with the children of the said deceased who were minor and were admitted to the benefit of the said firm. Out of the moneys earned by M/s. Kanayalal Rameshkumar and partly from the moneys advanced by Mr. Kanayalal to the said firm, residential flat was purchased in the name of four brothers in Jolly Maker Apartment. The consideration of the said flat was paid by the firm. The flat was sold in the month

of April, 1992. There was surplus after purchase of four flats out of the said sale proceeds which surplus was utilized for starting another firm M/s. Rameshkumar Gopaldas in which defendant nos. 1, 3 and 4 and plaintiff were made partners. Since the year 1984, father of the plaintiff and defendant nos. 1 to 8 diversified the said business to construction, marble processing, spices business etc. Defendant no. 1 who was eldest brother was at all material time head of the family. After demise of the father, all the businesses of father were continued by the joint family of the plaintiff and defendant nos. 1 to 8. Plaintiff and defendant no. 1 who were partners of M/s. Kanayalal Rameshkumar retired because the plaintiff was also partner of Rameshkumar Gopaldas along with defendant no. 1. The audited balance sheet of Kirana and construction business would indicate that there was transfer of funds from one account to another account and the funds were utilized for the common purpose of Ahuja Family.

(b) Plaintiff and his wife had mortgaged their ownership flats in favour of the banks to secure facilities availed of by various firms and companies. In most of the companies who were parties to this proceedings, plaintiff or his wife are share holders and or directors. Plaintiff and or his wife are also partners in some of the firms. Reliance is placed on capital account of Kirana business firm in support of his submission that the capital introduced by the other partners of the said firm including defendant no. 1 was not equal to the capital introduced by the plaintiff. Even the order passed by the Income Tax Appellate Tribunal in respect of one of the company, finding was recorded that there were internal transfers of amount across Ahuja family concerns without payment of interest. It is submitted that the joint family nucleus funds were used to acquire property situated at A1 Rajpipla, Santacruz (West), Mumbai.

(c) Mr. Shah, learned senior counsel submits that the plot was allotted to two of the firms by Kirana Merchants Association in view of the two firms being members of the said association. Plaintiff was the secretary of the said association. The first construction project was started on the said plot. It is submitted that there was free flow of funds from Rameshkumar Gopaldas to other companies and vice versa. Learned counsel relied upon chart annexed to the rejoinder in support of the submission that the said chart would show the flow of funds from one firm and/or company to another of the joint family.

(d) Mr. Shah learned senior counsel submits that there is presumption of joint family staying together, jointly having food and doing worship and nucleus has been shown by the plaintiff to show that all the properties and businesses are family properties and businesses. Father started business in the year 1969 in the name of M/s. Kanayalal Rameshkumar and defendant no. 1 started business of his own. The court has to draw inference that the said businesses started in the name of M/s. Kanayalal Rameshkumar was started by the father by introducing his own funds and for the benefit of the family. The said business thus was family business. Out of the income generated from the said family business in the name of M/s. Kanayalal Rameshkumar, all subsequent businesses were started by the

family. The income of the firm M/s. Kanayalal Rameshkumar was used in buying flat at Cuffe Parade, Mumbai and starting other businesses. During the period 1969 to 1982, there was no other business started except purchase of flat at Cuffe Parade which was sold in the year 1982. It is submitted by Mr. Shah, learned senior counsel that the partnership deed of 1970 would show presence of all the brothers and thus would show that the business run by joint family either through father or through all efforts of brothers by starting joint family business. In so far as defendant No. 15 to 19 private limited companies are concerned, it is submitted that those companies incorporated are in the nature of glorified partnership and this court shall lift the corporate veil of such companies and declare the properties and business of said companies joint family properties and businesses. It is submitted that the plaintiff and defendants are together in all the firms and businesses which are described in Exh. C to the plaint.

(e) Mr. Shah placed reliance on the brochure/profile got printed by the first defendant and submits that defendant no. 1 himself has described the construction business as family business. Mr. Shah, also strongly placed reliance on paragraph 5 of the affidavit in reply filed by defendant no. 1 on 14th June, 2013 in this notice of Motion in which according to learned senior counsel it was admitted by defendant no. 1 that he used the profits generated by M/s. Kanayalal Rameshkumar for other business. Learned senior counsel placed reliance on the judgment of the Supreme Court in the case of Appasaheb Peerappa Chandgade Vs. Devendra Peerappa Chandgade and Others, and in particular paragraphs 9, 10 and 11 in support of his submission that if it is established that the family possessed some joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. Mr. Shah submits that the plaintiff has been able to demonstrate, prima facie at this stage that the plaintiff and other defendants are partners and/or share holders as the case may be in various firms/companies/businesses. All the businesses started after 1969 were started by utilizing funds of the firm started by the father in 1969. Paragraphs 9 to 11 of the said judgment read thus:

9. So far the legal proposition is concerned, there is no gain saying that whenever a suit for partition and determination of share and possession thereof is filed, then the initial burden is on the plaintiff to show that the entire property was a joint Hindu family property and after initial discharge of the burden, it shifts on the defendants to show that the property claimed by them was not purchased out of the joint family nucleus and it was purchased independent of them. This settled proposition emerges from various decisions of this Court right from 1954 onwards.

10. In the case of Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, their Lordships held that proof of the existence of a joint family does not

lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where 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. Therefore, so far as the proposition of law is concerned, the initial burden is on the person who claims that it was joint family property but after initial discharge of the burden, it shifts to the party who claims that the property has been purchased by him through his own source and not from the joint family nucleus. Same proposition has been followed in the case of *Mst. Rukhmabai Vs. Lala Laxminarayan and Others*, wherein it was observed as follows:

There is a presumption in Hindu Law that a family is joint. There can be a division in status among the members of a joint Hindu family by defilement of shares which is technically called "division of status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need not receive any share in the joint estate but may renounce his interest therein; his renunciation merely extinguishes his interest in the estate but does not affect that status of the remaining members vis-a-vis the family property. A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether moveable or immovable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property.

Similarly, in the case of *Achuthan Nair Vs. Chinnamu Amma and Others*, their Lordships held as follows:

Under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is a well settled proposition of law.

Similarly, in the case of Bhagwant P. Sulakhe Vs. Digambar Gopal Sulakhe and Others, their Lordships have held that the character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act it is not open to any member of the joint family to convert any joint family property into his personal property.

11. In the case of Surendra Kumar Vs. Phoolchand (dead) through and another, their Lordships held as follows:

It is no doubt true that there is no presumption that a family because it is joint possessed joint property and therefore the person alleging the property to be joint has to establish that the family was possessed of some property with the income of which the property could have been acquired. But such a presumption is a presumption of fact which can be rebutted/But where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family.

Therefore, on survey of the aforesaid decisions what emerges is that there is no presumption of a joint Hindu family but on the evidence if it is established that the property was joint Hindu family property and the other properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then 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 by cogent and necessary evidence.

(f) Mr. Shah also placed reliance on the judgment of the Supreme Court in case of Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay, and in particular paragraph 9 in support of his submission that the joint Hindu family under Dayabhaga is like a Mitakshara family, normally joint in food, worship and estate. In both systems, the property of joint family may consist of ancestral property, joint acquisitions and/or self acquisitions thrown into the common stock. Paragraph 9 of the said judgment reads thus:

9. The appellant is governed by the Mitakshara school of Hindu law but that is not of any particular consequence for the purposes of this appeal. The differences between the Mitakshara and Dayabhaga schools on the birth-right of coparceners and the rules of inheritance have no bearing on the issues arising in this appeal, particularly on the question whether a single male can constitute a joint or undivided family with his wife and unmarried daughter. A joint Hindu family under the Dayabhaga is, like a Mitakshara family, normally joint in food, worship and estate. In both systems, the property of joint family may consist of ancestral property, joint acquisitions and of self acquisitions thrown into the

common stock. Mayne's Hindu Law and Usage, Eleventh Ed., p. 277 paragraph 227(3) pp, 364-365, paragraph 297; Mulla's Hindu Law Fourteenth In fact, whatever be the school of Hindu law by which a person is governed, the basic concept of a Hindu undivided family in the sense of who can be its members is just the same.

3. Mr. Shah, learned senior counsel placed reliance on Judgment of Supreme Court in case of Bhagwan Dayal (since deceased) and thereafter his heirs and legal representatives Bansgopal Dubey and another V. Mst. Reoti Devi (deceased) and after her death, Bhagwan Dayal Vs. Mst. Reoti Devi, in support of his submission that every Hindu family is presumed to be joint unless contrary is proved; but that presumption can be rebutted by direct evidence or by course of conduct. Reliance is placed on paras 16 and 47 of the said Judgment which read thus:

16. The general principle is that every Hindu family is presumed to be joint unless the contrary is proved; but this presumption can be rebutted by direct evidence or by course of conduct. It is also settled that there is no presumption that when one member separates from others that the latter remain united; whether the latter remain united or not must be decided on the facts of each case. To these it may be added that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps more readily by reasonable inferences that in a case where the evidence is not obliterated by passage of time.

47. In Mayne's Hindu law, 11th edn., the legal position has been neatly stated thus at p. 347:

So long as a family remains an undivided family, two or more members of it, whether they be members of different branches or of one and the same branch of the family, can have no legal existence as a separate independent unit; but all the members of a branch, or of a sub-branch, can form a distinct and separate corporate unit within the larger corporate family and hold property as such. Such property will be joint family property of the members of the branch inter se, but will be separate property of that branch in relation to the larger family.

The principle of joint tenancy is unknown to Hindu law except in the case of the joint property of an undivided Hindu family governed by the Mitakshara law.

The legal position may be stated thus: Coparcenary is a creature of Hindu law and cannot be created by agreement of parties except in the case of reunion. It is a corporate body or a family unit. The law also recognizes a branch of the family as a subordinate corporate body. The said family unit, whether the larger one or the subordinate one, can acquire, hold and dispose of family property subject to the limitations laid down by law. Ordinarily, the manager, or by consent, express or implied, of the members of the family, any other members or

members can carry on business or acquire property, subject to the limitations laid down by the said law, for or on behalf of the family, Such business or property would be the business or property of the family. The identity of the members of the family is not completely lost in the family. One or more members of that family can start a business or acquire property without the aid of the joint family property, but such business or acquisition would be his or their acquisition. The business so started or property so acquired can be thrown into the common stock or blended with the joint family property in which case the said property becomes the estate of the joint family. But he or they need not do so, in which case the said property would be his or their self-acquisition, and succession to such property would be governed not by the law of joint family but only by the law of inheritance. In such a case, if a property was jointly acquired by them, it would not be governed by the law of joint family; for Hindu law does not recognize some of the members of a joint family belonging to different branches, or even to a single branch, as a corporate unit. Therefore, the rights inter se between the members who have acquired the said property would be subject to the terms of the agreement whereunder it was acquired. The concept of joint tenancy known to English law with the right of survivorship is unknown to Hindu law except in regard to cases specially recognized by it. In the present case, the uncle and the two nephews did not belong to the same branch. The acquisitions made by them jointly could not be impressed with the incidents of joint family property. They can only be co-sharers or co-tenants, with the result that their properties passed by inheritance and not by survivorship.

4. Mr. Shah also placed reliance on a Judgment of Supreme Court in case of Sameer Kumar Pal and Another Vs. Sheikh Akbar and Others, in support of his submission that the plaintiff has to only prove the nucleus has been formed. Reliance is placed on paras 4, 5, 8 and 12 of the said Judgment which read thus:

4. The appellants filed a suit for eviction against the defendants (respondents herein) u/s 12(1)(c) (that the tenant has created nuisance), 12(1)(f) (for bona fide requirement of landlord for non-residential purposes) and 12(1)(g) (bona fide requirements of landlord to carry out repairs) of the M.P. Accommodation Control Act, 1961. The relevant parts of section 12 of the Act are set out as under: "12. Restriction on eviction of tenants.--(1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any civil court against a tenant for his eviction from any accommodation except on one or more of the following grounds, only, namely--3 (a)-(b) x x x (c) that the tenant or any person residing with him has created a nuisance or has done any act which is inconsistent with the purpose for which he was admitted to the tenancy of the accommodation, or which is likely to affect adversely and substantially the interest of the landlord therein: (d)-(e) x x x (f) that the accommodation let for non-residential purpose is required bona fide by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters if he is the owner thereof or for any person for whose benefit the accommodation is held and that the landlord or

such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned; (g) that the accommodation has become unsafe, or unfit for human habitation and is required bona fide by the landlord for carrying out repairs which cannot be carried out without the accommodation being vacated.

5. In the written statement filed in the trial court, the respondents herein raised the main objection that the appellants herein are not the owners of the suit property and the trial court had no jurisdiction to adjudicate the matter as the suit property has been a Wakf property. It may be pertinent to mention that in the written statement the respondents nowhere took the plea that the suit property, namely "Madras Hotel" is a joint family property. The trial court held that the appellants were in bona fide need of carrying on the business of sweets and for running a restaurant. No other vacant property was in possession of the appellants in Jabalpur. It was also held that the shop in question is very old, unsafe and in dilapidated condition. There is need to repair and carry out some structural changes in the shop which cannot be carried out unless the same is made available to the appellants. The trial court clearly held that the appellants are in bona fide need of the suit property. The trial court also held that the respondents have not paid rent since September, 1992 and decided the issue of default in favour of the appellants. The trial court categorically held that the suit property is not the Wakf property and decreed the suit of the appellants.

8. The High Court in the impugned judgment, without any pleadings or basis, held that the property namely "Madras Hotel" is a joint family property. The High Court erroneously observed that the property namely "Madras Hotel" was purchased by the father of the appellants and his brothers, whereas in fact the property was purchased by the appellants vide sale deed dated 31.12.1991. The assumption of wrong fact has led to total erroneous finding and conclusion. The High Court in para 8 observed as under: "..... It is firmly established that the building known as "Madras Hotel" belongs to Laxminarayan Pal and his two sons who are the plaintiffs. That is their joint family property. This building was purchased by Laxminarayan when he was carrying on business with his two brothers and the partition took place long after the acquisition of that building. In that partition that building was allotted to Laxminarayan alone.....

12. The appellants further relied on Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh, wherein this Court held that, of course, there is no presumption that merely because the family is joint so the property is also joint. So the person alleging the property to be joint family property must prove it. In that case, this Court further held that the burden of proving that any particular property is joint family property is, therefore, in the first instance, upon the person who claims it to be coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. The Court carved out an exception and observed that, "this is, however, subject

to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate." In *Mudi Gowda Gowdappa Sankh* (supra), this court heavily relied upon the ratio of Privy Council judgment in AIR 1947 189 (Privy Council) wherein the legal position of Hindu Law has been beautifully articulated by Sir John Beaumont. The relevant portion of the judgment is reproduced as under: "Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where 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.

