Supreme Court of India
Mst. Rukhmabai vs Lala Laxminarayan And Others on 17 November, 1959
Equivalent citations: 1960 AIR 335, 1960 SCR (2) 253
Author: K Subbarao
Bench: Subbarao, K.

PETITIONER:
MST. RUKHMABAI

Vs.

RESPONDENT:
LALA LAXMINARAYAN AND OTHERS

DATE OF JUDGMENT:
17/11/1959

BENCH:
SUBBARAO, K.
BENCH:
SUBBARAO, K.
GAJENDRAGADKAR, P.B.
SHAH, J.C.

CITATION:
1960 AIR 335 1960 SCR (2) 253
CITATOR INFO :
R 1966 SC 470 (13)
RF 1967 SC 96 (26)

ACT:
Hindu Law-joint family-Partition-Admissions of members accepting Partition, value of-New point-When can be allowed to be raised-Suit for declaration of deed as sham- -Right to sue, when accrues-Limitation-Specific Relief Act, 1877, (1 of 1877), s. 42-Indian Limitation Act,1908 (IX of 1908), Sch. 1, art. 120.

HEADNOTE:
A joint Hindu family which was heavily indebted owned extensive properties and business. In 1915 certain members of the family including one Govindprasad executed a registered deed of relinquishment in favour of another member. The deed recited that the members of the family had become separated in 1898 by a deed of relinquishment which was not registered and so a fresh one was being executed confirming the earlier arrangement. On February 17, 1916, Govindprasad executed a trust deed in favour of two minors, Chandanlal, a son of one of his brothers and Rukhmabai, a daughter of another brother. The trust was created in a sum

of Rs. 15,000 for constructing a building or buying land therewith and paying the net income from it to the two beneficiaries in equal shares. With a part of this money a site was purchased and a building was constructed thereon. On October 25, 1929, Rukhmabai filed a suit against Chandanlal for partition of the said property and obtained a decree. When the Commissioner appointed by the Court went to effect the partition on February 13, 1937, the respondent, who is a brother of Chandanlal, obstructed him, and, on October 8, 1940, he filed a suit for a declaration that the trust deed executed by Govindprasad was a sham document and that the property was joint family property. Apart from oral and documentary evidence the appellant relied also upon certain admissions made by members of the family accepting the partition. The Court dismissed the suit holding that Govindprasad had become separated in 1898, that the trust deed was genuine and that the trust money was his self-acquired property. In the appeal before the High Court by the respondent the appellant raised two new pleas, namely, (i) that the suit for a mere declaration was barred by s. 42 of the Specific Relief Act and (ii) that the suit was barred by limitation under art. 12 of the Limitation Act as it was not filed within six years of the knowledge of the respondent of the fraudulent nature of the transactions which he had in 1917, or at least in 1929, when the appellant filed her suit for partition. The High Court rejected both these contentions, held that the two relinquishment deeds and the deed of trust were sham documents and set aside the decree of the trial court and decreed the

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respondent's suit. The appellant obtained a certificate and appealed.

Held, that the documents in question were sham documents, that the property in suit was joint family property and that the suit had been rightly decreed.

The admissions made by one or other members of the family to meet particular contingencies or to get an advantage were not of much value in determining the question whether some of the members of the joint Hindu family had separated. Persons sometimes made statements which served their purpose, or proceeded upon ignorance of the true position ; and it was not their statements but their relations, with the estate, which should be taken into consideration in determining the issue.

Alluri Venkatapathi Raju v. Dantuluri Venkatanarasimha Raju, (1935-36) L.R. 63 I.A. 397, relied on.

The new point raised by the appellant that the suit was barred by s- 42 of the Specific Relief Act could not be allowed to be raised as it was not raised in the trial Court. If the point had been raised at the earliest stage the respondent could have asked for the necessary amendment to comply with the provisions of S. 42- It was a well

settled rule of practice not to dismiss suits automatically but to allow the plaintiff to make the necessary amendment if he sought to do so. But the new point of limitation could be allowed to be raised in appeal as even if it had been raised at the earliest stage the respondent could not have pleaded or proved any new facts to meet the point.
The suit was not barred by limitation. The right to sue under art. 120 of the Limitation Act accrued when the defendant clearly and unequivocally threatened to infringe the right asserted by the plaintiff. Every threat to such a right was not a clear and unequivocal threat as to compel the plaintiff to file a suit. The execution of the Trust deed in 1916 and the construction of the house did not constitute any invasion of the respondent's right as the deed was a sham document executed for the benefit of the family. Till 1926 the respondent's father lived in the house and since 1936 the respondent had been residing in the house. The decree in the suit filed by Rukhmabai could not bind him or affect his possession of the house. The respondent's right was not effectively threatened till the commissioner came to partition the property on February 17, 1937, and the suit was filed within six years from that date.
Bolo v. Koklan, (1929-30) L.R. 57 I.A. 325, Annamalai Chettiar v. A.M.K.C.T. Muthukaruppan Chettiar, (1930) I.L.R. 8 Rang. 645, Govinda Narayan Singh v. Sham Lal Singh, (1930-31) L.R. 58 I.A. 125 and Pothukutchi Appa Rao v. Secretary of State, A.I.R. 1938 Mad. 193, relied on.

JUDGMENT:

CIVIL APPELLATE JURISDICTIoN: Civil Appeal No, 173 of 1955, Appeal from the judgment and decree dated September 9, 1949, of the former Nagpur High Court, in first appeal No. 45 of 1944, arising out of the judgment and decree dated April 24, 1944, of the First Additional District Judge, Nagpur, in Civil Suit No. 12A of 1940.

W. S. Barlingay, Shankar Anand and A. G. Ratna parkhi, for the appellant.

A. V. Viswanatha Sastri, R. K. Monohar, S. N. Andley, J. B. Dadachanji and Rameshwar Nath, for the respondents. 1959. November 17. The Judgment of the Court was delivered by SUBBA RAO J.-This appeal by certificate is directed against the decree and judgment of the High Court at Nagpur, reversing those of the First Additional District Judge, Nagpur, in Civil Suit No. 12-A of 1940. It would be convenient at the outset to give the following genealogy which would help to understood the contentions of the parties.

(The geneology is given on the next page).

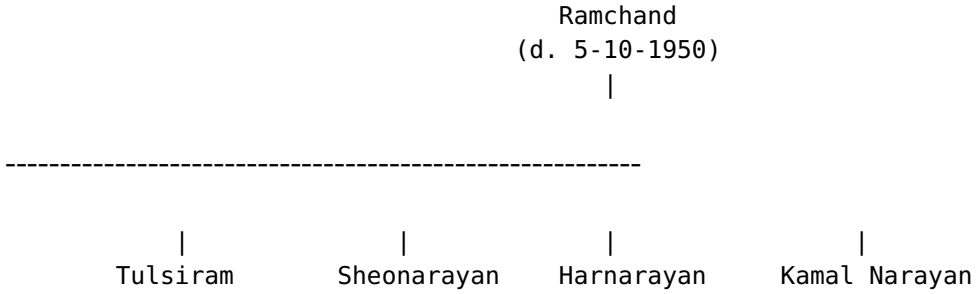
Ramesahai (d. 1897) | Ganesh Parsad (d. 1928) | Daughter Mst.

Rukhmahai == Lala Sheoshankar (defendant 1) Ramesahai (d. 1897) | Ajodhya parsad (d. 1912) Adopted son Chandanlal (d. 31-1-1940) == Window Mst.

