

Darshan Singh Vs. Parbhu Singh and ors.

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Court : Allahabad

Decided On : May-08-1945

Reported in : AIR1946All67

Appellant : Darshan Singh

Respondent : Parbhu Singh and ors.

Judgement :

Sinha, J.

1. This is a defendant's appeal and arises out of a suit for partition. The parties are relations, as will appear from the genealogical table set forth below:

CHAURA SINGH

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Sheoraj Singh Kehri Singh Mathura Singh

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Kamod Hazari Zabar Raghubar Angad Rachpal Sheo

Singh Singh Singh Singh Singh Singh Singh

(deft. 1) |||||

Parbhu ----- Gulab ----- | Balwant

Singh | | Singh | | Singh

(plff.) Darshan Kedar Chandra Shanker |

Singh Singh Palsingh Singh |

(deft. 2) | |

| Sheochandra |

Chhota Maul Singh |

Singh (deft. 3) |

| |

Babua Singh |

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Ganesh Singh Pahlad Singh Nawab Singh

(1) Chaura Singh - died before 1876.

(2) Sheoraj Singh - died about 1890.

(3) Kehri Singh died between 1900 and

1901, (vide pp. 316 and

(4) Mathura Singh 317 of the paper book.

(5) Zabbar Singh-died 1924.

(6) Hazari Singh-died 1927.

2. The story, with which the plaintiff came to Court, was briefly this: Chaura Singh and his sons were members of a joint Hindu family and the family continued as such even after his death. Sheoraj Singh and Mathura Singh also died in a state of joint-ness. Kehri Singh, according to the plaint, died in 1902, the materials on the record establish his death between 1900 and 1901. Chaura Singh, the story goes on, carried on a good deal of cultivation, money-lending business on a large scale and left considerable cash, cultivatory holdings, groves and a large amount of outstanding debt and considerable acquisitions were made out of the joint ancestral fund in the names of different members. The partition of the family property, the story proceeds, took place between the branches of Mathura Singh and Sheoraj Singh in 1924. There was no separation inter se between the members of each branch. Sheoraj Singh, Kedar Singh, Zabbar Singh and Hazari Singh, the plaint continues, died in a state of jointness and, in 1918 Zabbar, as the managing member of the joint family, executed, with the consent of the other members, a deed of wakf, with respect to some property and cash of the joint family and dedicated it to Sri Thakur Sita Ram Sadha Krishna installed in the temple of Mauza Rahnas, the home of the parties.

3. In other words, the plaintiff's case is that the family was, on the date of the suit, a joint family. It is on these allegations that the plaintiff claims partition and separate possession of his one-third share. The defence of Kamod Singh, Darshan Singh and Sheo Chandra Maul Singh is substantially the same. While admitting the pedigree and the dates of deaths, they alleged that Chaura Singh was a man of very ordinary status. He used to maintain himself by cultivation as a sub-tenant. He had no occupancy holding, nor did he do the business of money-

lending, nor did he, at his death, leave any amount in cash, or cultivatory holding, or grove, or zamindari property, or outstanding debt. Each of the sons of Chaura Singh, after attaining majority, started cultivation on a small scale separately from him and each of them was separate. Sheoraj Singh, it was also pleaded, was not financially well off and Zabbar, Hazari and Kamod, on attaining discretion, took up their abode and carried on their business separately and, in proof thereof, they executed an agreement, dated 2nd October 1904. The waqf of 17th December 1917 was executed by Zabbar in respect of his separate property. Another document, an agreement, of 4th October 1933, was also pleaded in which the plaintiff was alleged to have admitted separation. It was also pleaded that the parties are the exclusive owners of the property standing against their names. Of the issues framed by the learned Civil Judge, the following were the two material ones:

- (1) Whether defendant 1 and Hazari Singh and Zabbar Singh were joint with or separate from one another?
- (2) Whether the properties in suit are joint family properties belonging to the parties?

The learned Civil Judge condemned the agreement of 2nd October 1904, as a fictitious document, concocted for the purpose of the case. He found that the waqf deed of 17th December 1917, though genuine, was no proof of separation, it, on the other hand, evidenced jointness. The agreement of 4th October 1933, could not lend itself to any decisive inference. He found that the parties lived jointly and has thus summed up his conclusions:

After considering the entire evidence of the parties and all the circumstances and probabilities for and against the parties, I am of opinion, that Kamod Singh, defendant 1, and Zabbar Singh were joint with plaintiff and were not separate and that the properties in suit are joint family properties belonging to the parties and I find accordingly.

4. He decreed the suit for partition of the plaintiff's one-third share. Against this decree, Darshan Singh has come in appeal. Before addressing myself to the

various points in controversy, I must clear the ground by referring to certain special features of this case. The story unfolded in the plaint, is a story of jointness, in all material particulars, up to the time of the suit, but the plaintiff conceded in the witness-box that he 'separated in messing only two years ago, and also in cultivation, due to a private quarrel.' It must also be borne in mind that there is, according to the statement of the learned Counsel for the plaintiff made on 6th September 1938, no deed in writing with regard to the admitted partition of 1924 between the branches of Mathura Singh and Sheoraj Singh. The learned Civil Judge has held that the family was originally joint and, in the absence of any proof to the contrary, that presumption must be held to continue and it is for the party alleging separation to prove it. He also found that there was sufficient ancestral nucleus and there was, therefore, a presumption that the subsequent acquisitions could be referable to that nucleus. There can be no doubt that, if once the family is proved to be joint, that presumption of jointness continues, unless it is rebutted. It cannot also be doubted that

where the family is admittedly separate at the date of the suit, there is no presumption under the Hindu law in favour of the property being joint : vide *Sita Ram v. Gayeshwar Prasad* ('07) 4 A.L.J. 528.

It may be that the presumption of jointness is still available to the plaintiff in this case even after his admission of separation in mess and cultivation, but he is certainly not entitled to that presumption in full force. It is also true that their Lordships of the Judicial Committee have now definitely held that the present must be deemed to have had a legal origin: vide *Yellappa Ramappa v. Tippanna* ('29) 16 A.I.R. 1929 P.C. 8. Their Lordships have also left no doubt that:

The burden of proving in an action for partition of joint family property that any particular item of property is joint, primarily rests upon the plaintiff : vide *Annamalai Chetty v. Subramanian Chetty* ('29) 16 A.I.R. 1929 P.C. 1.

5. These are the guiding principles which must, in deciding this case, be kept in mind. On the strength of *Ramasary Prasad v. Radhika Devi* ('36) 159 I.C. 335 the learned Counsel for the appellant contends that, even though the story of separation as disclosed in the written statement may not be established it is open

to him to prove that, at some material time in its history, the family separated. He also contends that on the law as it stands it is open to him to contend that even though the family may be living jointly, there may be a separation in status as distinct from a division of property. This case, according to him, exemplifies in any event the distinction between separation and partition. The literature which has grown round the subject of jointness and separation in a Hindu family, is enormous and the case law is bewildering, but certain dicta are deducible from the decisions of their Lordships of the Judicial Committee and the Courts in India and may be summarised in these terms:

(a) Partition is the severance of the status of a joint family, which may be effected by the exercise of individual volition indicating an intention to separate from the other members of the family.

(b) The said intention must be manifested clearly and unambiguously.

(c) The intention to separate may be established either by explicit declaration or from an uniform and consistent course of conduct of the party concerned or of other members of the family. The intention may be declared orally or in writing and may manifest itself for partition, from an application for mutation of names to the tahsildar in specific shares with a view to separate enjoyment, from a written notice, served upon the members of the family demanding a partition of the property, from an agreement executed by the various members of the family whereby the shares of the individual members are defined with the object of securing separate enjoyment of the profits, or from an agreement of reference to arbitration for the partition of the property. Instances like these may be enumerated but cannot be exhausted.

(d) It is not necessary that there should be a consensus or agreement among the coparceners for the severance of status of a joint family.

(e) Where a severance is effected by explicit declaration, the result is decisive, and the legal result cannot be affected or controlled by the subsequent conduct of the parties.

(f) In the absence of an explicit declaration, an inference in support of the intention may be drawn from evidence of conduct which will necessarily be different according to the varying postures of each case.

(g) Where there is evidence of intention to separate, this can only be annulled by clear evidence of the renunciation of such intention, and in some cases, by consensus or agreement on the part of the members of the family to reunite.

(h) Partition may also result from a definement of ascertainment of shares with a view to separate enjoyment of property.

(i) The separation of one member of a coparcenary is not necessarily a separation of the other members inter se. Vide *Mt. Ram Kali v. Khamman Lal* : AIR1928 All422 .

