
(2002) 04 SC CK 0131

In the Supreme Court Of India

Case No : C.A. No.-002892-002892 / 2002

M.L. Subbaraya Setty (Dead) by Lrs. and Others	APPELLANT
Vs	
M.L. Nagappa Setty (Dead) by Lrs. and Others	RESPONDENT

Date of Decision : 23-04-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 26 Rule 13, Order 26 Rule 14, 54
Trusts Act, 1882 — Section 90

Citation : AIR 2002 SC 2068 : (2002) AIRSCW 2124 : (2002) 3 ALD 129 : (2002) 1 JT 383 Supp : (2002) 4 SCALE 75 : (2002) 4 SCC 743 : (2002) 3 SCR 326 : (2002) 3 Supreme 484

Hon'ble Judges : Y. K. Sabharwal, J;U. C. Banerjee, J

Bench : Division Bench

Advocate : Shanti Bhushan, Rama Jois and P. Krishnamurthy, Amit Dhingra, Gopal Jain, Yugandhara Jha, Sanjay Pathak, P.H. Parekh, P.R. Ramasesh, K.G. Raghavan, Shiraz Contractor Patodia, Dhanyam Chinnappa, Anirudh and Priyanjali Yadav, for the Appellant;

Final Decision : Dismissed

Judgement

Y.K. Sabharwal, J.—Leave granted.

2. Application for substitution allowed.

3. The dispute in these appeals relates to the partition of the estate of the family of one Lachiah Setty - one of the wealthiest families in the erstwhile Mysore State. The family had extensive business in Coffee and other commodities. The family possessed considerable movable and immovable properties including Coffee estates. Lachiah Setty died in the year 1936. Despite the desire expressed by him that even after his death, his children should live in harmony, united and without any difference as he felt that the vast properties had been acquired on account of the family remaining united, the disputes started between brothers within about two years of his death. i.e., in 1938.

4. The disputes were referred to three arbitrators for division of the family properties. The arbitrators entered upon reference on 1st April, 1940. The arbitration proceedings were, however, not very smooth. Difference arose with regard to the management of the family properties business. The elder brother Nagappa Setty was disinclined to remain in the family house along with other brothers. He was on one side and other brothers and mother on the other.

5. On 11th July, 1940, the arbitrators made a special provision, in agreement with the parties, with regard to the business. Securities of the value of Rs. 1,49,833/- were found in the hands of Nagappa Setty and of the value about Rs. 1,45,616/- in the hands of his other brothers. The stock-in-trade was valued at Rs. 1,32,495/-. There was no partition as such of the securities and stock-in-trade, but, on an ad hoc basis, the arbitrators directed that Nagappa Setty should retain with him securities of the value of Rs. 55,337/- and hand over the rest to other brothers. The other brothers, on the other hand, were directed to make over to Nagappa Setty stock-in-trade, worth Rs. 24,840/-. The parties, however, failed to carry out those directions although, in the first instance, they had agreed to the arrangement.

6. During arbitration proceedings, one of the arbitrator died. The other co-arbitrators were requested to continue with the arbitration, but they could not make much progress. Allegations were made about the partiality against one or the other of the arbitrator and since the arbitration was not completed by certain date, all attempts at arbitration aborted.

7. In the year 1948, Nagappa Setty filed against his brothers and mother a suit for partition of his share and the income of the joint family properties. He claimed in that suit 1/4th share on the basis of will of Lachiah Setty. The will was challenged by other brothers being inoperative either as a valid will or a valid family arrangement. According to them, the properties were ancestral joint family properties which Lachiah Setty was incapable of disposing of by will. There was no occasion also for execution of a family arrangement and, hence, it was pleaded that will could not be regarded as a family arrangement.

8. In the aforesaid suit, it was held that the suit properties were the ancestral joint family properties which could not be disposed of by Lachiah Setty by will and that there was no family arrangement and even if it were to be deemed to be a family arrangement, it was void. The High Court disagreeing with the District Court on the question of Nagappa Setty share being 1/19th held that he was entitled to 2/19th share in the properties and not 1/19th share as held by the Trial court. Nagappa Setty died on 20th February, 1949. His heirs and legal representatives have been prosecuting the suits and the appeals. The members of the branch of Nagappa Setty are respondents in these appeals. Defendants to the suit filed in 1948 are also represented by their heirs and legal representatives on account of deaths from time to time. They are appellants in these appeals.