SUBMISSION OF MR. P.K. DHAKEPHALKAR, LEARNED SENIOR COUNSEL FOR DEFENDANT NO. 3

5. Mr. Dhakephalkar, learned senior counsel appearing on behalf of defendant No. 3 one of the brother of the plaintiff supported the case of the plaintiff and submits that the presumption of joint family business exists. Learned senior counsel submits that there is no proof of separation of the family and/or business. Various firms and companies were formed by family members for various reasons. Forming of various firms and companies for the purpose of carrying on business does not mean that there was separation of family members. Mr. Dhakephalkar also placed reliance on para 5 of the Affidavit in reply filed by defendant No. 1 in support of his submission that defendant No. 1 had admitted in the said para that out of the income generated from M/s. Kanayalal Rameshkumar, the first defendant started other businesses. Mr. Dhakephalkar placed reliance on the Judgment of this Court in case of *Kausabai Rajaram Waradkar and Others Vs. Gayabai Gundaji Mogre and Others*, in support of his submission that a distinction has to be made between joint family property and the property acquired by joint efforts. Even if one of the coparceners decides to break away from the rest of the family other coparceners still can constitute a joint Hindu family. Learned senior counsel also submits that if the business was joint and the property was acquired from earnings of joint business, it must be presumed that each of the members has his equal share unless otherwise shown. Learned senior counsel submits that defendants have failed to show that any of the properties which are subject matter of this suit, were self-acquired property. Paras 8 to 10 of the said Judgment read thus:

8. Thus, they contend that they constitute a joint Hindu family. In fact, law presumes that every Hindu family is a joint family unless otherwise shown. In the instant case, however, the controversy seems to have arisen because the

father does not live with the family. Normally, a joint family consists of father, mother and sons and their wives. Here, admittedly, father had long back turned the plaintiffs and defendant No. 2 out of the house and he is living separately. The question is whether the mother and two sons could constitute a joint family and that seems to be the question of law raised. I see no reason why they cannot. If two brothers, upon death of father, can constitute a joint family, there is no reason why two brothers in this case with their mother cannot constitute a joint family, when father deserts them. Even if one of the coparceners decides to break away from the rest of the family, the other coparceners can constitute a joint family. Even otherwise, in the instant case father had deserted them, he has not separated as such from the family. I find that the two sons with their mother and even wives can constitute the joint Hindu family. In the instant case, it could be said that the plaintiffs and defendant no. 2 constituted a joint Hindu family.

9. The plaintiffs' case is that plaintiffs and defendant no. 2 were turned out of the house. If the pleadings in the plaint are seen, it could be gathered that the plaintiffs do not plead that family possesses any ancestral property at all. It is not even their case that the father had given anything to them from any ancestral property. There is, therefore, no pleading of the plaintiff's that any kind of nucleus was available for blending the suit property, in order that any property possessed or owned by the should become the joint family property. There has to be some nucleus available from which that property could be purchased. Since in this case the plaintiffs did not possess any ancestral income giving property, it could not be said that the suit house was a joint family property as such.

10. The distinction has to be made between joint family property and the property acquired by joint efforts. The suit property could in no case be treated as joint family property. It is to be seen if it is a jointly acquired property or not. Defendants contend that defendant no. 2 was alone running his own business, while plaintiff claims that the business run was family business and from its income the property is acquired. From the evidence on record, the suit property could certainly be said to be the jointly acquired property. It is the case of the plaintiffs that plaintiff no. 1 started the business and started earning. DW 1 Vitthal admits in the cross examination that his mother was dealing in grains and was earning. He also admits that his mother and aunt paid him money for starting business. If mother was also doing the business, as is accepted by the defendants, it is difficult to accept the theory of defendant no. 2 that he was alone running the shop. Admittedly, there were two shops at two different places. It is therefore, difficult to accept that defendant No. 2 alone could run both the shops at the two different places. The theory of the plaintiffs that the shops were joint and run by all has, therefore, to be accepted. There is another strong reason why the property has to be treated as joint ly acquired property. Defendant No. 1 had filed the suit against defendant No. 2 and plaintiff No. 1 in respect of recovery of rent of shop of plaintiffs and defendant No. 2. The certified

copy of the plaint in that suit is Exh. 36. In plaint para No. 2, following averments are made.

Defendant No. 2 is the mother of defendant No. 1 and they constitute joint family. Defendants carry on retail grocery business.

These contents are admitted in the written statement filed at Exh. 37. Obviously, defendant No. 2 admitted in that suit that the shop was a joint family business. Even in para 17 of the said written statement there is a clear averment that defendants were running the shop and house was reconstructed by the defendants. DW 1 Vitthal in cross-examination admits that he had filed such a written statement and that he had stated therein that house belonged to joint family. With this evidence, I do not think that any more evidence is required to conclude that the business was joint and the property was purchased from that business income. If the business was joint and the property is acquired from earning of joint business, it must be assumed that each of the members has an equal share in it unless otherwise shown. This takes me to the next substantial question of law i.e. Whether the appellant could be treated as a bona fide purchaser. Bona fide purchaser is that person who takes reasonable care to ascertain that the transferor had the power to make transfer and he had acted in good faith and also that the true owner had consented to such transfer. Since true owners are challenging the transfer, there is no question of consent. Let us see if there is evidence of appellant's acting in good faith and whether he had taken reasonable care. I find that this is a fit case of lack of good faith and not even a reasonable case has been taken. It appears, on the other hand, that defendant no. 1 entered into contract of purchase of the property with open eyes. The reason for saying so is that the appellant does not enter into witness box to make out the case in pleading and second in his own plaint vide Exh. 36, he had made an averment and assertion that the shop and the property belonged to the joint family. This clearly shows that defendant no. 1 has had full knowledge of the property being owned by the family and not by defendant no. 2 alone. The appellant therefore, could not be treated to be a bonafide purchaser. Although I find that the property is not a joint family property as such, all the same it is jointly acquired property in which each one of them has equal share. In the circumstances, there is no difficulty in confirming the judgment and decree as passed by the court below. The appeal is, therefore, dismissed. No order as to costs.

6. Mr. Dhakephalkar, learned senior counsel also placed reliance upon Supreme Court Judgment in case of Madanlal (Dead) by Lrs. and Others Vs. Yoga Bai (Dead) by Lrs., in support of his submission that running of various separate firms and companies would not necessarily imply separation. Paras 5 & 6 of the said Judgment read thus:

5. The High Court has not believed the case of the defendants that there had already been a settlement in respect of the properties in question in 1942. It at least indicates that even according to the contesting defendants, some

settlement of the property amongst the members of the family was necessary which had already taken place earlier i.e. to say existence of joint property cannot be denied. Once their case of settlement in respect of the same property having taken place earlier has been dis-believed, there remain hardly any ground to resist the claim of the plaintiff for partition and 1/5th share in the properties. The case of the defendant that after the settlement the brothers have been residing separately and they have been carrying on their business separately, hence there remained nothing which was joint amongst the members of the family which could be partitioned is rightly held to be untenable.

6. We find that after appreciation of the evidence the High Court has arrived at a finding that no such settlement had taken place in 1942. Learned counsel for the appellant has vehemently urged that Exhibit B-3 is the deed of settlement which should have been given due weight by the High Court while considering the evidence. He has also submitted that the High Court has not taken into account documentary evidence placed on record, namely Exhibits B-2, B-3, B-4, B-5, B-6 etc. as well as Ex. B-15 and B-16. He has also placed reliance upon the decision in Surinder Singh Vs. Hardial Singh and Others, to the effect that findings of fact recorded, ignoring the documentary evidence on record is vitiated. We find that the High Court has considered a number of documents on record except a few which may not have been considered necessary to be referred to in the judgment. The High Court has taken a note of Ex. B-3, the alleged deed of settlement executed by Purandas in 1957 and has dealt with it in detail. Referring to the statement of DW-1, the High Court has taken a note of the fact that according to him B-3 came into existence since the Government was demanding inspection of their account books. DW-1 also could not indicate the order of handing over the shop to him by Purandas prior to 1972. The settlement was said to be in 1942 and deed is executed in 1957. Taking the evidence on record as a whole the case of the defendant of settlement of properties in 1942 and the deed executed in 1957 have not been believed. We find no good reason to interfere with that finding of fact which is supported by evidence and cogent reasons. In so far the other documents, which according to the appellant have not been considered, they are some partnership deeds which have been entered into between different members of the family in different combinations. It is sought to be established that they have been running their business separately under different partnership. We feel that no such inference can be drawn. In a family which carries on a number of business, it is quite often that it is carried out under different names and styles and often constitutes different companies or partnerships for better handling of business or to keep it manageable or for various other reasons. It is no proof of separation nor are the letters which are sought to be relied upon, written to the income tax authorities and the assessment orders passed by the income tax authorities. It has already come in evidence that even B-3 came into existence since the government wanted to inspect the account books. Therefore, once the settlement before the suit for partition was filed is not accepted by means of a finding of fact recorded by the

High Court, the case of the defendant falls through.

7. Mr. Dhakephalkar, learned senior counsel submits that the third defendant is also entitled to 1/10th share in the properties and business described in Exhibit-D & C, defendant No. 3 being a member of the joint family.

8. Defendant No. 6 has filed separate affidavit supporting the case of the plaintiff and adopts the arguments advanced by the plaintiff and defendant No. 3.

SUBMISSION OF MR. ASPI CHINYOY, LEARNED SENIOR COUNSEL ON BEHALF OF DEFENDANT NO. 1:

9. Mr. Chinoy, learned senior counsel submitted that defendant No. 1 at the age of 17 started business as a broker in spices and earned profits. It is submitted that in the year 1969, firm of M/s. Moolchand and Co. in which father was partner, had stopped business as it had suffered large losses. Father had liabilities of Rs. 25 lacs and did not carry on any other business. In 1969, the firm M/s. Kanayalal Rameshkumar was started in partnership with M/s. Kanayalal Lokram and others. Defendant No. 1 introduced in the said firm the amounts he had earned from his brokerage business. Defendant No. 1 was the eldest and the only earning member also introduced/admitted the plaintiff and defendant Nos. 2 to 4 who were then minors to the benefits of the partnership. Father of the plaintiff and defendant Nos. 1 to 8 along with other two partners of M/s. Mulchand & Co. filed a petition in 1973 for declaring father and few others as insolvent in this Court. Mr. Chinoy, learned senior counsel invited my attention to the statement of father recorded in the said insolvency proceedings. Father admitted in his statement that he had liability of Rs. 25,80,000/- to 17 creditors. It was also admitted that since 1969 he had not carried on any other business and had not invested any money with any firm or relations and did not have any private investments. He also admitted that he had not entered into any contract under which he had to receive any benefit. By an order dated 9th October 1973, this Court declared father of the plaintiff and defendant Nos. 1 to 8 as "insolvent". It is submitted that for purchase of flat in Jolly Maker Apartment in 1976, defendant Nos. 1 to 4 had pulled their own funds which flat was sold in 1982 and four separate flats at Andheri were purchased by defendant Nos. 1 to 4 out of the sale proceeds of flat in Jolly Maker Apartment. Mr. Chinoy submits that in 1982 defendant No. 1 formed his sole property concern viz. Gautam Overseas for trading in dry-fruits and spices. Since 1985, defendant Nos. 2, 3 and 4 exited and the plaintiff has in effect been running the partnership firm of M/s. Rameshkumar Gopaldas and the profits and funds have been distributed on between the plaintiff and defendant No. 1 and nobody else. Defendant No. 2 started his own independent business in the year 1985. Defendant Nos. 3 and 4 started business in the name and style of Bhagwandas & Sons in 1985. Plaintiff purchased a flat at Versova Woodlands in the year 1985 out of his own funds. Defendant No. 1 started his first construction venture M/s. United Development Agency with outside partners in 1985. Plaintiff started doing business as a sole proprietor of M/s. Ahuja Traders which carried on the business of trading in dry

fruits and spices in 1986. Defendant No. 1 entered into partnership with certain outsiders in the firm viz. CAMS constructions in the year 1988 and carried on the business of construction contractors. In 1989, first defendant entered into partnership firm with certain non-family members in the name and style of CAMs Developers and carried on the business of construction contractors. In 1989, the first defendant entered into partnership with eight other partners in the name and style of CAMS India Corporation which included the plaintiff and certain non family member. Mr. Chinoy submits that as far as mortgage of flat No. 601-B standing in the name of plaintiff is concerned, the said flat was given as security in favour of State Bank of India for securing the loan given to CAMS Developers. At the request of the first defendant, plaintiff being a partner of CAMS India Corporation, plaintiff mortgaged his flat. It is submitted that in 1990, plaintiff started carrying on construction business in the name and style of Mahavir Constructions with certain outsiders and non family members. In 1991 defendant No. 1 and plaintiff started partnership business in the name and style of Ahuja Constructions.

10. During the period between 1991 to 2003, the plaintiff and his wife have been partners and shareholder in diverse partnership firms and companies set up by first defendant to undertake business initially as construction contractors and later as developers. Plaintiff and his wife hold shares in different companies. Mr. Chinoy submits that other family members i.e. defendant Nos. 2 to 8 were not involved in any of these firms and companies and had never made any claims to the business, assets, profits or funds thereof. The profits and assets of any of the firm or company were never shared with or distributed to defendant Nos. 2 to 8. Plaintiff and his wife were given shares details whereof are forming part of record in various companies in this proceedings. Mr. Chinoy submits that in the year 2001, the real estate market had collapsed and contracting jobs had come to a standstill. The partnership firms of the businesses of the first defendant had accumulated losses of Rs. 35 crores. Plaintiff wanted to exit from the business and wanted to ensure that he would not be exposed to such large liabilities and that the assets he had offered as security for such firms/businesses were released. Accordingly during the period 2001-2003, the first defendant proceeded to convert the said partnership firms into private limited companies under Part IX of the Companies Act and the erstwhile partners were allotted shares in the new companies in proportion to their capital ratios in the firms resulting in the liability of the plaintiff and the other partners becoming restricted to their shareholding. The said companies thereafter raised capital by increasing their shareholding. The plaintiff did not subscribe to such additional shares. Plaintiff was fully aware of such additional shares being offered/issued and did not invest additional amounts in purchasing the shares. Mr. Chinoy submits that to finance the project defendant No. 16 Company gave 49% equity to Citi Properties (a Division of Citi Bank) for Rs. 198 Crs. and took a loan of Rs. 225 Crs. It is stated that Rs. 195 Crs. had been disbursed from ICICI Bank. Presently there are liabilities of Rs. 635 Crs. in respect of the said project. There are

borrowings of Rs. 270 Crs. in other projects and losses of Rs. 135 Crs. in defendant No. 17 Company. Mr. Chinoy submits that for the first time by letter dated 28th January 2008, plaintiff through Advocate sought inspection of various documents and registers of defendant No. 17 Company. Since loan taken by Keepsade Private Limited from Cosmos Bank was repaid, flat of the plaintiff on the 12th floor at Soona Villa was released in the month of November 2011.