6. If the three deeds, the agreement of 1904, in case it is genuine, the waqf of 1917 and; the agreement of 1933, amount to an explicit declaration of separation, the legal result will be decisive, and it shall not be affected or controlled by the subsequent conduct of the parties. Nor can this intention to separate, once evidenced, be annulled, except by clear evidence of the renunciation of such intention. If an intention to separate cannot be deduced from all or any of these deeds, an inference in support' of such an intention may be drawn from the evidence of conduct as evidenced by the transactions on the record. If separation can be deduced from any of these agreements or from the conduct of the parties as evidenced by the transactions, in other words if we can 'read' a will to separate 'into these facts and events', *Bhagwati Saran Singh v. Parmeswari Nandan* ('42) 29 A.I.R. 1942 All. 267 at page 224, separate or joint residence or mess will have no legal effect on the legal status.

7. Before, however, dwelling on this aspect of the case, I should like to say a few words as regards the contention of the learned Counsel for the appellant that the property in suit cannot be traced to any nucleus. In the first instance, he argues that there was no nucleus and that 'there is no presumption that any property acquired by an individual member of a joint Hindu family which is not shown to have possessed any nucleus, was joint family property': vide *Durga Prasad v.*

Chaunharja 1930 A.L.J. 775. He contends, in the alternative, that even if there was a nucleus, it was not so effective as to lead to an irresistible conclusion that the subsequent acquisitions were the outcome of that nucleus: vide *Vythianatha v. Varadaraja* ('38) 25 A.I.R. 1938 Mad. 841. Say their Lordships:

The mere existence of nucleus of ancestral property will not by itself raise a presumption that the subsequently acquired properties of a member are joint family properties and hence will not shift the burden of proving that the properties are separate properties on the person alleging it to be so. To shift this burden on him, it must be proved that the nucleus was of such a character, as, taking into consideration the surrounding circumstances, could have led to the subsequent acquisitions with its help. The presumption is against blending and it is only natural for a person to keep his self-acquired properties separate from the joint family property, meeting the expenses of the joint family from the joint family property.

8. The question, in other words, is whether assuming that Chaura Singh could be credited with some property, was that property enough to meet the growing needs of the family and leave such surplus in his hands or, after him, in the hands of his sons, that, with its aid, subsequent acquisitions could be made? There is no written deed evidencing separation and the plaintiff is right in saying that we must start with a presumption of jointness, the more so because the parties concerned were brothers. It is true that there is no writing, but, as I have said above, there is no writing even as regards the two branches of Sheoraj and Mathura, who admittedly separated at some time. But the question which awaits consideration at the very threshold is whether Chaura Singh left any nucleus and, if so, was it an adequate nucleus so that the acquisitions could be referred to it? This question may, to my mind, be dealt with first.

9. There are a number of documents of the year 1876, Khatauni Jamabandi of Mauza Rahnas and Mauza Maharajpur, printed at pages 306 to 313 of the paper book, which indicate that the family had some groves and tenancy land with a total rent of rupees 77-3-9, some tenancy in Mouza Narainpur in the year 1897 with a rental of Rs. 4, After that we come to the year 1901 when we find an accretion to the extent of a rental of Rs. 11-8-7. This is the only evidence on this point. There

are at page 318 accounts indicative of some business carried on by the family, but these are of the year 1916 and cannot necessarily lead to the inference that the family had any business in the time of Chaura Singh. I should now consider the acquisitions. They are as below:

(a) 9th September 1898-mortgage by Bal Bhadra in favour of Zabar Singh, of a few trees, for Rs. 32; (b) 6th March 1900 - sale by Mohkam Singh to Zabar Singh and Sheo Singh, of a share in Mauza Kamalpur, for a sum of Rs. 1800; (c) 23rd June 1900 - sale by Madho Ram, of a share in mauza Rahnas, in favour of Zabar and Sheo, for Rs. 4000; (d) 10th September 1901 - sale by Balbhadra, of a few trees, in Mauza Rahnas, to Zabar Singh for Rs. 15; (e) 13th August 1902 - Sale by Kannu Mai and Bhagwan Das, of a share in Mauza Rahnas, to Hazari Singh and Kamod Singh - half - and Raghubar Singh and Rachhpal Singh - half - for Rs. 4000; (f) 17th September 1904 - sale by Bhagwan Singh of an orchard and a well to Zabar Singh for Rs. 500; (g) 25th August 1905 - sale by Balbhadra to Zabar of some land and trees for RS. 49-14; (h) 5th August 1907 - sale by Khannu Mal etc. to Zabar Singh, Hazari Singh, Kamod Singh, Raghubar Singh, Rachhpal Singh and Angad Singh, of some land in mauza Katri Dhendhipur for Rs. 800; (i) 14th January 1913 - auction sale in favour of Zabar Singh and Sheo Singh, of some share in Mauza Sarsol for Rs. 1500; (j) 13th February 1913-sale by Mt. Sita Kuer and Mt. Sunder Kuer of an enclosure in Sirsaul in favour of Zabar for Rs. 300; (k) 6th February 1914 - mortgage by conditional sale by Mahanand to Zabar of shares in groves in Mauza Parhaulti, for a sum of Rs. 50; (l) 6th February 1914 - mortgage by conditional sale by Mahanand of zamindari share in Mauza Parhaulti, in favour of Zabar and Sheo Singh for Rs. 150; (m) 29th July 1914 - sale by Suraj Prasad of inferior proprietary holding, in favour of Zabar for Rs. 196; (n) 21st November 1914-sale by Bishunath to Zabar of a grove and some other property in Mauza Sarsol, for a sum of RS. 99; (o) 7th June 1917-sale by Sheo Kanth and Sheonath of some share in Mauza Sarsol in favour of Kamod and Eabhubar for Rs. 400; (p) 29th August 1917 - sale by Ram Narain of a house in the city of Cawnpore in favour of Hazari Singh, Kamod Singh, Raghubar Singh and Angad Singh for Rs. 3500.

10. These transactions mark the end of one chapter of acquisitions, which closes with the death of Zabar Singh in 1924. I shall now refer to the acquisitions after his death, (q) 7th January 1926-sale of a zamindari share in Mauza Sirsaul by Shyam Sunder in favour of Darshan Singh for a sum of Rs. 430; (r) 4th February 1926 - sale by Patha Din of a share in Mauza Sirsaul in favour of Darshan Singh for a sum of Rs. 300; (s) 4th August 1926 - sale by Shyam Shanker of a zamindari share in mauza Sirsaul in favour of Darshan Singh for a sum of Rs. 275; (t) 11th January 1927 - sale by Sheorani Kunwar of zamindari share in Mauza Sirsaul in favour of Darshan Singh, for a sum of Rs. 10,170; (u) 11th January 1927 - sale by Mt. Sheorani Kunwar of a share in Mauza Sirsaul in favour of Kamod Singh, Parbhu Singh and Darshan Singh, for a sum of Rs. 8, 300; (v) 9th May 1930 - sale by Dirgaj Singh and others of shares in certain villages in favour of Darshan Singh, for a sum of RS. 17,000; (w) 26th April 1933 - sale by Mahabir Singh of zamindari share in mauza Muttra Khera in favour of Darshan Singh for a sum of Rs. 12,850; (x) 12th June 1933 - sale certificate of certain shares in mauza Rahnas, for a sum of Rupees 1, 400; (y) 2nd January 1934 - sale certificate with respect to certain share in Mauza Sirsaul in favour of Darshan Singh, for a sum of Rs. 1500; (z) 23rd February 1938 - sale by Patuwan of groves in Mauza Kamalpur in favour of Darshan Singh for a sum of Rs. 75.

11. These exhaust the list of the acquisitions made by the family from 9th September 1898, to 23rd February 1938. The important feature of these transactions is that they were in the beginning for very moderate amounts. For instance, the first mortgage of 9th September 1898, was for a sum of Rs. 32 only. So was the sale of 10th September 1901, for Rs. 15. The second sale of 6th March 1900, was for a sum of Rs. 1,800. As time wore on, we find some substantial transactions, but they are just a few. Most of them continued to be for petty sums. For instance, there is a sale by Bal Bhadra of 25th August 1905, for a sum of Rs. 49-14-0, sale by Mt. Sita Kuar and Mt. Sunder Kuar on 13th February 1913, for a sum of Rs. 300, the mortgage by Mahanand on 6th February 1914, for a sum of Rs. 50. There is no transaction of the time of Chaura Singh. They started from 1898, i.e., twenty-two years after his death. If we bear in mind that, barring a few, almost all the transactions were for small amounts, it cannot, of a certainty, be said that, to use the words of their Lordships of the Judicial Committee in Amar

Nath v. Hukum Chand ('21) 8 A.I.R. 1921 P.C. 35 they were 'to the detriment of the ancestral nucleus.' At p. 253, Lord Sumner has thus put it:

Many a learned man makes nothing and many a sciolist gets on in his profession by pertinacity and mother wit.