9. The suit was decided in the year 1956. The appeals therefrom were decided by the High Court on 9th July, 1962 and finally by this Court on 20th September, 1971 holding the findings on the High Court to be quite unexceptional and dismissing the appeals preferred by Nagappa Setty branch. The judgment is reported in M.N. Aryamurthy and Another Vs. M.D. Subbaraya Setty (Dead) through L. R. and Others, .

10. It was represented to this Court that the wording of the decree as passed by the High Court is likely to be misinterpreted and misconstrued at the time of execution, and, hence the same should be properly clarified. Therefore, this Court substituted for the decree passed by the High Court, a decree as under:

"(1) It is declared that the original plaintiff Nagappa (now his heirs brought on record) was entitled to a 2/19th share in the joint family properties and liable for a similar share in the joint family liabilities.

(2) The joint family properties, as mentioned in the suit, shall comprise all the movable and immovable properties including stocks, shares and valuable securities in the possession and control of the plaintiff and defendants 1 to 9 as, on July 11, 1940. The family liabilities as on that date shall be ascertained with a view of determine the net assets. The plaintiff shall have 2/19th share in the same.

(3) The parties are liable to account for the rents, income, profits and dividends received by them after July 11, 1940 till the date of final partition in respect of the joint family properties in their respective possession on and After July 11, 1940. If, on taking accounts, the plaintiffs are found to have received less for their 2/19th share in such rents, income, profits and dividends, the deficiency shall be made good by the defendants.

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

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

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

(Emphasis supplied by us)

11. The aforesaid judgment brought to an end the controversy regarding the share of the original plaintiff in the joint family properties. There is no dispute now that the share of original plaintiff in the joint family properties is 2/19th . There is also no dispute as to which are the joint family properties. Despite this as also the aforesaid directions which were issued with a view to obviate misinterpretation and misconstruction of the decree as passed by the High Court, the litigation has continued for mere than three decades after the afore noticed reported decision between the parties. Litigation in courts is already more than half a century old. Commenced in the year 1948, the end does not appear to be near as yet.

12. One of the controversy now is the construction and interpretation of the aforesaid underlined words 'The present possession of the parties shall be respected as far as possible' in the decree substituted by this court.

13. In the proceedings that were taken up before the Trial court for passing of the final decree, after conclusion of preliminary decree proceedings on passing of decree as aforesaid, the Trial court framed 10 issues. One of the issue relevant for our purpose is issue No. 6 which reads as under:

"If the Plaintiffs were found to have been in possession of the assets of the value of more than 2/19th share as on 11.7.1940, are they not entitled to the other reliefs of partition and accounting as alleged by the Defendants."

14. The findings on issue No. 6 are as under:

"The plaintiffs were in possession of assets of a value of more than 2/19th share as on 11.7.1940 and they are entitled to other reliefs of partition and accounting."

15. The aforesaid findings are recorded in the order dated 3rd October, 1979 passed by the Trial court. The Trial court directed in view of the findings on issues 1 to 6 and also in view of the directions given by this Court in SLP (C) No. 3554/78 (Civil Appeal No. 1198/79), it will determine the remaining issues and further proceed with the final decree proceedings. The order passed in CA No. 1198/79 reads as under:

"S.L.P. granted.

The judgment of the High Court is suspended as far as the direction relating to the Deputy Commissioners of Hassan and Chickmagalur is concerned. The Deputy Commissioners will proceed to divide the revenue paying lands in the suit and separate the 1/19th share of the Petitioner. There will be stay of delivery of possession. The parties agree that the trial court will proceed with the final decree proceedings to enable them to effect a final decree in terms of the direction of this Court. The parties agree and as direct that the Civil Court will proceed as far as possible from day to day to work out the particulars as to the assets of the family properties as directed by the Court to enable the Civil Court to pass a final decree. The Deputy Commissioners will forward a report to this

Court through the High Court latest by the end of July according to the terms of the decree of this Court. The Civil Court shall also send a report through the High Court with regard to the progress of the proceedings before it by the end of July, 1979."