11. Mr. Chinoy, learned senior counsel submits that merely because two brothers were partners in various businesses would not mean that it would be a family business. No other members participated in the business. There was no family contribution in any of the businesses which are claimed as joint family business. Since 1970, parties were not residing together and were separate. Since 1984, apart from plaintiff, no other family members have been participating in Kirana shop or construction firm. There is no plea of the plaintiff that since 1984, any distribution of the property in any of the business had taken place amongst the family members. There is also no plea of the plaintiff that any other family members other than partners in such business were given any share and/or demanded by such family member. It is submitted that there is neither joint family nor any joint participation or issuing of profit or liability between the plaintiff and defendant Nos. 1 to 8. Mr. Chinoy submits that since father had no income of any nature whatsoever and had no investments and had not started any business as admitted by father himself in his statement recorded in insolvency proceedings since 1969 and had suffered a huge loss, there was no question of the father investing any amount or starting any business in the name of family members in the year 1969 or thereafter. It is submitted that the plaintiff has failed to prove any nucleus. Defendant Nos. 1 to 4 had purchased flats from the funds out of profit distributed to each partner. Plaintiff also had purchased a flat at Versova out of his own funds. Except defendant Nos. 2 and 6, other family members have filed affidavit admitting that there was no joint family business as claimed by the plaintiff. Mr. Chinoy invited my attention to affidavit in reply of defendant No. 1 in which it was pleaded that the shares were issued in various companies in which plaintiff had shares at material times and was offered such shares but plaintiff chose not to invest any further amounts in the said companies. Mr. Chinoy also invited my attention to rejoinder filed by the plaintiff to the reply dated 5th July 2013 to demonstrate that the said averment made in the affidavit and in particular para 17 which was not denied by the plaintiff in rejoinder. Plaintiff had signed balance-sheet of the companies and was aware of the increase in share capital. Mr. Chinoy submits that it is not the case of the plaintiff that he represents other 8/10th share. There is neither such pleading nor any prayer in the plaint. It is submitted that in 1976, there was split of four defendants. There is separate residence, separate kitchen and business. Mr. Chinoy submits that if there is any independent agreement of any shareholder including the plaintiff in the business arrived between in any of the companies, who were parties to the proceedings, plaintiff would have independent cause of action. Mr. Chinoy submits that during the period 2003-2010, plaintiff got his

personal properties given by him in security which are released. Mr. Chinoy pointed out that it was not the case of the plaintiff in the pleadings that since 1985, plaintiff and defendant Nos. 1 to 8 distributed any profit or had contributed any amount towards any liability of the business of the partnership firm in which they were independent partners and had contributed towards liability of that particular business and were given their respective share as a partner. Other eight family members have not claimed any share in any of the properties which are subject matter of the suit. It is submitted that onus is on the plaintiff to prove nucleus. If family leaves together and worships together, there is general presumption of joint family. It is submitted that independent businesses are never proved otherwise by cogent and clinching evidence. It is submitted that participation in business by labour service, funding and issuing of profit and loss has to be proved. Mr. Chinoy, learned senior counsel relied on Judgment of Madras High Court in case of R. Selvaraj Vs. R. Raadhakrishna Pillai alias R.R. Krishna Pillai and Another, in support of his submission that the contribution of labour, service or money by one member of the joint family to the other should be so conspicuous and impressive that on a prima facie examination of such material, a reasonable and prudent person should gain the impression that the two members were so associated with the common object of exploiting a commercial activity to the advantage of the joint family. It is submitted that there is no presumption that a business conducted by a member of the joint family is a joint family business. The presumption on the other hand has to be contrary. Learned counsel placed reliance on paras 1, 2, 6 and 11 of the said judgment which read thus:

1. The unsuccessful plaintiff in O.S. No. 3 of 1968 on the file of the Court of the Subordinate Judge of Nagapattinam, is the appellant. Originally the suit was numbered is O.S. No. 42 of 1967 on the file of the Court of the District Judge, East Thanjavur at Nagapattinam. The suit is one for partition and separate possession of the plaintiff's one-third share in the suit properties and for future profits. The plaintiff's case is that his paternal grandfather Rajagopal Pillai started a photo business in 1917 under the name and style of Sri Krishna. Photo Studio. The first defendant is the plaintiff's father and the second defendant is the step-brother of the plaintiff. It is claimed that the first defendant got himself associated with his father in the photo business and both of them ran it as a joint family business. When the grandfather Rajagopal Pillai became old, the first defendant, was in sole charge of the studio and the business and the plaintiff after completing the school course, participated in the same and contributed his labour also. Thus, the family photo business was continued after the death of Rajagopal Pillai in 1965 and considerable properties were acquired from and out of the profits of the business. The plaintiff says that he became an expert in the said business and the grandfather himself till his death was doing the sedentary part of the business. As the joint family had no other business or source of earning except the photo studio, the plaintiff acquired a right by birth in the family activity and the assets secured in exercise of such profession. The family

acquired the house in which the studio is at present situate besides agricultural lands of an extent of 6.80 acres in Serukudi village from and out of the business profits. It is claimed that large sums of money have also been deposited by the first defendant in his name in various banks. Soon after the death of the grandfather there were misunderstandings between the plaintiff and the first defendant, who was under the influence of his second wife and by the end of April, 1967 the bickering compelled the plaintiff to demand a division of the joint family properties and allotment of his one-third share to him. The plaintiff also refers to a partition in the family to which he was a party but claims that it is an unstamped and unregistered document and, therefore, would not bind him. As the first defendant refused to effect any proper division of the properties and give his one-third share, though such a demand was made through mediators, he had to file the present action claiming a one-third share in the plaint A to D schedule properties. A schedule properties deal with the materials in the photo studio; B schedule refers to a house in Thiruvarur town. C schedule deals with the agricultural lands and the D schedule refers to a deposit of a sum of Rs. 10,000 made by the first defendant in the Indian Overseas Bank at Thiruvarur.

2. In the first defendant's written statement he admits that the plaintiff was living with him till April, 1967. Thereafter the plaintiff was living separately with his wife. It is denied that the photo studio called Sri Krishna Photo Studio is a joint family business and the properties mentioned in the various schedules to the plaint are joint family properties. Rajagopal Pillai, the grandfather of the plaintiff was a public servant employed as a clerk in the Sub-Registrar's Office in the first instance and later in the railways. Rajagopal Pillai thereafter started a business in watch and clock repairs and later learnt photography and was carrying on a mere photography business at Nagapattinam and Thiruthuraipundi and was not even successful. He was adjudicated as an insolvent and the first defendant emphatically denies that there were any ancestral nucleus left by Rajagopal Pillai for the first defendant to exploit the same. The first defendant's independent case is that he was trained by one G.V. Naidu, photographer of Nagapattinam and he became proficient in it. With a paltry sum of Rs. 130 given to him by his maternal uncle, he purchased a camera and carried on the profession as a photographer at Thiruvarur. Thereafter he started a photo studio of his own at Thiruvarur and with the funds provided by his paternal aunt, he opened the studio Sri Krishna photo studio on 19th February, 1931. Thereafter he had to borrow some moneys for purchases of cameras and equipment and thus, no funds were provided by his father and no photographic equipment was inherited by him to continue the so-called photographic business of Rajagopal Pillai, the grandfather of the plaintiff. Thereafter, this studio was shifted to a pucca building and with the borrowings made from third parties and banks, the first defendant continued his own separate studio business as the proprietor thereof. In course of time, he improved the business and began to deal with the photographic materials and earning income therefrom. He lent moneys on mortgages and purchased immovable properties mentioned in the schedules and

they are his sole and separate properties. The house and the agricultural lands are not joint family properties and the plaintiff has no interest or right by birth in them. The allegation that the plaintiff assisted his grandfather as well as the first defendant in conducting the alleged photographic business started by Rajagopal Pillai in 1917 is denied. The plaintiff if at all was writing some accounts and beyond that no contribution was made by the plaintiff in acquiring the schedule mentioned properties. The bank deposit of Rs. 10,000 is denied. The first defendant also refers to some mediation at the instance of respectable persons and the fact that a draft partition deed was drawn up whereunder the first defendant was prepared to give the plaintiff an ex-gratia sum of Rs. 4,501 and five mass of land so that the plaintiff could live upon it and maintain himself. The first defendant also refers to a release deed which the plaintiff had to execute incorporating the terms agreed upon during the course of mediation. Though the plaintiff signed a copy of such deeds and affixed his signature thereto, he wriggled out of the situation and at the instance of his friends, has filed this suit on false allegations. The plaintiff's claim of one-third share in the schedule mentioned properties is denied.

6. The foundation of the appellant's case is that it was the grandfather Rajagopal Pillai, who started the photo studio and the ancillary photographic business. If this basis or hypothesis on which the edifice of this argument is built, is taken out, then the plaintiff should naturally fail. Rajagopal Pillai was a Government servant. He was working in the Sub-Registrar's office for sometime and later on in the railways. He was for sometime doing business in watch repairs. Thereafter he got a camera on a hire purchase and was taking photos. He was later adjudicated insolvent in 1927. This by itself is sufficient to discredit the story of the plaintiff as well as his witnesses that there was ancestral nucleus left by Rajagopal Pillai for the first defendant to continue the same. Exhibit B-90 is the insolvency petition. Exhibit B-91 is the affidavit filed by Rajagopal Pillai pleading inability to pay his debts. Exhibit B-92 is the application for discharge, which was pending till 30th October, 1928. The final order of discharge was made directing Rajagopal Pillai to deposit a sum of about Rs. 25 for distribution amongst his creditors and he was given six months time for payment. It is, therefore, seen that Rajagopal Pillai was unable to make both ends meet even in 1928, as he could not pay the sum of Rs. 25 in one lump sum and he wanted six months time for payment of the same. Rightly, therefore, the lower Court stated that it would be unwise to comprehend that Rajagopal Pillai was conducting a photo studio during 1927 and 1928 and that too at Thiruvapur, a place not mentioned in Exhibits B-90 and B-92. It was only in 1931 that the first defendant started his own photo business. There is no link to prove that the grandfather provided the father of the plaintiff with funds during 1929 and 1930 to enable the father to start a photo studio business at Thiruvapur in 1931. When the first defendant started his studio in 1931, it may be that Rajagopal Pillai was assisting him. When Rajagopal Pillai associated himself with his son's new photo business at Thiruvapur, proclaiming that his son was the proprietor of the concern, that is

sufficient admission on the part of Rajagopal Pillai that he had nothing to do with the new photo business started by his son. Exhibits B-2, B-48 to B-59 establish that the grand father admitted that he was receiving only a salary of Rs. 25 or Rs. 35 as an employee in the photographic business of his son. The conduct of Rajagopal Pillai throughout gives the lie direct to the plaintiff's case that Rajagopal Pillai was the author of Sri Krishna Studio, Thiruvavarur and that his association with the said business of which the first defendant was the proprietor was in the status of a member of an undivided joint family. The plaintiff did not let in any evidence to show that the grandfather handed over at least a camera to the first defendant as an undischarged insolvent or after discharge for him to continue the so-called joint family business. The contention, however, is that the grandfather was also interested in his son's business and that he contributed sufficient labour for raising a presumption that there was a joint family activity. It is not every sporadic or unimpressive contribution by a member of the joint family, may be the father, that would make the resultant activity, a joint family activity. The contribution of labour, service or money by one member of the joint family to the other should be so conspicuous and impressive that on a prima facie, examination of such material, a reasonable and a prudent person should gain the impression that the two members were so associated with the common object of exploiting a commercial activity to the advantage of the joint family as a whole and in general. In the instant Case, the grandfather was writing accounts acknowledging that the father was the sole proprietor of the Thiruvavarur photo business. The grandfather also accepts that he was receiving a salary for such service rendered. The surrounding circumstances also belie the tall story of the plaintiff that the grandfather and the father so associated themselves so as to make their joint activity a joint family venture. In the absence of such essential features, which would make such contribution by one member to the other a commercial activity the intendment and purpose of which is to make it a joint family trade, it is hazardous to infer that such unisoned activity between the members should be equated to a co-ordinated activity on their part equitable to the activity of members of a Hindu joint family resulting in the properties acquired by such common exertions as joint family properties.

11. However, one such incident relied upon is the writing of accounts of Sri Krishna Photo Studio by Rajagopal Pillai. Such occasional offers by the grandfather to render service to the father after he was discharged as an insolvent cannot be put in the forefront to show that Rajagopal Pillai associated himself with the son so as to make the activity of the first defendant a joint activity. It may be that the first defendant as a dutiful son allowed his father to help him in his business during the early part of its commencement. We have already referred to the fact that Rajagopal Pillai himself was paid a salary of Rs. 25 per month as is seen from Exhibits P-60 to 69. Exhibits B-48 to B-59 are letters written by the grandfather to various persons to intervene on his behalf and request the first defendant to send a sum of Rs. 30 per month. The one other incident referred to by the plaintiff is his own contribution to the business.

That he has experience in photography is vaguely referred to by P.Ws. 2 and 5. It may be that the plaintiff is interested in photography. But the question is, whether he rendered assistance to his father and contributed his labour to set up a case that the business as well as the properties acquired from the surplus income, are joint family properties. He did not receive any salary or any remuneration from the first defendant. He also assisted his father during his spare time by writing a few entries in the accounts. Even such association by the plaintiff would not make the commercial activity of his father a joint family business, A conscious, voluntary abandonment by the first defendant of his separate rights in the business should be established. He might have taken some photographs on some occasions. He might have proficiently as a photographer as is seen from Exhibit B-70 which is the advertisement given in The Hindu to show that he is an experienced photographer. But all such sporadic acts and exhibitions of proficiency cannot make the business of the father a joint family business. The well established principles as is seen from the pronouncements of the Supreme Court and our High Court is to the effect that there is no presumption that a business conducted by a member of the joint family is a joint family business. On the other hand the presumption is to the contrary. The person alleging such a state of affairs should prove the same by acceptable and clinching evidence. The fact that the business started by one of the members was of the same nature as the business which was carried on by his ancestors will not by itself be a sufficient discharge of the burden Of proof on the part of the person alleging that such business is ancestral business. Even if it is assumed that the first defendant out of his generosity associated for certain purposes the plaintiff and put him in administrative charge of a part of his affairs, it does not tantamount to a relinquishment or abandonment of his exclusive rights in his business and conversion of his separate business into joint family business. Even if the first defendant trained the plaintiff for acquisition of the necessary knowledge as a photographer that would not be a telling feature to prove blending or intentional abandonment of his exclusive rights in the photographic business and trade. One other feature very strongly relied upon by the plaintiff is that when the account book was opened by the first defendant on 19th February, 1931 in the name of Sri Krishna Photo Studio, a sum of Rs. 379-11-0 was credited towards the photographic charges from customers. When the business was started on 19th February, 1931 the entry as if a sum of Rs. 379-11-0 is due from customers indicates that there was a continuity of an old business. The learned Judge on a careful consideration of the entries in Exhibit B-2 which contained the above entry also rightly held that it represents the amount due by way of charges for photographs taken on that date. It is not unlikely that a credit is shown on that date for services rendered by the photographer to his customers. Invariably a business man would try to boost up his business. Apparently on such anxiety, the first defendant might have made these entries on the very date when he started the business. The first defendant, however sent some old bill books containing the bill numbers which are not continuous. The first defendant explains the position by saying that the order forms were

loose sheets got from another photographer.