Annapurnabai (defandant 2) Ramasahai (d.1897) | Janki parsad (d. 1923) |

Ramprasad (defendant 1)	daughter Saroobai == Lala Sunderlal Ramasahai (d. 1897) | Govind prasad (d. 1923) adopted son Kisanlal (defendant 8) Ramasahai (d. 1897) | Ratanlal (d. 1926) |
	Ganga prasad (defandant 5)

LAXMINARAYAN (plaintiff)	Chandanlal (adopted to Ajodhya prasad) Ramasahai (d. 1897) | Mangal prasad (d. 1914) | Ghasiram (d. 1917) Ramasahai (d. 1897) | Sarjoo prasad (d. 1903) | adopted son Tulsiram (defendant 3) Ramasahai (d. 1897) |	Kisanlal (adopted to Govind prasad)



(adopted to (defendant 6) (defendant 7) (d. 1924) Sarjoo prasad Ramasahai (d. 1897) | Daughter Tarabai == Lala Chhotelal During the life time of Ramasahai, he and his eight sons and one cousin, namely, Sitaram, constituted a joint Hindu family with Ramasahai as its managers The joint family carried on its ancestral family business of excise contracts in several districts in the former C. P. & Berar provinces. On January 24, 1897, Ramasahai died and, at the time of his death, the family, though heavily indebted, had extensive properties distributed at various places like Nagpur, Kamptee Rajnandgaon, Raipur, Jabalpur etc. Sarjooprasad died in 1903, Ajodhya prasad in 1912, Mangalprasad in 1914, Jankiprasad in 1923, Ratanlal in 1926, Ganeshprasad in 1928, Govindprasad in 1934, and Ramchand in 1940. On February 27, 1915, Ganeshprasad, Jankiprasad, Govindprasad, Ratanlal and Ramchand, the surviving brothers executed a registered deed of relinquishment in favour of Jankiprasad. In that document it was recited that the brothers had become separated on January 24, 1898, by a deed of relinquishment of that date and that, as the said document was not registered, they were executing a fresh one confirming the earlier arrangement. On February 17, 1916, Govindprasad executed a trust deed in favour of his nephew, Chandanlal, the son of his deceased brother Ajodhyaprasad, and his niece, Rukhmabai, the daughter of his brother Ganeshprasad, both of whom were minors at that time. In that deed Govindprasad, after asserting that he had become divided from his brothers under the aforesaid two deeds of relinquishment, created a trust in a sum of Rs. 15,000 for the benefit of the said minors, handed over the said money to the trustees appointed thereunder and. directed them to construct a building or buy a land and pay the net income from the said property in equal shares to the two minor beneficiaries. With a part of that amount a site was purchased in Cotton Market, Nagpur, and between the years 1916 and 1921 a building was constructed thereon. On or about October 25, 1929, Rukhmabai filed a suit against Chandanlal for partition of the said property and obtained a decree against him on January 5, 1934, for partition and mesne profits. Chandanlal filed an appeal against that decree and it was dismissed. After the said decree, Chandanlal died on January 31, 1940. When the Commissioner appointed by the Court went to the building to effect the partition by metes and bounds, the respondent, who was in the house, obstructed the Commissioner, and thereafter on October 8, 1940, filed a suit, out of which the present appeal arises, for a declaration that the said trust deed executed by Govindprasad in favour of the appellant and Chandanlal was a sham document. The respondents' case, inter alia is that the first relinquishment deed was brought into existence some- time before the second registered relinquishment deed was executed and that the said deeds and the trust deed were parts of a same scheme of fraud conceived by the members of the family to defraud the creditors. The appellant, on the other hand, alleges that Govind-prasad had really separated himself from the other members of the family, that he had his own businesses, that from out of his self-acquisitions he created the trust deed to benefit his minor nephew and niece for whom he had great love and affection, and that subsequently the trustees purchased a land and built the house

thereon with additional funds supplied by him. She also alleges that the first respondent, after having set up by his natural brother, Chandanlal, to to resist her claim to the building and having failed in that attempt, started the present litigation to deprive her of the fruits of her decree.

On the pleadings the learned District Judge framed as many as 12 issues. He held, on a consideration of the documents and oral evidence adduced, that Govindprasad became divided from the members of the joint family in 1898, that thereafter he was carrying on the business of moneylending, was dealing in gold and silver, and also was taking liquor contracts, that out of his self-acquisitions he created the trust in respect of Rs. 15,000, and that the land was purchased and the suit building was put up with the trust amount and additional amounts given by him. On those findings, the suit was dismissed. The respondent No. 1, (hereinafter called the respondent), preferred an appeal against that decree to the High Court at Nagpur. The High Court held that the two relinquishment deeds were sham documents brought into 'existence to shield the liquid assets of the family, which were for that purpose placed in the hands of Govindprasad, that the trust deed was also a sham one designed to achieve the same purpose and that the house was also constructed with the aid of the family funds. For the first time before the High Court the appellant raised a plea of limitation. The learned Judges of the High Court held that the suit was within time under Art. 120 of the Limitation Act. It was also for the first time contended that the respondent should be non-suited as he failed to claim a further relief within the meaning of the proviso to sub-s. (1) of s. 42 of the Specific Relief Act. The High Court negatived the said contentions. It is not necessary to notice the other points raised before the High Court as they are not pressed before us. In the result the decree of the District Judge was set aside and the respondent's suit was decreed. Hence this appeal. The main point that arises for consideration is whether the plaint-schedule house is the property of the joint family or whether it was built out of the self-acquisitions of Govindprasad in respect whereof he executed the trust deed. At the outset the relevant and well-settled principles of Hindu Law may be briefly noticed.

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

Bearing the aforesaid principles in view, we shall now proceed to consider the main issue in the appeal. The appellant naturally relies upon the document of 1898, in support of her case that Govindprasad renounced his interest in the joint family property in the year 1898. That document is Ex. D. 54-A, dated January 24, 1898, and is described as " farkatnama ". The seven brothers, Ganeshprasad, Ajodhyaprasad, Jankiprasad, Ratanlal, Mangalprasad, Sarjooprasad and Ramchand, executed the said relinquishment deed in favour of Govindprasad. It is stated therein as follows:

" ... we are not pulling together well in affairs and you and we are not on good terms in family treatment. III-will between you and us all brothers is consequently growing more and more from day to-day. Similarly, as (our) father himself involved all ancestral property into debt and the remaining movables were partitioned by all at that very time, no movable and immovable ancestral property has now remained. Consequently, we all have to undergo trouble and sustain., loss in our business.

We, therefore, execute this pharkhatnama (deed of relinquishment) and hereby declare as follows: Each brother should from this day enjoy his own self- acquired property and that he may acquire with his personal exertions-articles, grain, cash, movable and immovable property, so on and so forth. One has no connection with another, of family relation in property, transactions ... (torn), dealings and the like, of others. Each should enjoy his benefit and sustain his loss ... (torn) unless (we) give voluntarily (some 'property) to your children and (you) give voluntarily (some property) to our children, (they) shall have no manner of right against each other "." This document purports to have been signed by the seven brothers. If this deed is not a sham document, it clearly brings about a division of status between all the members of the family. It also proves that movables were divided between the brothers at the time of the death of their father, and -that the joint family property, presumably because it was heavily involved in debts, was not divided in metes and bounds. Exfacie it does not support the appellant's version that Govindprasad alone separated from the joint family taking his share of movable properties at the time of his father's death and relinquishing his interest in all the immovable properties of the family. The first respondent attacks this document mainly on the ground that this was a sham one brought into existence after the year 1912 as a part of a scheme to defraud the creditors. The first circumstance relied upon is that this document, though it purports to bring about a division in status among the members of the family and, according to the appellant, amounts to a relinquishment of Govindprasad's interest in the extensive joint family property, was not registered. Doubtless an unregistered document can affect separation in status; but Ramasahai and his sons were carrying on extensive businesses, purchased properties in different places and in the course of their business they were executing registered mortgage deeds. The ostensible purpose of the execution of the document is alleged to be the intention of Govindprasad to free himself from the family troubles caused by its involvement in heavy debts and to eke out his livelihood by carrying on a new business of his own. It is not likely that he would not have insisted upon a registered document to achieve that purpose. There is therefore Some justification for this comment. Secondly, if there was a partition of the movable properties either at the time of the execution of the document or even earlier-a rich family like that of Raniasabai must have had large extent of movables-the details of that partition should have found a place in the document. The absence of such details is indicative of the fact that the document was not really intended to be a formal document effecting a division between the parties.

