1951

May 7.

BHAGWATI PRASAD SAH AND OTHERS

v.

DULHIN RAMESHWARI KUER

AND ANOTHER.

(SAIYID FAZL ALI, MUKHERJEA and

CHANDRASEKHARA AIYAR JJ.)

Hindu Law—Joint family—Presumption of jointness—Separation of one member—Effect of—Burden of proof of subsequent state of family—Evidence of separation—Statement of deceased member—Evidence Act (I of 1872), s. 32(3).

Though the general principle is that a Hindu family is presumed to be joint unless the contrary is proved, yet where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or they remained united and the burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which the claims relief.

Except in the case of reunion, the mere fact that separated coparceners chose to live together or act jointly for purposes of business or trade or in their dealings with properties would not give them the status of coparceners under the Mitakshara law.

The statements of a particular person that he is separated from a joint family of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father, would be statements made against the interest of such person, and, after such person is dead, they would be relevant under s. 32(3) of the Evidence Act. The assertion that there was separation not only in respect of himself but between all the coparceners would be admissible as a connected matter and an integral part of the same statement. It is not merely the precise fact which is against interest that is admissible but all matters that are "involved in it and knit up with the statement."

The expression "joint family" is used in legal as well as in a loose sense. The fact that the said expression is used in

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describing a family in a document does not therefore necessarily lead to the inference that the family is a joint Hindu family with all its legal incidents.

CIVIL APPELLATE JURISDICTION. Civil Appeal No. 83 of 1950.

Appeal from the Judgment and Decree dated the 2nd March, 1948, of the High Court of Judicature at Patna (Manohar Lal and Ray, JJ.) in Appeal from Original Decree No. 60 of 1944 arising out of the Judgment and Decree dated the 22nd December, 1943, of the Court of the First Sub-Judge of Saran, Chapra, in Title Suit No. 24 of 1941.

Bakshi Tek Chand (*Ramanugrah Prasad,* with him) for the appellants.

Gopinath Kunzru (*D. K. Saran,* with him) for Respondent No. 1.

1951. May 7. The judgment of the Court was delivered by

Mukherjea J.

MUKHERJEA J.—This appeal is directed against a judgment and decree of a Division Bench of the Patna High Court dated 2nd March, 1949, by which the learned judges reversed, on appeal, a decision of the Second Additional Subordinate Judge of Saran in Title Suit No. 24 of 1941.

The controversy between the parties to the suit centres round only one question of fact, *viz.*, whether the plaintiff's father, who died in 1926, was joint with or separate from his nephew, the defendant No. 1, at the time of his death. If he died separate, it is not disputed that his properties would devolve by inheritance upon his widow and after the death of the widow would vest in his daughter, who is the plaintiff in the suit. If, on the other hand, he died joint, his interest in the joint properties would pass by survivorship to defendant No. 1, who together with his male descendant constitute a joint Hindu family governed by the Mitakshara law.

It may be convenient at the outset to give a brief resume of the material facts as they appear in the

pleadings of the parties. One Sheo Narain Sah, who was the grandfather of the plaintiff as well as of defendant No. 1 had three sons: (1) Imrit, (2) Janki and (3) Ram Narain. Imrit's branch is represented by defendants 11 and 12 in the suit, and they are his son and grandson respectively. Janki's only son is Ram Saran, the defendant No. 1. Defendants 2 to 4 are the sons of defendant No. 1 and defendants 5 to 10 are his minor grandsons. Ram Narain died in 1926 leaving behind him his widow Sumitra and a daughter Rameshwari who is the plaintiff in the suit. Sumitra died in 1933 and the plaintiff claims to be the sole heir of Ram Narain after the death of her mother. According to the plaintiff, there was a complete separation between the three sons of Sheo Narain in food, estate and business nearly 65 years prior to the institution of the suit. After separation, Ram Narain and Ram Saran, the defendant No. 1, did carry on a cloth shop jointly and dealt with the profits of this business together, as well as acquired properties in their joint names. But these properties and interests they could and did hold as tenants in common. Sumitra was a woman of weak intellect and after the death of Ram Narain, she was completely under the influence of defendant No. 1 and his sons. It is stated in the plaint that in the year 1928 the defendant No. 11, who is the son of Imrit, instituted a suit at the instigation of defendant No. 1 and his sons in which he denied the separation of Imrit from the joint family and claimed the properties in possession of defendant No. 1 and his sons as the joint properties of the family. That suit, it is said, ended in a collusive compromise and Sumitra was made to file a collusive written statement in that suit as well as to depose falsely on commission to the effect that her husband died joint with defendant No. 1. The plaintiff herself brought an earlier suit on much the same allegations as she has made now but that suit she had to withdraw because of some formal defects. The present suit was instituted on 20th of December, 1940, and the plaintiff prayed for recovery of possession of the properties specified in Schedules I to IV in the plaint together with mesne profits both past and future.