12. Mr. Chinoy also placed reliance on the Judgment of Andhra Pradesh High Court in case of V. Srisailam Vs. V. Krishna Murthy and Others, and in particular paragraphs 42, 43, 49, 50, 83, 84 and 87 in support of his submission that the member asserting the property to be joint family property, has to prove by cogent and convincing evidence that the member or members acquired the property by investing joint family business and only in that event the onus would shift. It was not joint family property. Mr. Chinoy submits that if it is joint family business, then all the members of the family are liable for its debts upon the terms and to the extent laid down by Hindu law. A member of the joint undivided family can make separate acquisition of property for his own benefit and unless it is shown that the business grew from joint family property or that the earnings were blended with joint family estate they remain free and separate. Paragraphs 42, 43, 49, 50, 83, 84 and 87 read thus:

42. The core question is whether Buggaiah and his sons own joint family properties in plaint A and C schedules and whether businesses in plaint B schedule are joint family businesses. It is well settled that possession of joint family property is not a necessary requisite for constitution of a Hindu joint family. A family which does not own any movable or immovable properties may nevertheless be a joint family, for, there is always a presumption in Hindu customary law that a Hindu family is a joint family. Such a family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. There is no presumption much less irrebuttable presumption that a Hindu joint family at all times possesses joint family properties. Be it also noted that every Hindu joint family is not a Hindu coparcenary. The latter is a narrower body and includes only those persons like sons, grandsons and great grandsons of the holder of the joint family property, who acquire an interest in the coparcenary property by birth.

43. Even in a situation where a undivided Hindu family joins in worship and food, the members of a family who constitute a Hindu joint family may have their own avocation and may acquire separate and individual estate, but still share the community activities like common mess, common worship etc. Likewise, even where a Hindu joint family probably owns and possesses joint family properties, a member with an undivided share in such properties, may on his own acquire and enjoy separate estate in addition to the undivided share. In such an event, the other joint family members cannot claim separate self-acquired property of other member as joint family property unless two conditions are pleaded and proved. First of such conditions is blending. When the individual member who acquired estate on his own has voluntarily thrown the same into the common stock/common hotchpot with the intention of abandoning exclusive vesting duly establishing that a member who had separate self-acquired property has clear intention to waive his separate rights. An inference cannot be drawn from the mere fact that a member who has self-acquired property allowed other members

of the family to use it conjointly himself. An inference is also not permissible from the fact that income of the separate property was used to support his close blood relations and member of a joint family. The second situation where separate self-acquired property is treated as joint family property, is when investment for a business activity which enabled acquisition of separate property itself came from the joint family nucleus with a clear understanding and intention that though the business is separate it was always treated as joint family property. In either case, it must be proved that a member who acquires separate property is a coparcener of a joint family property and there was coparcenary property with which self-acquired property blended. That is to say, unless there is a coparcenary joint family property, inherited by a member of joint family, there cannot be any blending or showing of self-acquired property into the common hotchpot. There should be a common hotchpot which may come from joint family nucleus or ancestral property.

49. In *Rukhmabai v. Laxminarayan* (supra), the Supreme Court laid down thus:

There is a presumption in Hindu Law that a family is joint. There can be a division in status among the members of a joint Hindu family by definement of shares which is technically called "division in status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis-a-vis the family property. A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property.

50. The conspectus of the above pronouncements is that there is a presumption in Hindu Law that a family is joint. Nonetheless, there is no presumption that the property owned by any member or members of the joint family is property of Hindu joint family. The member asserting the property to be joint family property, has to prove by cogent and convincing evidence that the member or members acquired the property by investing joint family nucleus, in which event the onus shifts to the member or members who assert that it is not joint family

property. These are, however, not abstract questions of law, but questions of fact to be determined on appreciation of evidence adduced by the contesting parties. The learned Counsel referred to various other judgments of the Supreme Court as well as various High Courts. It is, however, not necessary to proliferate the extracts from these judgments.

83. In *Bhuru Mal v. Jagannath* (supra) the Judicial Committee of the Privy Council considered this aspect of the matter and held that there is no presumption in law that joint business is a joint family business. It was held.

Though a business, if it belongs to a Hindu joint family, is an item of joint family property, special considerations apply to the question whether or not a business belongs to the family or to the individual member who carries it on. If it be a joint family business, then all the members of the family are liable for its debts upon the terms and to the extent laid down by the Hindu law. Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business. A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate they remain free and separate.... The question whether a business carried on by a member of a joint Hindu family was begun or carried on with the assistance of joint family property is a question of fact upon which the burden of proof lies upon the plaintiff who claims a share in the business. The burden of proving that the business was separate in its inception cannot be cast upon the defendant who asserts it. Jointness may be proved by evidence that the business was carried on as a family business, by proof that the profits were treated as joint family property being brought to one account or divided among the members.

84. The Privy Council also observed that adverse inference against a member of the joint family that business carried on by him was not his individual business cannot be drawn merely on proof that he treated his younger brothers with ordinary kindness, supporting them when they were not earning, helping them to start business and, seeing to their marriage and so forth. P.W. 1 and D.W. 2 repeatedly say that Buggaiah brought some amount from Agapalli which formed a nucleus for the firm Veesamsetti Buggaiah and all other businesses were slatted from out of the profits of the first firm. They also in one voice state that defendants 1 to 5 had no money to invest in the business. Even assuming that if it is Buggaiah who gave money to sons to start business the same does not lead to an inference that all the businesses were started by Buggaiah. It is well settled that when the family has a joint family business, the partners in the said business are not allotted share of their own and there is no apportionment of share of profits whereas in partnership firm constituted with members of the joint family, the share in the profits is apportioned. It is in the evidence that all

the defendants were having individual income tax assessments and they were filing these returns to show the profits they earned as partners in each of the business in B-schedule. A reference may be made to the decision of the Supreme Court in *Nanchand Ganga Ram v. M.M. Sadalge* (supra) which supports this view.

87. A Division Bench of Madras High Court in *R. Selvaraj v. R. Radhakrishna* (supra) reiterated the settled principles of law that there is no presumption that the business conducted by a member is the joint family business and on the other hand presumption is to the contrary. The person alleging such state of affairs should prove the same by acceptable and clinching evidence. It was held that the fact that the business started by one of the members was of the same nature as the business which was carried on by ancestors will not by itself be sufficient to discharge the burden of proof on the part of the person alleging that such business is ancestral business. It was further held that:

The contention, however, is that the grandfather was also interested in his son's business and that he contributed sufficient labour for raising a presumption that there was a joint family activity. It is not every sporadic or unimpressive contribution by a member of the joint family, may be the father, that would make the resultant activity, a joint family activity. The contribution of labour, service or money by one member of the joint family to the other should be so conspicuous and impressive that on a prima facie examination of such material, a reasonable and prudent person should gain the impression that the two members were so associated with the common object of exploiting a commercial activity to the advantage of the joint family as a whole and in general.

13. Relying upon this Judgment, learned senior counsel would submit that there is no evidence on record or even pleaded by the plaintiff that either plaintiff or other family members shared any profits and liabilities. Mere association of two family members does not mean association of family business. Mr. Chinoy also placed reliance on the Judgment of Privy Council in case of (1942) 12 AWR 25 (Privy Council) Relevant paragraph of the Judgment at page Nos. 16 and 17 is extracted as under:

The first question to be considered is whether the Chief Court were right in reversing the trial Judge's finding that it was not proved that the business carried on at Macandrewganj by Gobardhan under the style Gobardhan Das Tota Ram belonged to the joint family-that is to say, to Moti Ram's descendants. On this their Lordships would premise that though a business, if it belong to a Hindu joint family, is an item of joint family property, special considerations apply to the question whether or not a business belongs to the family or to the individual member who carries it on. If it be a joint family business, then all the members of the family are liable for its debts upon the terms and to the extent laid down by the Hindu law. Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business. Lord Buckmaster delivering

the judgment of the Board in AIR 1929 1 (Privy Council) put the law thus:

A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate.

In the present case, very little is known as to how and when the business of Gobardhan was begun, and it becomes all important to distinguish between matters that can readily be imagined and matters which the evidence establishes. The family dwelling-house at Rajwara is described as a haveli, and Gobardhan left it for Macandrewganj at some time between 1874 and 1879. there is not evidence that the haveli was ever mortgaged or that in 1874 there was a family business at Rajwara, though Gobardhan's brothers are shown to have had a business in groceries and moneylending by 1898 if not before. The Chief Court would appear to think that these bald facts render it probable that there were family resources out of which grew the businesses both at Macandrewganj and Rajwara, but their Lordships agree with the trial Judge in thinking that by themselves they leave the means whereby Gobardhan started business completely in the dark. Had his efforts proved unsuccessful and debts accumulated in Macandrewganj his brothers could hardly have been called upon to pay his debts upon proof that at Rajwara the family dwelling-house was more than a cottage and that they were making their living by carrying on a grocer's shop. It is not irrelevant to reflect how many times businesses of substantial size have arisen not merely from small beginnings but by the activity of an energetic man wholly without capital, content to begin selling goods for others and in due course obtaining credit for small transactions on his own account. Their Lordships are unable to see that the Chief Court have made good their criticism of the learned trial Judge that he has misdirected himself in law as regards nucleus of joint property. On the contrary, they think that he correctly treated the question whether Gobardhan's business was begun or carried on with the assistance of joint family property as a question of fact upon which the burden of proof lay upon the plaintiffs who claim a share in the businesses. They think the Chief Court misapprehended and misapplied the case in 10 M.L.A. 490 in coming to the conclusion that they were not debarred from "casting the burden of proving that the business was separate in its inception upon the defendant who asserts it." In that case each of five brothers was actively engaged in the management of a bank of the same bank. They constituted a joint Hindu family, and by a partition deed it was clear that they all had an equal interest and that all the branches were one business, accounting together as one business. There was no evidence of an agreement of partnership and, as jointness was undeniable, it was held that the business belonged to the five as joint family property. In these circumstances the conclusion could not be resisted merely on the ground of the obscurity which surrounded the beginnings of the business and the means by which the brother Deeranath had first laid its foundations. In the present case, as in that case, jointness may be proved by evidence that the business was

carried on as a family business, by proof that the profits were treated as joint family property being brought to one account or divided among the members. It might be, for example, that Tota Ram and Ram Gopal were engaged in the business of Gobardhan Das Tota Ram as representing their respective branches. It might be that profit and loss from all the businesses carried on by any member or members was brought into one account or that they had all been dealt with by a partnership deed which made clear that all the members had an interest. But these are all matters which stand in need of proof and, until they are established as facts, the present case does not begin to be comparable to the case relied on by the Chief Court. The similarity of the two cases on the facts is illusory. Mr. Mayne in a well-known passage has referred to the difficulty which arises from attempting to lay down an abstract proposition of law which will govern every case, however different its facts, and has observed that the amount of evidence necessary to shift upon the other side the burden of displacing it might be very small but would necessarily vary according to the facts of each case (Hindu law and Usage, 6th Ed., S. 291, pp 356-8). the learned Judges of the Chief Court were right to bear in mind the necessity for taking the various considerations together and having regard to their cumulative effect. But unless in the present case, the initial onus is placed squarely upon the plaintiffs the evidence is not properly weighed.

Upon the question of fact, whether it is proved that Gobardhan Das Tota Ram was the business of the joint family, their Lordships have reached the same conclusion as the learned trial Judge. They think that the Chief Court show no sufficient reason for disagreeing with his finding that there was a partition of the Rajwara business in 1898; and that this fact affords some evidence that the business at Macandrewganj was not joint property, since Gobardhan got no share in the Rajwara business and the Macandrewganj business was not partitioned on that occasion. But their Lordships look in vain for evidence which establishes that the latter business was ever family property. There is no direct proof that it was so conducted by Gobardhan in his lifetime or that its profits and those of the Rajwara Business were ever disposed of or accounted for as joint family property.

14. Mr. Chinoy, learned senior counsel placed reliance on the Judgment of Supreme Court in case of G. Narayana Raju Vs. G. Chamaraju and Others, and in particular paragraphs 1 to 3 in support of his submission that there is no presumption under Hindu law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Paragraphs 1 to 3 and 5 of the said Judgment read thus:

1. The plaintiff G. Narayana Raju filed O.S. 34 of 1951-52 in the Court of District Judge, Mysore for partition and separate possession of suit properties mentioned in the various schedules of the plaint. The first defendant is the brother of the plaintiff. The second defendant is the widow of Muniswami Raju, the eldest brother of the plaintiff. The third defendant is the legal representative of the

plaintiff's mother. She is now the appellant having been brought on record as the legal representative of the deceased plaintiff. The case of the original plaintiff was that he, the first defendant and Muniswami Raju (husband of the second defendant) were the sons of one Gopala Raju and were all members of the joint family. Gopalaraju died in May 1931 and after his death the plaintiff and his brothers continued to be members of the joint family. The joint status of the family was served by the issue of a registered notice by the first defendant to the plaintiff in July 1951. An ancestral house in Nazarbad belonging to the family was acquired by the City Improvement Trust Board in or about the year 1909. Out of the compensation paid for that house and supplemented by the earnings of the members of the joint family, the house item No. 1 of Schedule "A" to the plaint was purchased by Gopalaraju in or about the year 1910. Subsequently item No. 2 of Schedule "A" was also purchased by Gopalaraju from the income of item No. 1 supplemented by the earnings of the members of the family. All the other items of properties mentioned in Schedule "A" and other Schedules attached to the plaint were acquired out of the income from item 1 and 2 of Schedule "A". It was further alleged that the business known as "Ambika Stores" was also the joint family business and all the properties mentioned in Schedules except items 1 and 2 of Schedule "A" were acquired out of the income of the members of the family including the income from the business of Ambika Stores. The plaintiff accordingly claimed that he and the first defendant would each be entitled to get 5/14ths share and the second and third defendants would each be entitled to get 2/14ths share. In the alternative the plaintiff pleaded that if for any reason the Court held that the properties stand in the name of Muniswami Raju and were not acquired with the aid of the joint family nucleus, he and the second defendant were entitled to equal shares as co-owners of the joint family business. The suit was mainly contested by the second defendant who asserted that the properties mentioned in all the Schedules of plaint were self-acquisitions of Muniswami Raju and constituted his separate properties. It was alleged that Muniswami Raju was the only earning member of the family at the time of the acquisition of items 1 and 2 of Schedule "A" properties and the plaintiff and the first defendant were employed in petty jobs in Wesley Press. Muniswami Raju later on employed the plaintiff in his shop as a salaried servant and the latter had no proprietary right in the business of Ambika Stores. After consideration of the oral and documentary evidence the District Judge held that the plaintiff, first defendant and Muniswami Raju were not divided and that the only property which was divisible was item No. 1 of Schedule "A" and there was not sufficient ancestral nucleus for acquisition of the other properties and that all properties except item No. 1 of Schedule "A" were the self acquisitions of Muniswami Raju, that Muniswami Raju never blended his properties with that of the joint family, that the plaintiff was only an employee under Muniswami Raju and therefore he was not entitled to the alternative relief claimed by him. Accordingly, the District Judge granted a preliminary decree holding that the plaintiff was entitled to 2/7th share in item No. 1 of Schedule "A". The plaintiff took the matter in appeal to the Mysore High Court. By its judgment dated March 25, 1960 the High Court

affirmed the decree of the trial court with the modification that besides item No. 1 of Schedule "A" item No. 2 also should be held to be joint family property and the plaintiff was entitled to partition of his share in this item also. The High Court cancelled the direction of the District Judge that the plaintiff should account for the moneys and properties of Muniswami Raju in his hands before he is given possession of his share.

