

lock or to assist the Harijans in entering the temple. If the view of the Collector is that there is a custom which entitled Hindus to enter this temple, if the view of the Jains is that there is no such custom, the proper forum for determining this disputed question of fact would be a Court of law, and if the Collector prosecutes the Jains, then this issue will come up before the Court and the Court on the taking of evidence will determine whether there is such a custom in existence or not. Apart from expressing this opinion, we do not think that any order is called for at our hands on this petition.

No order as to costs of the petition.

Order accordingly.

K. B. S.

1951
 BHAICHAND
 TARACHAND
 v.
 STATE
 OF
 BOMBAY
 Chagla C. J.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Vyas.

SHANKAR NATHU HALWAI (ORIGINAL DEFENDANT No. 1), APPELLANT
 v. NARAYANIBAI GANGARAM NATHU HALWAI (ORIGINAL PLAINTIFF'S HEIR), RESPONDENT.*

1951
 July 27

Hindu law—Suit for partition by coparcener—Coparcener dying pending suit—Whether widow entitled to continue suit as heir—Hindu Women's Right to Property Act (XVIII of 1937)—Right to partition, whether personal right—Civil Procedure Code (Act V of 1908), O. XXII r. 1.

G and S, two brothers were members of a joint Hindu family. In 1944 G filed a suit for partition and possession of his half share in the joint family properties. Pending the suit G died and his widow N was brought on record to continue the suit. S contended, *inter alia*, that N was not entitled to be brought on record as the heir and legal representative of her deceased husband and that the right to claim partition, being a personal right, did not survive after the death of G.

Held, (1) that by filing a suit for partition, G unequivocally expressed his intention to effect a severance of joint status and acquired merely on the institution of the suit an absolute right as owner in the properties which would fall to his share on partition. On the death of G, without leaving him surviving any son, N was entitled to inherit the separate property of G under the ordinary Hindu law, irrespective of the provisions of the Hindu Women's Right to Property Act, 1937, and enjoyed a Hindu Woman's estate therein;

* First Appeal No. 237 of 1949.

1951

SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM

(2) that the type of estate which was created in the Hindu widow under the provisions of the Hindu Women's Right to Property Act, 1937 was neither inheritance nor survivorship, but nevertheless it was an estate which devolved on her by virtue of her being the widow of her deceased husband and so far she could be aptly described as the heir and legal representative of her deceased husband. Considering the position under the said Act or under the ordinary Hindu Law, N, the widow of G was the heir and legal representative of her deceased husband and was entitled to continue the suit for partition;

Nagappa Narayan v. Mukambe,⁽¹⁾ referred to.

(3) that the right to partition is merely an incident of the proprietary rights which a person has got. A proprietary right of this nature is not a personal right and does not die with the death of the person enjoying the same.

Mt. Manglan v. Hira Singh,⁽²⁾ distinguished.

First Appeal against the decision of M. H. Kazi, Civil Judge, S. D., at Jalgaon.

One Nathu Halwai and his two sons Gangaram and Shankar were members of a joint Hindu family. Nathu had acquired considerable immovable properties and also established a confectionery and money-lending business. In 1922 he started a grocery business putting forward Shankar as a partner along with an outsider Sakharam. Sakharam retired from partnership in 1923 and Shankar continued the grocery business by himself. Nathu died just before the dissolution of the partnership. Shankar was more literate than Gangaram and he continued to manage all the properties of the family. Gangaram ultimately filed a suit against Shankar and his two sons for a partition of the joint family properties. During the pendency of the suit Gangaram died leaving him surviving his widow Narayanibai. Narayanibai was brought on the record of the suit and she continued the same when a contention was taken by Shankar that the suit could not be continued by Narayanibai.

The trial Judge held that Narayanibai was entitled to continue the suit. On merits also he disbelieved the several contentions raised by Shankar and passed a preliminary decree for partition and possession of half share in the suit properties.