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Defendants 11 and 12 did not appear or contest the suit. The suit was contested by defendants 1 to 4 who filed one joint written statement. Another written statement and that of a formal character was filed on behalf of the minor defendants by their pleader guardian appointed by the Court. The material thing stated in this written statement was that the natural guardians of the minors in spite of notices being given to them did not properly instruct the pleader guardian.

The defence of defendants 1 to 4 in substance was that there was no separation between Ram Narain and defendant No. 1 as alleged in the plaint, but that after the death of Janki, the father of defendant No. 1, Imrit alone separated himself from Ram Narain and the defendant No. 1 when the latter was only five years old. Ram Narain and defendant No. 1 continued to remain joint as before and as Ram Narain died joint, the defendant No. 1 got all the properties by right of survivorship. It was denied that Sumitra was influenced in any way by defendant No. 1 or his sons or that she was made to file a collusive written statement in the suit instituted by defendant No. 11 or make a false statement in her deposition while giving evidence therein. Several other pleas were taken with which we are not concerned for our present purpose.

The material issue framed in the suit was issue No. 6 and this was worded as follows :—

"Was there any separation between Ram Narain Sah, plaintiff's father and defendant No. 1 as alleged?".

The trial Court on a consideration of the evidence adduced in this case decided this issue against the plaintiff and in that view dismissed the suit. There was an appeal taken to the Patna High Court against this decision by the plaintiff and the learned Judges of the High Court reversed the decision of the trial Judge and gave the plaintiff

a decree in terms of the prayers made in the plaint. The defendant No. 1 died after the decision of the trial Judge, and his sons and grandsons have now come up on appeal to this Court. The substantial contention raised by Mr. Bakhshi Tek Chand, who appeared in support of the appeal, is that the decision arrived at by the High Court on the question of separation is not warranted by the evidence on the record.

Before we discuss the evidence on the record, we desire to point out that on the admitted facts of this case neither party has any presumption on his side either as regards jointness or separation of the family. The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief. These principles which have been laid down in several pronouncements of the Judicial Committee seem to us to be perfectly sound : (vide *Bal Krishna* v. *Ram Krishna*[1]) and *Palaniammal* v. *Muthuvenkatachala*[2]) and *Balabux Ladhuram* v. *Rukhmabai*[3]). Another thing to be noted in this connection is that it is not the case of the defendants made either in the pleadings or in the evidence that even if there was a separation between Ram Narain and Ram

(1) L.R. 58 I.A. 220

(2) L.R. 59 I.A. 83

(3) L.R. 30[.A. 130

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Saran at any anterior time they subsequently reunited. The controversy, therefore, narrows down to the short point as to whether at any time before the death of Ram Narain there was a separation between him and Ram Saran. If, as the plaintiff avers, there was a disruption of the joint status in regard to all the three brothers, it would really be immaterial if, subsequent to separation, Ram Narain and Ram Saran lived together in commensality or dealt with their properties in such manner as is ordinarily done by members of a joint Hindu family which is not set up in the present case. Except in the case of reunion, the mere fact that separated coparceners chose to live together or act jointly for purposes of business or trade or in their dealings with properties, would not give them the status of coparceners under the Mitakshara law. It is in the light of these principles that we propose to examine the evidence before us.