This document did not see the light of day till the year 1915, when Govindprasad, for the first time, made a reference to it in Ex. D. 32, a registered relinquishment deed executed by him. On September 7, 1912, Govindprasad executed a Will, Ex. P. 1, bequeathing some properties described by him as his self-acquisitions. In that Will he stated thus:

This property shown above is all my acquisition, and the ancestral property is not included in this or received by me. I too have not retained my right over the ancestral property.

"My father expired on 27-1-1897 A.D. From that time without taking any share in my father's property, I have acquired this property by solely doing business; business of relations are not included in this nor have I joined in their business. Hence, nobody has any right to this. " If really there was in existence on that date a written relinquishment deed, Ex. D. 54, it is not likely that Govindprasad would not have mentioned that fact in the formal document he executed bequeathing his property. In contrast with this recital, in the Will Ex. P. 2, executed by him on May 1, 1919, the following recital is found: "... I have taken no share at all in the movable and immovable property left by him, and all the property in my possession on my earning it. is acquired by me, and consequently, my brothers, Lala Ganeshprasad, Jankiprasad Ratanlal, Ramchandra and -all other brothers had executed a pharkath-nama (deed of relinquishment) in my favour on 24-1-1898 A.D. . . . " What could be the reason for Govindprasad not referring to the deed of relinquishment of the year 1898 in his Will of 1912, but thought fit to do so in his Will of 1919 ? The only possible explanation is that in between these two documents, another relinquishment deed, Ex. D. 32, executed by him on February 27, 1915, came into existence. We will have to say more about this document at a later stage of our judgment. This document, for the first time, affirms the recitals of the earlier alleged relinquishment deed of 1898 and is also registered. It is therefore a permissible inference that Ex. D. 54 might not have been in existence before Ex. D. 32 was executed or, at any rate, before Ex. P. I was executed by Govindprasad.

Reliance is also placed by the respondent on the alleged discrepancies between the particulars of partition given in Ex. D-54 and Ex. D-32. But we do not find much force in this contention, as the argument cuts both ways. If Ex. D- 54 was forged to support Ex. D-32, there could not have been any room for introducing discrepancies between the two documents. We find no such irreconcilable discrepancies between the two documents and in substance the recitals are similar.

The respondent attacks the genuineness of Ex. D-54 by attempting to establish that the signatures of Ajodhyaprasad and Mangalprasad were forged after their death. If this was proved, this document might have come into existence only after 1914, i.e., after Mangalprasad had passed away. On the other hand, if Mangalprasad's signature was genuine, but Ajodhyaprasad's signature was a forged one, this document could have come into existence after 1912 but before 1914. The learned District Judge, disposed of this contention with the following remarks:

" The expert examined the admitted signatures on document executed in the years 1903 and 1904 while the disputed document was executed in the year 1898. The opinion of the expert does not carry conviction and is not corroborated by circumstances. The farkatnama was found to be genuine in the previous litigation."

It may be noticed that the learned District Judge did not scrutinize the signatures with the help of the expert's evidence, and has not expressed any considered view thereon. But the High Court bestowed greater care on this aspect of the case, as it should, for, if this document was a forgery., it would go a long way to support the respondent's version. The learned Judges of the High Court considered the evidence of the expert, scrutinized the impugned signature of Ajodhyaprasad, compared it with his admitted signatures and agreed with the expert in holding that the disputed signature was not that of Ajodhyaprasad. So far as Mangalprasad's signature was concerned, the learned Judges were not able, on the evidence adduced, to hold that it was not his signature. The expert was examined as P.W. 3. He is practising as handwriting and finger-print expert in Nagpur since 1937, and he also keeps a branch office in Bombay. He has examined the impugned signature of Ajodhyaprasad with the latter's admitted signatures found in the mortgage deeds, Exs. P-7 dated March 10, 1898, P-66 dated November 2, 1902, and P-6 dated June 25, 1904. He has examined the disputed signatures synthetically and analytically and found differences in the pictorial aspect of the admitted signatures and the disputed signature in that that the admitted signatures are fluently scribed with no hesitation and with a flourish, whereas both the fluency and flourish are lacking in the disputed signature. Examining the signatures analytically, he gives the following differences between the impugned signature and the admitted signatures:

(i) in the disputed signature the down strokes end bluntly, whereas in the admitted signatures, they end in'& flourishing manner with ticks to the right; (ii) in the disputed signature, the down strokes have a tendency to curve in the centre quite differently from the down strokes in the admitted signatures; (iii) in the disputed signature there are dots after the letter "dha" in "dhasthur" instead of the usual dashes found in the admitted signatures; (iv) in the admitted signature in spelling the name " Ajodhyaprasad " the letters " Joo " have been used, whereas in the disputed signatures, the letters 'Jo " have been used; (v) in the disputed signature there is uneven pen-pressure which is not found in the admitted signatures; (vi) there are over-writings in the disputed signature; and (vii) there is a marked difference in the formation of letters between those found in the admitted signatures and those found in the disputed signature. The credentials of this expert have not been questioned in the cross-examination. Except suggesting some irrelevant theories, no real attempt has been made to discredit this witness or demolish his factual observations or his conclusions. The appellant has not thought fit to examine another expert to contradict this witness or to prove her case. In the circumstances, we derive great assistance from the expert's evidence in our attempt to compare for ourselves the disputed signature with the admitted signatures. The learned Judges of the High Court also compared the signatures with the help of a powerful magnifying glass. Hidayatullah, J., as he then was, gives the results of his observation thus:

" To begin with the pictorial aspect differs in many respects and even to a person not versed in the identification of handwritings they would appear to be dissimilar. The letter formations are different; the strokes and the little curls at the end of vertical strokes are all wrong. There is also a spelling change. Whereas the writer usually wrote ' joo', in the disputed signature this has been changed to 'Joo'. This detracts somewhat from the force of this argument but the document Exhibit P-81 is merely a copy of a copy and we were unable to compare the signatures as such. The fact however remains that barring this solitary instance, the admitted signatures contain the' other spelling."

Mudholkar, J., agreed with the observations of Hidayatullah, J. We must also give due weight to the observations of the learned Judges. We have also compared the impugned signature with the admitted signatures with the help of the expert's evidence, and we are inclined to agree with the view of the expert and the learned Judges of the High Court. The learned Counsel for the appellant has not been able to place before us any material to compel us to take a view different from that of the High Court. We, therefore, agree with the High Court that it has been established that the impugned signature of Ajodhyaprasad in Ex. D-54 is not his. This conclusion lends strong support to the respondent's version that Ex. D-54 must have been brought into existence at a later stage when Ajodhyaprasad was no more.

