
(1949) 07 KAR CK 0001

In the Karnataka High Court

Case No : Appeal No's. 104 and 109 of 1947-48

Rukn-ul-Mulk Syed Abdul Wajid and Others

APPELLANT

Vs

R. Vishwanathan and Others

RESPONDENT

Date of Decision : 29-07-1949

Acts Referred:

Citation : AIR 1950 Kar 33

Hon'ble Judges : Medapa, C.J;Mallappa, J;Balakrishnaiya, J

Bench : Full Bench

Judgement

Medapa, C.J. and Mallappa, J.—The appellants in these two regular appeals are defendants 1 to 3 in O.S.No. 60 of 1944 on the file of the District Judge, Civil & Military Station, Bangalore, as well as in O.S. No. 56 of 1942-43 on the file of the District Judge, Bangalore City, re-numbered as O.S. No. 60 (A) after its transfer to the District Court, Civil & Military Station, Bangalore. These two suits were disposed of by a common judgment and it is against this judgment of the District Judge, Civil & Military Station decreeing the two suits as prayed for that the appellants have come up in appeal. The appeals were first heard by Sri Balakrishnaiya and Sri V. Kandaswami Pillai JJ but on a difference of opinion, they were referred to a Full Bench by Sri Balakrishnaiya J. and have come up, therefore, for decision before the Full Bench.

2. The three plaintiffs in the two suits referred to above are sons of V. Ramalinga Mudaliar who died after disposing of the plaint schedule properties under a testamentary disposition dated 30th July 1942 leaving major portion of the properties for charity and appointing the appellants as executors. The suits have been filed for a declaration that the properties are the joint family properties of plaintiffs and their father and that the latter had thus no right to dispose of the same by a will. Plaintiffs have prayed for possession of the properties and for a declaration that defendants 1 to 3 should render accounts of their possession till date of suit. The appellants contended that the properties are the self-acquired properties of the testator and that he had every right to dispose of the same in

any manner he liked. Defendant 4 in the two cases in the mother of the plaintiffs. The other defendants except one, who has been impleaded as purchaser of one of the plaint schedule properties are their sisters.

3. The basis of the claim of the plaintiffs was laid as follows in the plaint in O.S. No. 60 of 1944 on the file of the District Judge, Civil & Military Station:

"The said V. Ramalinga Mudaliar came into possession of movable and immovable properties including some houses in Arunachala Mudaliar Road, Civil & Military Station, Bangalore, which had belonged to his father, Vydyalinga Mudaliar. The said properties were sold by Ramalinga Mudaliar and the sale proceeds were invested in several business in or about the year 1928 plaintiff 1 joined his father and actively assisted him in the several business of the family.. ..Apart from the fact that there was a nucleus of ancestral property with which the business were carried on the plaintiffs submit that the adult members of the family, viz., plaintiff 1 and late Mr. V.Ramalinga Mudaliar were actively associated with the family businesses and that all the properties were treated by V. Ramalinga Mudaliar as family properties."

4. This was also exactly the case put for ward by the plaintiffs in the other suit filed in the District Judge's Court, Bangalore City. Separate suits had to be filed as properties were within the jurisdiction of different Courts. The very words used by the plaintiffs in the plaint are quoted above but we find to our great surprise that the case as laid in the plaint has been allowed to develop from stage to stage and a good deal of evidence which has no reference to the stand taken by the plaintiffs in the plaint has been adduced and points not arising out of the pleadings have been traversed and dealt with, with the result that the suits which are as simple as most of the suits filed in the Munsiffs Courts in respect of properties of lesser value have been complicated on account of the huge mass of irrelevant evidence allowed to be adduced in the case and discussion of points not raised in the pleadings.

5. The simple case of the plaintiffs that the properties in dispute are the joint family properties is based on the allegations, (i) that the proceeds of the sale of two houses of Ramalingam's father formed the nucleus of ancestral property with which Ramalingam carried on his business, (ii) that he actively associated plaintiff 1 with the family business and (iii) that all the properties were treated by him as family properties. There is not even a suggestion that the properties were acquired with the money realised in a joint family business of plaintiffs father and uncles. It is nobody's case that the plaint schedule properties are joint family properties as they were acquired from out of a business stated by Ramalingam with money paid to him by his brother Shanmugam and none of the parties have raised any contention as to the nature of the business by which Shanmugam the eldest of the brothers acquired considerable property. The learned District Judge, however, has based his conclusion mostly on his finding on this aspect of the matter and it is, therefore, that some attention to this aspect of the matter has become unavoidable.