12. Although his Lordship's observations refer to a different set of facts, the principle may be applied to the facts in this case. The learned Counsel for the respondent relies upon Rajangam Ayyar v. Rajangam Ayyar ('22) 9 A.I.R. 1922 P.C. 266 at p. 464 and Raghubir Singh v. Sheoran Singh ('43) 1943 A.L.W. 212 and contends that, nucleus being proved, it rests upon the defendant to prove that the property is the self-acquired property of Zabbar or Darshan. With this proposition of law indeed, can have no quarrel. It is its application to the facts of a particular case which presents difficulties. Coming now to the facts of this case, the question is really this Did anyone in the family of Chaura Singh, after meeting the needs of the family, have sufficient balance in his hands to take any investments? Again, were the acquisitions of such substantial character that they could not be made by his own 'pertinacity or mother wit', i.e., individual skill and resourcefulness? The family nucleus may have been there to set the growing family of Chaura Singh on its feet. But beyond doing this, did it or could it play any further part? Another interesting question may also arise. What will be the nature of the acquisitions if they were made by Zabbar or any other individual by practising the utmost economy and investing the small savings out of his own small quota from the family funds when those funds were hardly enough for the very necessities of life? It will to my mind, be pressing the doctrine of nucleus too far to hold that, in extending its application, no allowance should be made in favour of the personal element.

13. I, therefore, think that it is very difficult in this case to say that the nucleus was an effective nucleus, such that round it and it alone could grow all the acquisitions. The evidence, to my mind, does not lead to any decisive result. These transactions starting from 9th September 1898, while not throwing sufficient light on the vexed question of nucleus or family funds, do, however at least, some of them-lead to very definite conclusions. I do not attach any importance to a

particular member figuring in any particular transaction, but considered in conjunction with other facts, it leads to an unmistakable inference. To take a few of them: The sale of 17th September 1904, by Bhagwan Singh in favour of Zabar Singh was of one orchard bearing No. 2112 and one pucea well. There is no paper indicating the revenue entry corresponding to this sale at the time when the purchase was made by Zabar, but at pp. 264, 265, 269 and 270 of the paper-book are to be found the names of Darshan and Sheo Chandra Maul Singh alone, i.e., of Zabar's branch only. It is true that there is nothing uncommon in an acquisition being made by one member of the family, but it is not common to find this name and, after him, the names of the members of his branch alone mutated in the revenue papers. If the doctrine of representation is true, the purchase is made for the benefit of the entire family and one almost always finds the names of all the members entered in the revenue papers. This stands unexplained and this, in my opinion, leads to one and one conclusion only that this purchase was made by Zabar not for the benefit of the family, but in his personal capacity. And this will attract at least in some measure the application of the dictum laid down by their Lordships of the Privy Council in *Yellappa Ramappa v. Tippanna* ('29) 16 A.I.R. 1929 P.C. 8 at page 8.

When it appears from facts that through generations a property has been possessed in a certain single line, it can never be said that it lies upon that line to establish that it was dissociated generations ago from another line which appears on the scene as a claimant....

14. The present is not a case of generations; it could not be so, because the purchase was made only by the father of Darshan and grandfather of Sheo Chandra Maul and it is for this reason that I have said above that the dictum laid down by their Lordships will not be attracted in its full force. But it has remained in a single line from the date of the acquisition; it remained not only with Darshan, the son of Zabar, but also with Sheo Chandra Maul, the son of a predeceased son of his, i.e., it has remained in a line after the acquisition. Some faint attempt has been made to explain it on the ground that Zabar was the managing member of the family and after him the mantle fell upon his son. To my mind, this is not a convincing explanation. I shall deal with this part of the case a little later. But the

entry not only of Darshan but of the name of Sheo Chandra Maul Singh furnishes a complete answer to this argument.

15. Then there are a group of papers-the sale by Shyam Sunder to Darshan on 7th January 1926, by Patha Din to Darshan on 4th February 1926, and by Shyam Shankar to Darshan on 4th August 1926. The aggregate of these three sales was one anna in Mauza Sirsaul. In all these cases the purchaser was Darshan and the entry at page 268 is in the name of Darshan alone. On 11th January 1927, Mt. Sheorani Kunwar sold a share in Mauza Sirsaul to Darshan and on the same day the lady sold some other property in the same mauza to Kamod, Parbhu and Darshan. Sheo Chandra Maul Singh had as much interest in the family as any other member, but he does not figure in either of the two. The transaction in favour of Darshan alone requires no explanation; the one in favour of all the three can be explained only on the basis that all the three branches were separate and made their interest secure by figuring in the transaction. Sheo Chandra Maul required no protection; his interests were safe in the hands of his uncle Darshan, with whom he was joint. On no other basis can his absence be explained. Coming to more recent times, there are two transactions telling the same tale. On 9th May 1930 Dirgaj Singh and others, in pursuance of an agreement of 12th March 1930, and registered on 17th March 1930, sold a two annas eight pies share in Mauza Hathegaon to Darshan for Rs. 17,000. This is printed at p. 232 of the paper, book. Effect was given to it in the revenue papers only in the name of Darshan Singh. On 26th April 1933, one Mahabir Singh sold a fourteen anna share in Mouza Muttra Khera to Darshan for Rs. 12,850 in lieu almost entirely of two previous mortgages in favour of Darshan Singh alone. Here again, his name alone was entered in the revenue papers.

16. Apart from the comment to which these, in common with other transactions of this character are open, these are very substantial transactions and it was, to say the least, very unnatural that Kamod and Parbhu were content not only with the acquisition by Zabbar in his name but also with the entry in the revenue papers, of his name alone. There is another feature of some of these transactions, which should not be lost sight of. For instance, in the mortgage by conditional sale by Mahanand in favour of Zabbar on 6th February 1914, part of the consideration was

paid in cash and part went towards the discharge of a previous mortgage, dated 20th March 1913, also in favour of Zabar Singh. Similarly in the sale made by Suraj Prasad to Zabar on 29th July 1914, part of the consideration was left in the hands of the vendee as a set-off towards a possessory mortgage in his favour alone, dated 18th February 1894. The same we find in the deeds of 7th January and 4th February 1926. In the former the sale was made in favour of Darshan and part of the consideration went towards the discharge of a mortgage of 20th August 1925, in favour of Darshan alone. In the second sale-deed, again in favour of Darshan, part of the consideration went towards the discharge of an earlier mortgage of 22nd August 1925, in favour of Darshan alone. The sale-deed by Thakur Dirgaj Singh to Darshan Singh alone, dated 9th May 1930, has reference to an earlier agreement between Dirgaj and Darshan, dated 11th March 1930. That agreement, in pursuance of which this sale was made, was also in favour of be it noted Darshan alone.

17. That Darshan, a junior member, was in almost all the transactions after his father's death, the sole obligee and part, if not the whole of the consideration, went to the discharge of an earlier transaction in his favour alone, is a factor in favour of the theory of defence. That effect was given in the revenue papers by entering both his name and in some cases also of his nephew, Sheo Chandra Maul, to the exclusion of Kamod and Hazari and after him Parbhu, is a factor almost conclusive in favour of separation. The Hindu law starts with a presumption in favour of the doctrine of representation. But this case presents certain extraordinary features and it will be pressing the doctrine of representation to absurd lengths, if it is held that, even with these extraordinary features, the ostensible purchaser is not really the sole purchaser but he must needs share with others the fruits of what is ostensibly his exclusive earning. We also find another unusual feature that, sometimes on one and the same day, there are two transactions, one standing in the name of Darshan and the other in the names of Darshan and others. For instance, on nth January 1927, there are two sale-deeds by the same vendor, in respect of shares in the same village, one for a sum of Rs. 9375, in favour of Darshan alone, and the other for Rs. 8300 in favour of Darshan, Kamod and Parbhu. If the family was joint and Darshan was the Karta after Zabar, there was no point in two transactions of this character on one and the same day. It clearly

shows that Kamod and Parbhu had an interest in one of the sales and not in the other. In other words, the ostensible estate is also the real estate.