It leads us to the consideration of Ex-D-32. It is dated February 27, 1915, and purports to be a relinquishment deed executed by Ganeshprasad, Jankiprasad, Ratanlal and Ramchaild in favour of Govindprasad. In this document, referring to Ex.D-54 it is stated that the brothers became separated on that date and that as the earlier document was not registered, they executed a fresh document and registered the same. A recital is also made, persumably to explain the conduct of some of the brothers in living together and having a common mess, that by such common living they should not be deemed to be united. This document, as we have already indicated, is attacked on the ground that it was part of a scheme of fraud and that it was executed only nominally to achieve the purpose of the said scheme. Our finding that the document of January 24, 1898, was subsequently got up after the death of Ajodhyaprasad undermines to some extent the reality of the transaction. That apart, we shall further scrutinize with great care the surrounding circumstances to unravel, if possible, the true purpose of this document. It is common case that the members of the family had been executing nominal documents such as mortgage deeds, sale deeds etc. in favour of family friends to defeat or, at any rate, delay the creditors. Our attempt, therefore, will be to draw a real picture of the attempted scheme of fraud and to see whether this document will fit into that picture.

We have already noticed that at the time of the death of Ramasahai the family was heavily indebted. On June 12, 1895, Ramasahai, Sitaram, Ganeshprasad and Mangalprasad had executed a mortgage deed in favour of one Buty. On March 2, 1898, the said Buty filed Civil Suit No. 5 of 1898 against the members of the joint family for recovery of the amount due under the mortgage and obtained a decree on June 16, 1900. On August 25, 1897, Ajodhyaprasad, Ratanlal and Govindprasad executed a mortgage deed, Ex. P-81 in favour of Baliram Hari Bokhare for a sum of Rs.2,400 alleged to have been borrowed from him on the said date. This document was executed six months before Buty filed his suit on his mortgage, Nothing further was heard of this mortgage. In the circunistances it may be assumed that the mortgage, deed was only a sham one brought into existence to defraud the creditors. On March 10, 1898, Ganesh, prasad, Ajodhyaprasad, Jankiprasad and Ratanlal executed a mortgage deed, Ex. P-7, in favour of one Hemraj for a sum of Rs' 2,000. Under this document, properties not covered by Ex. P-81 were mortgaged. There is nothing on record to show what has happened to this mortgage and whether the alleged debt was discharged. This also appears to be another sham transaction. On February t4, 1902, Ganeshprasad executed a mortgage deed, Ex. P-75, in favour of Sheoprasad: though this document is dated February 14, 1902, the stamp for the document appears to have been purchased only on April 27,1902. This document appears to have been ante-dated for some ulterior purpose. On November 2, 1902, six of the Lala brothers, i.e., all except Govindprasad and Mangalprasad, executed another mortgage deed, Ex. P-66, in favour of

Narayanrao Govindrao Mahajan for a sum of Rs. 9,975 mortgaging thereunder the family immovable properties. For this mortgage deed a stamp paper purchased on June 25, 1898, was utilised. Again on February 26, 1903, the same executants executed another mortgage deed, Ex. p-74, in favour of the said Narayanrao Govindrao Mahajan for a. sum of Rs. 10,000. The stamp for this document was purchased on August 4, 1902. Both the Exs. P-66 and P-74 were presented for registration on February 26, 1903 but they were registered on March 4, 1903. This delay in the registration is presumably for the reason that the Lala brothers waited till the mortgagee executed an agreement, Ex. P-7, dated March 3, 1903, in their favour. Under this agreement, the mortgagee admitted that the said mortgages had been paid up and he also undertook to execute a written " mortgage deed " and get the same registered at any time when the mortgagors paid the full expenses in that regard. This agreement proves beyond any doubt that the said two mortgages in favour of Narayanrao Govindrao Mahajan were colourable and sham transactions. On June 25, 1904, five out of the six executants, Sariooprasad having, died meanwhile, executed a mortgage deed, Ex. P-6, in favour of Awasarilal for a sum of Rs. 2,000 for payment to Hemraj. It has already been noticed that there is no evidence on record to show that Hemraj paid any amount and the record does not disclose any further details in regard to this mortgage. On May 26, 1908, Ganeshprasad, Jankiprasad, Ratanlal and Ramchand executed a mortgage deed, Ex. P-76, in favour of one Kasturchand Daga for a sum of Rs. 20,000. The document discloses that all the family properties mortgaged there under were purchased in execution in the name of the mortgagee with the funds provided by him and that, as the said amount was paid to him, the property was put in the possession of the mortgagors. It may be reasonably inferred from this recital that the properties purchased in the name of the said Daga were mortgaged to him for the amounts advanced by him. This document also recognized the existence of other mortgage debts due by the family to Daga. It may be mentioned that there is no dispute that the family was borrowing moneys from Daga. This document was not execut. ed by Ajodhyaprasad, but he attested it. On July 31, 1914, Ganeshprasad and Ratanlal executed another mortgage deed, Ex. P-73, in favour of Narayanrao Govindrao Mahajan for a sum of Rs. 18,925, being the amount alleged to be due by the family under two registered documents dated February 26, 1903. This mortgage was engrossed on a stamp paper purchased as early as January 31, 1903, and was registered on November 23, 1914. Before the registration of this document, the inortgagors obtained from the mortgagee a deed of agreement, Ex. P-38, dated October 6, 1914, admitting that the said mortgage was a nominal one. On June 18, 1915, Kasturchand Daga filed Civil Suit No. 1 of 1915 against the Lala brothers on the basis of the mortgage deed, Ex. P-76. Three days prior to the filing of this suit i.e., on June 15, 1915, Ganeshprasad, Ratanlal. Jankiprasad and Ramchand executed the following three sale-deeds: (i) sale-deed, Ex. P-9 dated February 21, 1915 in favour of Baliram Hari Bokhare conveying the family properties situated at Jubbulpore and Kamptee for a consideration of Rs. 9,500; (ii) sale-deed dated February 21, 1915, Ex. P-71, executed in favour of the said Baliram Hari Bokhare for a consideration of Rs. 9,250 in respect of properties at Raipur and Kamptee: this document was executed on a stamp paper purchased on August 8, 1910; and (iii) sale-deed dated June 11, 1915, Ex. P-70, in favour of Narayanrao Govindrao Mahajan for a consideration of Rs. 10,000 conveying some property at Kamptee. The said three documents were registered on June 15, 1915, though they were all purported to have been executed on different dates. On June 20, 1915, Narayanrao Govindrao Mahajan executed three documents, Exs. P-10, P-35 and P-36. Ex. P-10 is an agreement executed by Naravanrao Govindrao Mahajan in favour of the Lala brothers, whereunder Narayanrao Govindrao

Mahajan agreed to reconvey the property conveyed to him. Ex. P-35 is a receipt given by Narayanrao Govindrao Mahajan to Lala brothers, wherein it is mentioned that it was agreed between them at the time of the execution of the sale-deed that whenever the Lala brothers paid Narayanrao Govindrao Mahajan the, amount of the sale-deed and interest thereon, the latter would return the said property and would execute a deed of reconveyance and that, as they have paid him a total amount of Rs. 11,200, he would execute the reconveyance in their favour. Ex. P 36 of the same date is a Will executed by the said Narayanrao Govindrao Mahajan directing his heirs to convey the property to the Lala brothers in case he died without executing the said document. It is not disputed that the grand-son of Narayanrao Govindrao Mahajan did execute a sale deed in favour of two members of the Lala brother's family and the same was given to Kasturchand Daga in discharge of his debt. The learned District Judge, and, on appeal, the High Court held that the said saledeeds were nominal transactions and the appellant did not, and could not, question the correctness of the facts found by them.