Both the Courts below have discarded the oral evidence adduced by the parties as wholly unreliable and the learned counsel appearing for neither side has invited us to place any reliance on the same. We do not, therefore, think it necessary to refer to the oral evidence at all.

As regards documentary evidence, it must be admitted that there is no deed of partition in the present case, nor is there in existence any document to which all the members of the family were parties and which proceeds on the basis of any admitted partition. Imrit's separation from the family is of course an admitted fact but there is no evidence even on the side of the defendants to show when this separation took place. The defendant No. 1 in his deposition in a Money Suit, to which he was a party, stated in the year 1942 that his age was 81 at that time. If this is a correct statement, Ram Saran must have been born some time in 1861 and Imrit's separation may be dated near about the year 1866.

The earliest document that we have on the record is Ex. 2 dated the 30th of September, 1879. This is a

mortgage bond executed by Imrit in favour of Ram Narain. There is no recital of separation in the document itself, but the statement of boundaries of the mortgaged properties shows clearly that Ram Narain's share was separated from that of Imrit. The mortgaged properties were two houses, one of which was situated at Dahiawan and the northern boundary of this house is stated to be "house of Ram Narain Sahu, *puttidar* of me, the executant, partitioned". This shows that there was a partition between Imrit and Ram Narain and Ram Narain had a separate house of his own. It is not stated in this document that this house was the joint property of Ram Narain and Ram Saran. Exhibit 2(a) is another mortgage bond between Imrit and Ram Narain and is dated the 21st of March, 1885 and here the northern boundary of the mortgaged property is stated to be the "Bakasht land of Ram Saran Sahu, *puttidar* of me, the executant." This is a strong piece of evidence in favour of the plaintiff and taking Exhibits 2 and 2(a) together, it can legitimately be inferred that Ram Saran was also separate and he had certain *bakasht* lands allotted to him in his share. The matter is practically clinched by the recital of another document which is Exhibit 2 (b) and which is also a registered mortgage bond executed by Imrit in favour of Ram Narain. The date of the instrument is 8th of November, 1898. There is a recital in the document to the following effect :—

> "I, the executant, have been living separately and have been separate in mess from Ram Narain Sahu and Ram Saran Sahu my own nephew for a long time and at the time of separation all the movable and immovable properties were partitioned among all the three parties. Since separation, all business is carried on separately."

The document further recites that Sheo Narain Sahu, the father, was a party to this partition and he was given a house for his residence and Rs. 1,100 in cash for trade and maintenance and that after his death these properties were also divided amongst the three sons. It is stated that Imrit received a sum of

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Rs. 334-7-9 as his share of the cash money left by his father and this money he paid to Ram Narain in part satisfaction of his debt. Then again, in the description of the mortgaged property given in the schedule, the northern boundary is stated to be "House of Ram Saran Sahu nephew of me, the executant."

There is no reason to doubt the truth of these statements which were made in an old document long before any dispute arose between the parties in regard to these matters. A question was raised, however, as to whether this statement of Imrit could be legally admissible as evidence. Imrit is undoubetedly dead and Mr. Kunzru, appearing for the respondents, contended that this statement could be admitted in evidence under section 32 (7) of the Indian Evidence Act. We are not sure that section 32 (7) is really of assistance to the respondents. The particular right, which is the subject-matter of dispute before us, was certainly asserted *in* this transaction but not *by* it within the meaning of section 13 (a) of the Evidence Act. We think, however, that the statements could be admitted under section 32(3) of the Evidence Act. The statements of a particular person that he is separated from a joint family, of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father, would be statements made against the interest of such person, and, after such person is dead, they would be relevant under section 32(3) of the Evidence Act. The assertion that there was separation not only in respect of himself but between all the coparceners would be admissible as a connected matter and an integral part of the same statement (Vide Blackburn J. in *Smith* v. *Blakey*[1]). It is not merely the precise fact which is against interest that is admissible but all matters that are "involved in it and knit up with the statement." See Wigmore on Evidence, Art. 1465.