16. Before the matter was finally decided by the Trial Court on 15th July. 1999, on various occasions, one or the other party approached the High Court or this Court challenging one or the other order.

17. The trial court by order dated 15th July 1999 decided the remaining issue Nos. 7 to 10 directing that the properties in possession of plaintiff can be conveniently allotted to the plaintiff and the properties held by the plaintiff in excess of their share can be ordered to be delivered to the defendants by the plaintiffs. It held that since plaintiffs were in possession of the property of Rs. 1,92,496/- as on 11th July, 1940 as against the properties of their share valued at Rs. 1,68,390/-, the plaintiff being in possession of property in excess of the value of Rs. 24,085/-, he should hand over bond and securities worth that amount to the defendants. The Trial court held that this Court had observed that the present possession of the parties shall be respected as far as possible and under these circumstances the properties that are in possession of the plaintiff shall remain with them and those in possession of defendants shall be retained by them. The value taken was as on 11th July, 1940. Since plaintiff was held to be in possession of the property of more value than his share, as aforesaid, he was directed to hand over to the defendants the property of the excess share.

18. The effect of the aforesaid direction of the trial court was that the Coffee estates in possession of the defendants were allowed to be retained by them on partition representing their share of 17/19th . Regarding the accounting, it was directed the parties could appear before a Chartered Accountant who was appointed as a Commissioner and they shall submit the details of income derived from the properties of the joint family in their possession from 11th July, 1940 till the date of the judgment i.e., 15th July, 1999. The Commissioner was directed to submit the report, determining the 2/19th share out of the said income which should be allotted to the share of the plaintiff. The Commissioner was further directed to state as to what exact amount the plaintiff will be entitled to receive on account of the said profits income after deducting the profits and income the is received from the property in the possession. The order of the Trial court also records that "The orders passed by my learned predecessor on I.A. on 3.10.1979 which has not been challenged by any of the parties so far, be read as part and parcel of this order".

19. Both the parties challenged the order of the Trial Court dated 15th July, 1999 by preferring first appeals before the High Court. The plaintiffs challenged the order since it denied to them any share in the coffee estate on the ground that value of property with them as on 11th July, 1940 was more than 2/19th of their share. The defendants challenged the order to the extent it directed that out of the income derived from the properties of joint family from 11th July, 1940, the

plaintiff should be paid 2/19th share from the said income. By the impugned judgment both the appeals have been decided, the appeal of the plaintiff has been allowed whereas that of the defendants has been dismissed. The defendants are in appeal before us.

20. Few admitted/established facts be first noticed as under:

1. The share of the plaintiff in joint family properties is 2/19th .
2. The joint family properties shall comprise all the movable and immovable properties, as mentioned in the suit, including stocks, shares and valuable securities in possession of the parties on 11th July, 1940.
3. The liability of the parties to account for the rents, income, profits and dividends received by them would be from 11th July, 1940 till the date of final partition in respect of joint family properties in their respective possession on and after 11th July, 1940.
4. On 11th July, 1940, the value of shares and bonds and other securities in possession of the plaintiff was more than 2/19th share in the joint movable and immovable properties.
5. Most of the share, bonds and securities which were in possession of the family are not now available. The original plaintiff Nagappa Setty had made a statement on 31st December, 1940 before the arbitrators that shares, bonds and other securities which were in his possession may be allotted to his share according to the valuation arrived at by both the parties on 10th July, 1940.

21. Having noticed the facts as aforesaid, the questions to be determined in these appeals are:

1. Is the plaintiff entitled to 2/19th share in the joint family properties?
2. If the answer to the aforesaid question be in affirmative, what is the relevant date for determining the valuation of the assets so as to ascertain and separate 2/19th share of the plaintiff?
3. What is the effect of the non-availability of most of the shares, bonds and securities which were in possession of the plaintiff in the year 1940?
4. Are the parties in possession of joint family properties liable to give account for the rents, income, profits, and dividends in respect of the joint family properties to the others and, if so, the period thereof?

22. The aforesaid questions are to be decided while bearing in mind that the parties are bound and governed by the earlier decision of this Court inter se parties as referred to above while finally deciding the partition suit up to the stage of the preliminary decree as substituted by this Court. The present litigation arises out of the final decree proceedings. The parties in these proceedings are governed and bound by the terms of the preliminary decree. The matters decided up to that stage cannot be reopened and readjudicated.