The two sale-deeds executed in favour of Baliram Hari Bokhare for a total sum of Rs. 19,425, alleged to be the amount due under earlier mortgages executed in his favour are also colourable transactions; for, on July 1, 1915, Baliram Hari Bokhare executed Exs. P-11, P-33 and P- 34-under Ex. P-11 he agreed to reconvey the properties covered by the sale deeds if the said amount was paid to him;. Ex. P-33 is a receipt given by Baliram Hari Bokhare to the Lala brothers acknowledging the receipt of the said amount and there is a recital in the document that he would reconvey the said property to the Lala brothers; and Ex. P- 34 is a Will executed by Baliram Hari Bokhare directing his heirs to transfer the said property to the Lala brothers in case lie died before transferring the same to the said brothers. It is, therefore, seen that the same pattern was followed by the Lala brothers in the case of the two sale- deeds executed by them in favour of Baliram Hari Bokhare. It is said that the three sale-deeds exhausted the family's unencumbered immovable properties and there can hardly be any doubt that the three documents were executed to prevent the decree-holder in Civil Suit No. 1 of 1915, from proceeding against them after exhausting the mortgage properties. Both the District Judge and the High Court held that these documents were collusive; and, on the facts noticed, their finding is correct.

The contesting respondent's case is that the farkatnama of February 27, 1915, was also executed as part of the said scheme to preserve the cash and the movables of the family for itself. The nominal sale-deeds executed in favour of Narayanrao Govindrao Mahajan and Baliram Hari Bokhare might be used to screen the family's immovable properties from being proceeded against in execution of the decree obtained against them, but could not prevent the decree-holder from proceeding against the family's movables and cash. It is said that the said farkatnama was intended to plug this loophole in the scheme of fraud. This document also was registered on the date when the other documents were registered. There is no acceptable reason why this document should have been executed and registered on the same date when admittedly colourable documents were executed by the family, if it was not intended to support the same design. The appellant suggests that the coincidence in dates was not decisive of the question raised; for, it might well have been that Govindprasad realising the danger which prompted his brothers to resort to fraudulent transactions insisted upon them to reaffirm the earlier transaction to avert the same danger to his self-acquisitions. This may be a plausible contention, but in the context of the then existing

circumstances it does not appeal to us. The creditors' possible threat to proceed against Govindprasad's alleged self-acquisitions on the ground that they were part of the joint family property had always been there. What had happened was that instead of Buty, Daga become the creditor. There is, therefore, no reason why the tell-tale date was fixed for the execution of Ex. D-32, if it was not intended to be a prop to the common design of fraud. Further, it became necessary to put back the date of the alleged division in status to 1898, i.e., to a date prior to the filing of the suit by the creditor Buty against the family on March 2, 1898, to meet the possible argument that the claim could be traced back to that of Buty and therefore the alleged partition could not affect the claim of Daga. Ex. D-32 purports to be a confirmation of the farkatnama dated January 24, 1898. We have already held that the said document was an ante-dated one and that the signature of Ajodhyaprasad was forged therein. If so, it follows that Ex. D-32 is another- link in the chain of fraud perpetrated by the family. To summarize: the family had joint business and extensive properties as well as heavy debts at the time of the death of Ramasahai on January 24, 1897. After Ramasahai's death, the family creditor, Buty, filed a suit against the members of the family to enforce his mortgage. In the year 1898, the members of the family executed nominal mortgages in favour of Hemraj, Narayanrao Govindrao Mahajan and Chunnilal Sonar, and when some of the family properties were brought to sale in execution of the decree obtained by Buty, they were purchased by Kasturchand Daga benami for the members of the family, and some of the members of the family executed a mortgage deed on May 26, 1908, for the sale price in favour of the said Daga. The said Daga filed Civil Suit No. 1 of 1915 against the family to enforce the mortgage, on June 18, 1915. Three days before the filing of this suit, i.e., on June 15, 1915,. the brothers brought into existence three nominal sale-deeds-two in favour of Baliram Hari Bokhare and another in favour of Narayanrao Govindrao Mahajan-and a relinquishment deed in favour of Govindprasad; and all the documents were registered on the same day. Three of them were admittedly nominal documents and the fourth, viz., the relinquishment deed, has been proved to be another nominal document. The said facts disclose an integrated scheme of fraud and it is not possible in the circumstances to single out therefrom Ex. D-32 and hold that it is a bona fide transaction; on the other hand, the circumstances already narrated by us indicate beyond any reasonable doubt that the said document is also a part of that scheme and intended to protect the cash and movables of the family. The appellant relies upon the Wills executed by Govindprasad in 1912, 1919, 1920, 1926 and 1930 to establish that he was divided from the family, and that he was treating some properties as his self-acquisitions. If, as we have held, neither Ex. D-54 nor Ex-D-32 effected a severance of Govindprasad from the joint family, the said documents would not carry the matter further; for the Wills were based upon the assertions made by Govindprasad that he was separated from his family in 1898 and that the properties he was bequeathing were his self-acquistions. As we have held that there was no severance of the joint family, the evidentiary value of these documents must be rejected on the ground that they were further attempts on the part of the family to keep up the appearance consistent with the alleged partition. We now come to the consideration of the main document in the case, namely, the trust deed dated February 17, 1916. It is marked as Ex. D-12. It purports to be a deed of trust executed by Govindprasad in favour of his nephew Chandanlal, the natural son of his brother Ratanlal and adopted son of his another brother Ajodhyaprasad, and his niece, Rukhmabai, the daughter of his eldest brother Ganeshprasad. Under this document Rs. 15,000 was set up for the said beneficiaries, who were minors at that time. Kasheo Rao Laxman Rao Aurangabadkar, Gujalal, Davidin, Mahadeo, and Govindprasad were appointed trustees. The document directed that the

trustees should carry on the management of the trust money and that they should make over the money to the minors on their attaining majority. They were also directed to construct a building or buy a land which might bring in good rent and to reserve one-fourth for themselves for expenses of the building or the land, as the case may be, and to distribute the the remaining three-fourths in equal shares to the two beneficiaries. Alternatively, they were also directed to carry on a business with the said, amount and distribute the income therefrom to the beneficiaries in equal shares. The first question that occurs to one is, why did Govindprasad execute the trust, deed if his intention was to give a sum of Rs. 15,000 to his nephew and niece; for, he could have easily achieved, that purpose by executing a Will or a settlement deed,and during his life time by giving them the income therefrom in equal shares. The amount set apart is comparatively small and is surprising that he should have appointed five trustees for implementing the trust. Secondly, the trust deed itself refers to the earlier deeds of relinquishment and we have already held that the said two deeds were colourable transactions. The trustees appointed were the agents of the family. Ex. P-72 dated September 9, 1913, the General Power of Attorney, shows that two of the trustees, Kasheo Rao Laxman Rao and Davidin were the family agents of the Lala brothers. Ex. P-38 dated October 6, 1914, indicates that Kasheo Rao Laxman Rao, one of the trustees, attested the said document whereunder Narayanrao Govindrao Mahajan declared that the, mortgage deed executed in his favour by the Lala brothers was a nominal transaction. This shows that Kasheo Rao Laxman Rao was one of the close associates of the members of the family in executing the fraudulent documents. Mahadeo is the brother- in-law of Babulal, a servant of Ganeshprasad, who is the father of Rukhmabai, the appellant. The fact that most of the trustees were either the agents or the servants of the family is also a circumstance, though not. conclusive, against the version of the appellant. Two minor members of the family were selected for the bequest; though ordinarily it may not have any significance, in the peculiar circumstances of the case, this fits in the general scheme of fraud perpetrated by the family. What is more, the trust comes to an abrupt end. Ex. D-3 is the deposition of Govindprasad in Civil Suit No. 204 of 1931. Therein he- describes how the trust deed was implemented and how it came to an end. He says that for building the house the site opposite Cotton Market at Nagpur was acquired from Babulal, and Rs. 10,000 out of the sum of Rs. 15,000 was utilised for building the house and Rs. 5,000 was given to Babulal by the trustees as loan. The -trustees demanded Rs. 5,000 more from him, but he gave them only Rs. 2,500 and another sum of Rs. 2,500 was given to them by Sheoshankar, the husband of the appellant. The trust was dissolved in 1921 and after that he commenced to construct the second storey and completed it with a sum of Rs. 6,000 returned by Babulal. This evidence proves that the trust was put to an end even before the completion of the building, and Govindprasad completed the construction. This conduct indicates that no distinction was made between the trust property and his own property, and that, though a registered document had been executed, he was able to put to an end to the trust when he chose to do so. Ex. D-30 is the copy of the proceedings from the Proceeding Book filed by the trustees in Civil Suit No. 55 of 1929. Therein Govindprasad says that Chandanlal and Rukmabai became majors and, though he wanted to make over the building to them, they did not like to take it and agreed to have it left with him so long as he was alive and that, as Davidin left the place, Gajulal passed away, Mahadeo had gone to another district for a service and Kasheo Rao was unwilling to take further responsibility, he had taken over the building according to the wishes of his nephew and niece. This laboured explanation also demonstrates the nominal nature of the trust deed. Ex. D-35 is a Power of Attorney dated January 26, 1921, executed by Rukhmabai and Chandanlal in favour of