18. There is yet another aspect which demands attention. The existence of a large number of transactions in the name of Zabar alone we are not concerned with the other branch and I do not, therefore, attach any particular significance to transactions jointly in favour of Zabar and Sheo Singh or Darshan and Sheo Singh-may not necessarily militate against the theory of jointness. But the continued presence of this feature, after the death of Zabar, with Darshan alone figuring in almost all the transactions, does certainly militate against, if it does not cut across, the theory of jointness. At the time of his father's death, Darshan was, according to the age given in the plaint itself, 34 and so was Parbhu; Kamod was 48. It has come in evidence that Hazari was elder than Kamod. One would have expected that, after the death of Zabar, Hazari stepped into his shoes as the manager and after him Kamod. But Darshan exclusively figures in these transactions even in the life-time of Hazari. The law seems to be well-settled that:

So long as the members of a joint Hindu family remain undivided, the senior member of the family is entitled to manage the family properties, and the father, and in his absence, the next senior-most male member of the family, is its manager provided he is not incapacitated from acting as such by illness or other sufficient cause. The father's right to be the manager of the family is the survival of the patria potestas, and he is in all cases naturally, and in the case of minor sons necessarily, the manager of the joint family property. In the absence of the father, or if he resigns, the management of the family property devolves upon the eldest male member of the family provided he is not wanting in the necessary capacity to manage it. Where the senior-most member is physically incompetent or has resigned his office, even the junior member can be chosen as such manager. (Raghavachariar's Hindu Law, 1939 Edn., p. 268) and

(a) Except in the case of a trading family, the father, and in his absence, the next senior male relation is the rightful manager of a coparcenary.

(b) The right of the father to manage his family stands above the right of any other relation. It is the survival of the patria potestas. After the father, its management

devolves upon the eldest male member of the family, especially the eldest brother. This is the normal rule, but where the person qualified to be the manager of his family lacks the qualification to manage it, its management devolves upon one better qualified. (Gour's Hindu Code, IV Edn., pp. 442 and 443).

19. The foundation of this law is the text of Vrihaspati, quoted in the Mitakshara, Chap. I:

While the father lives the sons are not independent in respect of the receipt, alienation and recovery of wealth, but if he is prodigal, absent in a remote country or afflicted with disease, let the eldest son manage the affairs. (Vivada Ratnakar, Chap. I, page 4.)

and

If the father be incapable, let the eldest manage the affairs of the family; or, with his consent, a younger conversant with business. (Vivada Ratnakar, Chap. I, page 4.)

20. The normal condition, therefore, is that the senior-most member is the manager, unless exceptional reasons are made out and this principle has been followed in several cases. To mention just a few *Tara Kiran v. Hari Kishan Das* : AIR1928 All251 and *Ram Singh v. Sri Chanran* : AIR1938 All147 . In the former case, Jagannath Prasad, the father, was confined in jail. He had a wife, Mt. Parbati, and two sons, who were minors. She contracted certain debts to discharge the liability of her husband. Their Lordships held that, in circumstances such as these, the lady was entitled to manage the family. In the latter case, a promissory note had been executed by a junior member of the family and the question was whether the debt was binding. Say their Lordships at p. 15:

We think that it is not always necessary that the eldest member of the family should be its karta. It is clear to us that when the promissory note dated 20th February 1931, was executed Pitambar Singh defendant 4 was at the head of the family affairs probably because Mukat Singh had been incapacitated by failing health.

It is, therefore, manifest that the proper person to be placed at the helm of the affairs of the family after the death of Zabar was Hazari and, after his death, Kamod. It was for the plaintiff to establish why there was, in this family, a departure, from the normal practice. One reason has been suggested that Darshan was conversant with Court work. This suggestion does not commend itself to me. The family was an ordinary zamindari family and did not require any specialised education or particular skill in the management of its affairs. Nothing has been shown to indicate that Hazari or Kamod was suffering from any mental infirmity or was, in the words of their Lordships in *Ram Singh v. Sri Chanran* : AIR1938 All147 'incapacitated by failing health,' or otherwise, I am of opinion that this is yet another circumstance in support of the theory of separation. I now come to another aspect of the matter, the specification of shares in the revenue papers. The law on this point is no longer in doubt. It was laid down so far back as the year 1896 in the leading case in *Gakemdar Singh v. Sardar Singh* ('96) 18 All. 176 at p. 180, that a definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated.

21. What is generally missed is the expression 'by itself' or 'standing alone.' The learned Counsel for the appellant has taken his stand principally on the case in *Anurago Kuer v. Darshan Raut* and *Harkishan Singh v. Partap Singh* in support of his contention that the definition of shares is a proof of separation. I do not think these cases have modified or introduced any departure from the well-settled legal rule founded upon the case in *Gajendar Singh v. Sardar Singh* ('96) 18 All. 176. In *Anurago Kuer v. Darshan Raut* their Lordships were called upon to decide the status of the family and they merely said that:

The definition of shares may be proved, inter alia, by an entry in the record of rights....

i.e. the definition of shares may be a factor along with other factors. Their Lordships say nothing more in *Harkishan Singh v. Partap Singh*. But, while saying that the definition of shares by itself does not mean separation, it is not correct to say that no significance should be attached to it. If their Lordships meant to attach no value to it at all, they would not have approved the 'language used by Sir John Edge in *Gajendar Singh v. Sardar Singh* ('96) 18 All. 176 as they did in *Mt. Bhagwani Kunwar v. Mohan Singh* ('25) 12 A.I.R. 1928 P.C. 132 at p. 599. 'By itself' means that it has some significance, though it needs other factors to make itself effective. Indeed, there is some force in the contention of the learned Counsel for the appellant that the definition of shares does play some part in the rule of burden of proof. It does make a breach in the presumption of joint-tenancy and, once that breach is made, it is for the party who takes his stand on that presumption to repair that breach and offer some explanation for it. In a recent case of this Court, *Mahabir Prasad v. Chahta Devi* ('43) 1943 A.L.W. 116, their Lordships did give some weight to it. At p. 122 say they:

We next have the undoubted and admitted fact that, in place of Shiva Dayal Mai's name, the names of Banarsi Das and Mahabir Prasad were entered in the khewat against the only zamindari property which the family owned, namely, the half share of khewat No. 7 of Mahal Niadar Singh in village Aminnagar Sarai, each of them being entered in respect of a quarter share. This, again, is of course not conclusive evidence of separation, but is certainly a piece of evidence which, along with other evidence, can rightly be relied upon in support of a finding of separation. Learned Counsel for the defendant-respondent has, in this connexion, relied upon the decision of their Lordships of the Privy Council in *Anurago Kuer v. Darshan Raut*. It may further be pointed out that the manner in which the entries are made in the khewat is significant....

22. It falls to be considered what is 'the manner in which the entries' have been made in the present case? At p. 316 is the Khatauni of Mauza Rahnas of 1307F., corresponding to the year 1900-1901. The names of all the three sons are there, viz., Zabar, Kehri and Mathuca. But, instead of all three being recorded the owners of one-third each, we find Kehri and Mathura, two-thirds, and Zabar, Hazari and Kamod in equal shares, half. This is a very unusual entry. It has come in evidence

that both Kehri and Mathura died either in 1900 or 1901, as will appear from pp. 316 and 317 of the paper-book. It is the plaintiff's case that separation between Sheoraj and Mathura took place in 1924. The learned Civil Judge says that they separated earlier. He does not fix any time of separation. Whether they were joint or separate in 1900 or 1901, this is an incorrect entry. If they were joint, the name of the manager of the family alone might have been entered, or the names of all in equal shares; if they were separate, even then they were entitled to a one-third each and the entry ought to have been to this effect. In no case were Zabar and his sons entitled to a half. Again it is nobody's case that Zabar separated leaving Kehri and Mathura joint. The separation of Zabar, if it had come into being, would have meant the separation of all and we ought to have found Kehri one-third, Zabar one-third and Mathura one-third. The entry, to say the least, is not like the entries we ordinarily find in a joint Hindu family. This entry, therefore, falls within the meaning of the dictum laid down by their Lordships in the case in Mahabir Prasad v. Chahta Devi ('43) 1943 A.L.W. 116, that

The significance lies in the fact that these entries are not of the type that is so often made in the revenue records with the words *ba hissa barabar* (in equal shares). On the contrary, in this case Banarsi. Das is shown as being the owner of '2 shares' and Mahabir Prasad is separately entered as the owner of another '2 shares'.

23. Indeed, the entry is not only not of the usual type, but is of a very unusual type even made unusual than the one in the reported case. There is no *hissa barabar* here; there are no entries indicating one-third each of all the three brothers, unlike what we find in the reported case—two shares of Banarsi Das and two shares of Mahabir Prasad. It may not be safe to found the judgment on this evidence. But it cannot equally be disputed that this is a factor which must be taken into account when we have to arrive at the conclusion after a consideration of the cumulative effect of the entire evidence on the record. The learned Civil Judge has not attached any significance to it and in this he has, to my mind, gone astray. It did have some weight—though the value may be infinitesimal—and it demanded attention. Beyond this I do not want to say anything on this particular point. We now come to the agreement of 2nd October 1904. The learned Civil Judge has, as

said above, condemned this document outright as a forgery. He has held that it was prepared to fit in with the state of affairs on the date of the suit and is not coming from proper custody. It is printed at p. 185 of the paper-book and bears the signatures of Zabar Singh, Hazari Singh, Kamod Singh, Sheo Singh and Kunwar Randhir Singh. No reference is made to it in the plaint. All that we find in the plaintiff's cross-examination about this document is this:

(On being shown the original agreement, dated 2nd October 1904, the witness identified the signatures of Zabar Singh marked as (1) by me and of Kamod Singh marked aa (2) by me in red pencil and said about the attestation of Shiva Singh that he could not say if the same were his signatures or not. He further said that he could not tell if the attestation of Randhir Singh was by him or not. About the signatures existing between the signatures marked (1) and (2) by me, the witness said that the same could not be the signatures of Hazari Singh as he could not sign like that). I hold no paper by which I can show that Hazari Singh signed differently.