We agree with the learned Judges of the High Court that Exhibits 2, 2(a) and 2(b) taken together afford most satisfactory evidence of there being a separation

(1) L.R. 2 Q.B. 326

amongst all the sons of Sheo Narain and that they show further that the separation took place during Sheo Narain's lifetime. This conclusion is fortified by the recitals in several other documents which were executed during this period. In fact, prior to 1905 there is no evidence of any transaction in which both Ram Narain and Ram Saran took part, or of any acquisition of property in their joint names.

It seems that on the very day that Exhibit 2(b) was executed there was another mortgage bond executed by Imrit in favour of Ram Saran and though that document has not been produced, the transaction is recited in a latter document, namely, Exhibit C (9), where it is expressly stated that the money was taken by Imrit on the strength of the mortgage bond from out of the funds of Ram Saran. Exhibit C (5) is a deed of sale dated 14th of February, 1880, and by this instrument one Welayat Mian sold a house to Ram Narain and the document stands in the name of Ram Narain alone. On behalf of the appellants, it is contended that this house was treated as the joint property of both Ram Narain and Ram Saran as would be evident from a Kobala Exhibit C(7) executed on 23rd of May, 1925, by both of them together in favour of one Dulhin Ram Kuer. It is said that this identical property was the subject-matter of the subsequent sale deed. We have compared the boundaries and description of the properties given in the two documents and we are unable to hold that they relate to the same property. The property dealt by Exhibit C(7) is situated in Mahalla Karim Chak, while that sold by Welayat Mian was situated in Dahiawan. The boundaries on the three sides are also quite different. Exhibit C(8) is another sale deed executed during this period. It is dated 13th of December, 1898, and in this document also Ram Narain figures as the sole purchaser of certain property from Ram Singari Singh. Here again, it is the appellants' case that this property was shown to be the joint property of Ram Narain and Ram Saran in the Survey Khatian. We do not think that this contention can be accepted as correct.

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The property that is recorded in Khatian No. 233 in the joint names of Ram Narain and Ram Saran is situated in *mouza* Purbari Telpa, while the property that is dealt with by Exhibit C(8) is in Telpa Buzurg. Moreover, the area of the property in Exhibit C(8) is only 6 cottas 8 dhoors, while that in the settlement record is more than one *bigha*. Thus, all the earlier documents support the inference which may be drawn from Exhibits 2, 2(a) and 2(b) that all the three sons of Sheo Narain separated from each other, though it is not possible to fix the precise time at which such separation took place.

From 1905 onwards we come to another series of documents upon which considerable stress was laid by the Subordinate Judge in support of his decision that Ram Narain and Ram Saran remained joint throughout. It is perfectly true that for a period of nearly 20 years from this date, we find quite a number of transactions in which Ram Narain and Ram Saran jointly took part and in some of which they were described as members of a joint Hindu family. In our opinion, the High Court is right in holding that during this period the cloth and money-lending business that was carried on jointly by Ram Narain and Ram Saran probably became a flourishing concern. Ram Narain had no son of his own and Ram Saran being an orphan, the uncle and the nephew were drawn very much closer to each other and to all outward appearances they conducted themselves like members of a joint family, of which the uncle would naturally be the head. It was natural also that properties, which were acquired out of the profits of the joint business, would be acquired in the names of both and in suits and other legal proceedings they would figure as joint parties. The question however is whether from these documents it is possible to infer that Ram Narain and Ram Saran were joint all along and are they sufficient to destroy the inference of separation that can legitimately be drawn from the earlier documents referred to above? Exhibit E is a Zarpeshgi deed executed by the sons of Imrit in favour of Ram Narain and Ram Saran