Govindprasad. In that document both of them, who had become majors declared that they could not manage the property and therefore they appointed Govindprasad as their agent and authorized him to manage the property and act for them in the courts. Whatever might be the reason, the said document shows that the property was taken back by Govindprasad and there is nothing on record to show that any benefit from the trust reached the hands of either Chandanlal or Rukhmabai. This conduct of Govindprasad also fits in with the general scheme of colourable transactions: and the property in fact continued to be the joint family property. There is also positive evidence, both documentary and oral, to prove that the brothers, including Govindprasad, were living an members of a joint Hindu family. Ex. P-63-A is a letter written by Ganesh prasad to Chandanlal. This letter is not dated, but it appears to have been written in or about the year 1926. In this letter Ganeshprasad points out:

" I have so far helped all my brothers upto this day and have been helping them so far as possible in spite of experiencing such great miseries. What should I do ? Had I thought of passing my time by living separate, it could have been done in a good way; I would have not fallen in such difficulties. With all this you are seeing how memberji is causing different troubles. Whatever I have done, I have done with my earnings; I have given to my men family." In unravelling a fraud committed jointly by the members of a family, only such letters that passed inter se between them can give the clue to the truth. This letter shows that notwithstanding the assertions of the family to the contrary to suit a particular occasion, they were really living together as members of a joint family and the whole responsibility of the conduct of the affairs of the family was taken by the eldest member of it. Ex. P- 5 dated January 21, 1922, is a public notice given by all the members of the family and published in " The Maharastra " on January 25, 1922. Therein they asserted that in Nagpur 'City they owned an ancestral property, consisting of a house, vacant land and a pacca well, constructed with stones for drinking water for the public, and that Mt. Deoka Bai, W/O Sitaram Lala Kalar had no right to sell the same. If Govindprasad had separated himself from the family, as it is now contended, he would not have joined in the issuing of this public notice, for, in that event he would not have had any interest in the ancestral property. Ex. P-59 is a copy of the application made by Govindprasad to the Secretary of State for India on May 19, 1922. In that application Govindprasad states:

" I have now to mention that for the long standing three years, i.e., 1920-21, 1921-22, and the remaining nine months of 1922, 1 have undergone and have to undergo a serious loss of about rupees twenty thousand which is heavy and unbearable to meet the Government Revenue and to maintain my large family consisting of twenty-five (25) members." Govindprasad alone could not have lost so much amount in his individual business. What is more, he had no children and so his family of twenty five members must have reference only to the members of the joint family.

There is also the evidence of P.Ws. 12,/ 13 and 14, who are the common relatives of both the parties. P.W. 12, Bhagwandas, is the brother of Lala Chotelal, the husband of Tarabai, daughter of Ramasahai. He has been acquainted with the affairs of the family for about 30 years, i.e., since the time his brother was married to Tara Bai. He is positive that Govindprasad used to live either at Kamptee or Nagpur in the family house and that all the brothers were keeping account books jointly. P.W. 13, Lala Sadanand, is the brother of Mangalprasad's wife. He says that his sister married

Mangalprasad in 1896 or 1897 and his knowledge of the family, therefore, went back to that year. He asserts that the sons of Ramasahai were members of a joint Hindu family and that their excise contracts were also joint, and that none of the brothers had separate trade or property. P.W. 14, Lala Sitaram's son was married to Ratanlal's daughter about 25 years before the date of his giving the evidence. He supports the evidence of P. Ws. 12 and 13. Nothing has been elicited in the course of cross-examination of any of these witnesses which would detract from the weight of their evidence. They are natural witnesses who could with authority speak to the affairs of the family. The oral evidence adduced by the plaintiff also establishes that there was no partition among the members of the family. We, shall now briefly notice the admissions alleged to have been made by one or other members of the family accepting the partition. In this context, the observations of the Judicial Committee in Alluri Venkatapathi Raju v. Dantuluri Venkatanarasimha Raju (1) are apt and they read: It sometimes happens that persons make statements which serve their purpose, or proceed upon ignorance of the true position; and it is not their statements, but their relations with the estate, which should be taken into consideration in determinining the issue." The issue in that case, as it is in the present case, was whether one of the members of a joint Hindu family separated himself from the others by renouncing his interest in the joint family property.

Exhibit 49 is the rejoinder filed by Lala Laxminarayan in Civil Suit No. 260 of 1931 filed against Sheoshankar, the husband of the appellant. Therein he stated that the members of the family separated from time to time -and that the last but one group that remained joint was the one 'With four brothers and the very last was with two brothers, Ganeshprasad and Ratanlal and that after the death of the two brothers he (Lala Laxminarayan) was the only survivor. It is obvious that the said statement was made to serve his purpose in that suit and support his claim therein. Ex. D- 11 is an application dated November 10, 1938, made by Lala Laxminarayan to the Deputy Commissioner, Nagpur, for exemption from furnishing security at Excise Sales. Therein he alleged that Lala Ratanlal owned and possessed immovable and movable properties worth about a lakli of rupees, which on his death devolved on his son, the applicant therein, that all the said properties were held by the applicant in his own right as the sole owner thereof and that he was in uninterrupted possession of the same since the death of his father. He also alleged that the business was inherited by the members of the family in 1890 and that he had been doing the business of his forefathers since the year 1927. In this document Laxminarayan did not set up any case of partition in 1898; but it is pointed out that he did not include the trust property in the schedule attached to that application. The object of that application was to show that he owned (1) (1935-36) L.R. 63 I.A. 397, 406.

large extent of properties, and the fact that he had omitted some items of property would not establish that the said items were not joint family properties. That question has to be considered on other evidence. Lala La But what is important in Ex. D- 1 1 is his assertion that there was no partition in the family. If we do not place much reliance on Ex. D-11, we should also, for the same reason, not place much value on the assertions made in Ex. D-49. Exs. D-49 and D- 11 show that the plaintiff was making -assertions to suit his purpose. Ex. D-56 is the deposition of Jankiprasad in Civil Suit No. 260 of 1931. Therein he stated that the defendants were all brothers but were divided. That was a suit filed by Kasturchand Daga against some of the brothers and, perhaps, Jankiprasad thought that it was necessary to assert separation so that some of the, family properties, other than

those mortgaged, might be salvaged. The same Jankiprasad, in Ex. P-80, asserted to the contrary. In that exhibit he stated that the farkatnama was cancelled by him by notice to Govindprasad and that he and Govindprasad continued to have common food. The claim of the creditor, Kasturchand Daga, who sought to attach the trust property along with other family properties, was settled and some of the family properties were sold to him under Ex. P-24 in discharge of his claim. On the sale- deed, Govindprasad made the following endorsement: " As I have been living separate for a number of years from all the members of the family, I have no right to this property and no objection to its sale." This endorsement is entirely consistent with the case of the respondent that the properties in the hands of Govindprasad were intended to be preserved by this compromise. That statement must have been made to strengthen the case of the family. These con- tradictory statements were made by one or other members of the family to meet a particular contingency or to get an advantage, and, therefore, these cannot be of much value and the case really falls to be decided not on such statements, but on- the basis of the relations of the various parties with the estate.