Shankar appealed to the High Court and Narayanibai filed cross-objections in regard to some items of accounts.

R. B. Kotwal, for appellant.

⁽¹⁾ (1950) 53 Bom. L. R. 177.

⁽²⁾ [1931] A. I. R. Lah. 675.

V. S. Desai, for respondent No. 1.

B. N. Gokhale, for respondents Nos. 2 and 3.

BHAGWATI J. This is a first appeal from the decision of the learned Civil Judge (Senior Division) at Jalgaon who decreed the plaintiff's suit for partition.

One Nathu Halwai and his two sons Gangaram and Shankar were members of a joint and undivided Hindu family. Nathu had settled down at Jalgaon having migrated from Agra. He had made good and had acquired considerable immovable properties and had also established a confectionery and a money-lending business. In the year 1922 he started a grocery business, putting forward his son Shankar as a partner along with an outsider Sakharam. That partnership business was started in the name of Shankar Sakharam. Sakharam continued as a partner until June 7, 1923, when he retired, and Shanker continued the grocery business thereafter by himself. Nathu in the meanwhile died in the year 1923 just before the dissolution of the partnership between Shanker and Sakharam. Shanker was more literate than his brother Gangaram and he continued to manage all the properties of the family. In the year 1924 he purchased an immovable property for a consideration of Rs. 2,900. Two other immovable properties were purchased in the joint names of Gangaram and Shanker subsequently. The grocery shop, the confectionery business and the money-lending business continued. Gangaram ultimately filed a suit being Special Regular Civil Suit No. 10 of 1944 against Shanker and his two sons Namdev and Devi for a partition of the joint family properties. Besides the immovable properties which were specified in Schedule A to the plaint, he claimed to have a share in the properties which were specified in Schedules B, C and D to the plaint, which consisted of the money-lending business, ornaments and the outstandings of the confectionery business and the grocery shop. This suit of Gangaram was resisted by Shanker. He contended that in the year 1923 a partition had already been effected by Nathu amongst his two sons. At that time Nathu had four immovable properties being Nos. 1, 2, 5 and 6 in the Schedule A to the plaint and certain gold. Shanker contended that in that partition the immovable properties Nos. 1, 2, 5 and 6 were given by Nathu to him and the gold weighing about 200 odd tolas was given to Gangaram. Shanker further contended that the grocery business was his own exclusive business, that the immovable property No. 7 in the Schedule A to the plaint had been purchased by him out

1951

SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM

Bhagwati
J.

1951
SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM
Bhagwati
J.

of the income of the grocery business and that the said property No. 7 belonged absolutely to him. He admitted that immovable property No. 8 in the Schedule A to the plaint was joint property. In regard to immovable properties Nos. 3 and 4, his contention was that they were no doubt purchased in the joint names of Gangaram and himself, but Gangaram was to get a half share in them provided he gave his share of the consideration moneys paid for the purchase of those properties. Except, therefore, in these immovable properties No. 8 and Nos. 3 and 4 in Schedule A to the plaint, he denied that Gangaram had any interest in any other properties which were in his possession, and contended that Gangaram was not entitled to any share or interest in the same.

During the pendency of the suit Gangaram died leaving him surviving his widow Narayanibai. Narayanibai was brought on the record of the suit and she continued the same. On this, a further contention was taken by Shanker that the suit could not be continued by Narayanibai because there was a custom in the family of the parties under which a widow was not entitled to a share in the properties and also because, even if the Hindu Women's Rights to Property Act, 1937, (No. XVIII of 1937) applied, she got a special estate created in her which was neither succession nor survivorship and, therefore, she was not entitled to be brought on the record of the suit as the heir and legal representative of the deceased Gangaram.