In the course of arguments, it was suggested that one Bhagwan Singh had executed a sale-deed in favour of Zabar on 17th September 1904, and insisted upon an agreement to recovery from Zabar. A stamp paper was purchased to give effect to this agreement and it was signed by Zabar. The agreement, however, was not executed, but that signed paper remained in the possession of Zabar and, after him, his son, Darshan, and it was utilised for this purpose about the time of the institution of the suit. The deed is not registered and the lack of registration though detracting a great deal from its evidentiary value, need not necessarily lead to an inference against its genuineness. Whether it was genuine or fictitious will have to be decided on the materials on the record, on the circumstances and the probabilities of the case. One would have expected the plaintiff to meet it in his oral evidence at least when it was put in the very forefront of the defence. There is no trace of this in the oral evidence. The learned Civil Judge extended to the plaintiff some particular latitude, as he was greatly impressed by his simplicity. To quote his not very elegant testimony on another aspect of this document, at p. 138, 1.20 of the paper-book : '...the stupid nature of the vulgar witness.' How the learned Civil Judge could have this impression, it is difficult to say, because as the record shows it was a different officer who presided over the Court during the

examination of the plaintiff. Be that as it may, he did allow a theory to be advanced, which was never foreshadowed before the arguments.

24. I shall now examine some of the more important reasons of the, learned Civil Judge in condemnation of this deed, (a) The story that this paper was the one on which Zabar was to execute an agreement of reconveyance in favour of Bhagwan Singh does not inspire confidence. The sale-deed by Bhagwan Singh was executed on the 17th, and registered on 19th September 1904. The stamp paper bears 19th September 1904, as the date when it was sold by the stamp vendor. If Bhagwan Singh was insisting upon an agreement to reconvey, how is it that he agreed to and did execute a sale-deed on 17th September, without such a deed? He waited for two days for the registration of the sale-deed, but even then he had it registered without the deed of agreement. Then, again, why did Zabar sign it? The signature of Zabar should have been almost the last link in the chain of events. The learned Counsel for the plaintiff has tried to explain it by saying that Zabar had signed it by way of an assurance to Bhagwan that the due execution of the deed would follow. The execution by Bhagwan Singh of the sale-deed on a mere assurance from Zabar to reconvey, even though that assurance was reinforced by Zabar's signature on a blank paper, without securing from him a properly executed deed, might bespeak an amazing credulity, but certainly not due care and caution associated with a man of ordinary prudence. I am not disposed to hold that Bhagwan Singh was not a man of ordinary prudence and was satisfied with a mere assurance. Unless Bhagwan Singh was such a simpleton, he would have instituted a suit for specific performance of the contract. Such an evidence, if forthcoming, might have invested the explanation with an air of plausibility. In its absence, even that element is lacking. We must, therefore, assume that it is a paper which bears the signature at least of Zabar Singh. The first ground of attack on the genuineness of the deed, therefore, fails, (b) It also bears the signature of Hazari Singh, the father of the plaintiff. The learned Judge has compared it with his admitted signature on another document, to which I shall advert later, viz., the waqf deed of 1917, and held that it was a forgery for the following reasons:

(a) The writer of the signatures of Hazari Singh on the agreement of 1904 puts the two dots usually put after (of 'Daskhat') or of gawani straight off by putting the two

dots with a pressure and marching off while Hazari Singh obviously put the dots by rounding the pen over each dot or double movement over each dot as is clear from his three signatures on the registered waqf-deed.

(b) In writing the letter the writer of the signatures in dispute takes the pen upwards along a line without any abrupt change in angle, whereas the characteristic of Hazari Singh is that he always increased the angle abruptly at about the middle of the height of the letter thus giving a curve in the middle and raising the line upwards. We find this in all the three specimen signatures of Hazari Singh.

(c) The letter (S) 'S' of the writer of the disputed signatures is characteristically quite different from that of Hazari Singh in all the three signatures. The writer of the disputed signatures gives very little or practically no round curve in the middle while Hazari Singh gives a characteristic curve or rounding which is similar in all his specimen signatures and the ratio of the distances at which this rounding is made is quite different from that in the disputed signatures though it is similar in the three admitted signatures of Hazari Singh.

(d) There is marked difference in the letter 'gh' of the two writers. The writer of the disputed signatures takes the last line of the letter straight up while Hazari Singh first takes it almost perpendicular and then gives a horizontal curve. Similarly the relative angle at which the two curves of the letter stand to each other is so different that it leaves no doubt that the writer of the disputed signatures must be a quite different man.

(e) Hazari Singh is habituated to give a slight curve to all the vertical lines drawn downwards such as those of letters while the writer of the disputed signatures does not do so.

25. It is important to remember that the plaintiff, on whom rested the burden to prove that it was a forgery, did not examine any expert. That gap the learned Civil Judge has filled in by constituting himself an expert. It is difficult to follow him in the ramifications of his reasoning; portions of them are absolutely unintelligible. It is not desirable

that a Judge should take upon himself the task of comparing signatures in order to find out whether there has been a forgery in a case....: vide J.C. Galstann v. Sonatan Pal : AIR1925 Cal485 .

Sir Tej Bahadur Sapru's grievance is that he never even sought the assistance of the bar, but did all this in his chambers. The least that the learned Civil Judge should have done was to have sought the assistance of the lawyers concerned in comparing the two signatures and arriving at his conclusions. The value of doing this work in the presence of the counsel of the parties has been emphasised in *Sreemutty Phoodo Bibee v. Govind Chunder Roy* ('74) 22 W.R. 272. In *Barindra Kumar v. Emperor* ('10) 37 Cal. 467, Sir Lawrence Jenkins, in one of the leading cases on this point, has condemned this procedure in unmistakable terms. Says he at p. 303:

In this case we are told that a comparison was made by the learned Sessions Judge out of Court after the conclusion of the arguments, but whether with the assistance of the assessors or not does not appear, If there was no submission of this question to the assessors, it may be a question how far this was not an irregularity. The result has been that on a comparison so conducted the learned Sessions Judge, without in all cases observing the precise terms of the section, has held certain writings to be those of one or other of the accused without having invited or heard arguments from their counsel on this point. I cannot think this was a proper course to pursue : a comparison of handwriting is at all time as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. In *Sreemutty Phoodo Bibee v. Govind Chunder Roy* ('74) 22 W.R. 272, it was said by the Court that 'a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution.

In this case no expert has been called to assist the Court, and not because no expert was available: there is, it is well known, a Government expert as to handwriting and certain of the documents in this case bear a stamp which shows that they have been submitted to them. It is true that the opinions of experts on

handwriting meet with their full share of disparagement at times, but at any rate there is this use in their employment, that the appearances on which they rely are disclosed, and can thus be supported or criticised, whereas an opinion formed by a Judge in the privacy of his own room is subject to no such check. And that the aid of an expert may be of value was clearly the opinion of 80 distinguished Judges as Blackburn J., who in *Reg. v. Harvey* (1869) 11 Cox. C.C. 546, refused to allow a comparison to be made without the help of experts.

26. What the learned Civil Judge should have done was to consider the general character of the two signatures, viz., the disputed signature on the agreement and the admitted signature on the waqf-deed, and this is what has been emphasised both in England and in this country. In *Rabson v. Rocke* (1824) 2 : Add. 53, Sir J. Nicholl thus laid down the law:

The best usually perhaps the only proper evidence of handwriting is that of persons who have acquired a previous knowledge of the party's handwriting from seeing him write and who form their opinion from the general character and manner of these, and not from criticising the particular letters.

In *Deo d. Mudd v. Suckermore* (1837) 5 Ad. & El. 703, at p. 705, Coleridge J., observed:

The test of genuineness ought to be the resemblance not to the formation of letters in some other specimen or specimens but to the general character of writing which is impressed on it as the involuntary and unconscious result of constitution, habit or other permanent cause, and is, therefore, itself permanent.