23. In view of the earlier decision, it stands settled that there was severance of joint status from 11th July, 1940 and the members of the joint family became tenants in common of the family property from 11th July, 1940. The parties were not liable to give account to each other for the profits earned by them respectively in their own business or for the acquisitions made by them in that business. Property acquired by a member of the joint family after severance of the joint status had to be treated as his individual property and the said property could not be regarded as one acquired for the family.

24. Regarding joint family properties, it has been directed that where rents and profits are received by members from joint family property in his possession, he would be liable to account for such rents and profits received by him. Regarding acquisition of property after severance of joint status, it was directed that if a member acquired some property with the funds in his possession, the other members could claim no share in that property. It is clear that the liability to account to each other for the income derived from the joint family would continue. The parties are liable to account for the family assets in their possession is apparent from para 20 of the earlier decision reported in M.N. Aryamurthy's case which reads as under:

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

income derived by from the family assets in their possession."

25. In view of the above, the Trial court has rightly decided that the parties are liable to give account to others in respect of profits earned from the joint properties in their possession. Accordingly, the High Court correctly dismissed the appeal of the appellants/defendants. There is, thus, no merit in the submission of Mr. Shanti Bhushan, learned counsel for the appellants, that the defendants are not liable to account for the rents, income, profits and deviants received by them after 11th July, 1940 till the date of the final partition in respect of the joint family properties in their respective possession. This is also clear from direction No. 3 in para 21 of the earlier judgment reproduced above.

26. Learned counsel for the appellants also submitted that the status of the plaintiff was that of a trustee and, thus, the principle of trust would be applicable. The contention is that the plaintiff as a trustee had been given custody and possession of the valuable securities, on behalf of the members of the family and as a trustee, he had no right to deal with those assets treating them as his own and misappropriating the share of the others members of the family in those assets and such a situation is governed by Section 90 of the Indian Trust Act. Relying upon the factum of non-availability of most of the shares, bonds and securities which were with the plaintiff, it is contended that the plaintiff committed a breach of trust by disposing of those valuable assets and appropriating the entire sale proceeds to himself. In support reliance has been placed on Section 90 of the Trust Act and a passage from Hanbury and Megarry on Modern Equity, 13th Edition (1989) in Chapter XII dealing with "Constructive Trusts" which reads as under:

"90. Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold. for the benefit of all persons so interested, the advantage so gained.

(H) Constructive Trusts of a New Model: Justice and Good Conscience. Some modern development indicate a wide extension of the operation of constructive trusts by the introduction of what Lord Denning M.R. has called 'a constructive trust of a new Model'. The basic principle is that a constructive trust may be imposed, regardless of established legal rules in order to reach the result required by equity, justice and good conscience. The principle was thus articulated in *Hussey v. Palmer*. It is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity..... It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution".

27. The submission of Mr. Shanti Bhushan is that the disposal of the joint properties in possession of the plaintiff as a trustee and appropriation of the sale

proceeds shall be regarded as final acceptance by him of the allotment of those properties for which he himself had made a prayer in the arbitration proceedings and, therefore, he had no right to claim any share in the remaining properties. On this basis, the allotment of the shares and securities to the plaintiff by judgment of the Trial court dated 15th July, 1999 was sought to be supported.

28. More than a century ago, House of Lords in *John Kennedy v. Mary Annette De Trafford and Ors.* 1897 AC 180 held that there is no fiduciary relation between tenants-in-common. A tenant-in-common by leaving the management of the property in the hands of his co-tenant cannot impose upon him an obligation of a fiduciary character. This judgment has been cited with approval in the earlier decision *inter se parties*. The contention of being a trustee was rejected. It is a different matter that at that stage, the contention of a co-tenant being trustee was urged on behalf of the plaintiff to claim a share in the properties acquired by the members of joint family with the funds in their possession after severance of the joint family status. We are, therefore, unable to accept the contention that the status of the plaintiff was that of a trustee and on that ground, the allotment of shares to him in terms of the judgment of the trial court dated 15th July, 1999 was justified.