From the aforesaid evidence, we must hold that there was no severance in the joint family of Govind prasad and his brothers and that they continued to be joint, doing joint business, that all of them collusively brought into existence documents, including the relinquishment deeds, to tide over the financial difficulties in which they were involved. On the basis of the finding that Govindprasad did not relinquish his share in the joint family, but continued to be its member, the next question is whether the sum of Rs. 15,000, in respect whereof the trust deed was -executed by Govindprasad and the moneys spent to put up the suit house, came out of the selfacquisitions of Govindprasad. This question we must approach on the basis of our finding that Govindprasad continued to be a member of the joint Hindu family until his death. The initial burden is no doubt on the contesting respondent to prove that the trust property is part of the joint family property; but if it was established that there was sufficient nucleus from or with the aid of which the property could have been acquired, the burden shifts to the appellant. The first question, therefore, is whether the joint family had sufficient property or income out of which Govindprasad could have put aside Rs. 15,000, under the trust deed and also could have advanced other amounts for constructing the building. We have already noticed at an earlier stage of the Judgment that the family owned extensive properties distributed at different places. Ex. 9-D-8 is a copy of the Valuation Register for 1923 in Civil Suit No. 260 of 1931. There the annual income from one of the liquor shops, Lala Bada Liquor Shop, from the year 1919 to 1923 is given. The licence was for Rs. 15,000. The profit for 1919-20 was Rs. 1329; for 1920 21 was Rs. 14,152; for 1921-22 was Rs. 185; for 1922 was Rs. 7,650; and for 1923 was Rs. 5,140. Ex. 9-D-7 is the copy of the Valuation Register for 1924 in the same suit in respect of Janajail Liquor Shop, Nagpur. It shows that the profit for the year 1919-20 was Rs. 1,486; for 1920-21 was Rs. 8,814; for 1921-22 was Rs. 1,779; and for 1922-23 was Rs. 3,837. Ex. P-77 is a security bond executed by the members of the family in favour of Kasturchand Daga. It shows that security was given in connection with the contract taken by the family in the name of Lala Ratanlal for retail dealing in liquor in different shops at Karnptee and Nagpur during the years 1906 and 1907. In that connection Ratanlal deposited a sum of Rs. 54,700. These three documents show the extensive business the members of the family were doing-in liquor. Indeed, the learned Counsel for the appellant does not dispute the fact that the family was in a position to give Govindprasad the amount covered by the trust deed and that spent for the con- struction of the building. If so, the question is whether the appellant has proved that Govindprasad paid the said amounts from and out

of his self-acquisitions. If Govindprasad had a business of his own, he must have had accounts, but no such accounts were forthcoming. Summons was served on Tuljabai, the wife of Ganeshprasad and mother of Rukhmabai, for producing the account books of the Lala brothers from the year 1897 to 1928, but no accounts were produced except Ex. D-22, which is an extract from the accounts of Ganeshprasad covering a period of only one month of the year 1927. This extract does not help either party. It may, therefore, be held that the accounts, which could have thrown some light on the sources from which Rs. 15,000, was drawn by Govindprasad and the further amounts for building the house were supplied, were not filed. D.W. I is one Jainarayan, who was a member of Legislative Council of the State from 1930 to 1936. He states that Govindprasad was doing business in shares and also in moneylending, that he had his own account books; that before going to Jabalpore he took away all his account books, and that he (the witness) may still have one or two account books of Govindprasad with him. This witness did not produce any account books. Rukhmabai also says in her evidence that the account books of Govindprasad were with him but she could not say whether they were at Nagpur or at Kamptee. But Govindprasad in his deposition made on October 23, 1932, in Civil Suit No. 204 of 1931 stated that he had no regular account books showing his income or expenditure, but he had only a sort of note book and that was not in his possession then. If Govindprasad was doing business on a large scale, as the appellant asked us to believe, he must have had account books. If we accept the statement of Govindprasad that he had no account books, it shows that he could not have had any extensive business; on the other hand, if we accept the evidence of D. W. 1 and Rukhmabai that he had account books, it was not explained why they were not produced. The only direct evidence in regard to Rs. 15,000, the subject-matter of the trust deed, and the moneys spent for building the house, is that of Govindprasad in the earlier suit, viz., Civil Suit No. 204 of 1931, and it has been marked as Ex. D-3. He has stated therein that he had some deposits in banks and that out of affection he set apart Rs. 15,000 for his nephew and niece and executed a trust deed in respect of that sum. He adds that out of the said sum of Rs. 15,000, Rs. 10,000 was spent in purchasing the site from Babulal and for constructing a part of the suit house thereon, and the balance of Rs. 5,000 was given to Babulal as loan. He further stated that the trust was dissolved in 1921 and that thereafter he spent another sum of Rs. 6,000 out of his own pocket in addition to the sum of Rs. 6,000 returned by Babulal for completing the building and that Sheoshankar, the husband of the appellant spent Rs. 2,500 in connection with the building; but in the cross-examination he admitted that he bad no shop for gold and silver and that lie used to do business in a small scale. He gave evasive answers when he was asked whether the first defendant was managing the liquor shop in dispute ; he did not know whether the defendant was managing the liquor shop in dispute, he did not remember the year in which the shop was opened in the suit building; he could not say when the shop was discontinued; he, admitted that he had no regular account books showing his income or expenditure. Though he said that he had a sort of note book, he said that he was not in possession of it then. Though he said in examination in-chief that he spent Rs. 6,000 for the building, had to admit in the cross-examination that the said money was not withdrawn from any bank. He also admitted that the materials were bought by Ganeshprasad and Ratanlal and that he did not know when they purchased them. The evidence of Govindprasad clearly establishes that he was merely lending his name for the family and that the amounts were spent from the family coffer,-, under the supervision of one or other members of the family. Ex. P-62-A is a copy of the letter written by Ganeshprasad to Babulal in the year 1922-Babulal was acting as the agent of Ganeshprasad. Therein Ganeshprasad complaints that large amounts had already been

spent but the upper portion of the building had not yet been constructed. Though it is suggested that Ganeshprasad was constructing some other building,in the year 1922, there is- nothing on record to support that theory. Babulal was certainly connected with the suit building and the reference in the said document must be to the suit building. This letter also shows that Ganeshprasad, presumably on behalf of the family, was giving moneys for the construction of the building. Ex. P-60-1-A is another letter written by Ganeshprasad to Babulal. Therein Ganeshprasad gave specific direction in regard to the construction of the building. The building referred to in this letter also must be the suit building.

Exs. D-63 to D-96 are the receipts for the amounts disbursed in connection with the construction of the suit building. Govindprasad states in Ex. D-3 that he used to hand over the money to his brother Ganeshprasad or Ratanlal for disbursement. This lame explanation cannot explain away the fact that the moneys were spent and receipts taken by the other members of the family in regard to the construc- tion of the house' Then remains the oral evidence of P.Ws. 4, 5, 9 and 13, who were some of the contractors connected with the construction of the house and they say that either Ganeshprasad or Ratanlal asked them to do the work and paid them the amounts clue to them. Their evidence is consistent with the evidence of Govind prasad in Ex. D-3. They are disinterested witnesses and their evidence can safely be accepted. There is also the evidence that the family liquor shop was located in the suit building and that must be so because it was built by the family.