6. A brief summary of the family history of the plaintiffs up to the date of suit has to be stated to understand the case as argued by the learned District Judge to support the case of the plaintiffs though it is not set out in the plaint. Their maternal grandfather Loganathan had been doing business till some time before his death on 3rd December 1900. Their paternal grandfather Vaidayalingam was at first a translator on a pay of Rs. 70 in this Court and retired as a District Court Sheristedar. He died in 1904 leaving two houses and there in nothing to show that he had any other assets. On the other hand, the accounts of C.R. Bank show that he died indebted. He had three sons of whom Shanmugam was the eldest, Devaraj was the next and plaintiff's father Ramalingam was the youngest. Evidently encouraged by the success that Loganathan attained in building contracts entrusted to him by Mining Companies at Kolar Gold Fields, he began to do the same business before or at any rate in May 1898. At about this time, a sum of Rs. 2,000 was borrowed by Vaidyalingam on the security of a pronote executed by him and his son Shanmugam from C.R. Bank in which he had opened an account. It is not improbable that this amount was utilised by Shanmugam for purposes of his contract work though there is no definite oral or documentary evidence adduced on the point. It is equally clear that Shanmugam paid back Rs. 2,000 in 1902. It is found that he had also opened an account in C.R. Bank and was borrowing small sums of money till 1904 when for the first time he was able to credit to his account Rs. 7000. It is not disputed that his business was very successful and that he acquired considerable property. Both Devaraj and Ramalingam were employed by him in his business. The brothers lived amicably and the eldest brother who was successful in his business met the expenses of the family before and after the death of their father. He paid his brothers money in consideration of their employment in his business. Ramalingam sold under Ex.A, dated 20th July 1919 one of the houses of his father as having been give to him exclusively, by his father whose self-acquired property it was. He on his own behalf and as guardian of his son, as well as Devaraj executed Ex. B a release deed in which it is clearly stated that the properties acquired by Shanmugam were all his self-acquired properties and that the two houses of their father had been bequeathed to ramalingam as his elder brothers had got some self-acquired properties of their own while Ramalingam had no such property then. This document was executed on 30th March, 1912 and a day later, i.e. on 1st April 1912, we find from Ex. K that Shanmugam entered in to a partnership with Ramalingam though Ramalingam contributed no money for his share. Shanmugam divided the assets of his business valued at about Rs. 4000 into two investments, one of Rs. 34,400 into two investments, one of Rs. 34,220 being considered as capital contributed by him, the other of Rs. 5000 being considered as capital contributed by Ramalingam and leaving Rs. 742-14-3 in the drawing account. the cheque of Rs. 2500 received by Ramalingam both on his behalf and his son from Shanmugam under Ex. B is credited to his bank account 23 days later. It is likely that Ramalingam was drawing money from the Bank fro his business and it amy be taken that this sum has been made use of also for purpose of his business before and a after the

partnership with his brother which ended in 1916. He continued his business thereafter without any partner and amassed considerable wealth. He attempted to train his son plaintiff 1 by placing him in charge of one or the other of his businesses but like most of the spoilt children of rich people he was found to be useless. Ramalingam's wife and his eldest son were loved by him tenderly. But differences arose; wills were executed by Ramalingam with the consent of his wife and plaintiff 1 and it was mentioned in them that the properties were self-acquired properties of Ramalingam. Later, plaintiff 1 and his sisters and their mother rebelled against the authority of Ramalingam and their conduct towards him was felt by him to be outrageous as he puts it, with the result he executed the will in question, bequeathing the major portion of the properties for charitable purposes. Plaintiff 1 and his mother at first contended that the property was acquired with the help of streedhana of the mother in their objections in the probate proceedings to the appellants taking possession of the properties as executors. Later, in these suits filed by plaintiffs they changed their stand and contended that the property was acquired by Ramalingam from out of the business stated with the proceeds of the sale of two houses of his father. They developed their case at the time of arguments by urging that the source of the plaint schedule properties was an ancestral joint family business started by their grandfather Vaidyalingam Mudaliar. They succeeded in convincing the District Judge on this aspect of the matter with the result that the executors-defendants 1 to 3 have now come up in appeal against the decision of the District Judge.

7. The learned District Judge has begun by stating in Para. 9 of his judgment that:

"No doubt according to plaintiffs' case on their pleadings and even more particularly as sought to be pressed during arguments of counsel on their behalf, the properties were said to have come to be and to partake of the character of joint family properties in several ways alternative as well as cumulative"

It was urged by the plaintiffs not in their plaint, but at the time of arguments that the suit properties partake the character of joint family properties as they were acquired with the assets of a joint family business carried on by their paternal grandfather through Loganatha Mudaliar who is their maternal grandfather. It is not necessary to consider this point as even the District Judge who has gone out of the way to make out a case for plaintiffs not raised in their plaints concludes

"that as regards the plaintiff's case that their grandfather Vaidyalingam may have done business at Kolar Gold Fields through their maternal grandfather Loganatha Mudaliar, there is no adequate evidence in proof thereof."

It is however, necessary to state before leaving this point that the District Judge refers in Para. 18 of his judgment to

"circumstances that may be found on reference to Ext. CCCV, the Mines Cash

account and Exs. H and H-1 Vaidyalingam's account with the Cavalry Road Bank viz, that an amount almost equal to Rs. 23,000 received by Loganathan from the Mines during the period between May and 26th November 1898 had come to be credited in Vaidyalingam's Cavalry Road Bank account."

A through examination of Exs. H and H-1 shows that the statements that Rs. 23,000 of Loganatha Mudaliar was credited to Vaidyalingam's Cavalry Road Bank account during the period referred to above is absolutely an incorrect statement, and it is surprising that such incorrect statements on questions of fact should find a place in the judgment of an experienced District Judge. Such incorrect statements are likely to influence an appellate Court and as a matter of fact, in this case, the incorrect statement has been taken as correct by Sri Kandaswami Pillai J., as he did not evidently expect statements made by an experienced District Judge being incorrect. The following observation of his Lordship makes it clear how it has influenced him to agree with the opinion of the District Judge and has necessitated this reference to the Full Bench;

"It would be also seen from Exs. H and H-1 that about Rs. 23,000 in the aggregate received by Loganatha Mudaliar between May and 26th November 1898 from the Mines was credited in Vaidyalingam's accounts in the Bank. As observed by the learned District Judge, the inference from all these is irresistible that K.G.F., contract business in the name of Shanmugam was run with the said initial capital of Rs. 2000 by amounts credited in the accounts of Vaidyalingam and Shanmugam in the Bank and by amounts received into Vaidyalingam's account in the Bank from the Mines in respect of bills of Loganatha Mudaliar to it."