27. It is not unusual to find a difference in the writing of one and the same person even after a short interval of time. It all depends upon so many extraneous circumstances - the pen, the ink, the paper, the posture of his hand, the general conditions in which he writes. It is for this reason that the law merely requires a consideration of the general character. And this is precisely what the learned Civil Judge has not done. We examined the deed with the assistance of the counsel for the parties and the learned Counsel for the respondent frankly conceded that some of the criticisms of the learned Civil Judge were unfair. For instance, when

he says that:

The creases have been to a great extent avoided in writing the deed except for 'matra' strokes which have been carefully put. But at some places splitting of ink and retarded action of the pen due to creases is noticeable as for instance at the letter in the last word in the 16th line from the top and at the letter of in the same line two words before.

28. The deed was scribed by one Sheo Darshan Singh. The learned Civil Judge says that it has come in evidence that he is not a professional scribe, or, to use his own words, 'Sheo Darshan Singh did not do the business of writing bonds.' I do not see any point in this criticism. It has been attested by Sheo Singh and Kunwar Randhir Singh. Randhir Singh's evidence has been rejected, on the ground that Darshan Singh had made a gift of some zamindari property to his son. The other witnesses are Dhani Ram and Ranjit Singh. Ranjit Singh, according to the learned Civil Judge, does not prove the signatures of the executants or of Hazari Singh. He was produced only to identify the writing of the scribe. So has he rejected the testimony of Dhani Ram, who identifies the signature of Hazari Singh. Dhani Ram claimed knowledge of the writing of Hazari Singh, as an old 'class-fellow of the plaintiff. The learned Civil Judge has condemned his evidence too, on the ground that this man had no proper opportunities to intimately know the writing of Hazari Singh. A word now about the theory that the deed was brought into being to fit in with the present state of affairs and the clause

Even if we may become joint in mess also, we all the three brothers have settled among ourselves that there should happen no such thing in respect of this small joint business, which may give rise to any private dispute or litigation as a result of which we may become deadly enemy and ill-wisher of one another and we or our descendants may lose our property and money is specially referred to.

29. It is said that the family has joint residence and some joint business too and it is to meet this case that the deed was written. The words on which, however, the greatest stress is laid are 'we may become deadly enemy and ill-wisher of one another.' It has come in the evidence of Darshan Singh that in the year 1937 Parbhu Singh was wounded and admitted in the hospital and, after his release, his

licence for a gun was confiscated. It is contended that deadly enmity could never have been in the contemplation of the parties in 190i and the present deed was executed only after this incident.

30. The document was produced by Kamod Singh. The learned Civil Judge has also held that it is not coming from proper custody. The defendants' story is that after the agreement, it was placed in the charge of their mother and that it was in the possession of Kamod. This the learned Judge does not consider as proper custody. He is of opinion that there is no point in giving this deed to the mother. In my opinion, this criticism is, again, unwarranted. The deed relating to the affairs of the family, in which every member was evenly interested, has to be placed in the custody of someone and there can be no better custodian than the mother to whom all the three sons were alike and who was evenly interested in all. The learned Judge thinks that Zabar was the proper custodian. I do not agree. If Zabar, why not Hazari and Kamod? - because all were interested in it. The mother, who was expected to hold the scales even, was the best person. Although I do not agree with the learned Civil Judge in his criticism of this deed and disapprove of the procedure adopted by him in arriving at his conclusions, I do not propose to rest my decision on it, as my learned brother does not feel convinced that it is a genuine document.

31. Coming now to the wakf-deed of 17th December 1917, this is the most important document in the case. It is a registered document and its genuineness has not been disputed; what falls to consider is its legal effect. It is printed at page 209 of the paper, book. The value of the property gifted is, according to the recital in the deed itself, Rs. 41,000 and Zabar says that it

has been purchased and acquired by me, the executants, personally. I am exclusively in proprietary possession and occupation of the said property.

At page 217 are the attesting witnesses and they are as below:

(a) Angad Singh |(b) Sheo Singh |Sons of Mathura Singh(c) Raghubar Singh |and
cousins of Zabar.(d) Rachhpal Singh |(e) Hazari Siagh |Brothers of Zabar(f)
Kamod Singh |(g) Bal Kishan |(h) Raghunandan Pra |Strangers to the family,sad

At page 212 is the specification of the names of the persons, who were granted annuities:

1. Darshan Singh ... Rs. 300 annually.2. Sheo Chandra MauliSingh ... ' 300 annually.3. Hazari Siagh ... ' 100 annually.4. Kamod Singh ... ' 100 annually.5. Sheorani Kunwar ... ' 50 annually.

At page 213 Zabar speaks of a committee to control the actual management, the scheme of which is mentioned on page 210 in these terms:

(a) I shall remain the Karpardaz during my life-time and after me my eldest son Darshan Singh and after him my grandson Sheo Chandra Maul Singh son of Kedar Singh and after him the person, out of the male descendants begotten by both of them, who shall be higher in rank, efficient and fit to discharge the duties, shall be appointed as Karpardaz, i.e., so far as possible a Karpardaz shall be appointed out of the male issue begotten by these very two persons.

(b) If, God forbid, these two persons are issue-less the musammat who, out of their widows, shall be higher in rank and efficient to discharge the duties of a Karpardaz shall be appointed as such.

(c) In case the musammats aforesaid are not alive my brothers Hazari Singh and after him Kamod Singh and in case they are not alive, the person who, out of the male issue begotten by them shall be higher in rank, able and efficient shall be the Karpardaz as mentioned above, i.e., he shall be appointed as Karpardaz and in case they are also not alive, a woman of that family shall be higher in rank and efficient shall be appointed as Karpardaz.

(d) In the absence 'f the above-mentioned the sons of my uncles, viz., Sheo Singh, Baghubar Singh, Bachhpal Singh and Angad Singh shall be appointed as Karpardaz in serial order....

(e) The Karpardaz shall be liable to make collections in respect of the village property, etc., and to keep a supervision over it. He should either do this himself or get it done through servants. The Karpardaz shall be authorized to appoint or dismiss servants in case of necessity arising during the intervening period. In other

events the servants will be appointed according to the opinion of the Dharamsabha.

Then follows a list of the properties dedicated. Before considering the legal effect of this document certain special features of it must be clearly brought out. At the time of its execution, according to the age given in the plaint, Kamod was 41 and Hazari, who was according to Kamod four or five years older than he, must have been 45 or 46. The property covered by this deed is, as said above, worth Rs. 41,000. Zabar has described himself its exclusive owner. It has been attested by all the members of both the branches. There is great disproportion in the annuities fixed in favour of Darshan and Sheo Chandra Maul, on the one side, and Hazari, Kamod, and Mt. Sheo Rani Kuar, sister of Zabar, on the other, the former get Rs. 300 each and the latter Rs. 100 each, barring Skeorani Kunwar, who gets Rs. 50. This invidiousness is maintained in the line of succession provided for the actual managers. The lines of Hazari and Kamod come on the scene only after the lines of Darshan and Sheo Chandra Maul, - including the ladies in their branch-are exhausted, and the line of Mathura Singh comes after the exhaustion of the lines of Kamod and Hazari.

32. The plaint has been valued at Rupees 58,831-6-9. The property covered by this waqf is outside the scope of this suit. After 17th December 1917, the date of the waqf, there was a lull in the purchases till we come to 7th January 1926, when we find the first sale-deed. There were about ten acquisitions. Of these, four are for very substantial amounts-sale by Sheorani Kuar in favour of Darshan alone, on 11th January 1927, for Rs. 9375, sale again by her, on the same day, in favour of Darshan Parbhu, and Kamod, for Rs. 8300, sale by Dirgaj in favour of J3arshan alone, on 9th May 1930 for Rs. 17,000 and sale by Mahabir in favour: of Darshan alone, on 26th April 1933, for Rs. 12,850. I am not mentioning the minor acquisitions of the aggregate value of about Rs. 2000. If we deduct the above sums from the total value of the estate, as given in the plaint, the value of the property then in possession of the family, even on the assumption that the ostensible purchaser, Zabar, was not the sole purchaser, was only Rs. 11,305-6-9. In other words, almost the bulk of the estate was being gifted by Zabar and of this bulk he describes himself as the exclusive owner. It is not possible to conceive of

a family like this where one member¹ of it is the exclusive owner of such a vast bulk, leaving a small portion as joint family property in which, again, he had an interest. The plaintiff says that it was joint family property. In the case of a joint family the manager has certain rights to make a gift or bequest for charitable purposes, but their Lordships of the Privy Council have prescribed the limits within which they are permissible. In *Tadi Bulli Gangi Reddi v. Tadi Bulli Tammi Reddi* their Lordships say:

A dedication of a portion of the family property for the purpose of a religious charity (and the-charity which Gangi Beddi purported to endow is of this nature) may, according to Hindu Law, be-validly made without any instrument in writing, even if it be an appropriation of some landed property, and the act of the Karta of the family would be valid if assented to in any way, however, informally, by the other members of the family. Such an appropriation may even (if the property allotted be small as compared with the total means of the family) be made by the Karta without consent. This much was not questioned by counsel for the appellant.