29. The Trial court for allotting the Coffee estate and other immovable properties only to the defendants relied upon the underlined sentence in direction No. 4 of the earlier decision. The direction has been misconstrued and misinterpreted by the trial court. It is true, as contended by Mr. Shanti Bhushan, that the direction that the plaintiff is entitled to 2/19th share in the joint family property and that he shall be put in separate possession of the properties giving him share by metes and bounds does not mean that every item of the property is to be divided between co-shares. It is correct that the only requirement is that property allotted to each co-sharer should bear approximately the same value as corresponds to his share. It may also not be necessary that if the properties consist of movable and immovable properties then each party must necessarily be given a share in all movable and immovable properties. While effecting partition of joint family properties, it may not be possible to divide every property by metes and bounds. The allocation of properties of unequal value may come to the share of a member of a joint family at the time of effecting partition but for that necessary adjustments have to be made. It can also happen that some of the co-sharer on partition may not get any share in immovable property. No hard and fast rule can be laid. It depends upon the facts of each case. It depends upon the nature of the immovable property and number of such properties as also the number of members to whom it is required to be divided. Properties of a larger value may go to one member. Property of lesser value may go to another. What is necessary, however, is the adjustment of the value by providing for payment by one who gets property of higher value. In short, there has to be equalization of shares. But that is not what has been done by the Trial Court in the present case. The Trial court going by the valuation of July, 1940 has allotted shares and bonds to the plaintiff and immovable property to the

defendants and for this partition support was also sought to be drawn from the aforequoted sentence from direction No. 4. That was certainly not the intention. It was a case of a total misinterpretation and misconstruction of the decree passed by this Court which has been set right by the High Court in judgment under appeal. It was not the direction of this Court that in each and every number of the Coffee estate, the plaintiff should be given 2/19th share by metes and bounds. We do not think that the impugned judgment of the High Court also directs that.

30. Another question to be determined is as to the date of valuation of the properties in a suit for partition. Ordinarily, it has to be the date of the passing of the final decree and not the date of filing of the suit for partition. In a given case, however, there may be exception of this general rule. It is a matter of common knowledge that such suits for partition take considerable time for disposal. There is a big time lag between date of filing of the suit and date of decision thereof. There is also considerable lapse of time between passing of preliminary decree and passing of final decree. Take the present case, suit was filed in the year 1948, preliminary decree proceedings were finalized in 1971 by decision of this Court. Thereafter more than 30 years have lapsed, the parties are still no way near the final partition. It would be absurd if it was to be held that the valuation of 1940 or 1948 should be taken. It is also possible that in a given case, the value of one property may appreciate drastically while not so in the case of other properties or it may even decline and some of the parties may be in possession of those properties. It has been the endeavour of the Courts in such suits to protect, preserve and respect the possession of the parties as far as possible. While so protecting, there has to be equalization of shares which has been recognized in law "by making a provision for payment of Owelty".

31. Reverting to the present case, regarding the shares etc. in possession of the plaintiff, it already stands settled between the parties that it was an ad hoc arrangement. If the plaintiff has dissipated those shares, then he is required to account for it. The value of those shares said to have been dissipated may have to be worked out. It is not possible, at this stage, to hold that such valuation is not practicable. Assuming the plaintiff has dissipated those shares that cannot result in denial of 2/19th shares to him in the joint family properties in terms of the decree finally passed by this Court as referred to hereinbefore. If that had been so, it would have resulted in dismissal of plaintiff's suit for partition instead of passing of partition decree as substituted by this Court. The question of sending the case for effecting partition of Coffee estate being revenue paying land to the Deputy Commissioner would arise after the Court has come to the conclusion on the basis of principles laid in this judgment that the plaintiff is entitled to a share in the said estate which may in turn depend upon the valuation of the shares, bonds and securities which are said to have been dissipated by the plaintiff. We are expressing no opinion upon the alleged dissipation.

32. The legal position is well settled that on mere severance of status of joint family, the character of any joint family property does not change with such severance. It retains the character of joint family property till partition. In *Bhagwant P. Sulakhe v. Digamber Gopal Sulakhe and Ors.* AIR 1976 SC 79 (para 14) this Court held that the character of any joint family property does not change with the severance of 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-shares.