jointly. The consideration for this lease was the money due to them under the mortgages executed separately in their favour on 8th of November, 1895. One of these mortgages, as we have pointed out already, is Exhibit 2(b), while the existence of the other is recited in Exhibit C(9). Although in Exhibit 2(b) it was stated that all the three brothers were separated, it was stated in Exhibit E that Ram Narain and Ram Saran were living jointly and that their business was joint. We do not think that the statement in Exhibit E contradicts the recital of Exhibit 2(b). There might have been complete separation between the two brothers and yet it is quite possible that afterwards, when Ram Narain and Ram Saran began to carry on business together, they lived like members of a joint Hindu family. Exhibit C(3) is a sale deed dated 9th of July, 1909, executed by Bibi Bechan in favour of Ram Narain and Ram Saran. It is somewhat surprising that the vendor, who was a complete stranger, recites in this document that the purchasers are related to each other as uncle and nephew and form members of a joint family. Exhibit C(4) is another sale deed dated the 7th of May, 1913, executed by one Kishun Chand and Gopi Chand in favour of Ram Narain alone. Ram Saran does not figure as a purchaser in this document. It is argued by the learned counsel for the appellants that this land was recorded in the joint names of both Ram Narain and Ram Saran in the Survey Khatian, but the description of the land as given in the sale deed is totally different from what appears in the Khatian. There is marked difference both as regards the area as well as the Touzi number. In Exhibit C(2), which is a sale deed executed by Mustafa Hussain on 20th April, 1922, in favour of Ram Narain and Ram Saran, the purchasers are mentioned as joint Zarpeshgidars of the executant of the deed, but there is no description of them as members of a joint family. Similarly, in Exhibit C(h), which is the sale deed is totally different from what appears in the Ram Saran were described as joint creditors of the vendor. The only other sale deed executed during the lifetime of Ram Narain is Ex. C (1). This was also a deed of sale in favour of both Ram Narain and Ram

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Saran, though they are not described as members of a joint family.

In our opinion, a proper consideration of all these sale deeds does not necessarily lead to the conclusion that there was no original separation between Ram Narain and Ram Saran, as alleged by the plaintiff and proved by the earlier documents. There is no doubt that Ram Narain and Ram Saran did carry on a cloth and money-lending business jointly. The vendors in the above sale deeds had borrowed money from this joint money-lending concern and the consideration for the sales in the majority of instances were unsatisfied debts due by these persons. It was quite natural, therefore, that these properties should be purchased in the names of both Ram Narain and Ram Saran jointly. Except in Ex. C(3), there is no recital in any of these documents that they were members of a joint Hindu family and even if there was any such recital, there would have been nothing unusual in it, having regard to the way in which they conducted their affairs, both in and outside the family.

The learned counsel for the appellants laid considerable emphasis however upon the statements of Ram Narain and also of Sumitra after the death of Ram Narain in a number of plaints and depositions where it was expressly stated that Ram Narain and Ram Saran constituted a joint Hindu family, of which Ram Narin was the *karta*. In Ex. K (2), which is a plaint in a mortgage suit filed in the year 1917, there is a statement in paragraph (y) of the plaint as follows :—

"The bond in suit, is executed in favour of plaintiff No. 1 alone, who is the head and managing member of the joint family, but the plaintiff No. 2, who is the brother's son of plaintiff No. 1, has got a claim to one-half share in the amount claimed. Therefore, he joins as a plaintiff."

It may be noted that plaintiff No. 1 in the suit was Ram Narain and plaintiff No. 2 was Ram Saran. In

Ex. K (1), which is another plaint in a mortgage suit of 1924 and in which both Ram Narain and Ram Saran figured as plaintiffs, it was stated in paragraph 6 of the plaint that plaintiff No. 2 (Ram Saran) was the member of a joint family with plaintiff No. 1 (Ram Narain) and, therefore, he was also joined in the suit. Lastly, we have got the following statement in a plaint in another mortgage suit, (Ex. K), which was filed by Ram Narain and Ram Saran in the year 1923 :—

"That the plaintiffs are members of a joint family and carry on money-lending business jointly. Mortgage bonds are executed in favour of any member of the family. Accordingly, the mortgage bond sued upon was executed in favour of plaintiff No. 1 alone. But both of the plaintiffs have got claim thereto."