The learned trial Judge negatived these contentions of Shanker and held that Narayanibai was entitled to continue the suit. On the merits also, he disbelieved the story of the partition in 1923 as also of the grocery business being the separate business of Shanker and the immovable property No. 7 being, therefore, the separate property of Shanker. He also disbelieved the story in regard to Gangaram having made himself liable for the payment of half of the consideration moneys paid for the purchase of immovable properties Nos. 3 and 4. He, therefore, decreed the plaintiff's claim for partition. So far as the grocery shop, the confectionery shop and the money-lending business were concerned, he recorded a finding in the negative in regard to issue No. 8 which was:

"Whether plaintiff proves the monetary dealings, the ornaments and the savings out of rent income as described in Schedule B, C and D?"

He did not, in terms, record any finding as to whether the grocery shop, the confectionery shop and the money-lending business belonged to the family at the date of the partition,

but allowed to the plaintiff an account of the decrees which had been obtained by Shanker in his name or by Gangaram and Shanker in their names, and also allowed to the plaintiff an account of the recoveries of the amounts of those decrees, if any, made by Shanker after the date of the suit.

Shanker filed First Appeal No. 237 of 1949 against this judgment and decree passed by the learned trial Judge, and Narayanibai filed cross-objections in regard to the accounts, which she contended she was entitled to, of the outstandings of the various businesses of the family and the recoveries, if any, made by Shanker after the date of the suit. This is the appeal which has come before us for hearing and final disposal together with the cross-objections filed by Narayanibai.

Mr. Kotwal appearing for Shanker has very strenuously contended before us that Narayanibai, the widow of Gangaram, was not entitled to maintain the suit. So far as Shanker's allegation in regard to the custom of the family debarring the widow from having share in the properties was concerned, Mr. Kotwal referred us to the evidence of Shanker and his four witnesses exhibits 151 to 154. These witnesses had deposed broadly to the existence of such a custom, but had not been able to give any instance in regard to the same. Exhibits 152 and 153 had been convicted under the Abkari Act. Exhibit 151 was doing business in the name of Shanker and both exhibits 151 and 152 were also the tenants of Shanker. All these witnesses had come to Jalgaon from U. P. some 15 to 20 years back to earn their livelihood and it was impossible to prove any custom of the nature alleged through their evidence. Apart from this, it also appeared to us on a perusal of the evidence of these witnesses that what they really deposed to was that the widow was not entitled to a share. Their evidence did not go to the length of suggesting that she was also not entitled to succeed to her deceased husband. That the widow is not entitled to a share is a well known proposition in Hindu law. She is not a sharer in any property which is left by her deceased husband. Except in the cases which are covered by the Hindu Women's Rights to Property Act, 1937 (No. XVIII of 1937) where in regard to the separate property left by her deceased husband she gets a share equal to that of a son, the widow would not be entitled to a share in the property of her deceased husband. She would be only entitled to a widow's estate therein which is a limited estate known to Hindu law. Even if her husband left a son him surviving, the

1951

SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM
Bhagwati
J.

1951

SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM
—
Shagwati
J.

son would be the heir of her deceased husband and she would be only entitled to residence and maintenance out of the estate. The depositions of these witnesses, therefore, did not carry the matter any further so far as Shanker's contention in regard to the custom of his family set up by him was concerned.

A more important contention, and a very interesting one at that, was raised by Mr. Kotwal basing his arguments on the provisions of the Hindu Women's Rights to Property Act, 1937 (No. XVIII of 1937). Mr. Kotwal contended that, after the enactment of this Act, all the rights which a widow had on the death of her deceased husband under the ordinary Hindu law, as it then stood, were abrogated, and the only rights which the widow got were under the provisions of this Act. Mr. Kotwal contended that after the passing of this Act, we had not got to fall back upon the ordinary position as it obtained under the Hindu law, under which the widow of a deceased Hindu, who had separate properties of his own, was entitled to succeed to his estate and enjoy therein the limited estate known as the Hindu woman's estate. All this, according to him, went by the board and we had got to look only to the provisions of the Act No. XVIII of 1937 in order to see what were her rights in property. He drew our attention to s. 3 (1) of the Act in which it is stated that when a Hindu governed by any other school of Hindu law (*i.e.* any other school except the Dayabhaga School of Hindu law) dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-s. (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son. He then referred us to sub-s. (3) of s. 3 which provides that—

"Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner."