33. The effect of the plaintiff holding excess of 2/19th share would be that the plaintiff would be accountable for the value of those shares as on the date of the final decree.

34. A contention was also urged that there is generally a time gap between the report of the Commissioner submitted pursuant to the directions in the preliminary decree and passing of the final decree and it would not be practicable to value the assets as on the date of the final decree. There is no impracticability. Ordinarily, though it is the date of the final decree but in reality the date of valuation which the Commissioner takes into view in the report, that is taken consideration by the Court. But that would again depend on the facts of each case; In a given case, there may be gap of years between the date of the report of the Commissioner and the date of the final partition. In the meanwhile, there may have been a sharp increase or decrease in the value of the property or properties. In such event, the Court may to balance the equities and pass other directions in order to partition the properties between the parties as per their respective shares. The preliminary decree declares the shares of the parties and the properties which are joint and are required to be divided between the co-shares. Regarding valuation, reference may also be made to Order 20 Rule 18 and Order 26 Rule 13 and 14 of the Code of Civil Procedure, which read as under:

"Order 20, Rule 18. Decree in suit for partition of property or separate possession of a share therein. - Where the Court passes a decree for the partition of property or for the separate possession of a share therein, the, --

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

Order 26 Rule 13. Commission to make partition of immovable property. - Where

a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

Rule 14. Procedure of Commissioner. - (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit."

35. The actual partition is effected by passing of the final decree. The valuation has, thus, to be as on the date of final decree.

36. Learned counsel for the appellants, however, strenuously relies upon *Khatoon Bibi v. Abdul Wahab Sahib and Ors.* AIR 1939 Mad. 306. That was a case where the entire movable property had been dissipated by the defendants whose value far exceeded the value to which the defendants were entitled. As such no properties were available for the purpose of partition. Under these circumstances, it was held that the plaintiff was entitled to all the immovable property though the value of immovable property was far less than the value of plaintiff's share in the joint family properties. The said decision has no applicability in the present case. The value of the property is to be ascertained as on the date of the partition and then alone the question as to whether the value of the shares said to have been dissipated by the plaintiff was more than the value of the share in the hands of the defendants to which he may be entitled or not, would arise. Without ascertaining the value of the two, the principles laid in the Madras decision will have no applicability to the present fact position.

37. The acceptance of the contention now sought to be raised would amount to going behind the preliminary decree. That is not permissible. Before concluding, we wish to clarify that the observation of the High Court that the plaintiff is entitled to share in each of the joint family property does not mean the actual partition of all such properties by metes and bounds. We may also clarify that the

direction that the present possession of the parties shall be respected as far as possible also does not mean that if the plaintiff is not in possession of any immovable property and the same are in possession of the defendants, he could not be allotted the immovable property even though he is so entitled as per his share. If that was so, the words "as far as possible" in the said direction would become redundant. When the Court directs that the present possession of the parties shall be respected, it means that if partition of the property is to be effected, then as far as possible the person in possession of a property should be allowed to retain it by equalization of share but it does not mean that a person out of possession of all immovable properties should not be allotted any part of the immovable property whatsoever. In view of the earlier decision and aforesaid discussion, it is not possible to accept the contention that the plaintiff is not entitled to a share in the joint family immovable properties.

38. In view of aforesaid discussion, our answers to the four questions noticed in earlier part of the judgment are as under:

1. The plaintiff is entitled to 2/19th share in joint family properties.
2. The date of valuation of shares is date of the final decree in terms of law laid hereinbefore.
3. The effect of non-availability of shares, bonds and securities by itself is not to deprive the plaintiff of his 2/19th share if on valuation he is otherwise entitled thereto.
4. Parties in possession are liable to give accounts for the rents, income, profits and dividends in respect of the joint family property to others from 11th July, 1940 up to passing of the final decree.

39. Since more than 30 years have passed since passing of the preliminary decree and more than half a century since filing of the suit, the Trial court will do well to take up the matter, as far as possible, on day to day basis and conclude the final decree proceedings in the light of this judgment preferably within a period of six months.

40. In view of the aforesaid, we find no infirmity in the impugned judgment of the High Court and, thus, appeals are dismissed. Parties are left to bear their own costs.