8. The next point raised before the District Judge at the time of arguments though not set out in the plaint is that Vaidyalingam was doing contract business in the name of his eldest son Shanmugam, that the business was a joint family concern in which all his sons including Shanmugam were helping him and that the property thus acquired must therefore be deemed to be joint family property. In support of the case of the plaintiffs that Vaidyalingam took over the business of Loganathan, the learned District Judge observes as follows:

"No doubt having regard to the nature of the contract business, that he had been doing with the Gold Mining Company at K.G.F., the making over by him and the taking over by Vaidyalingam of such business, spoken to by the witness P.W. 6, could have been merely by way of his having recommended Vaidyalingam to the Gold Mining Company Authorities at K.G.F., and having got them to assent to entrust, in future to his nominee, the contract works, similar to those he himself had been given so far by the Mining Companies."

He adds:

"We have also the confirmatory circumstances in the case that, as could be seen from Ex. CCCV, the Nandidroog Mines Cash Book extracts, it was also the same kind of building and masonry work, that Loganathan had been doing for the company, for which the last payment made to his hands by the company was in

May 1899, that since December 1900 Vaidyalingam's eldest son Shanmugam in whose name the business was started, had come to be paid for, by the Mining Company, and so, the execution of the same works must have been taken up much before them. Thus, it seems also that the contract business at K.G.F., with the Mining Company, in the name of Shanmugam, the senior most uncle of the plaintiffs and eldest son of their grandfather Vaidyalingam came to be carried on almost as it were in succession or continuation of similar business, which Loganathan, their maternal grandfather, had been doing for the company before."

9. The District Judge is wrong in thinking that the last payment made to Loganathan by the Mining Company was in May 1899, and it is more correct to say that the last payment was made in 1900 as is clear by Ex. 305 and that Shanmugam had began his contract business about two years earlier in 1898 as is clear by Ex.B. Even if it could be said that Shanmugam continued the business of his maternal uncle Loganatha, Mudaliar, it does not follow that his father or his brothers had anything to do with Shanmugam's business. Even if the business was started by Shanmugam and his brothers when Vaidyalingam was alive, it cannot be said to be their joint family business as there is nothing to show that Vaidyalingam who was a District Court Sheristedar working in Shimoga or Mysore had anything to do with the business. Where only some of the members of a joint family share a business as partners it cannot be said to be a joint family business. As observed by Really J., in *The Official Assignee Vs. Neelambal Ammal*, :

"A joint family business need necessarily be the business of a whole joint family, or a whole branch of a joint family, and it cannot be the business of some group of members of a joint family or members of a branch of a joint family less than the whole joint family or the whole branch."

10. It may be that if the business is stated with the assistance of joint family property, the property acquired might be regarded as joint family property, but as observed in *Bhurumal v. Jagannath* AIR 1942 P.C. 13: ILR (1942) KANT 33:

"The question whether a business carried on by a member of 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 assert it".

11. It is that in this case it is likely that shanmugam utilised in his business a sum of Rs. 2,000 which he and his father borrowed from Cavalry Road Bank and discharged that debt later, but a son who starts a business with the help of money borrowed by himself and his father and who later discharges that debt can not be said to start his business with the help of any joint family property. That will be only a case of contracting a debt under a pronote and becoming liable to discharge it. The amount cannot be regarded as joint family property merely because two of the members of the family consisting of more than two

members borrowed the amount on their personal liability under a pronote and it was utilised by only one of them. It cannot therefore, be said that the learned District Judge was right in drawing an inference from the above facts that the business started by Shanmugam was a joint family concern. On the other hand, the fact that Shanmugam opened another account in C.R. Bank in his own name and the fact that the business was run only in his own name and not even in the name of himself and his brothers indicates that it was his own business. It might be added that the mere fact that Shanmugam took the help of employees like Rama Iyer and Kumaraswamy Mudaliar trusted by his father cannot convert his business into a family concern as made out by the learned District Judge.

12. Another reason give by the learned District Judge is as follows:

"We now reach the stage in January 1904 when the father Vaidyalingam jointed his sons, after retiring from the post of Sheristedar at Shimoga on medical certificate, and it is indeed significant that in this very month January, while over Rs. 15,000 is shown by Ex. CCCV, the Mining Company's cash book extract, to have been received by Shanmugam, as cash, only about Rs. 3,100 had come to be credited into his C.R. Bank account, as per Ex. G. (2) while on the other hand, such a large amount as over Rs. 12,000 had come to be credited into the father Vaidyalingam's Bank account as per Ex. G (3) and it is no less significant."

13. This inference is absolutely unwarranted. If Shanmugam got Rs. 15,000 and only Rs. 3,000 had come to be credited to his account it may be that the balance must have been required to pay his employees, to by materials for contract work and to discharge such debts as he might have borrowed in executing the contract work. It amounts received by one have not been credited to his Bank account and almost a similar amount has been credited in the account of another, a few days later, even though that person happens to be father of the first, it cannot follow that the amount received by the former has gone into the account of the latter.