He, therefore, argued that a widow succeeding to the separate property of her deceased husband got therein the same share as a son and that interest was a limited interest known as a Hindu woman's estate coupled with the same right of claiming partition therein as a male owner. When it was pointed out that this provision did not apply to the case of a widow or widows who succeeded to the deceased husband leaving separate property where the deceased husband left no son him surviving along with the widow or widows, Mr. Kotwal contended

that this provision applied even in the case of the deceased husband leaving him surviving no son or sons. When it was pointed out that in that event the words "be entitled.....to the same share as a son" in sub-s. (1) of s. 3 would be inappropriate, because, if there was no son left by the deceased husband him surviving, there would be no question of the widow (or widows) having the same share as a son, as in that case she would be wholly entitled to the separate property of her deceased husband, though as a limited owner, and she would be sharing that property with none. Mr. Kotwal then urged before us that, in the event of the widow adopting a son to her deceased husband, that son would be an heir to the estate of her deceased husband and in that event the question would arise of her sharing the estate of her deceased husband along with that son. We are afraid we cannot accept this argument which has been urged before us by Mr. Kotwal. The plain words of the section cannot be controlled by any such contingency as that of the widow adopting a son to her deceased husband. Whether she would adopt a son to her deceased husband or not would be a problematical event. She might have been even prohibited by her husband from adopting a son to himself. Her right to adopt may be of no avail by reason of various circumstances which are known to Hindu law. We cannot, therefore, in interpreting s. 3 of the Hindu Women's Rights to Property Act, 1937, take into account such a possibility as that of the widow adopting a son to her deceased husband. We have only got to construe the section as it stands and on a plain construction of the section, we are of the opinion that the case which has been contemplated in s. 3 (1) of the Act is the case where a Hindu dies leaving separate property and leaving him surviving a widow or widows and a son or sons; it is only in that case that this particular right of property is given to the widow or widows. A reference to the preamble of the Act would make this position very clear. The Act was enacted because it was deemed expedient to amend the Hindu law to give better rights to women in respect of property. There were certain rights which they enjoyed in respect of property, but they were very limited in character. In the case of a coparcenary the widow had no interest in the property of her husband which devolved upon the other coparceners of his by survivorship, except that of being maintained out of the same and having a provision for residence made for her thereout. In the case of the separate property of her deceased husband, the son or sons, if any, left by the deceased

1951

SHANKAR
NATHUv.
NARAYANI-
BAI
GANGARAMBhagwati
J.

1951

SHANKAR
NATHU

v.

NARAYANI-
BAI
GANGARAM*Bhagwati*
J.

took all the property by inheritance. There also the widow only got a right of maintenance out of the estate and residence therein. It was only in the cases where the deceased husband died leaving him surviving only a widow or widows, and no son or sons, that the position was that the widow or widows inherited to the estate of her or their deceased husband and got therein the limited estate known as the Hindu woman's estate. This was the widow's definite right which she enjoyed. This right was, in our opinion, not touched at all by the provisions of Act No. XVIII of 1937. There was no question thereof having a share in that estate which could be predicated as the same share as a son had, or in respect of which it could also be predicated that she would have the same right of claiming partition as a male owner. If there were no son or sons, and nobody else was interested in the property left by the deceased husband, with whom could the widow have a share or from whom could the widow claim partition as a male owner? The whole of the property had vested in her as the heir and legal representative of her deceased husband. She had a life estate in it and the whole property, except for the alienations which she made for legal necessity, would go to the reversioners of her deceased husband on her death. The provisions, therefore, contained in s. 3 (1) of Act XVIII of 1937 would be absolutely inappropriate in such a case. There was no question of enlarging her rights to the property or giving her better rights therein than what she already enjoyed. This case was, therefore, not touched by the Act at all. It was only in those cases which we have mentioned above, namely, the deceased husband leaving separate property and leaving him surviving a widow or widows and a son or sons, or the deceased husband dying as a member of a coparcenary leaving him surviving a widow or widows, that the widow or widows had no rights to the property left by the deceased husband or the property in which the deceased husband was interested as a coparcener, except that of being maintained thereout and having a right of residence therein. This was the limited right which was sought to be extended by the provisions of this Act and it was, therefore, that the Act was enacted to amend the Hindu law to give better rights to women in respect of property. These were certainly better rights than those which the widows enjoyed in the property left by their deceased husbands or in the property in which their deceased husbands were interested as