2. This appeal is brought by certificate on behalf of the plaintiff from the judgment of the Mysore High Court dated March 25, 1960 in R.A. No. 155 of 1953.

3. The first question to be considered in this appeal is whether the business of Ambika Stores was really the business of the joint family and whether the plaintiff was entitled to a partition of his share in the assets of that business. It was contended on behalf of the appellant that the business of Ambika Stores grew out of a nucleus of the joint family funds or at least by the efforts of the members of the joint family including the appellant. The contention of the appellant has been negated by both the lower courts and there is a concurrent finding that the Ambika Stores was the separate business of Muniswami Raju and it was neither the joint family business nor treated as joint family business. It is well-established that there is no presumption under Hindu law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate. The question therefore whether the business was begun or carried on with the assistance of joint family property or joint family funds or as a family business is a question of fact.-(See the decisions of the Judicial Committee in AIR 1943 40 (Privy Council) and in AIR 1948 108 (Privy Council) and of this Court in Chattanatha Karayalar Vs. Ramachandra Iyer and Another, In the present case there is a concurrent finding of both the lower courts that the business of Ambika Stores was a separate business of Muniswami Raju and it was neither a joint family business nor treated as joint family business. The concurrent finding of the lower courts on this issue is upon a finding of fact and following the usual practice of this Court, it is not now open to further scrutiny by this Court under Art. 133 of the Constitution.

5. On the other hand, it was contended on behalf of the respondents that the finding of the High Court is supported by proper evidence. The business of Ambika Stores was started by Muniswamiraju as the proprietor thereof at a time when Muniswamiraju himself was comparatively well-off as a result of his partnership with Krishnaswamy Chetty & Co. In the year 1925 the partnership with Krishnaswamy Chetty & Co. was dissolved by a document Ex. D. The entire business with all the assets and liabilities was taken over by Muniswami Raju while the widow and son of Krishnaswamy Chetty were given a house estimated

by the appellant himself at Rs. 3,000/- and furniture worth Rs. 400/-. Muniswami Raju changed the name of the shop after taking it over into Ambika Stores and continued the business as is apparent from Exs. XVIII, XXVI and XXVI(A). There is also evidence that at the time when Ambika Stores was started other members of the family were not in a financial position to make any contribution to purchase such a business. The appellant joined Wesley Press in 1912 on a salary of Rs. 8 or Rs. 9 p.m. and he was drawing Rs. 27 p.m. in 1927 when he resigned from the Press. The first defendant joined Wesley Press in 1910 on a salary of Rs. 10 p.m. and he was continuing to work there till the institution of the present suit. The income of the property item No. 2 of Schedule "A" was Rs. 15 p.m. and the income from pounding rice for which there is no satisfactory evidence was also negligible. Therefore, the earnings of the members of the family other than Muniswami Raju were hardly sufficiently to maintain the family at the time when the business of Ambika Stores was started. The High Court has found that the family did not have sufficient nucleus and that Muniswami Raju was not a partner of Krishnaswamy Chetty & Co. on behalf of the family but that he was a partner in his own right. The High Court has observed that there is no evidence to show that the family supplied the money or that the family had enough means or that Muniswami Raju was representing the family when he started the business of Ambika Stores. As we have already said, the finding of the High Court and of the District Judge is a concurrent finding on a question of fact and Counsel on behalf of the appellant has been unable to make good his argument that the finding is vitiated in law on any account.

15. Mr. Chinoy placed reliance on Judgment of Supreme Court in case of P.S. Sairam and Another Vs. P.S. Rama Rao Pisey and Others, in support of his submission that no presumption can be applied to business. Para 7 of the said Judgment reads thus:

7. Crucial question in the present appeal is as to whether business which was conducted by defendant No. 1 was his separate business or it belonged to joint family, consisting of himself and his sons. It is well settled that so far as immovable property is concerned, in case the same stands in the name of individual member, there would be a presumption that the same belongs to joint family, provided it is proved that the joint family had sufficient nucleus at the time of its acquisition, but no such presumption can be applied to business. Reference in this connection may be made to a decision of this Court in the case of G. Narayana Raju Vs. G. Chamaraju and Others, wherein in a suit for partition defence was taken that business of Ambika Stores was separate business of defendant as the business did not grow out of joint family funds or at least by efforts of members of joint family which was accepted by the trial court as well as the High Court. When the matter was brought to this Court in appeal, upholding the judgment of the High Court, the Court observed thus at page 466:- "It is well established that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could

be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blender with the joint family estate, the business remains free and separate.

SUBMISSION OF Mr. BALSARA, LEARNED COUNSEL FOR DEFENDANT NOS. 17 to 19:

16. Mr. Balsara invited my attention to share holding pattern in defendant Nos. 17 to 19 in support of his submission that individuals were allotted specified shares. It is submitted that properties owned by a private limited company cannot be considered as joint family property. There is no joint family business as claimed by the plaintiff.

SUBMISSION OF Mr. B.N. VAISHNAV, LEARNED COUNSEL FOR DEFENDANT NO. 8:

17. Defendant No. 8 is married sister of plaintiff and defendant Nos. 1 to 5 and has filed supporting affidavit in favour of defendant No. 1 and adopted the arguments of defendant No. 1.

SUBMISSION OF Mr. G.S. GODBOLE, LEARNED COUNSEL FOR DEFENDANT NOS. 2, 4, 5, 7 9 to 11.

18. Defendant No. 2 and defendant No. 4 are brothers of the plaintiff, defendant No. 1 and defendant No. 3. Defendant No. 5 and defendant No. 7 are sisters of plaintiff, defendant Nos. 1 to 4 and 6. Defendant Nos. 9 to 11 are daughters of the deceased sister Mrs. Kavita Chawla. Defendant Nos. 2, 4, 5, 7, 9 to 11 have filed affidavits in this proceedings supporting defendant No. 1. It is stated in the affidavit that what is stated in the plaint, notice of motion and affidavit in support by the plaintiff is false and incorrect. To their knowledge no joint family business was ever started by the father. It is stated that plaintiff as well as defendant No. 1 had started their respective business from their self acquired funds and father was not in a position to invest/make any moneys available for the same in the said businesses as he himself was in debts for a considerable period of time. It is also stated in the affidavit that the properties described in Exhibit-B are not joint family properties and those defendants have no right, title or claim in the said properties/assets, shares and business of either the plaintiff or defendant No. 1. Mr. Godbole submits that none of his clients have any claim in respect of any of the properties. Property at Sr. No. 27 described in Exhibit-B-1 is in possession of defendant No. 2. Mr. Godbole submits that his clients are wrongly impleaded as parties to the suit.

SUBMISSION OF Mr. J.D. DWARKADAS, LEARNED SENIOR COUNSEL FOR DEFENDANT NO. 16.

19. It is submitted that plaintiff has not filed this suit on behalf of all the family members and is not speaking on their behalf in the suit. Mr. Dwarkadas placed strong reliance on the letter addressed by the plaintiff on 1st June 2010 to the first defendant and his wife (Exhibit-I-5). Mr. Dwarkadas submits that in the

entire letter, plaintiff has described defendant No. 1 as equal partner in the kirana business, imputed complete knowledge of books in other transactions and has complete access to the record of the said firm. It is also claimed that in construction and marble business, plaintiff and his wife were equal partners. The plaintiff by the said letter has demanded equal share to that of the first defendant. Mr. Dwarkadas submits that on bare reading of the said letter, it is clear that the letter addressed by the plaintiff was not as a coparcener or on behalf of the family but as an individual claiming equal share in the business being conducted by the first defendant. Mr. Dwarkadas also invited my attention to para 36 of the rejoinder filed by the plaintiff in support of his submission that even in his rejoinder, the plaintiff has individually claimed shares in defendant No. 17 company. Plaintiff has claimed 50% share in the company in his individual capacity and not on behalf of all the family members. Mr. Dwarkadas submits that plaintiff himself has been carrying out several businesses in his individual capacity in his own name or in the name of his wife and son and also owns immovable properties and makes huge profit. Neither plaintiff has considered any business or his personal properties as properties of joint family nor the defendants have rightly claimed any share in those properties as family properties and/or business. Mr. Dwarkadas would submit that even in kirana business, the plaintiff has claimed 50% share, claim and profit and never admittedly distributed any profit amongst family members except partners. Even statement of accounts produced by the plaintiff including capital account would disclose that the plaintiff as well as defendant No. 1 was having 50% profits and liabilities in kirana business. There was no distribution of ancestral profits and liabilities amongst other family members. There is no entity ever existing as Bhagwandas HUF. No returns have been filed. Mr. Dwarkadas invited my attention to the correspondence addressed by defendant No. 16 and the plaintiff by which defendant No. 16 had called upon the plaintiff to give inspection of the income tax returns filed by the plaintiff and his family members. In spite of such repeated requests, plaintiff did not offer inspection nor furnished copies thereof and therefore, this Court shall draw adverse inference against the plaintiff.

20. Mr. Dwarkadas, learned senior counsel placed reliance on the Judgment of this Court in case of Smt. Shivani S. Roy and another Vs. Shri Hari Pada Roy and others, and in particular paragraph 8 in support of his submission that plaintiff not having produced income tax returns, adverse inference has to be drawn against the plaintiff. Para 8 of the said Judgment reads thus:

8. Mr. Chagla on the other hand submits that the dishonesty of the defendant is not at all relevant. The plaintiff has to prove its case on its own merits. Plaintiff has to prove that he has title in the property. It can be demonstrated that in reality defendant No. 1 is the true owner of the suit premises. Agreement for sale of the suit premises categorically states that the said flat has been sold to defendant No. 1. Consideration for the said flat has been paid by the defendant No. 1. The allegations about the joint ownership are wholly false within the knowledge of the plaintiffs. Even if the flat is purchased out of the funds of the

partnership it would not mean that the flat is jointly owned. In fact, the whole consideration has been paid out of the personal accounts of defendant No. 1. The defendant No. 1 and the deceased were members of the partnership firm along with other partners but the impressions has been given that the partnership firm consisted of only two partners being defendant No. 1 and the deceased. The vague claims made by the plaintiffs cannot enable the plaintiffs to merit any relief. According to the Counsel all these vague claims can be called out from a reading of the rejoinder filed by plaintiff No. 1. In paragraph 4 of the rejoinder it is stated that the funds which are employed for the purpose of the suit flat were joint partnership funds in which the deceased and the first defendants were equal partners. Payments were made directly out of the partnership account or out of the partnership fund transferred by the first defendant into his personal account. The suit premises were in fact purchased from payments made out of the partnership funds and not out of the personal account of the first defendant as alleged. The wealth tax returns of defendant No. 1 consistently showed debit balances in his capital accounts in the two firms. On the other hand the bank statements of the deceased do not show transfers of any significant amount into his personal account. Similarly numerous instances were quoted where the amounts have been transferred from the partnership account to the personal account of the defendant No. 1. According to the Counsel, these averments do not advance the case of the plaintiff to show that defendant No. 1 was co-owner of the suit premises with the deceased. With regard to the agreement with Saraswati Narayan Singh it is stated in the rejoinder that the agreement was entered into between the defendant No. 1 and Singh, treating defendant No. 1 as the head of the family. Defendant No. 1 was at all time a trustee for the half share of the suit property. This is evident from the fact that soon after the execution of the agreement one of the flats was in fact transferred to the name of the deceased in the Society's account. Counsel further points out that even in the plaint it is nowhere pleaded that the plaintiffs are co-owner of the flat. The same is, however, pleaded in the rejoinder. Therefore, it is submitted that the plaintiffs were not sure of their claim in the suit premises. With regard to the statements made in the Small Causes Court it is submitted that the statements made are consistent with the claim put forward by the defendant No. 1 to the effect that the deceased is the owner of flat No, 32 and defendant No. 1 is the owner of the flat No. 31. The said flats are given on leave and licence basis to Chase Bright. The licence agreement is executed only by the defendant No. 1. Record of the Co-operative society shows at best that the deceased was the owner of flat No. 32. In regard to the wealth tax returns, it is submitted that the plea put forward by the plaintiffs is not correct. A perusal of the return filed by defendant No. 1 as on 31-3-1970 shows immovable property in the amount of Rs. 50,000/-. Same is the position in the returns filed on 31st March, 1972, and in 1975-76. The correct position according to the Counsel, is depicted in the report of valuation of immovable property dated 31st March, 1976. In this against the column of ownership it is clearly stated that defendant No. 1 is the sole owner of residential premises on 3rd floor flat Nos. 31 and 32 of the building

called Belle View Co-op. Housing Society. However, with regard to this valuation report, the plaintiffs have stated that the same has been obtained by the first defendant for purposes other than the wealth tax. This is evidential from the fact that even after the said valuation report was prepared the wealth tax returns of the two brothers continued to show the same basis of valuation. Counsel submits that for whatever reason the valuation report was obtained the evidentiary value cannot be brushed aside. Counsel submits that there is weightily evidence in favour of the defendant No. 1. The agreement with Mrs. Singh is executed solely by defendant No. 1. Society record show that flat No. 32 is the ownership of deceased and flat No. 31 is the ownership of defendant No. 1. All the maintenance bills had been paid by the defendant No. 1. Share certificates show that there are two owners of flat No. 31 and Flat No. 32. Agreement with Chase Bright was entered into by defendant No. 1. The entire amount of compensation paid by Chase Bright has been deposited in the personal account of defendant No. 1. All the outgoings with regard to suit property has been paid by defendant No. 1. Valuation report of flat No. 32 shows that defendant No. 1 is the sole owner of the suit flat No. 31. The income tax returns show that the rent has been received in favour of flat No. 32. It is further the submission of Mr. Chagla that the submissions and admissions made in the Small Causes Court are not binding on the defendant No. 1. In fact, there is no admission in the Small Causes Court to the effect that defendant No. 1 and deceased are co-owners. There is also no admission to the effect that they are equal co-owners. If anything, at best, it could be said that deceased is the owner of flat No. 32nd defendant No. 1 is the owner of flat No. 31. In fact, the deceased himself has been representing that he is the owner of flat No. 32. He has continuously declared a sum of Rs. 6,000/- received on account of rent in the Income Tax returns for the years 1978-79, 1979-80, 1980-81, 1981-82, 1982-83, 1983-84 and 1984-85. In view of the above it is submitted by Mr. Chagla that the plaintiff has miserably failed to establish a prima facie case for the grant of any interim relief. In support of the claim Mr. Chagla has relied upon an unreported judgment given by the Division Bench of this Court dated 22nd April, 1991 in Appeal No. 332 of 1991 and others, S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, Sri Chand Vs. Inder and Others, Shri Chand v. Inder and others, and. E.L. Ebrahim Lebbe Marikar v. Austin De Met Ltd.

21. Mr. Dwarkadas also placed reliance on a Judgment reported in AIR 1943 40 (Privy Council) and in particular paragraph 8 at page 42 in support of his plea that there is no presumption that an individual business carried on by a member of a joint family in partnership with a stranger in joint family business and whether it is or it is not, is a matter for evidence. Relevant portion of the said Judgment at page 42 reads thus:

With regard to the timber business, it appears that this concern was started and carried on by Sultan Singh in partnership with one Lala Mohan Lal under the firm name of Sultan Singh & Company at various places including Chamba, Kulu and Simple. There is no presumption that a new business carried on by a member of

a joint family in partnership with a stranger is joint family business. It may be or it may not be. It is a matter for evidence. In the present instance it is clear that the timber business was financed from the family funds.