14. The Cash Book product from the Mines begins at p. 175 of Vol. II-A. It is seen on p.188 that on 9th January three items of cash have been paid making up a total of Rs. 15,902-3.1. That shows that Shanmugam received cash of Rs. 15,902.3.1 on 9th January. On 19th and 20th of January, a total sum of Rs. 3,100 is received in Shanmugam's cash account in the Cavalry Road Bank (vide Vol. II.B p. 368.) Earlier account is found in Vol. II p. 391. In January there is no other entry beyond these entries. Vaidyalingam's account is found at p. 382 in vol.II.A sum of Rs. 12,120-6-9 has been credited to this account of 23rd January; a similar sum has been debited to this account on 29th January. These three transactions are sought to be connected and made the foundation of the reasoning of the District Judge that the Mining Company's money went into the account of Vaidyalingam. The whole of the District Judge's reasoning is fallacious" the dates are different, the amounts are different and there is no evidence except what is contained in the entries and the entries by themselves do not show anything.

15. This and other similar mistake made by the District Judge had, as already stated, the effect of misleading Sir Kandaswami Pillai J., who evidently could not conceive of an experienced District Judge being capable of making such mistake and adopted them; this resulted in his agreement with the findings of he learned District Jude. His Lordship observes:

"On 28th November 1904, Devaraja Mudaliar had drawn from the business account in the Bank Rs.2,030 by cheque drawn by Shanmugam in his favour and credited that account with Rs. 2,000 on 11th February 1905."

This is based on the following observations of the District Judge in his judgment:

"It is admitted that neither Devaraja nor Ramalingam had any account in their own name in the C.R. Bank, and we still see from the K.G.F. business edger account relating to the C.R. Bank at page 67 of Ex, CXLII, that on 28th November 1904, Devaraja had drawn from the business account in the C.R. Bank by way of cheque Rs. 2,030 and had credited into the account Rs. 2,000 on 11th February 1905."

The learned District Judge has made a confusion between credit and debit, found at page 67 of Ex. CXLII, which is the ledger page in Shanmugam's K.G.F. account showing his dealings in Bangalore Cavalry Road Bank. Whatever money is put in by him into the Bank, that amount is naturally debited in that page to the account of the Bank. The entry dated 28th November 1904 shows that Shanmugam got through his brother Devaraj Mudaliar sum of Rs. 2,030 deposited in the Bank. This amount has actually been credited to the account of Shanmugam in C.R. Bank account in the same month after the cheque amount was realised as is clear by Ex. C.4, printed at page 392 in Vol.II. It is therefore clear that the learned District Judge was mistaken when he stated that Devaraj had drawn Rs. 2,030 form the business account in the C.R. Bank by means of cheque. He proceeds to connect Rs. 2,030 which he imagined Devaraj withdrew from C.R. Bank on 23rd November 1904 with an amount of Rs. 2,000 he imagines to have been credited by Devaraj into his account 3 months later on 11th February 1905. At page 571 of Ex. BBBBBBBB referred to above printed ate page 124 in Vol. II (a), we find that Shanmugam to whose account the amount of Rs. 2,000 referred to is debited has drawn the amount from the Bank by sending a letter with Devaraj Mudaliar. It is a wonder whether it is due to incapacity of seeing the difference between debit and credit entries or whether it is due to a preconceived notion that the property is joint family property as claimed by the plaintiffs that such mistakes have become possible. Anyhow there they are, and it is equally surprising that attempts are made to connect different items of credit and debit entries found in account books though the amounts are not the same and the dates are different, in order to weave an imaginary theory. It seems to us that entries is one set of account books were taken hold of and dovetailed into the entries in another set of account books without any evidence to connect them. This process of reasoning is utterly fallacious. A number of other instance showing mis-statements can be pointed out but this would serve

no useful purpose. It is sufficient to say that the learned District Judge has confused himself in the mass of irrelevant documentary evidence adduced in the case and his reasoning is likely to confuse others.

16. Considering all the circumstances, there is little doubt that Vaidyalinga, Mudaliar, who was away in Shimoga and Mysore working as District Sheristedar had nothing to do with the contract business at K.G.F. On the other hand, Shanmugam Mudaliar his eldest son appears to have been as enterprising a businessman as his youngest brother Ramalingam was later on proved to be. his maternal uncle Loganatha Mudaliare amassed some wealth in his business as a contract employed by mines for construction of buildings. It is natural that Shanmugam who was by that time an adult should look to him for guidance and help and the guidance and help of his maternal uncle was no doubt available. He induced his father to execute a pronote along with him in favour of the C.R. Bank for borrowing Rs. 2,000. With the amount so borrowed and with the help of small sums of money otherwise borrowed from the Bank on this own account and with such amount of profits as he was able to realise in the early days, he was able to carry on his contract business with such success that he was not only able to discharge the debt he contracted with the help of his father, but also to deposit by about the year 1904 Rs. 7,000 in the C.R. Bank. He was, how ever, not the sort of man who would neglect his parents or brothers. He allowed his father to draw money he wanted by writing letters to the Bank. He met all the family expenses and trained his younger brother in the same kind of business as he was doing. But at no time did he show the idea of treating his self-acquired property as joint family property. The learned District Judge has confused himself in stating that his brothers were operating on his bank account. It is true that money was either debited or credited through them to his account. The entries show that he has done so though strangers also. It cannot follow that either Vythialingam, Ramalingam or Devaraj had any right to the amount deposited in the Bank in Shanmugam's account any more than the other persons, who were allowed to deposit or withdraw money for him. On the other hand, it was made clear in the K.G.F. account books of Shanmugam that his brothers and father had nothing to do with the business. It is true as observed by the learned District Judge that money spent for the household expenses finds a place in the accounts under a separate heading. That is because Shanmugam met the family expenses out of kindness and the money thus spent has to find a place in the accounts. If any money was paid either to his father or to his brothers these sums were mentioned in separate ledger pages opened in their names. So also his own personal account has been opened, and the significant word kasa is found in the accounts with reference to himself and that makes it clear that he ins the proprietor. it, on the other hand, the business was a joint family concern, a single ledger account for all the members of the family would have been opened in the name of the joint family. After all, we find that Shanmugam has paid for the services of his brothers. As much as a sum of Rs. 1,000 has been paid to Devaraj in the year 1910. As observed in the decision reported in 50 Mys. H.C.R. 177:

"The separate property of a Hindu ceases to be his property and acquires the characteristics of his joint family or ancestral property not by any physical mixing with his joint family or ancestral property, but by his own volition and intention, by his waiving or surrendering his special right in it as separate property. A clear intention to waive separate rights must be established and will not be inferred from acts which may have been done merely from kindness or affection."

It is clear that Shanmugam at any rate had at no time conceived the idea of treating his property as the joint family property of himself, his father and brothers.

17. That the brothers or the father of Shanmugam had no such idea, even prior to the time of setting their affairs is clear from the fact that when Ramalingam, one of the brothers had to sell a house, it was clearly stated in the sale deed that the house had been bequeathed to him by his father, and in view of the fact that the father realised that his elder sons were in enjoyment of their self-acquired properties. It is nobody's case that at that there was any idea of making any false statements and if the District Judge conceives that there was any such idea, that is because of his imagination which he could not avoid on account of what appears to be his pre-conceived notion that the plaint schedule properties are the joint family properties. The fact that the executant of the document is referred to in it as "contractor Vythialinga Mudaliar's son Ramalinga Mudaliar" is merely intended to show that the executant was the contractor and not his father. Vythialinga Mudaliar. It is not doubt true that this description could either be applied to the father or his son but it has to be applied to such person as was actually doing contract work. There is nothing to show that Vythialinga, Mudaliar was doing contract work. On the hand, there is everything to show that Ramalinga Mudaliar was doing contract work. Use of the word "contractor" as referred to above in Ex, A in no way helps the plaintiffs.

18. The exact relationship between the parties is clarified by a document which came into existence to evidence the same after the parties sat for that purpose, and that document is Ex, B, the release deed executed by Devaraj Mudaliar and Ramalinga Mudaliar in favour of their brother Shanmugam. It is of such a great importance that it is necessary to quote here at least a good portion of the document. The document referred to is as follows:

" Whereas from about the year 1898, the said V.V. Shanmuga Mudaliar started life as a contractor and merchant by his own exertions without the use or aid of funds of the joint family to which he belonged when he was forced to find his own means of living on the Kolar Gold Fields and elsewhere, whereas contenting himself with the general education he had with the limited means of his father, the late V. Vaidyalinga Mudaliar aforesaid; whereas the said V.V. Shanmuga Mudaliar by intelligent, honest and hard labour as a contractor and merchant of the Kolar Gold Fields has been able to make the self acquisitions described in the schedule hereto affixed and has all along kept them as his separate properties; whereas the said V.V. Shanmuga Mudaliar and his younger brothers, V.V.

Devaraja Mudaliar and V.V. Ramalinga Mudaliar have already given effect to their father V. Vaidalinga Mudaliar's intentions orally declared by him a his last wishes during his illness shortly before his death on or about the 3rd May in the year 1905 in regard to the disposal of his Immovable and moveable properties which were all his self-acquisitions.... whereas according to the disposals already made agreeably to the orally declared intention of late V. Vaidyalinga Mudaliar aforesaid, the two dwelling house above described have already become the sole and exclusive properties of V.V. Ramalinga Mudaliar, the youngest of the three brothers aforesaid, his elder brothers V.V. Shanmuga Mudaliar and Devaraja Mudaliar, then agreeing to claim no right title or interest therein in deference to their father's last wishes and all the movable properties of the late V. Vaidyalinga Mudaliar, including the amount of his Endowment Policy aforesaid, have already been well and truly appropriated towards discharge of his just debts and his other liabilities with the knowledge and consent of all the parties to these present viz. V.V. Shanmuga Mudaliar, V.V. Devaraja, Mudaliar and V.V. Ramalinga Mudaliar, so that nothing in the nature of undivided joint Hindu family properties remains to be shared or divided between the said parties to these present; whereas it is however true that V.V. Shanmuga Mudaliar on account of the natural love and affection and considering the limited means of his father the late V. Vaidyalinga Mudaliar aforesaid not only gave promising aids to the family to which he belonged from the time to time from his self-acquisitions both during and after the lifetime of his said father but also has enabled his brother V.V. Devaraja Mudaliar to form business connections with the him from the year 1905 after the close of about 2 years apprenticeship in the latter's line of business and whereas the said Shanmuga Mudaliar has given his other brother V.V. Ramalinga Mudaliar also a training in business and enabled the latter to form business connection with him from about the month of October in the year 1910, with the happy result that both his brothers V.V. Devaraja Mudaliar and V.V. Ramalinga Mudaliar are now able to stand on their own legs as business and each of them, the said V.V. Devaraja Mudaliar and V.V. Ramalinga Mudaliar, has earned moneys as separate properties to carry on his profession without any extraneous help in future; And whereas the said V.V. Shanmuga Mudaliar has now made arrangements to go abroad and considering the uncertainties of human life and nature in spite of the splendid relations existing between the parties to these presents the said V.V. Shanmuga Mudaliar wishes to set his house in order and avoid all chances of any future dispute relating to his self-acquired and separate properties described in the schedule hereto affixed and the said V.V. Devaraja Mudaliar for himself and V.V. Ramalinga Mudaliar for himself and as guardian and father of his minor son V.R. Viswanathan, are willing and hereby agree to comply with the said V.V. Shanmuga Mudaliar's wishes in the circumstances above set forth and to release and relinquish and quit claim their right, title and interest, if any in the said properties of the said V.V. Shanmuga Mudaliar in a formal manner. Now this Indenture witnesseth that in pursuance of the said agreement and in consideration of a sum of Rs. 2,500 given this day by the said V. V. Shanmuga Mudaliare to his brother V.V. Devaraja Mudaliar and another sum of