members of the coparcenaries. We are, therefore, of the opinion that Narayanibai, on the death of Gangaram without leaving him surviving any son or sons, was merely entitled to inherit the separate property of Gangaram under the ordinary position as it obtained under the Hindu law, irrespective of the provisions of Act No. XVIII of 1937, and enjoyed a Hindu woman's estate therein.

Mr. Kotwal further contended that if we accepted his contention that Narayanibai got an interest in the properties left by Gangaram under Act No. XVIII of 1937, the interest which she acquired was not acquired by her either by way of inheritance or by way of survivorship, but that it was a special legal estate which was carved out for her under the provisions of the Act which would not entitle her to maintain the suit which had been filed by Gangaram. He referred us to a judgment which was delivered by Mr. Justice Dixit and myself on the construction of the provisions of Act XVIII of 1937 and which is reported in *Nagappa Narayan v. Mukambe*,⁽¹⁾ where we have held that the estate which the widow got under the provisions of the Act was neither an estate of inheritance nor one which she got by survivorship. We held there that it was a misnomer to classify the estate into either of the two categories, inheritance or survivorship, and to hold that if it was not inheritance it was survivorship, or if it was not survivorship, it was inheritance. The type of estate which was created in the Hindu widow under the provisions of the Act was an anomalous one. It was neither inheritance nor survivorship, but nonetheless it was an estate which devolved upon her by virtue of her being the widow of her deceased husband. She had no independent right to the same. She was, therefore, held liable to have the property in her hands attached in execution of a decree which had been passed against her deceased husband at the instance of a creditor of his. That would not be the case if she had an independent interest in the property created in her by virtue of the provisions of the Act. Even though the estate which she thus got could not be liable to be classified into either inheritance or survivorship, she nonetheless got it as a widow of her deceased husband and so far she could be aptly described as the heir and legal representative of her deceased husband.

Considering, therefore, the position under the Hindu Women's Rights to Property Act, 1937 (No. XVIII of 1937), (even though we have held that the Act does not apply to the facts

1951

SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM

Bhagwati
J.

⁽¹⁾ (1950) 53 Bom. L. R. 177.

1951
 SHANKAR
 NATHU
 v.
 NARAYANI-
 BAI
 GANGARAM
 Bhagwati
 J.

of the present case), or under the ordinary Hindu law, Narayanibai, the widow of Gangaram, was the heir and legal representative of her deceased husband Gangaram for the purpose of being brought on the record of the suit and was thus entitled to continue the suit.

Mr. Kotwal, however, urged before us that under O. XXII, r. 1, of the Civil Procedure Code, it was only in those cases where the right to sue survived that the heir and legal representative could continue the suit. He urged that the right to partition was a personal right, that the right to sue for partition did not survive after the death of Gangaram and that, therefore, the suit which had been filed by Gangaram abated on the death of Gangaram. The main argument of Mr. Kotwal in this behalf was that the right to partition was a personal right. If that was a personal right the maxim *actio personalis moritur cum persona* applied, with the result that this right to partition which was enjoyed as a personal right by Gangaram died with him and Narayanibai could not continue the suit in exercise of that right. If Narayanibai had any right of her own to have a partition of the properties which were the subject-matter of the suit, she could exercise it by filing a separate suit in that behalf, but she could certainly not exercise it by continuing the suit which had been started by Gangaram in vindication of his own personal right. In support of this contention of his, Mr. Kotwal referred us to a decision of the Lahore High Court in *Mt. Manglan v. Hira Singh*,⁽¹⁾ and the remarks of Mr. Justice Broadway at page 676 (column 2):