It may be pointed out, first of all, that these statements occur in plaints filed in mortgage suits arising out of the money-lending business which was carried on by Ram Narain and Ram Saran jointly. The business being a joint business, even if the bonds were taken in the name of one of the creditors, it was necessary, to avoid all risks, that both of them should join as plaintiffs. It was for the purpose of explaining as to why the bond sued upon did not stand in the name of both the plaintiffs, that this explanation was added to each one of these plaints. In the second place, it may be noted that it was expressly stated in these plaints that Ram Saran had also an equal share in the mortgage money. It would be unusual in, and quite inappropriate to, a transaction relating to a Mitakshara joint family, of which the *karta* or manager can by himself file suits and conduct transactions, to specify that another coparcener has got so much share in the claim or property. Thirdly, the expression "joint family" can certainly be used in a legal as well as in a loose sense, and it would not be improper in the circumstances of the present case to hold that it was in fact used in a loose sense. The deposition of Ram Narain given in a mortgage suit (Ex. N) does not really improve the the position. In his deposition Ram Narain states as follows :—

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"Ram Saran Sahu is my nephew and we live jointly. I am *karta* of my family."

Here again the deposition being given in a mortgage suit only for the purpose of justifying the inclusion of the name of Ram Saran as a co-plaintiff, no undue stress could be laid upon the words used. Mr. Bakhshi Tek Chand tried to make much also of the statements made by Sumitra, the mother of the plaintiff, both in the written statement which she filed in the suit brought against the defendants by Imrit's son and also in the deposition on commission which was given by her in that suit. It is to be noticed that the plaintiff was a party to this suit but later on Ram Saran and his sons had her name expunged from the suit altogether in order that there may be a petition of compromise between them and the plaintiff in that suit in her absence. It would appear from the deposition given on commission by the lady in that suit that she was completely under the influence of defendant No. 1 and her sons. The High Court, in our opinion, has rightly laid stress on some portions of her deposition where she made certain admissions even against her will. One thing said in her deposition was that there were really three houses and not two and this fits in with the story of a complete partition. In the second place, she admitted that the separation of Imrit took place during the lifetime of Sheo Narain. That the stock of knowledge of this lady was very small and she could be made to say any thing as the defendants liked is apparent from the fact that she herself did not know what was north, south, east or west. She did not know how to count money and did not know even how her husband conducted his business. In such circumstances, we feel unable to attach much importance to the evidence of this lady, though it is somewhat surprising that she should have made any statement against the interests of her own daughter.

The two other classes of documents which are relevant for our present purpose and to which reference was made by the learned counsel for the appellants are the settlement records and the account books. The

settlement records Exs. 4 and R are not, in our opinion, decisive of the point in issue. The records show that some lands were recorded in the name of Ram Narain alone and others were recorded in the names of both Ram Narain and Ram Saran with a further remark that they have equal shares in the properties. If really the family was joint from the very beginning and Ram Narain was the *karta,* then all the lands would have been recorded in the name of Ram Narain alone. The fact that some lands were recorded in the name of Ram Narain alone, while others were recorded in their joint names, clearly indicates that it was not a joint Mitakshara family in the proper sense of the word. In this connection reference may be made to two important documents to which just importance has been attached by the learned Judges of the High Court. These are Exhibits G and 1. The first is a deed of relinquishment of claim by Ram Narain to Shri Thakur Lachhmi Narayan Swamiji Maharaj. The document is dated 9th of November, 1899, and by this instrument Ram Narain relinquished his interest in certain properties which he purchased in his own name, but for the benefit of the deity. It is stated in this document that Ram Narain would remain manager of the temple during his lifetime and shall make settlement and management of the properties in such a way as he thought proper and after his death Ram Saran Sah, son of his full brother, and after him the heir and representative of Ram Saran Sah would be the managers. Ram Saran was an attesting witness to this document. This clearly shows that Ram Narain had property of his own which he was disposing of in any way he liked to the knowledge of his nephew who is alleged to be his joint coparcener. If it was an endowment created by the family itself, there was no necessity of laying down that after the death of Ram Narain, his nephew would become the manager as the managership would descend in the line of Ram Saran as a matter of course. By the subsequent document (Exhibit 1), which was executed shortly before the death of Ram Narain, this arrangement was changed and a