22. Mr. Dwarkadas, learned senior counsel placed reliance on Judgment of Supreme Court in case of Nanchand Gangaram Shetji Vs. Mallappa Mahalingappa Sadalge and Others, and in particular paragraphs 20, 31, 37 to 41 which read thus:

31. Thus the evidence furnished by the income tax returns was conflicting. But the aforesaid endorsement on Ex. 309 was a clincher. It was a statement made ante litem motam. It confirmed the testimony of Def. 2 that the partition had taken place in 19(sic) and this tilted the balance against the contention of the plaintiff. In such evidentiary value, it out-weighs the income tax returns, Exs. 310, 311 and 314, in which the status of the assessee is shown as H.U.F. The High Court was therefore, not wrong in holding that all these documents taken together do not show "that the family of the defendants had continued to be joint.

Reference has already been made to Ex. 316, an order dated June 20, 1950, of the income tax Officer showing that defendants 1, 2 and 3 were being assessed on the basis that each of them had 1/3rd share in the business. In a joint Hindu family business, no member of the family can say that he is the owner of one-half, one-third or one-fourth. The essence of joint Hindu family property is unity of ownership and community of interest, and the shares of the members are not defined. Similarly, the patterns of the accounts of a joint Hindu family business maintained by the Karta is different from those of a partnership. In the case of the former the shares of the individual members in the profits and losses are not worked out, while they have to be worked out in the case of partnership accounts.

38. In view of all that has been said above, we are of opinion that the concurrent finding of the courts below to the effect, that the joint Hindu family of the defendants had disrupted on November 4, 1945, does not suffer from any legal infirmity or gross error which would justify our interference in this appeal by special leave. We therefore, take it that no joint Hindu family of the defendants, nor any joint business of such a family was in existence either on October 15, 1949 when the last dealing (vide Ex. 394) of the plaintiff with defendants 1 and 2 took place, or when on April 15, 1953 the accounts were stated and admitted. Indeed, on the date, April 15, 1953, on which the plaintiff's cause of action arose, even the partnership was not in existence, the same having stood dissolved since April 20, 1951.

39. Mr. Datar next contends that even if the joint status of the family stood disrupted from November, 1945, then also, on the principle of Section 45, Partnership Act, the acknowledgments made by defendants 1 and 2, representing themselves, jointly or severally, as Karta of the joint Hindu trading family, would, in the absence of public notice to the traders in general or particular notice to the plaintiff be binding on all the erstwhile members of the joint family. Reliance for

this contention has been placed on a single Bench Judgment of the Bombay High Court in Kashiram Bhagshet Shete Vs. Bhaga Bhaushet Redij,

40. As against this, Mr. Desai submits that Kashiram Bhagshet Shete Vs. Bhaga Bhaushet Redij, does not lay down the law correctly. Counsel main tains that the contrary view taken by the other High Courts in these cases is sound. Pramod Kumar Pati and Another Vs. Damodar Sahu and Others, ; Rangaswami Aiyangar Vs. Sivaprakasam Pillai and Others, ; Muthyala Ramachandrappa Vs. Muthyala Narayanappa and Others, .

41. Kashiram Bhagshet Shete Vs. Bhaga Bhaushet Redij, decided by an eminent single Judge certainly supports the proposition propounded by Mr. Datar. Applying the principle of Section 45 of the Partnership Act, 1932, the learned Judge held that unless intimation of the severance of joint status between the members of the joint family is given to the outside creditors who had dealings with the joint family through its karta, either by public notice or individual notice in that behalf, the karta would be deemed to continue to represent the family and to have power to incur debts for family necessity and to make acknowledgements or part-payments in respect of the same so as to extend the period of limitation. With great respect to the learned Judge, we do not think that this is a correct enunciation of the law on the point. Firstly, the legislature has, in its wisdom, excluded joint Hindu trading families from the operation of the Partnership Act. Section 4 of that Act defines "partnership" as "the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all". Section 5 further makes it clear that this Act governs only that relation of partnership which arises from contract and not from status such as the one obtaining among the members of a joint Hindu family trading partnership. Secondly, the question whether an acknowledgement made by the karta of an erstwhile joint Hindu family after its severance, would extend limitation against all the former members of that family, turn primarily on an interpretation of Clause (b) of Sub-section (3) of Section 21 read with Section 19 of the Limitation Act, 1908. Clause (b) of Section 21(3) provides:

Where a liability has been incurred by or on behalf of a Hindu undivided family as such, an acknowledgement or payment made by or by the duly authorised agent of, the manager of the family for the time being, shall be deemed to have been made on behalf of the whole family.

Submission of Mr. V.V. Tulzapurkar, learned senior counsel appearing on behalf of defendant No. 15

23. It is submitted that plaintiff holds 33% shares in defendant No. 1 company. Other members of the family are not shareholders of defendant No. 15 company. Mr. Tulzapurkar invited my attention to para 11 of the plaint by which it is pleaded by the plaintiff that he is not alleging any oppression and mismanagement against defendant No. 15. It is submitted that assets of defendant No. 15 company belong to the company. No shareholder can claim any

asset of the company as his personal asset. In the alternative, it is submitted that as against the claim of 1/10th share in defendant No. 15, plaintiff already holds 33% share in the said company. It is submitted that defendant No. 15 company had entered into an agreement on 12th December 1999 to which neither plaintiff's nor defendant No. 1 was party. The said agreement was entered into for providing resources to other companies. The said company is not carrying on any other company. The said agreement was for a period of three years which period has already expired. It is submitted that no relief as claimed in prayer (a) and (b) of the plaint can be granted against defendant No. 15 company in this suit.

24. Mr. Tulzapurkar placed reliance on the Judgment in case of Mrs. Bacha F. Guzdar, Bombay Vs Commissioner of Income Tax, Bombay, XXV Company Cases page 1 and in particular page Nos. 5 and 6 in support of his plea that a shareholder does not buy any interest in the property of the company which is a juristic person entirely distinct from the shareholder, though he has a right to participate in the properties if and when the company decide to divide them. It is company's property and not shareholder's. Relevant portion of the said Judgment at page 6 and 7 is extracted as under:

There is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the company which is a juristic person entirely distinct from the shareholders. The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the articles of association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. HE has undoubtedly a further right to participate in the assets of the company which would be left over after winding up but not in the assets as a whole as Lord Anderson puts it.

The High Court expressed the view that until a dividend is declared there is no right in a shareholder to participate in the profits and according to them the declaration of dividend by the company is the effective source of the dividend which is subject to tax. This statement of the law we are unable to accept. Indeed the learned Attorney-General conceded that he was not prepared to subscribe to that proposition. The declaration of dividend is certainly not the source of the profit. The right to participation in the profits exists independently of any declaration by the company with the only difference that the enjoyment of profits is postponed until dividends are declared.

It was argued that the position of shareholders in a company is analogous to that of partners inter se. This analogy is wholly inaccurate. Partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners. Such is, however, not the case of a company which stands as a separate juristic entity distinct from the shareholders. In Halsbury's Laws of England, Vol. 6 (3rd) Ed),

page 234, the law regarding the attributes of shares is thus stated:

A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by its articles, and are not of the nature of real estate.

25. Submissions of Mr. Shailesh Shah, learned senior counsel appearing for the plaintiffs in rejoinder:-

It is submitted that merely because some of the family members are not claiming the properties and in business and/or properties in joint family would not mean that the claims of the plaintiffs is not proved or the same can be discarded. Plaintiff is not representing others and is claiming his 1/10th shares. It is submitted that from construction business, there were no sharing of profit given to the plaintiff or other family members whereas in kirana business, defendant no. 1 was given his share. As far as sharing of liabilities is concerned, learned senior counsel submits that the liabilities would be shared when partition takes place by metes and bound. It is submitted that if plaintiff wanted to withdraw from the family business in 2003, plaintiff would not have given security of his two flats in 2006 to secure the loans obtained by the firms and companies.

As far as inspection of the income tax returns demanded by defendant no. 15 from the plaintiff is concerned, Mr. Shah submits that in those income tax returns filed by the plaintiff, since plaintiff has not disclosed any properties which are subject matter of this proceedings as joint family property and therefore inspection and/or furnishing copies of those income tax returns filed by the plaintiff or his wife and sons would not be necessary. It is submitted that though since 1982, there were separate residence of all the family members, that would not indicate that there is no joint family. Situation prevailing in 1969 has to be considered and not in 1982. Nucleus has to be seen of the year 1969 and not 1982. Mr. Shah submits that the plaintiff has prima facie demonstrated nucleus and thus onus is shifted to defendants to show that properties were self acquired or individual properties which onus the defendant has failed to prove. Defendant no. 1 has not furnished any details as to what was his income arising out of alleged business started by him in 1967 with any documentary evidence and such allegation is totally vague. Out of five brothers, two brothers participated in kirana business, others three participated in construction business. Defendant has to show that all the properties were acquired by the individual income/self acquired which the defendants have failed to prove. It is submitted that in so far as insolvency proceedings are concerned, though statements were made by father in those proceedings, the fact remains that commencement of insolvency proceedings and commencement of business in 1969 was together. The fact that all family members were joined as partners would show that the joint family business was started. It is submitted that defendant no. 1 was born in 1950 and

thus there was no question of he buying any flat in 1948. Mr. Shah would submit that when firm started in 1969, 1st defendant was just 18 years old and would not have joined other brothers who were minor due to love and affection. Defendants have not pleaded any such allegations in their affidavit. Mr. Shah made an attempt to distinguish the judgment cited by Mr. Chinoy (2003) 1 ACD 520 A.P. on the ground that once plaintiff has proved nucleus, burden has shifted to defendant to prove that the properties were self acquired. Learned senior counsel further submits that plaintiff has no objection if the business standing in the name of plaintiff, his wife or sons are also considered as the joint family property and businesses. This submission of Mr. Shah is vehemently opposed by defendant no. 1, defendant no. 15 and other supporting defendants of defendant No. 1 on the ground that there is no such pleading.

As far as judgment relied upon by Mr. Chinoy that there can be no presumption drawn by the business is concerned, Mr. Shah, learned senior counsel submits that there is no question of having any presumption about the business in this case as the partnership deed itself shows that it was joint family business. Defendant no. 1 was admitted as partners at the age of 18 and the other brothers who were minor in 1969-70 were admitted to be benefits of the partnership. It was thus clear that joint family business was started in 1969 itself. Mr. Shah submits that Gautam Overseas started by defendant no. 1 was also by using funds from the profit earned by him from other business of the joint family. Mr. Shah submits that court has to only draw presumption that the father started business in 1969 in which all the sons were made partners which would indicate that the business was joint family business. Mr. Shah distinguishes the judgment of Madras High Court relied upon by Mr. Chinoy on the ground that the facts of the said case before Madras High Court in the said matter were different. Mr. Shah laid emphasis on the judgment reported in 2003 (5) SCC 589 in support of his submission that the separate residence would not drew conclusion that there was no family business. In so far as business carried out by the private limited companies which are parties to this proceedings are concerned, learned senior counsel submits that the shares in those business and properties would be ascertained at the time of participation and this court shall lift the corporate veil of those companies which are started by using the funds and income of the joint family business. In so far as judgment reported in AIR 1943 Privy Counsel 40 relied upon by Mr. Dwarkadas is concerned, Mr. Shah submits that at this stage, the court has to only see prima facie whether all brother were involved by the father in the joint family business or not.

In so far as letter dated 1st June, 2010 addressed by the plaintiff to the 1st defendant is concerned, Mr. Shah submits that plaintiff has not given up his share in the joint family properties. It is submitted that reading of letter would not conclude that the plaintiff has no claim in the family business and/or properties. As far as shareholdings of Citi Bank in defendant no. 16 company is concerned, Mr. Shah submits that financial arrangements arrived at between the said company and the Citi Bank indicates that the said company had an option to

buy back those shares.

As far as statement of Mr. Shah that he has no objections if all the properties and businesses which are standing in the name of the plaintiff or his wife or his sons are also considered as joint family properties and/or businesses is concerned, all defendants supporting defendant no. 1 strongly opposed this submission on the ground that there is no such pleading in the plaint or in any of the affidavits and none of those defendants have any claim in respect of the personal properties of the plaintiff, his wife and his sons. The learned senior counsel appearing for the supporting defendants made a statement that none of these personal properties were joint family properties and none of them have any claim in respect of those properties nor they want the plaintiff and/or his wife or his sons to treat those properties as properties of joint family properties and/or business. It is submitted that they have no claim of any nature whatsoever in respect of those properties which are acquired by the plaintiff, his wife and his sons.

REASONS AND CONCLUSION

26. On consideration of the case law relied upon by the parties, following statement of law can be culled out:-

(a) Proof of the existence of a joint family does not lead to the presumption that the properties held by any member of the family is joint. Burden is on the person who ascertains that any item of the property was joint to establish the fact. There is no presumption that any property whether moveable or immoveable held by the member of a joint Hindu family is joint family property. If such person proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, burden shifts to the member of family making a claim that it was his personal property and was acquired without any assistance with joint family property. If it is proved or is admitted that family possesses sufficient nucleus with the aid of which the member might have made that acquisition, it arises presumption that it is joint family property. Such presumption is however presumption of fact and rebuttable. Whether a person is governed by school of Hindu law under Dayabhaga or Mitakshara, a joint Hindu family, normally joint in food, worship and estate and property of such joint family may consist of ancestral, joint acquisition and self acquired but thrown into a common stock.

(b) If one or more of the family start a business or acquire property without the aid of joint family property, such business or acquisition would be his or their acquisition. It can be however thrown into a common stock or blend with the joint family property in which case the said property becomes the estate of the joint family. If it is not done, the said property would be his or their self acquisition and succession of such property will not be governed by the law of joint family but only by the law of inheritance rights inter se between the members who have acquired such property and would be subject to the terms of the agreement whereunder it was acquired. There is distinction between the joint family

property and property acquired by the joint efforts. Court has to see whether it is a jointly acquired property or not.

(c) Partnership Act, 1932 excludes joint Hindu trading family from the operation of the Partnership Act. The said Act governs only that relation of partnership which arises from the contract and not from the status such as one obtaining amongst member of the joint Hindu family trading partnership.

(d) There is no presumption that business carried out by a member of the joint family with the stranger is joint family business. It is a matter for evidence.

(e) In case of immoveable property standing in the name of the individual member, there would be presumption that the same belongs to joint family provided it is proved that the joint family had sufficient nucleus at the time of its acquisition but no such presumption can be applied to business. There is no presumption under Hindu law that a business standing in the name of any member of joint family is a joint family business even if that member is a manager of the joint family. Unless it is shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate. Such question is a question of fact.

(f) A shareholder who buy shares does not buy any interest in the property of the company, which is a juristic person entirely distinct from the shareholders. The shareholder who buys shares become entitle to participate in the profit of the company when the company declares such profit subject to Articles of Association.