The foregoing discussion of the evidence brings out the following facts: (i) the family had extensive business and was in a position to purchase the land and build the suit house; (ii) there is no reliable evidence to show that Govindprasad had separate income from which he could have set apart Rs. 15,000 and paid an additional sum of Rs. 6,000 for building the house; (iii) there is evidence that Ganeshprasad and Ratanlal supervised the construction of the building, paid the contractors and had taken receipts from them; and (iv) though the trustees under the trust deed pretended to function thereunder, they were the agents of the family and the trust was abruptly put an end to in 1921. On the said facts it must be held that the appellant has failed to prove that Govindprasad had self-acquisitions and the suit site was purchased and the building put up thereon with the private funds of Govindprasad.

Before we close this aspect of the case, the conduct of the respondent in not questioning the trust deed from 1916 to 1940, when he filed the suit, requires some explanation. The contesting respondent was a minor. Even after he become a major, he could not have had any grievance because the trust deed was executed for the benefit of the family. It is in evidence that Ratanlal, his father, was living in the house till his death in the year 1926. It is also in evidence that he was residing in the house from the year 1936. It is true that when the litigation between Rukhinabai and Chandanlal was being conducted he did not intervene; that may be because Chandanlal was his natural brother and he might not have thought fit to set up any claim against his brother. His conduct, therefore, is not such as to give rise to any inference that the trust deed was executed in regard to Govindprasad's self-acquired income, To summarize: There was no separation of the members of the family: all the members of the family continued to be joint and the family was doing business in different places. They had extensive properties and a fairly large income: they were also heavily indebted. The family was involved in debts in Ramasahai's life time and even after his death

the position continued to be the same. Various attempts were made to salvage the properties of the family and to keep both the movable and immovable properties not mortgaged from the reach of the creditors. The relinquishment deeds, innumerable mortgages, sale deeds and the trust deed were all executed as parts of the same scheme. We, therefore, hold that the suit property was the joint family property and the respondent is entitled to the declaration he has asked for, namely, that the trust deed dated January 17, 1916, was a colourable and fictitious document and could not affect the respondent's right to ownership of the property in the suit.

The next question raised by the learned Counsel for the appellant is that the suit should have been dismissed in limine as the plaintiff asked for a bare declaration though he was in a position to ask for further relief within the meaning of s. 42 of the Specific Relief Act. The proviso to s. 42 of the said Act enacts that " no Court shall make any such declaration when the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." It is a well-settled rule of practice not to dismiss suits automatically but to allow the plaintiff to make necessary amendment if he seeks to do so. The learned Counsel for the appellant contends that in the plaint the cause of action for the relief of declaration was given as the execution of the partition decree through the Commissioner appointed by the Court and, therefore, the plaintiff should have asked for a permanent injunction restraining the appellant from interfering with his possession. The appellant did not take this plea in the written statement; nor was there any issue in respect thereof, though as many as 12 issues were raised on the pleadings; nor does the judgment of the learned District Judge disclose that the appellant raised any such plea. For the first time the plea based on s. 42 of the Specific Relief Act was raised before the High Court, and even then the argument advanced was that the consequential relief should have been one for partition : the High Court rejected the contention on the ground that the plaintiff, being in possession of the joint family property, was not bound to ask for partition if he did not have the intention to separate himself from the other members of the family. It is not necessary in this case to express our opinion on the question whether the consequential relief should have been asked for; for, this question should have been raised at the earliest point of time, in which event the plaintiff could have asked for necessary amendment to comply with the provisions of s. 42 of the Specific Relief Act. In the circumstance, we are not justified in allowing the appellant to raise the plea before us.

This leaves us with the only surviving question, namely, whether the suit was barred by limitation. This point was raised for the first time in the High Court and the High Court allowed the same to be raised but negatived the contention. The learned Counsel for the respondent contends that, for the reasons mentioned in regard to the plea based upon s. 42 of the Specific Relief Act, we should also not allow the appellant to raise this contention either. But there is an essential distinction between the two contentions; while in the former case, if the contention was allowed to be raised, the, respondent would be prejudiced, in the latter case, even if this plea was taken at the earliest point of time, the contesting respondent would not have adduced better evidence or put before the Court further evidence. When the Court asked the learned Counsel to state what further facts he would have proved in respect of this plea if this contention was taken earlier, he was not able to suggest any. In the circumstances, when the appellate Court allowed the appellant to raise the plea of limitation, we do not think we are justified at this stage to say that the High Court should not have allowed the plea to be raised.

The argument on the question of limitation is put thus: The plaintiff, respondent herein, had knowledge of the fraudulent character of the trust deed as early as 1917 or, at any rate, during the pendency of the partition suit between Rukhmabai and Chandanlal instituted in the year 1929, and the suit filed in 1940, admittedly after six years of the said knowledge, would be barred under Art. 120 of the Limition Act. Article 120 of the Limitation Act reads:

Period Time from which Description of suit of period begins limitation. to run.

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120. Suit for which no period of limitation is Six years When the right provided elsewhere in to sue accrues.

this Schedule.

This Article was subject to judicial scrutiny both by the Judicial Committee as well as by the High Court of various States. The leading decision on the subject is that of the Judicial Committee in Bolo v. Koklan (1). Therein, Sir Benod Mitter, observed:

"There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted." The said principle was restated and followed by the Judicial Committee in Annamalai Chattiar v. A.M.K.C.T Muthukaruppan Chettiar (2) and in Gobinda Narayan Singh v. Shain Lal Singh (3). The further question is, if there are successive invasions or denials of a right, when it can be held that, a person's right has been clearly and unequivocally threatened so as to compel him to institute a suit to establish that right. In Pothukutchi Appa Rao v. Secretary of State (4), a Division Bench of the Madras High Court had to consider the said question. In that case, Venkatasiibba Rao, J., after considering the relevant decisions, expressed his view thus: " There is nothing in law which says that the moment a person's right is denied, he is bound at (1) (1929-30) L.R. 57 I.A, 325, 331.

(2) (1930) I.L.R. 8 Rang. 645.

(3) (1930-31) L.R. 58 I.A. 125.

(4) A.I.R. 1938 Mad. 193, 198, his peril to bring a suit for declaration. The Government beyond passing the order did nothing to disturb the plaintiff's possession. It would be most unreasonable to hold that a bare repudiation of a person's title, without even an overt act, would make it incumbent on him to bring a declaratory suit ".

He adds at p. 199:

" It is a more difficult question, what is the extent of the injury or infringement that gives rise to, what may be termed, a compulsory cause of action ? "

The legal position may be briefly stated thus: The right to sue under Art. 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right. The facts relevant to the question of limitation in the present case may be briefly restated: The trust deed was executed in 1916. The suit house was constructed in 1920. If, as we have held, the trust deed as well as the construction of the building were for the benefit of the family, its execution could not constitute any invasion of the plaintiff's right. Till 1926, the plaintiff's father, Ratanlal, was residing in that house. In 1928 when Daga challenged the trust deed, the family compromised the matter and salvaged the house. From 1936 onwards the plaintiff has been residing in the suit house. It is conceded that he had knowledge of the litigation between Rukhmabai and Chandanlal claiming the property under the trust deed; but, for that suit he was not a party and the decision in that litigation did not in any way bind him or affect his possession of the house. But in execution of the decree, the Commissioner appointed by the Court came to the premises on February 13, 1937, to take measurements of the house for effecting partition of the property, when the plaintiff raised objection, and thereafter in 1940, filed the suit. From the aforesaid facts, it is manifest that the plaintiff's right to the property was not effectively threatened by the appellant till the Commissioner came to divide the property. It was only then there was an effectual threat to his right to the suit property and the suit was filed within six years thereafter. We, therefore, hold that the suit was within time.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.