Rs. 2,500 to his other brother V.V. Ramalinga Mudaliar and his minor son V.R. Viswanathan, which sums of money this said brothers V.V. Devaraja Mudaliar for himself and V.V. Ramalinga Mudaliar for himself and as guardian of his minor son, V.R. Viswanathan aforesaid, do hereby acknowledge receipt the said V.V. Devaraja Mudaliar for himself and V.V. Ramalinga Mudaliar for himself and as guardian and father of his minor son, V.R. Viswanathan do hereby declare that they or any of them shall not be entitled to claim any manner of right or title or interest in the said V.V. Shanmuga Mudaliar's property (described in the schedule hereto affixed) which are his self-acquisitions as herein before recited and agree that even if they or any of them ever had or have any right or title or interest on the said properties in spite of the truth relating to their separate and exclusive acquisitions by the said V.V. Shanmuga Mudaliar, the same shall hereby and have hereby been released, relinquished and quit claimed, so that the said Shanmuga Mudaliar shall be and remain the sole and absolute owner thereof."

This document which evidences a family settlement solemnly entered into by the three brothers of whom Ramalingam, father of plaintiffs represented his branch of joint family as it existed then, clearly mentions their exact relationship and the extent and nature of interest they had, if any, in it. It is made clear that the entire property referred to in the document was the self-acquired property of Shanmugam alone, except for the two houses, which were the self-acquired property of their father and which were referred to as having been bequeathed to Ramalingam alone. While it specifically stated that none, apart from shanmugam had any interest in the properties it is mentioned that a sum of Rs.2,500 was paid as consideration to Devaraj on one hand and that Rs. 2,500 was paid to Ramalingam and his son for releasing such right as they might be demand to have, if any, in the said properties. The settlement as evidenced by this document has been acted upon for nearly four decades and neither Devaraj nor plaintiffs or their father are shown to have questioned it. Before considering the evidentiary value of what has been stated in the document, itself, we shall consider the question of law whether Ramalingam or his sons of whom plaintiff 1 alone had been born and was a minor then could question it. Numerous authorities could easily be quoted for upholding the position that so far as a manager of a joint family is a party to a suit in a representative capacity, the minors and other members of a joint family are bound by the decision. And it equally certain that when parties representing different branches of the family arrive at a settlement such settlement cannot be questioned either by them or by the persons, who are represented by them even though they are minors except in a suit properly instituted for that purpose within the time allowed by law. If after a bona fide settlement between the managers of a joint family the other members could be allowed to question the settlement without getting that settlement as aside in a proper Court there could be no finality to dispute. As observed in AIR 1938 181 (Privy Council) :

"It is true that if a compromise has been entered into in good faith by the manager of joint Hindu family or by a father in such family a minor member of

the family cannot be allowed to disturb it, on the ground of inequality of the benefit unless there was fraud or some other ground which in law vitiates it. This rule proceeds upon the principle that the minor was properly represented by the father as the manager of the family and he was therefore a party to the compromise."

We do not think, therefore, it is open to the plaintiffs to question in these suits the finality of the terms of settlement as evidenced in Ex. B or the nature of interest the parties to the settlement had in the properties according to the settlement.

19. It has, however, to be observed that no one has questioned the settlements evidenced in this document in the pleadings in this suit and in fact P.W. 1, Padmanabhan, who is the husband of one of the sisters of the plaintiffs and who claims to know the family affairs has stated that the release deed Ex. B evidences the final settlement between the parties, and that he has gone through it and advised the plaintiff to rely on the truth of the recitals in it in support of their contentions that they and their father were members of a joint family. Plaintiff 1 himself in his evidence admits that he accepted all the recitals except the portion Ex. B (6) which refers to Shanmugam having started life without the use and aid of joint family funds. It may be said here that plaintiff 1 has thus admitted the other recitals in Ex. B and if he questions the truth of the statement that Shanmugam did not begin his business with the help of any joint family funds, he is questioning the truth of what he does not know having been born long after Shanmugam started his business. It is nobody's case that any fraud was practised by Shanmugam on the brothers. The learned District Judge has out-heroded herod to use his own expression with reference to one of the witnesses, in making out a case for the plaintiffs, not conceived by them even when the plaint was drafted alleging that the suit properties are their joint family properties.

20. Even if it is open to the plaintiff to question the truth of what is stated in Ex. B to which their father was a party, can it be said there is any ground to support such a contention? Under the settlement evidenced by Ex. B, properties of great value were taken by Shanmuga Mudaliar and what was received by his two brothers including even the items referred to by the learned District Judge and not mentioned in Ex. B were disproportionately small in value. It cannot be conceived that Ramalinga Mudaliar, plaintiffs father who has been found to be a very shrewd businessman of great intellect would have given up his share in the valuable property if incase he had any interest in it. It is not shown that either Ramalinga Mudaliar or his brothers had any intention of deceiving or defrauding their own sons by recording in the release-deed, Ex. B, that the properties were the self-acquired properties of Shanmuga Mudaliar. The document itself came into existence evidently after great deliberation and in fact after consulting P.W. 11, Diwan Bahadur Masilamani Pillai who subsequently retired as a Judge of the High Court of Madras. It has not been shown that there was any motive or

reason for stating in Ex. B what is not true and there is nothing to show that anything but truth finds a place in it.