27. Question that arises for consideration of this court in this Notice of Motion is whether plaintiffs has prima facie shown that the properties which are subject matter of this suit are joint Hindu family property and has shown prima facie that there was sufficient joint family nucleus from and out of which various properties described in plaint could have been acquired. Whether plaintiff has prima facie shown that the firm started in the name of M/s. Kanayalal Rameshkumar in the year 1969 was started by the father of the plaintiff and defendant nos. 1 to 8 out of his own funds and remaining businesses and properties which are subject matter of this suit have been started and/or acquired by using the fund generated out of said alleged family business M/s. Kanayalal Rameshkumar.

28. It is case of the plaintiff that father of the plaintiff and defendant nos. 1 to 8 was carrying on kirana business during the period between 1948 to 1969 in the name and style of Moolchand & Co. in partnership. In the year 1969 M/s. Moolchand & Co. stopped its business as its partners were likely to face insolvency. It is the case of the plaintiff that on 5th December, 1969, father of the plaintiff and defendant nos. 1 to 8 started the firm M/s. Kanayalal Rameshkumar with his eldest son i.e. defendant no. 1 and few other partners. Defendant no. 1 had just attained the age of majority when the said partnership

firm was started by the father. According to the plaintiff the said M/s. Kanayalal Rameshkumar was reconstituted on 20th February, 1970 w.e.f. 5th December, 1969 when the plaintiff and defendant nos. 2 to 4 were minor and were admitted to the benefits of the said firm. According to the plaintiff even if the said firm was not started by the father out of his own funds and out of the profit generated from the joint family business, the other businesses were started by the family members. In the alternate, the said business started in the year 1969 in the name of M/s. Kanayalal Rameshkumar was joint family business started by the plaintiff and defendant nos. 1 to 4. It is the case of the 1st defendant which is supported by all other defendants except defendant nos. 3 and 6, that the 1st defendant had already started business as a broker/trader of spices, dry fruits and other commodities in or around the year 1967 when he was 17 years old. It is case of the defendants except defendant nos. 3 and 6 that the business run by the father in the name of Moolchand & Co. was already stopped in the year 1969 in view of the said deceased and other partners of M/s. Moolchand & Co. were being declared as insolvents. Since 1982 onwards defendant no. 1 started several businesses by constituting partnership firm and/or private limited company. In 1982, plaintiff alongwith defendant no. 1 and defendant nos. 2 to 4 had started partnership in the name of M/s. Rameshkumar Gopaldas & CO. and undertook the business of trading in spices. Defendant nos. 2 to 4 exited from the said business of M/s. Rameshkumar Gopaldas & CO. and started their own business. The said firm continued between plaintiff and defendant no. 1 as partners. It is the case of the defendants, except defendant nos. 3 and 4 that the said firm M/s. Rameshkumar Gopaldas & CO. has been run by the plaintiff and the profit and fund thereof have been distributed between the plaintiff and defendant no. 1 and not with any other defendants. Defendant no. 2 has been carrying on independent motor repair business since 1985. defendant nos. 3 and 4 started their own business in the name and style of M/s. Bhagwandas & Sons. since 1985. It is not in dispute that in some of the private limited companies, the plaintiff, his wife and his son are shareholders and/or directors.

29. I have perused the statement recorded by this court in insolvency proceedings (238 of 1973) filed in this court against Mr. Kishandas Mulchand Ahuja, Mr. Bhagwandas Mulchand Ahuja and Mr. Baldevdas Daryanomal Ahuja. In the said proceedings statement of the said deceased is recorded on 2nd November, 1973 before this court. The said deceased deposed that he had been adjudicated as an insolvent on 8th October, 1973 in his own petition. Total liabilities were about Rs. 25,80,000/- due to about 17 creditors. It is stated that his wife was not employed anywhere. His sons Jagdish and Narain were brokers in kirana and remaining three children were prosecuting their studies. He also deposed that he did not own any ancestral or self acquired immoveable property at his native place or anywhere else. He made statement that the business of firm of M/s. Moolchand & Co. was closed down in or about 1969 as the said firm had suffered losses in business. He also admitted that since then, he had neither been carrying on any business nor he had been employed anywhere, nor carried

on any other business either as a proprietor or as a partner of any firm. The said deceased also admitted that except his income from the said firm M/s. Moolchand & Co., he had no other income. Neither the said firm nor he had any post office savings bank account. He had deposed that in his personal capacity, he did not have to recover any money from anybody. He did not own any motor car or cycle or scooter nor any gold, silver or jewellery. He did not own any share of any joint stock companies or government securities. He also admitted that he had not invested any money with any firm or relations and did not have any private investments. It is further deposed that he had not transferred or gifted any property to anyone during the course of last two years when the said statement was recorded. By an order dated 9th October, 1973, this court ordered that Mr. Kishandas Mulchand Ahuja, Mr. Baldevdas Daryanomah Ahuja and the said deceased were adjudicated as insolvents and ordered that all the estate and effects of the said debtors vest in the Official Assignee of Bombay.

30. On perusal of Form E submitted by the said deceased and partners of M/s. Moolchand & Co. i.e. particulars of description of property in possession of the party, it is revealed that the said firm M/s. Moolchand & Co. had Rs. 221/- as bank balance with Bank of India, Mandvi, Mumbai, Rs. 213/- with the Punjab National Bank, Bhat Bazar, and Rs. 552/- in the account with Central Bank of India, Mandvi Branch. The deficiency statement filed in the said proceeding indicates that the profit from the said business was much lower than the expenditure and the expenses for up keep the said business. They were assessed very highly by the sales tax authorities and attachment was levied on their business premises by the sale tax authority on 5th September, 1973 and all their books of accounts, pass books were sealed. Schedule of assets disclosed in the said insolvency proceedings would indicate that the deceased father of the plaintiff and defendant nos. 1 to 8 had no assets. Liabilities towards preferential creditors was assessed at Rs. 22,05,017/- of the said Moolchand & Co. There were several other unsecured creditors of the said firm M/s. Moolchand & Co.

31. Mr. Shah, learned senior counsel for the plaintiff could not dispute the correctness of the statement made by the deceased father of plaintiff and defendant nos. 1 to 8 in insolvency proceedings. It is common ground that the partners of the said M/s. Moolchand & CO. had large number of creditors in the year 1969 and were facing insolvency. In the light of these statements and the statement of accounts and property, submitted by the said deceased in the insolvency proceedings filed by the said deceased himself, in my prima facie view, plaintiff is not able to show the nucleus of the income of the father from the business conducted prior to 1969 or that any income arising thereof was used for commencement of the firm M/s. Kanayalal Rameshkumar and out of income generated from the said business of M/s. Kanayalal Rameshkumar, other businesses were started by the joint family.

32. In my prima facie view since it is a common ground that the said firm Moolchand & Co, had large number of creditors and such partners were facing

insolvency in 1969, in such bankruptcy situation the said deceased could not have started partnership firm in the name of M/s. Kanayalal Rameshkumar out of his own funds by induction of defendant no. 1 and outsiders. The submission of Mr. Shah, learned senior counsel appearing on behalf of the plaintiff in my view is contrary to the statements made by the deceased father on oath in the insolvency proceedings recorded by this court. This court has accepted the evidence laid by the said deceased and other partners of the said firm and has declared each of such parties to those proceedings including the said deceased as insolvents and has ascertained the properties, assets and liabilities and has adjudicated upon the assets of the said firm M/s. Moolchand & Co. In my prima facie view such statement made on oath by the father of the plaintiff and defendant nos. 1 to 8 in this court and the order passed by this court declaring father and other two parties as insolvents based on such admissions cannot be ignored by this court in this proceedings. The said statement made by the father would equally bind the parties claiming through the father.

33. The entire foundation of the plaintiff's case that out of income generated by the father from his past business conducted prior to 1969, father had started the said firm M/s. Kanayalal Rameshkumar as joint family business in my prima facie view falls to the ground. In my prima facie view, plaintiff is not able to establish any nucleus on which it can be proved that the subject properties may have been acquired and/or such business may have been started out of income generated by the said business M/s. Kanayalal Rameshkumar. It has been held by the Supreme Court that a person who asserts a particular property to be a joint family property, onus is on him to establish that fact and unless such person who asserts such fact discharges his onus cast upon him, such burden is not shifted to the other party who claims the said property as self acquired property. In my prima facie view, since father of the plaintiff and defendant nos. 1 to 8 was facing insolvency and had large number of creditors in the year 1969 and said business of M/s. Moolchand & Co. had suffered a huge loss as admitted by the father, it is not possible to accept the submission of Mr. Shah, learned senior counsel for the plaintiff prima facie that the father of the parties had started business in the name of M/s. Kanayalal Rameshkumar out of his own fund in the year 1969. It is not the case of the plaintiff that when the said firm was started in the year 1969, plaintiff had any independent source of income. In the year 1970, plaintiff and other three defendants were admitted to be benefits of the said partnership.

34. The next question that arises for consideration is as to whether plaintiff and defendant nos. 2 to 4 who were minor and were admitted to the benefit of the said partnership firm M/s. Kanayalal Rameshkumar with 1st defendant and other partners started and continued the said joint family business and out of the income generated of such business, the plaintiff and defendant nos. 1 to 4 commenced various other joint family business and acquired joint family properties ?

35. It is not in dispute that the flat in Jolly Maker Apartment, Cuffe Parade, Mumbai was acquired in the name of defendant nos. 1 to 4 in the year 1976. Prima facie plaintiff has not been able to demonstrate that the said flat which was purchased in the year 1976 in the name of defendant nos. 1 to 4 was acquired out of funds and/or profits of M/s. Kanayalal Rameshkumar. The said flat was admittedly sold in the year 1982 and four separate flats were acquired at Andheri in the name of defendant nos. 1 to 4. Till 1982 there was no other business conducted by the parties. Defendant no. 1 started sole proprietary business in the name of M/s. Gautam Overseas in the year 1982. Defendant nos. 1 to 4 and plaintiff started business in the name of M/s. Rameshkumar Gopaldas & Co. in the year 1984. Defendant nos. 2 to 4 ceased to be the partners of the said firm M/s. Rameshkumar Gopaldas & Co. in the year 1985. Plaintiff and defendant no. 1 continued to be the partners of the said firm M/s. Rameshkumar Gopaldas & Co. Mr. Shah, learned senior counsel appearing on behalf of plaintiff invited my attention to the capital account, other account statement and the balance sheet of M/s. Rameshkumar Gopaldas & Co. in support of his submission that there was huge difference in the balance in capital of the plaintiff and defendant no. 1 in the said firm M/s. Rameshkumar Gopaldas & Co. Learned senior counsel laid emphasis on the said accounts in support of his submission that the amount withdrawn by defendant no. 1 out of the said business was much more than the amount withdrawn by the plaintiff as was reflected in the capital account of plaintiff and defendant no. 1. On perusal of the capital account of the partners in said firm capital balance would reflect different amount, in my view due to the withdrawal of the different amount by each partners from his capital account. Difference in the capital account would not prove that the amount withdrawn by the 1st defendant from such business was utilised for starting other businesses and as a result thereof, all such other businesses commenced by defendant no. 1 would be also joint family businesses. On the contrary capital account and balance sheet produced by the plaintiff would indicate that share of profit of the plaintiff as well as defendant no. 1 was equal. In my prima facie view reliance thus placed by the plaintiff on the capital account of the partners in the firm M/s. Rameshkumar Gopaldas & Co. would be of no assistance to the plaintiff but it would assist defendant no. 1. If a partner who is given his share of profit under the terms of agreement, it would be his personal and self acquired income and if such amount of profit is used by such partner in starting other business and acquires properties, it would be his self acquired properties and cannot be considered as joint family property or family business.

36. In my view Court must also see whether plaintiff has been able to demonstrate even prima facie as to whether in any of the other businesses in which plaintiff, his wife or son are not partners and such firm in which defendant no. 1 or his family members are partners or shareholders and/or directors of the companies whether at any point of time, profit and loss of such business or properties were shared amongst the family members including the plaintiff as income and/or loss arising out of joint family businesses.

37. Mr. Dwarkadas, learned senior counsel invited my attention to the letters addressed by his client to the plaintiff's advocate calling upon the plaintiff to disclose his income tax returns and accounts to show as to whether any of the properties standing in the name of various partnership firms and/or companies were claimed as Hindu undivided properties or as to whether any profit and/or loss of such firm and/or companies were claimed to have been received and disclosed by the plaintiff in his personal income tax return and/or books of accounts. It is not in dispute that the plaintiff did not offer any such inspection. It is not in dispute, plaintiff also did not produce any such documents, on record.

38. Mr. Shah, learned senior counsel in fairness conceded that in none of the personal income tax returns and/or books of accounts, plaintiff has claimed any of the properties standing in the name of various partnership firms and/or private limited company described in Exs. B, B1 and C of the plaint as joint Hindu family properties and/or claimed to have been received any profit and/or loss from the said businesses nor has shown any liabilities of any such company and/or firm as that of the plaintiff in his personal income tax returns and books of accounts. In my view, Mr. Dwarkadas, learned senior counsel is right in placing reliance on the judgment of this Court in case of Shivani S. Roy (*supra*). In my view admissions made by a party before wealth tax and income tax authorities cannot be ignored and the same would be against the public policy. It is held that if a party has not claimed before revenue authority that he was owner of a particular property, he cannot be permitted to approbate and reprobate. I am not inclined to accept the submission of Mr. Shah, learned senior counsel appearing for the plaintiff that though no amount of profit and/or loss was distributed by various partnership firms controlled by defendant no. 1 or other defendants and/or private limited company controlled by defendant no. 1 to the plaintiff and/or other members of the family, it would have no bearing on the issue whether such properties/businesses would be Hindu undivided property or not and distribution of such profit or property would be only at the time of partition of property and not otherwise. Court has to see whether any profit and loss from such businesses which are claimed to be joint family businesses are shared and/or distributed by parties before drawing any inference that such businesses and properties were joint family businesses and/or properties. In my *prima facie* view, plaintiff has failed to establish by producing any documents on record to demonstrate that any of such partnership firms and/or companies which are controlled by defendant no. 1 and/or other defendants, any profit was distributed to the plaintiff or that he had shared any liabilities of such firm and/or companies as the member of the joint Hindu Family or otherwise.

39. In my *prima facie* view, since 1982 onwards, various businesses came to be started by the defendant no. 1 and other defendants independently. It not the case of the plaintiff that in businesses and properties standing in the name of the plaintiff and his wife and/or son in which none of the defendants are the partners with the plaintiff or his family members, any profit and/or loss was distributed by the plaintiff and his family to the defendants including defendant no. 1. On the

contrary, record will indicate that plaintiff has claimed exclusive share in some of the immoveable properties which were given as security in respect of various loans. None of the defendants have made any claim in such properties as properties of the joint family businesses or joint properties or otherwise. Though at the conclusion of arguments, Mr. Shah, learned counsel appearing for the plaintiff submits that plaintiff has no objection if all the businesses and/or properties standing in the name of plaintiff, his wife and his sons are treated as properties of joint family properties and/or joint family businesses. In my prima facie view, all the contesting defendants are rights in their objection to such submission being made across the bar at this stage. It is submitted that all the businesses which are described in Exh. B, B1 and C to the plaint are independent and self acquired businesses of the respective parties in whose name it stands and are not Hindu undivided family businesses and/or properties. Objection is also raised on the ground that there is no such pleading made by the plaintiff to the effect that all such properties standing in the name of the plaintiff, his wife and son were also acquired out of the joint family fund and/or joint family properties and as joint family properties and/or businesses.