33. This is not a small portion; this is the bulk, if not practically the whole, of the estate. In order to get over this difficulty, the plaintiff said that the gift was made' with the consent of Hazari and Kamod. Kamod has denied this. But the learned Civil Judge has attached no value to his statement, inasmuch as he condemns him as one who has made common cause with Darshan Singh. But the deed itself does not speak of any consent. Its language is clear and emphatic. Zabar claims to have purchased it and to have been in its exclusive proprietary possession. The story of consent is a most unnatural story. The whole deed abounds in the invidious discrimination made by Zabar in favour of his son, Darshan, and his grandson, Sheo Chandra Maul, as against Hazari and Kamod, or, as against the branch of Mathura Singh. It is not human nature to expect that Hazari and Kamod would consent to an arrangement which had the effect of taking away such a large property from the family under a scheme so obviously partial to Zabar's branch and so obviously prejudicial to their interest. The waqf was given effect to in the revenue papers and was acted upon. The plaintiff has conceded that he has, in the past, brought suits for recovery of the annuity and has succeeded. The learned Civil Judge finds that the mere fact that Hazari and Kamod were granted some

annuities and not the branch of Mathura Singh proves that Hazari and Kamod were joint with Zabar. I do not find anything unusual in Darshan making some provision for his own brothers, though separate, and none for people more remotely related. In *Jangi Nath v. Janki Nath* ('5) 2 A.L.J. 225, their Lordships have condemned the practice of drawing an inference from an act of kindness, unfavourable to the doer of that act. Say their Lordships:

It is not reasonable or conducive to the peace and welfare of families to construe acts done out of kindness and affection to the disadvantage of the doer....

The inference of jointness from the grant of annuities is destroyed by a grant in favour of Sheorani Kunwar, the sister of the brothers. She could not be a member of that family, much less a member of a joint family. Sheoraj Singh had died in 1890. Even if she was born in 1890, she was 27 years of age at that time. The parties are respectable Kshattriyas. She must have been a married woman or a widow at that time. In either case, she did not belong to the family. The conclusion at which the learned Judge has arrived is, therefore, not warranted. The learned Civil Judge, has found some fault with the description of the property. He observes as follows:

Now, so far as the statement that the property was self-acquired property is concerned it was obviously not quite correct because in the wakf deed at least one property which was obviously joint property of the branch of Sheoraj Singh was included, i.e., a share of village Rahnas Mohal Madho Rama which was purchased by two sale-deeds of 1900 and 1902 partly in the name of Zabar Singh and Sheo Singh and partly in the name of Kamod Singh and Hazari Singh and whose profits were entirely realised by Zabar Singh.

34. I think it was hypercriticism to find fault with the description of the property at this distance of time. We do not know what arrangement was made between Zabar, on the one side, and Hazari and Kamod, on the other, or between Zabar, on the one side, and the branch of Mathura on the other. But it is wrong even as a fact. At p. 216 of the paper-book, the share in Mauza Rahnas, Mahal Madho Ram Singh, is described in this way:

A two anna, out of the entire 16 anna zamindari share, situate in Mauza Rahnas Mohal Madko Ram Singh, pargana and District Cawnpore....

The two sale-deeds by which shares in Mohal Madho Ram Singh were acquired are printed at pages 174 and 178 of the paper-book. By the first one) i.e., of 23rd June 1900, Madho Ram sold eight anna to Zabar Singh and Sheo Singh, for a sum of Rs. 4000. The vendor describes himself as the owner of the entire 16 annas. By means of the second sale-deed, dated 13th August 1902, the vendor, who describes himself as the owner in possession of an eight anna out of the entire 16 annas-eight annas having already passed out of his hands-sold the rest of the property, i.e., the eight annas for a sum of Rs. 4000 to Hazari and Kamod. The two annas gifted did not exceed the half share of Zabar in the first sale of eight annas. If the share gifted had exceeded his share, there might have been some justification for the remark of the learned Judge that he drew upon the shares of Kamod and Hazari, when he made the gift, in respect of a share in Mauza Rahnas, Mohal Madho Ram.

35. The other remark of the learned Civil Judge that the branch of Mathura Singh did not take part in this transaction or did not sign it is also wrong. We find that all the sons of Mathura Singh are attesting witnesses. To my mind, the cumulative effect of all these factors is that the family was not joint on the date of this gift and it was only an evidence of separation which had already come into being. Even as a matter of law, I think this document is enough to bring about separation. It was held so far back as the year *Joy Narain Gigi v. Grish Chander Mytee* ('79) 4 Cal. 434, that

the fact of his borrowing money for his maintenance, as well as making a will, as indicating at all-events, that he himself considered that a separation had taken place.

This case was followed in *Girja Bai v. Sadashiv Dhundiraj* ('16) 3 A.I.R. 1916 P.C. 104 at p. 833. The ratio of a recent case of this Court in *Santa Singh v. Ramdhari Singh* : AIR1945 All5 appears to be the same and has perhaps been more emphatically put. The facts were briefly these: On 2nd June 1937, one Debi Prasad sold his share in two villages to one Ramdhari Singh. His brother, Santa

Singh, brought a suit for pre-emption, on the allegation that he was a separated brother. The suit had been dismissed by the learned District Judge, on the finding that the brothers were members of a joint Hindu family and it was not open to one brother to pre-empt a sale made by another brother. Their Lordships held otherwise. They expressed themselves in this way:

We must, therefore, take it that the sale was made by Debi Prasad of his own share, and alleging, it to be his own share, in the property that he sold. This sale took place on 2nd June 1937. Then six months after on 24th January 1938, the plaintiff Santa Singh, second brother of Debi Prasad, raised this action and in the plaint he clearly recited that the brothers were separate and further that he intended to exercise his right of pre-emption. If these two transactions are taken together, namely, the recitals in the sale of 2nd June 1937, and the allegations in the plaint of January 1938, they go a long way in establishing that a disruption had taken place in the status of these two brothers. It is well settled that in order to bring a disruption in status the mere expression of intention is sufficient and it is not necessary that there should be any partition by metes and bounds.

36. If we bear in mind the value of the property gifted-Rs. 41,000, the value of the property left in the hands of the family-rupees 11,306-6-9, the declaration by Zabar that he was its sole and exclusive proprietor, the discrimination made in favour of Zabar's branch, i.e., his son and grandson as against Kamod and Hazari in the matter of annuities and also in providing the line of succession, there can be no doubt that this indicates conclusively that a disruption had already taken place in the family and this deed was a most incontrovertible evidence, to use the words of Lord Westbury in *Appovier's case* *Appover v. Ram Subba Aiyar* ('66) 11 M.L.J. 75, of a division of title as distinguished from the 'subject to which the title is applied.' We now come to the agreement of 4th October 1933. Its genuineness is admitted. The learned Civil Judge held that 'no decisive inference can be convincingly or satisfactorily drawn from this document.' It is printed at page 247 of the paper-book. It is an agreement between Sri Sita Ram Radha Krishnaji, under the guardianship of Darshan Singh, Darshan Singh, Kamod Singh, Parbhu Singh, Rachhpal Singh, Gulab Singh and Chandrapal Singh and Shanker Singh, sons of Angad Singh, under the guardianship of their mother, Ran Dulari alias Duli Kuar.

It appears that the family was already in possession of an eight annas, share in Mauza Rahnas. They were anxious to acquire the remaining eight annas from three persons, Chandrasekhar, Sheo Mahesh and Durga Prasad. They were equally anxious that one of them should not run away with the entire property but all the co-sharers should be benefited by it. It was for this reason that this deed of agreement was executed and there were distinct provisions that

(a) we, the executants, shall purchase it jointly and a single executant shall not have the right to purchase the whole or part of it individually and no executant shall have the right to enter into a contract of sale with Dnrga Prasad aforesaid....

(b) we, the executants, therefore, do hereby covenant and give in writing that out of us, all the executants, no one shall have the right to purchase individually i.e., all of the executants, will be bound by this agreement.

And they also provided that

(c) the money spent in purchasing the said share shall be invested by each of us separately.

It might also be mentioned that there was a previous agreement between Durga Prasad and Darshan Singh whereby a 2 anna 8 pie share was agreed to be sold by Durga to Darshan and that share was also thrown into the hotchpotch. It is signed by all the parties concerned, including Mt. Ram Dulari alias Duli Kunwar as the mother and guardian of Chandrapal Singh and Shanker Singh, minors. The important features of this document which immediately arrest attention are these: (1) Darshan Singh executes it both as the sarbarahkar of Sri Sita Ram Radha Krishnaji as also in his personal capacity: (2) All the members of both the branches are present: (3) Sheo Chandra Maul Singh is not a party to it.