"The broad principle appears to be that if a suit is instituted by a widow or the owner of a limited estate, which suit is in the interests of the estate of the last holder, then the reversioners would be entitled to continue the claim on the death of the plaintiff having only a limited interest. When however the plaintiff brings the suit in order to enforce his or her personal rights or claims, and if when her death brings those personal rights or claims to a definite end, then the reversioner or reversioners cannot be allowed to continue the suit."

We have no quarrel with the statement of law as it has been laid down in this decision. The case there was that of a widow or a limited heir prosecuting a claim which she had in that capacity by arriving at a partition of certain properties which had belonged to the estate of the deceased. That was no doubt a personal right enjoyed by her in her capacity as a limited heir and the suit was filed in order to vindicate that right. It was not a right which was enjoyed by the plaintiff as an

⁽¹⁾ [1931] A. I. R. Lah. 675.

absolute owner of the property. The Court there had to consider what would be the effect of the exercise by the limited heir of her personal right of partition. That right of partition was not the right of partition which an absolute owner of the property enjoyed. The personal right which the limited owner enjoyed came to an end with her death and the reversion opened up at that time and the reversioner, in his capacity as a reversioner of the original deceased, became the absolute owner of the property. He did not succeed to the limited owner. He succeeded to the absolute owner of the property who had died leaving as his heir the limited owner who inherited the property acquiring only a life interest therein. The case, therefore, before the learned Judges of the Lahore High Court was distinguishable from the case which we have before us, and it would be of no use merely to apply the general words or expressions used by the learned Judges in their judgment to the effect that the right to partition was a personal right enjoyed by the plaintiff. No doubt, so far as the plaintiff in the case before the Lahore High Court was concerned, it was a personal right, but, so far as the plaintiff Gangaram in the suit before us was concerned, it was certainly not a personal right, but a right which he had by reason of his being the absolute owner of the property. The right to partition is merely an incident of the proprietary rights which a person has got, and if Gangaram, by filing a suit for partition unequivocally expressed his intention to effect a severance of joint status, he acquired merely on the institution of the suit an absolute right as an owner in the properties which would fall to his share on partition. These were the properties which were then the subject-matter of the suit for partition which would be effected by the Court either by metes and bounds or by selling the property or properties under the provisions of the Partition Act. These were the separate properties which Gangaram left on his death and those properties devolved upon Narayanibai, his widow, as his heir under the Hindu law. In our opinion, the matter can be pushed one step further. After the suit for partition had been filed by Gangaram and a partition was thus effected of the properties belonging to the joint family of Gangaram and Shanker, there was no right of partition as such left thereafter. The properties had been partitioned by the institution of the suit, Gangaram enjoying a one half share therein being entitled thereto on such partition. The only thing which was left to be done by the Court was to

1951

SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM

Bhagwati
J.

1951

SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM

Bhagwati
J.