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certain Mahant, namely, Mahant Goswami Hirdaya Saran Deoji, was appointed manager of this endowed property. This proves that Ram Narain did purport to exercise absolute and unrestricted power of disposition over his properties in any way he liked, and that the properties except those which were jointly acquired by himself and his nephew out of the profits of the joint business, belonged to him absolutely. As regards the account books that have been produced in this case, the learned Judges of the High Court, it appears, are not quite correct in saying that there were two sets of accounts kept side by side, one in the name of Ram Narain and other in the name of Ram Saran. At least the learned counsel appearing for the respondents could not satisfy us that this was in fact the true position. We think, however, that the entries in the account books to which our attention was drawn by the learned counsel for the appellants do not realy improve the defendants' case. We agree with the learned Judges of the High Court in holding that the entries are inconclusive and at the best equivocal. Thus, for, example, certain expenses were debited to Ram Narain on account of the costs incurred by Ram Saran and others in going to Puri. It is not known who were the persons who actually accompanied Ram Saran to Puri and whether or not they were the wife and daughter of Ram Narain himself. Then again certain amounts were debited on account of *Sataisa* ceremony but nothing is elicited as to whose *Sataisa* ceremony it was. Certain expenses in connection with the marriage of Ram Saran's daughter undoubtedly find place in these account books and they are debited against Ram Narain. We have looked into the entries ourselves. They relate to very small sums of money consisting mostly of expenses incurred in connection with invitation of guests and presents received from them. They are not marriage expenses proper and in the absence of better evidence we are unable to say that they support the defendants' story of there being a joint family in the true sense of the expression.

The result is that on the whole we are of the opinion that the view taken by the learned Judges of the High

Court is correct and that there was in fact a separation of all the members of the family and not of Imrit alone during the lifetime of Sheo Narain himself. As no case of re-union has been attempted to be made on behalf of the defendants, the facts that Ram Narain and Ram Saran lived in commensality, carried on business together and acquired properties in their joint names, or that their names were recorded as joint holders of properties in the settlement records might at least create a tenancy in common between them, but not a joint tenancy under the Mitakshara law which would attract the law of survivorship. Defendant No. 1, therefore, did not acquire any right by survivorship to the properties which were owned by Ram Narain and the plaintiff is entitled to succeed on this ground.

We are unable, however, to affirm the decree in the form in which it has been made by the High Court in favour of the plaintiff. The plaintiff laid claim to the properties which are specified in schedules I to IV of the plaint. In paragraph 21 of the written statement, it was expressly averred by the defendants that the list of properties and the valuation given at the foot of the plaint were incorrect. Some of the properties, it was said, were non-existent. Some debts had become time-barred and claims with regard to certain others had been dismissed. Then, there were properties owned jointly by Ram Narain and Ram Saran to the entirety of which no claim could be laid by the plaintiff. Upon this defence, issue No. 7 was raised in the trial Court and it involved a consideration of the question as to what properties the plaintiff could claim to recover possession of even if she succeeded in establishing that her father died separate. The trial Court did not think it necessary to decide this issue, as it dismissed the plaintiffs suit altogether. The High Court, it is to be seen, has given a decree to the plaintiff in terms of her prayers in the plaint without considering this matter at all. It may be further pointed out that the plaintiff in her plaint claimed Rs. 6,600 as past mesne profits and there was a prayer for recovery of future mesne profits as well. What amount, if any, the plaintiff would be entitled to

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recover as mesne profits and on what basis mesne profits should be calculated formed the subject-matter of issue No. 8 and that issue has also been left undecided by the High Court. In these circumstances, although we agree with the decision of the High Court that the plaintiff's father did die separate from defendant No. 1 and consequently the latter was not entitled to claim any property by right of survivorship, still for the determination of the properties with regard to which a decree for possession could be made and also for ascertainment of mesne profits, the case must be sent back to the High Court.

The result is that we affirm the findings of the High Court and remand the case in order that it may be disposed of in accordance with law after determination of issues Nos. 7 and 8. It would be open to the learned Judges to remit the issues to the trial Court for findings on the points to be arrived at on the evidence on the record or on such further evidence, as the parties might be allowed to adduce. The plaintiff-respondent will be entitled to costs of the appeal. Further costs would abide the result.

Case remanded

Agent for the appellants : *Tarachand Brijmohanlal.*

Agent for respondent No. 1 : *R. C. Prasad.*