40. Mr. Dwarkadas, learned senior counsel invited my attention to the letter dated 1st July, 2010 addressed by the plaintiff to the 1st defendant and his wife (Ex. I-5 of the plaint). Mr. Dwarkadas, learned senior counsel laid emphasis on the contents of the said letter in support of his submission that the plaintiff had accepted the position that he was partner with the 1st defendant in one of the partnership firm in his individual capacity and was entitled to share of profit in that partnership firm. It is also alleged in the said letter that defendant no. 1 had not shared any profit from the construction and marble business though plaintiff was alleged to be partner. On perusal of the said letter dated 1st June, 2010, in my prima facie view, the plaintiff had represented the 1st defendant that plaintiff was having 50% share in the various businesses as equal partner with 1st defendant and such claim was not on the basis of such business/properties being Hindu undivided family businesses/properties. It is not the case of the plaintiff in the said letter that as a member of Hindu undivided family, he had 1/10th share. The plaintiff has claimed equal share with that of the 1st defendant. In my prima facie view, the claim of the plaintiff that all such businesses which are under the control of the 1st defendant or other defendants are joint Hindu family businesses is ex facie an afterthought.

41. Though plaintiff has claimed 1/10th share in all the properties described in Ex. B, B1 and C, it is not in dispute that the Defendant nos. 3 and 6 who are supporting the plaintiff has not filed any independent proceedings claiming their 1/10th share in the property as described in Exs. B, B1 and C or any of the properties. Defendant nos. 2, 4, 5, 7 and 9 to 11 have filed supporting affidavits in this proceedings in favour of defendant no. 1 stating that the father of the plaintiff and defendant nos. 1 to 8 never started any joint family business. It has been stated that the plaintiff as well as defendant no. 1 have started their respective businesses from their self acquired fund. It is further stated that the

business of the company as mentioned in the suit were not started out of any joint family fund and are not joint family businesses. Those defendants also made a statement across the bar through their counsel that none of the defendants have claimed any share in any of the properties standing in the name of the plaintiff, his wife or son or the 1st defendant as all such properties were their self acquired properties and not joint family properties and/or businesses. Defendant no. 1 also through their learned senior counsel Mr. Chinoy made a statement that in respect of the properties of business standing in the name of the plaintiff, his wife and son, no right, title or interest of whatsoever nature is being claimed by the 1st defendant as the same are self acquired by the plaintiff, his wife and son and none of the businesses run by each of them are joint family businesses and/or properties.

42. It has been held by the Supreme Court in case of Surjit Lal Chhabda (supra) that the property of joint family may consist of ancestral property, joint acquisition and/or self acquired thrown into a common stock. Question that arises for consideration of this court is whether prima facie plaintiff has made out a case whether any of the properties described in Exs. B, B1 and C of the plaint are jointly acquired by the members of the family or any of the self acquired properties by the plaintiff and/or by defendants are thrown into a common stock. In my prima facie view, plaintiff has been unable to show even prima facie that any of the properties described in Exs. B, B1 and C and/or businesses mentioned therein have been started out of the joint funds or any of the properties standing in the name of the individual partnership firm and/or companies were ever considered as joint Hindu undivided businesses and/or properties. No profit and/or loss has been distributed by any of this firm and/or to parties partners and/or shareholders. I am therefore prima facie not inclined to accept the submission of Mr. Shah, learned senior counsel that any of such businesses and/or properties standing in the name of individual members and/or firm and/or companies are to be treated as joint family properties or the same having been thrown into the common stock. Supreme Court in case of Bhagwan Dayal (supra) has approved the legal position summarised in Mayne's Hindu Law, 11th Edition that one or more members of the family can start business or acquire properties without the aid of the joint family properties but such business or acquisition would be of his or their acquisition. This legal position summarized in the said treatise that even if the business was started or the properties so acquired can be thrown into common stock or blended with the joint family property becomes the estate of the joint property. Such person need not do so in which case the said property would be of his or their self acquisition and succession to such property would be governed not by the law of joint family but only by the rights inter se between the members who have acquired the said property as per terms of the agreement whereunder it was acquired. In my view, such properties which are standing in the name of the partnership firm and/or company and/or individual and which are self acquired properties and are not thrown into common stock would be governed by the agreement whereunder such properties are acquired

and cannot be considered as Hindu undivided properties and/or businesses.

43. I am of the prima facie view that in the year 1969, when the firm M/s. Kanayalal Rameshkumar started, there was no joint Hindu family business in existence. Sections 4 and 5 of the Partnership Act, 1932 makes it clear that the said Act governs only that relation of partnership which arise from the contract and not from the status as the one obtaining amongst the members of the joint Hindu family trading partnership. Sections 4 and 5 has been construed by the Supreme Court in case of Nanchand G. Shetji (supra) and it has been held that legislature in its wisdom excluded joint Hindu trading families from the operation of the Partnership Act.

44. Supreme Court has held in case of Narayana Raju (supra) that unless it could be shown that the business in the hands of other partners grew up with the assistance of joint family properties or joint family funds or that the earnings of the business were blended with the joint family, the business remains free and separate. Supreme Court has held that as far as immoveable properties are concerned, in case the same stands in the name of the individual member, there would be a presumption that the same belongs to the joint family provided it is proved that the joint family had sufficient nucleus at the time of its acquisition but no presumption can be applied to the business. Father of plaintiff and defendant nos. 1 to 4 as demonstrated in the insolvency proceedings had no income that could be used for starting business in 1969. I am bound by the principles of law laid down by the Supreme Court in the aforesaid judgment that there can be no presumption drawn in case of business by the court that the business standing in the name of the individual member and/or partnership firm or company were joint family businesses.

On perusal of the judgment in case of N. Raju (supra) which is relied upon by Mr. Chinoy, learned senior counsel appearing for the 1st defendant, it is clear that the Supreme Court was considering a similar situation as in this case and had held that there was no evidence to show that the family supplied any money or that the father had enough money who could have started a business with any fund with him. In this case also deceased father himself had admitted in his evidence that he had no other income and/or business and/or assets. He was not a partner or had invested any amount in any of the businesses. In my view, the judgment of the Supreme Court in case of G. Narayana Raju (supra) squarely applies to the facts of this case.

45. Privy Counsel in case of Bherumal (supra) relied upon by Mr. Chinoy, learned senior counsel, has held that a member of the joint undivided family can make separate acquisition of properties for his own benefit and unless it is shown that the businesses grew up from joint family property or that the earnings were blended with the joint family estate, they remain free and separate. In case of R. Selvaraj (supra) Madras High Court has held that the contribution of labour by one member of the joint family to the others should be conspicuous and impressive that on a prima facie explanation of such material, the reasonable

and prudent person should gain the impression that two members were so associated with the common object of exploiting a commercial activity to the advantage of the joint family as a whole and in general. In case of R. Selvaraj (supra) Madras High Court has considered a similar situation where the member of the family who had alleged to have started joint family business was adjudicated as a insolvent and parties alleging joint family business had failed to prove any ancestral nucleus left by such party. It was held that the person who had alleged to have started family business was unable to make both ends meet as he was indebted. Considering such facts Madras High Court took a view that such persons could not have contributed in any of the family business. In my view facts in case of R. Selvaraj (supra) before the Madras High Court are identical to the facts of this case. I am in agreement with the view taken by the Madras High Courts in the said judgment and the principles laid down therein can be applied to the facts of this case.

46. Andhra Pradesh High Court in case of V. Srisailan (supra) relied upon by Mr. Chinoy, learned senior counsel appearing for the 1st defendant has held that a member who has self acquired property allowed other members of the family to use it conjointly himself, an inference is not permissible from the fact that income of separate property was used to support his close blood relations and members of a joint family. It has been held that even if father gave money to his son to start a business, the same does not lead to an inference that the business had been started by the father. It is held that when the family has a joint family business, the partner in the said business are not allotted share of their own and there is no apportionment of shares of profit whereas in the partnership firm constituted with the members of the joint family, the share in the profit is apportioned. A member of the joint Hindu undivided family can make apportionment of property for his own benefit. In my view, merely because plaintiff or his wife or son are admitted as partners in some of the partnership firm started by defendant no. 1 or by other parties or merely because plaintiff, his wife or son are allotted shares in some of the companies, no inference can be drawn by the court that such businesses in which family members are partners has to be a joint family business. In my view, such family members having partnership under a separate contract entered into by way of partnership deed, their rights, obligations, entitlement and duties would be governed by such contract and no inference can be drawn that being a joint family business.

47. In so far as shareholding of the plaintiff, his wife and/or son in other companies are concerned, all the properties acquired by the said company are properties of the company and does not belong to the shareholder. Company is a separate legal entity. Plaintiff as shareholder of such company if has any grievance in respect of the affairs of the said company has an independent remedy against such company under the provisions of the Companies Act, 1956 and/or other provisions of law. Properties and businesses started by the company which is a independent entity in the eyes of law cannot be construed as properties of the joint family. I am bound by the judgment of the Supreme Court

in case of Mrs. Bacha F. Guzdar (supra) relied upon by Mr. Virag Tulzapurkar, learned senior counsel appearing for defendant no. 15. I am also inclined to accept the submission of Mr. Tulzapurkar that in the said company, plaintiff already has 30% shareholding which is much more than the shares claimed by the plaintiff and no reliefs against the said company can be granted in this proceedings. In my view no reliefs thus can be granted in favour of the plaintiff and against any of the companies.

48. Mr. Shah learned senior counsel submitted that the plot of land was allotted by Kirana Merchant Association to two of the firms in view of the said firm being members of the association. Plaintiff was Secretary of the said Association. It is also submitted that there was free flow of funds from Rameshkumar Gopaldas to other companies and vice versa. In my prima facie view, merely because plaintiff was Secretary of the Association or that two of the firms were members of the Association and were allotted plot, that cannot be conclusive factor to draw any inference that the construction project carried out on the said plot was carried out by joint family or that the same would be a joint family business and/or property.

49. In so far as submission of Mr. Shah learned senior counsel that defendant Nos. 15 to 19, private limited companies are in the nature of glorified partnership and this Court shall lift the corporate veil of such companies and declare the properties and business of the said companies as joint family properties and businesses are concerned, no corporate veil can be lifted by Court and declare the properties of the companies as joint family properties. Even otherwise, plaintiff has not made out any prima facie case to prove that the said private limited companies are in the nature of glorified partnership and should be declared as joint family properties and businesses.

50. In so far as Judgment of Supreme Court in case of Madanlal (supra) relied upon by Mr. Dhakephalkar, learned senior counsel appearing for defendant No. 3 in support of his submission that merely because if a family carries on number of businesses, some of the businesses are being carried on in different names and styles and often constitutes difference companies or partnerships for better handling of business, there is no proof of separation of Hindu undivided family is concerned, perusal of the said Judgment relied upon by Mr. Dhakephalkar will indicate that the said Judgment was based on oral evidence led by the parties. In this case, prior to 2010, plaintiff has not made any claim in respect of any of the businesses and/or properties standing in the name of such firms and/or companies as joint family business.

51. Mr. Chinoy, learned senior counsel appearing for the first defendant invited my attention to the averments made in affidavit in reply of the first defendant that the plaintiff was partner with the first defendant in a construction business. In the year 2001, the real estate market had collapsed and contracting jobs had come to a standstill. The said firm had losses of Rs. 35 crores. Plaintiff wanted to exit from the said business and wanted to ensure that he should not be exposed

to such large liabilities and that the assets he had offered as security for such firm/business were released. The first defendant had accordingly during the period 2001-2003 proceeded to convert the said partnership firms into private limited companies under Part IX of the Companies Act and the erstwhile partners were allotted shares in the new companies in proportion to their capital ratios in the firms resulting in the liability of the plaintiff and other partners becoming restricted to their shareholding. It is submitted that presently there are liabilities of Rs. 635 crores in respect of the said project. Mr. Chinoy learned senior counsel submits that the plaintiff never came forward to share any liability of the firm or companies and got his security released. In my view, a person who claims a business to be a joint family business and/or property is entitled to profit but at the same time also liable to share liabilities of the joint family business. Mr. Shah learned senior counsel was unable to demonstrate whether plaintiff at any point of time agreed to share any liabilities of any of the partnership firm and/or company in which plaintiff, his wife and his son were partners and/or shareholders or actually shared the same.

52. Mr. G.S. Godbole, learned counsel appearing for defendant Nos. 2, 4, 5, 7 and 9 to 11 relied upon affidavit filed by his clients and supported the case of the first defendant. The learned counsel would submit that none of his clients have any claim in respect of any of the properties described in Exhibit-D except property at Sr. No. 27 described in Exhibit-B-1 which is in possession of defendant No. 2.

53. As far as order of ITAT relied upon by Mr. Shah, learned senior counsel is concerned, in my view the said order would be of no assistance to the plaintiff. One of the company had borrowed money at higher rate of interest and had given loan to sister concern at lower rate of interest. Issue in those proceedings was whether interest claimed as deduction could be allowed by assessing officer.

54. As far as reliance on paragraph (5) of the affidavit in reply of the first defendant by the plaintiff is concerned, on perusal of the paragraph (5) alongwith other paragraphs of the affidavit in reply of the 1st defendant, it is clear that there is no admission on the part of the 1st defendant that the businesses started by the 1st defendant were out of the profits generated from the alleged Hindu undivided family business started in the name of M/s. Kanayalal Rameshkumar. In my view, paragraph (5) cannot be read in isolation.

55. As far as copy of the profile of the 1st defendant annexed to the proceedings by the plaintiff and reliance placed thereof is concerned, no conclusion can be drawn against the 1st defendant that the 1st defendant has admitted the existence of any Hindu undivided family and/or joint family business. Reliance thus placed on the said profile is of no assistance to the plaintiff. In my prima facie view, plaintiff is unable to establish any rights in respect of any of the properties described in Exhibit-B, B-1 and C to the plaint as the properties of Hindu undivided family. Plaintiff is unable to show any nucleus by demonstrating before this Court even prima facie, that the income generated by his father prior

to 1969 was used by father in starting the partnership business in the name of M/s. Kanayalal Rameshkumar in 1969 and thereafter by defendant No. 1 and others by use of such income generated out of such firm in other businesses started by defendants. In my prima facie view, the plaintiff has failed to discharge such initial burden on the plaintiff to prove that all such businesses and properties described in Exhibits-B, B-1 and C are Hindu undivided family businesses and properties. The defendant no. 1, 2, 4, 5, 7 and 8 state that in so far as properties and businesses which are standing in the name of the plaintiff, his wife and his son are concerned or firms and companies in which those defendants are not partners/shareholders, all such properties and businesses are the properties of the plaintiff, his wife and his son and are not Hindu undivided family properties and/or businesses. All these defendants have also made statement that they do not make claim in respect of any of those properties and/or businesses. Statements made by the contesting defendants are accepted. Resultantly, I pass the following order.

Notice of motion is dismissed.

No order as to costs.

Ad interim order dated 25th February, 2013, modified by the orders passed by the division Bench to continue for the period of four weeks from today.