work out the partition which had been thus effected by a partition by metes and bounds or in the manner indicated above. Narayanibai by bringing herself on the record of the suit as the heir and legal representative of the deceased Gangaram was to continue the suit for carrying out this partition which had been effected on the institution of the suit by Gangaram. Even otherwise, the right which Gangaram had to claim partition of the joint family properties could not be said to be a personal right of his. It was a right which he enjoyed by virtue of his being the owner of these properties as a member of the coparcenary along with his brother Shanker. It was a proprietary right, and not a personal right. A proprietary right of this character cannot die with the death of the person enjoying the same. Personal rights of the nature which die with the death of the deceased are well known in law. They are rights of personal enjoyment of property like licenses, pensions, etc. They are rights to relief in respect of defamation, assault or other personal injuries not causing the death of the party. We need not multiply illustrations of this type. It is only those rights which are personal to the deceased that die with his death. The proprietary rights of the nature which we have got here, namely, the right to have a partition effected of the properties in which he is jointly interested with another or others, are certainly not personal rights and they do not die with the death of the deceased. We have, therefore, come to the conclusion that the right to sue survived and Narayanibai was rightly brought on the record of the suit as the heir and legal representative of the deceased Gangaram and was certainly entitled to continue the suit.

Coming to the merits of the appeal, Mr. Kotwal urged before us that there was the partition of 1923 effected by Nathu, the father of Gangaram and Shanker, under which the immovable properties Nos. 1, 2, 5 and 6 had been given by Nathu to Shanker and gold weighing about 200 tolas was given by Nathu to Gangaram. In regard to this partition also, the learned trial Judge disbelieved the story which was put forward before him. Apart from himself, Shanker examined two witnesses, exhibits 149 and 150, exhibit 149 being a pleader's clerk and the usual writer of Shanker's documents and exhibit 150 being a mason who had been employed by Shanker to construct a building. It is curious to observe that even though these witnesses deposed to this partition, there was no yadi or list of the properties ever made by them or

in their presence, and what is more, several properties were enjoyed thereafter by Gangaram and Shanker in common, rents were recovered by Gangaram as also by Shanker, both the brothers filed suits against tenants subsequently and both of them executed promissory-notes, etc., in favour of third persons. Shanker no doubt relied upon the fact that his name was entered as owner in the Record of Rights in respect of several immovable properties and that he paid the assessment or taxes alone by himself. These facts, however, do not necessarily go to show that Shanker was the absolute owner of these properties. The circumstances which we have mentioned above are enough indication to show that the story of the partition effected by Nathu in 1923 between his two sons Gangaram and Shanker is such as cannot be believed, and we are of the opinion that the learned trial Judge was right in disbelieving the same.

It was next contended by Mr. Kotwal before us that the grocery business which was started in 1922 was the separate business of Shanker and that the immovable property No. 7 having been purchased out of the moneys belonging to the grocery shop also belonged to Shanker. This grocery shop was started on April 28, 1922, and the partnership agreement was executed between Shanker on the one hand and Sakharam, the outsider, on the other. Mr. Kotwal further relied upon a promissory-note bearing date April 28, 1922, which was executed by Shanker and Sakharam in favour of Nathu in regard to a sum of Rs. 1,500 which was advanced by Nathu towards the capital of this grocery shop. He urged before us that if Nathu, Gangaram and Shanker, that is, all the members of the joint family, were really interested in this grocery shop putting forward Shanker as a partner *qua* the outsider Sakharam, there would be no reason why Shanker should execute the promissory-note in favour of Nathu, Shanker and Nathu being the two coparceners out of the three who were interested in the family. He also relied upon the fact that on June 7, 1923, there was a dissolution of the partnership and Sakharam retired and Shanker continued the grocery shop of his own and there was also an endorsement made on this very date June 7, 1923, at the foot of the promissory-note under which Shanker took over the liability under the promissory-note on himself alone. On all these materials Mr. Kotwal urged that Shanker was really the owner of this grocery shop and the family had nothing to do with the same.

1951

SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM

Bhagwati
J.

1951

SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM

Bhagwati
J.