21. Let us however examine what is stated in Ex. B and see if any of the statements is false. The first statement in Ex. B that needs some comment is the reference to the fact that V. Vythialinga Mudaliar, father of the brothers, died after bequeathing the two houses which he owned as his self-acquired property to Ramalinga Mudaliar exclusively and leaving no other property. There is nothing to show that the two houses were the ancestral property of Vythialinga Mudaliar and in fact in the mortgage deeds executed by him and attested by his son, the houses have been referred to as his self-acquired property. That he was not a man of any great means is clear from the fact that even the houses had been mortgaged. He died leaving some debts as is clear from the account books of the C.R. Bank. Even the ledger opened by his son Shanmuga Mudaliar in respect of monies paid or received by him does not show that he died leaving any assets other than the two houses which he had bequeathed to Ramalinga Mudaliar, father of the plaintiff. The statement in Ex. B that the two houses had been bequeathed to Ramalinga Mudaliar in view of his two brothers acquiring some properties of their own, is corroborated by the recital in the sale deed Ex. A executed by the plaintiff's father Ramalinga Mudaliar about two years before the date of Ex. B. There could hardly have been any reason for such statements being made in Ex. A long before the settlement between the parties as evidenced in Ex. B, unless it be that what is stated about the bequest in Ex. B is the truth.

22. The next statement in Ex. B that needs consideration is that V. V. Shanmuga Mudaliar who started life as a contractor and merchant attained success by his own exertions without use or aid of funds of the joint family to which he belonged. This is proved by the fact that till 1904 he had hardly anything to fall back upon except the debt of Rs. 2000 borrowed by him with the help of his father and small sums of money which he borrowed from the Cavalry Road Bank in his own khata. Thus the statement referred to above is found to be true.

23. The document Ex. B further states that considering the limited means of his father Shanmugam not only gave aids to the family to which he belonged from time to time from his self-acquisitions but also helped his brother V.V. Devaraja Mudaliar to form business connection with him from the year 1904 after the course of about two years' apprenticeship in the latter's line of business and that Shanmuga Mudaliar M has given his other brother V.V. Ramalinga Mudaliar also training in business and business connection with him from about the month of October 1910 with the happy result that both his brothers were able to stand on their legs. It is clear from the personal ledgers opened in the names of the brothers and the father of Shanmuga Mudaliar as well as from other entries in the account-books of the concern owned by Shanmuga Mudaliar that the latter was helping them out of affection towards his father and brothers and that he was meeting the family expenses. It is also clear that he employed his brothers in the business and not only gave them training but also paid for the work done

by them. This is found by the learned District Judge to be true but he is making use of these facts to show that all the brothers were interested in the business. That this is a misconception of the District Judge has been amply shown already. The learned District Judge should not have started with the presumption that all that has been stated in Ex. regarding the settlement between the brothers did not contain the truth. It looks as if he viewed with suspicion not warranted by any circumstance disclosed in the evidence adduced in the case. If as it should be believed, It is believed that Ex. B contains that the true state of affairs it clearly shows that all the properties referred to in it except the two house were self-acquired properties of Shanmugam alone, and that it is out of affection for his brothers and their families that he gave Rs. 2,500 to Devaraj and Rs. 2,500 to Ramalingam and his son plaintiff 1.

24. As observed in *Appalaswami v. Suryanarayana Murti* AIR 1947 PC 189: 1947 A. LJ 587:

"It is dangerous to construe act of generosity or kindness as admissions of legal obligation. Hence the fact that at the instance of mediators assisting in the partition one of the members of the joint family agreed to apply some of his self-acquired property for the benefit of the members of the family cannot be taken as establishing that the member intended to bring into partition his entire self-acquired interest."

This clearly shows that the mere fact that Shanmugam met the expenses of the family and employed his brothers in his business and paid them for their services or that he paid Rs. 2,500 to each of the brothers at the time the release deed was executed out of generosity or kindness cannot show that the property acquired by him was not the self-acquired property of Shanmugam or what was paid by him to his brothers Devaraj on the one hand had Ramalingam on the other both on behalf of himself and his son, plaintiff 1, should be regarded as their joint family property. It is in evidence that Shanmugam stated the partnership concern on the very next day with Ramalingam as his partner and generously divided the assets of his business allotting Rs. 5,000 to the share of his brother. It will be noticed that Shanmugam was no longer a member of the joint family of which the plaintiff and their father could be said to be members. As observed in *Daiva Ammal v. Ramanuja Nayakar* AIR Mad. 479: 168 IC 913:

Where the manager of a joint Hindu family is a member of a trading partnership, the family as a whole does not become a member of the partnership."