37. The deed proves that the waqf was acted upon, as we find that of Thakurji is also a party. The absence of Sheo Chandra Maul proves conclusively that, whereas everyone else was anxious to participate in this transaction to secure his interest, Sheo Chandra Maul was not there, because he was joint with his uncle and his interest was safe in his hands. There can be no other explanation of the

presence of all and the absence of Sheo Chandra Maul. No language could be more explicit and could prove the separate interest of every party than that:

The money spent in purchasing the said share shall be invested by each of us separately.

I have looked in vain into this document to find out a single word which could support the theory of jointness. Indeed, if this document had stood all by itself without the aid of the waqfnama of 1917, I would have been prepared to hold that this evidences a previous separation between the members of the family. I shall, however, very briefly refer to a few of the criticisms made by the learned Civil Judge. Some of his criticisms are so far-fetched that I do not think it is worthwhile noticing them. He says, on the statement of Nawab Singh, one of the defendants' witnesses, that it was Sheo Singh and Rachhpal Singh belonging to the branch of Mathura Singh, who had protested against the purchase by Darshan Singh. All that the witness has said is that:

Sheo Singh und Kachhpal Singh took the initiative to protest against Darshan Singh.

This does not show that Kamod and Parbhu were not anxious to have a share. After all the ball had to be set rolling, somebody had to take the initiative. It was a mere accident that it was Sheo Singh and Kachhpal Singh. There might have been some point in this criticism if Kamod and Parbhu had been no parties to the transaction, but would have been satisfied with their representation by Darshan Singh. Not only that it is not so, but we find that everybody, including the two minors of the branch of Mathura Singh, viz., Chandra Pal Singh, and Shanker Singh are parties through their mother. Even this circumstance is distinctive (sic. destructive?) of the theory of jointness, but the absence of Sheo Chandra Maul is proof positive of separation between all the members of the family, barring the members of the branch of Zabar Singh between whom there is no separation inter se.

38. The learned Civil Judge has also drawn an adverse inference against the defendants, on the ground that the previous agreement with respect to two annas

eight pies between Durga Prasad and Darshan must have been made by Darshan in his capacity as the karta of his branch. How he has drawn this inference from this circumstance, it is difficult to follow. To my mind, it is really begging the question. He has also drawn an inference adverse to the defendants from the presence of Shree Thakurji through Darshan Singh as a party. This, again, is hypercriticism. The waqfnama was a registered document; everyone belonging to the family was a party to it; the existence of Shree Thakurji only shows that the waqf was acted upon. I, therefore, hold on the strength of this document, that the family was at least on this date a separated family. It now remains to consider the effect of the admissions made by Darshan Singh and Kamod Singh. The former made two admissions-one on 20th June 1924, and the other on 8th April 1937; the latter's is dated 18th July 1924. The first admission was made in the mutation proceedings relating to mauza. Kamalpur. I do not believe the appellant's theory that the names of Hazari and Kamod were entered in accordance with an oral gift or will by Zabar. The admission is in these terms:

Zabar Singh was the zamindar of a 5 anna 3 pie share in mauza Kamalpur, muhal Chhatar Singh. He died on 8th May 1924. I am the own son of the deceased. Sheo Chander Maul Singh the own grandson of the deceased and my own nephew is a minor. I am his guardian. I want that the name of Hajari Singh, own brother of my father, may be entered against 1/3rd share, that the name of Kamod Singh, own brother of my father, maybe entered against 1/3rd share as the family is a joint one, and that my name may be entered against 1/6th share and that of Sheo Chandra Maul Singh against 1/6th share in the public papers. Kamod Singh has been making realisations in mauza Kamalpur for the last 25 years. He divides the profits among the other co sharers with reference to their shares. The family is joint. The entire cultivation and zamindari work of Hazari Singh, Kamod Singh and Zabar Singh is joint. They are joint in mess also.

We should appreciate the conditions in which it was made. According to the age given in the plaint, Darshan Singh was then an inexperienced youth of twenty-four, distracted by the recent death of his father. Apart from this, if the family was joint, the proper person to have figured in these proceedings was not Darshan, but Hazari. As to the other admission, which was made in a suit for specific

performance of a contract, on 8th April 1937, in his statement before the learned Civil Judge of Cawnpore, it was like this:

I do grain business and invest my money therein. I do not keep my money in bank. I keep with me at my house eight or ten thousand rupees always with me. I pay no income tax. My unele Kamod Singh with whom I am joint pays the tax. About Rs. 18-12-0 annually is paid for the income-tax. The malik or karta is Kamod Singh. I have my separate business also. I do money-lending separately to the extent of Rs. 50 or 60 thousand and also deal in grain.

This relates to grain business. It may be that 'joint' here means 'joint in business.' Besides, it is something remarkable that, in a joint Hindu family of this status, there should be any separate business of an individual member of the aggregate value of fifty or sixty thousand rupees. Evidently this statement refers to two businesses, the one which this man has with Kamod and the other which he has independently. This statement is, to my mind, inconclusive. We now come to the alleged admission of Kamod which was made in the same mutation proceedings in which the admission of Darshan was made:

I, own brother of the deceased, Hazari Singh my own brother, Darshan Singh, son of the deceased and Sheo Chandramol Singh, own grandson of the deceased have been living jointly as the members of a joint family since the life-time of Zabar Singh. We have been joint in cultivation and zamindari as well as in mess. I want that my name may be entered against one-third share, that of Hazari Singh against one-third share, that of Darshan Singh against one-sixth and that of Sheo Chandramol against one-sixth share in the public papers. Darshan Singh, son of the deceased is willing to the entry of the names of Hazari Singh and myself.

I am not laying any emphasis on the specification of shares, although I am very far from saying that it is not a factor to be considered however small its value. Apart from this, the admissions cannot nullify the effect of the 'actings and dealings.' As their Lordships say in *Harkishan Singh v. Partap Singh* :

(a) It is by no means a rare thing that a person makes a statement that he is a member of a joint family with his relative, but has reasons of his own for making

that statement. It is not his statement, but his acting's and dealings with the estate, which furnish a true guide to the determination of the question of jointness or otherwise.

(b) Nor can the legal construction or legal effect of an unambiguous document defining shares of the members of the family be controlled or altered by evidence of the subsequent conduct of the parties.

39. The learned Civil Judge has considered the oral evidence of the parties and found that the family is still joint in residence, cultivation and zamindari. In the view, which I have taken, it is not necessary to go into these questions. Once it is held, either on the basis of the various transactions or on the basis of the conduct and dealings of the parties as evidenced by the waqfnama of 1917, or the agreement of 1933 - in my opinion, either of the two documents is conclusive in favour of separation - the joint residence, joint realisation or joint business will not have any legal effect. Joint business will not mean joint tenancy but it will only mean tenancy in common. I wish to say a few words about the bahikhata. The learned Civil Judge has found that the bahikhatas were not satisfactorily proved and were not produced at the proper time. It is difficult to subscribe to this view. To follow the order in which these papers were filed. We have at page 57 an application by Darshan Singh intimating to the Court that in compliance with the plaintiff's request he has brought the account books. This application was made on 25th October 1939. Mr. Partap Bahadur, the counsel for the plaintiff, stated:

The counsel for the defendant showed the-heading of only four khata (ledger for Sambats 58, 59, 60 and 61 from which it appears that they are not the account books required. Hence I do not want to produce them on my behalf.

He made a further statement: 'The defendants have no right to produce those account books on their behalf.' From pages 58 to 64 is to be found a list of the account books. On the same day, i.e., 25th October 1939, some account books were filed on behalf of Sheo Chandra Maul Singh. It is true that the written statement was filed on 6th September 1938, but the evidence actually started on 23rd November 1939, and I do not see any force in the criticism of the learned Civil Judge that they were filed not in time.

40. After the case had been argued for some time, both parties expressed their agreement that the account books might be summoned from the Court below where, we were informed, they were lying. They were summoned. The learned Counsel for the appellant invited our attention to a number of entries in support of his case that it was an ordinary partnership business and that these entries clearly showed that the business was not run as a joint family business. I cannot say that the argument was without force, but I prefer to base my judgment upon the numerous transactions the two deeds, the waqf of 1917 and the agreement of 1933, and have no hesitation in holding that the family was a separated family. I, therefore, modify the decree of the Court below and decree the plaintiff's suit only with regard to the property standing in his name. The rest of the claim stands dismissed. I think it is a fit case in which the parties should bear their own costs in both the Courts.

Waliullah, J.

41. I agree.

42. This appeal is allowed. The decree of the Court below is modified. The suit shall stand decreed only to the extent of the property standing in the name of the plaintiff. The parties shall bear their own costs in both the Courts.

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