It will be seen that the partnership started by Shanmugam and Ramalingam cannot be said to be a joint family business in which plaintiff 1 was interested. It is no doubt true that 23 days after this partnership was formed Ramalingam deposited Rs. 2,500 paid to him by Shanmugam both on his behalf and on behalf of his son in his Bank. This shows that he kept the amount separately and did not invest it in his business. It is no doubt true that plaintiff 1 was interested in Rs. 1,250 out of this sum and even if this sum could be said to have been included in

the amounts drawn by Ramalingam for purposes of his business, it cannot convert the business into a joint family concern. It fact it has been observed in Venkata Suryanarayana v. A. Ramayya 40 M.LJ 153: AIR 1921 Mad. 98:

"A guardian of minors cannot enter into an agreements with a third person which can give the wards the status of partners with the third person.

25. The payment of Rs. 2,500 to plaintiff 1 and his father does not strictly speaking amount to a gift as was argued, since it was paid in consideration of those two persons giving up their claim, however imaginary such claims might have been. The father and son were entitled to Rs. 1,250 each and the father who received Rs. 1,250 on behalf of the son as his guardian, became liable to return the amount. This does not however, mean that the amount of Rs. 2,500 paid for giving up imaginary claims unlike the case of some of the members of a point family releasing their right in joint family properties, is their joint family property, and it is particularly so, as ti was paid out of what has been held to be the self-acquired property of Shanmugam. The plaintiff have no interest in the business started by the father even if he wrongly utilised in his business the sum of Rs.1,250 belonging to plaintiff 1. Plaintiff 1 is entitled to recover the same ti at all, together with damages if any.

26. All aspects of the matter on which the learned District Judges has mainly relied on have been so far considered, but it must be remembered that none of these aspects arise out of the pleading. Consideration of these matters in detail became inevitable as the main basis on which the District Judge decreed the suit of the plaintiffs, is the one so far dealt, with, and as this line of thinking was accepted by His Lordship Kandaswami Pillai J. though that was due to his acting on the incorrect statement of facts made by the District Judge, who could not have been expected to make such incorrect statements. All the same we cannot pass without remarking that it would always be safe for Judges of the lower Courts to read the pleadings carefully, frame issues without adopting the draft issues filed by Advocates and be familiar with the points really in dispute so as to enable them no merely to check unnecessary evidence, but also unnecessary arguments on points which to not really arise. As in this case, copies of documents like Ex. QQQQQQQQ should not be allowed to be lugged in at a late stage of the case or relied on without any evidence on the genuineness of the document. It has to be impressed on their mind that the danger of allowing evidence being let in on points not raised in the pleadings or allowing parties to argue on points not really pertinent to the case end in unnecessary waste of time, and the party against whom such points are decided will suffer, as he cannot be expected to have adduced evidence to rebut the case not set out in the pleadings. It may be added that the lengthy cross examination. It may be added that the lengthy cross examination of the witness could have been avoided if the Court had confined the attention of the parties to the points raised in the pleadings. Unnecessary length in arguments and judgment could also have been avoided.

27. Coming to the case of the plaintiffs as put forward in the plaint, it has to be stated that it has not been shown that Ramalingam came to be in possession of any moveable property of his father Vythislingam Mudaliar. It has been specifically stated that the two house of Vythalinga Mudaliar were sold by Ramalingam and the sale proceeds invested in several businesses and there was thus a nucleus of ancestral property with which the businesses were carried on. The adult members of the family viz., plaintiff 1 and late Mr. V. Ramalingam were actively associated with the family business and as all the properties were treated by Ramalingam as family properties, the properties are their joint family properties. This is the basis of plaintiff's case as set out in the plaint. It is no doubt true that Ramalinga Mudaliar sold the two houses of his father. It has already been shown that these two houses were the self-acquired properties of Ramalinga Mudaliar. They were bequeathed exclusively to Ramalinga Mudaliar by his father. It is clearly a case of the property being bequeathed to only one of the three members of the joint family and Ex. A also makes it clear that it was bequeathed to him to be enjoyed by him as he liked. It is, thus, clear that the father intended that Ramalinga Mudaliar should take the property as his self-acquired property and it may be added that at that time none of the plaintiffs were even born and it cannot be said that the property was bequeathed with the intention of making it a joint family property of Ramalingam and his sons. Following observations in 48 Mys. H C.R. 363 with reference to a gift are equally applicable to case of bequests:

"Where a gift is made to the members of a joint family by a paternal ancestor, whether they take the property as joint family property or self-acquired property would depend on the question whether the ancestor intended that the property should be taken by them as members of a joint family on behalf of the family. If the gift is to the family, the members take the property and hold it as joint family property. Where the gift is only to some members of a joint family, they must be deemed to take the property as tenants-in-common in the absence of anything to the contrary."

We might also cite this Privy Council decision in AIR 1933 72 (Privy Council) :

"Prima facie, a gift to a member of a joint Hindu family is his separate property and will only become joint family property when it descends to his sons, unless he himself has made it joint family property by throwing into the common stock."

As the two houses referred to above which were the self-acquired properties of Ramalingam's father, were bequeathed to him exclusively to be enjoyed as he liked it is clear that after the death of the testator it became his exclusive property and the plaintiffs can claim to have no interest in it. Ramalingam sold the houses for Rs.4,000 and there is nothing to show what he did with the money, though there is some oral evidence that he discharged some debts. Even if he had invested this sum of money in his businesses, it cannot be said that the business became a joint family concern as the amount belonged to him exclusively. [Their Lordship considered the claim of the plaintiffs, as put forward in the plaint that

both Ramalingam and his sons and found against the plaintiffs. Their Lordships also considered how the will came to be executed.]

28. In the view we take, the appeals are allowed and the suit of plaintiffs stand dismissed with costs throughout. The stay order passed is vacated.

Balakrishnaiya, J.

29. I concur with the decision.