There is no doubt that Rs. 1,500 was the capital which was invested in this partnership of grocery business and that Shanker was the person who was the partner of Sakharam. It is, however, well known that even though the whole of the joint family may be interested in the partnership venture, the person who has been shown as the partner in the partnership is the only person who is the legal owner of the partnership business and is the partner of the outsider who has been taken into the partnership. The member of the coparcenary who has been thus put forward as the partner may represent the whole of the joint family or the coparcenary in the partnership, but, so far as the relations between the partners are concerned and so far as the legal ownership of the partnership business etc. is concerned, he would be the only person having the rights as a partner and entitled to the properties of the partnership. The other members of the joint family or the coparcenary could look only to him and not to the outside partner. This being the position, the mere fact of the partnership agreement showing Shanker and Sakharam as the only two partners does not militate against the contention of Narayanibai that Shanker represented the joint family or the coparcenary in this business of the grocery shop. In regard to the promissory-note also, if there was only Shanker who was interested in this grocery shop, one could well understand the argument that he would not be expected to sign the promissory-note in favour of his father Nathu. We had, however, interested in this grocery shop an outsider Sakharam besides Shanker, and even if Nathu made an advance of Rs. 1,500 to the grocery shop out of the joint family funds and even though the joint family or the coparcenary was interested in that grocery shop, there would be nothing surprising in Nathu taking a promissory-note from Shanker as well as Sakharam so as, in any event to make Sakharam liable to the joint family in regard to the amount of the promissory-note which was really an advance made by the joint family or the coparcenary, for financing the business. The dissolution on June 7, 1923, followed the same pattern. It was necessary to have a deed of dissolution between Sakharam and Shanker and it was, therefore, but natural that when Sakharam retired, Shanker described himself as the sole owner of the business which was quite appropriate so far as Sakharam was concerned, though it may have been inappropriate as regards the interest which the joint family or the coparcenary had in the

business. The document, however, was concerned with the relations between Shanker and Sakharam, and not with the position as it obtained between Shanker and the other members of the joint family or coparcenary. The endorsement at the foot of the promissory-note dated June 7, 1923, also was to the same effect that, as between Sakharam and Shanker, Shanker took over the obligation or the liability under the promissory-note. That endorsement did not touch or affect the position as it obtained between Shanker and the other members of the joint family or the coparcenary.

We have thus observed that all these circumstances are not unequivocal in terms against the contention of Narayanibai. They are consistent with the position contended for by Shanker as also with the position contended for by Narayanibai. What is more, however, this promissory-note, though passed by Shanker in favour of Nathu, remained intact all throughout. No payment was made by Shanker to the joint family or the coparcenary thereunder and no moneys were either demanded by Gangaram from, or paid to Gangaram by Shanker at least to the extent of Gangaram's half share therein. As a matter of fact, the promissory note, though executed on April 28, 1922, continued to exist right up to the time when Shanker produced it in the record of this case, and that necessarily leads us to the inference that even though, when Sakharam, the outside partner, was interested in the grocery shop, that promissory-note was an effective one, it ceased to be of any effect and was treated as of no validity whatever and rightly so, after the dissolution of the partnership between Shanker and Sakharam. If this is the position, it goes to establish that the grocery shop was started by Shanker as representing the joint family or the coparcenary with a sum of Rs. 1,500 advanced out of the funds of the joint family and was really the business of the family. If the grocery shop was thus the business of the family, immovable property No. 7 which was purchased by Shanker ostensibly out of the income of the grocery shop also belonged to the family. Shanker has failed to prove before the Court below, and the onus of proving it, if it was his case, was on him, that he contributed any separate income of his towards the consideration for the purchase of the immovable property No. 7. There was sufficient nucleus of joint family properties at the time when this property was purchased in 1924 to provide the consideration for the purchase of the same. There was admi-

1951

SHANKAR
NATHU

v.

NARAYANI-
BAI
GANGARAM

Bhagwati
J.

1951
 SHANKAR
 NATHU
 v.
 NARAYANI-
 BAI
 GANGARAM
 Bhagwati
 J.

tedly a joint family between Gangaram and Shanker. There were admittedly joint family properties, particularly immovable properties Nos. 1, 2, 5 and 6, and if that was so, the onus lay heavily on Shanker to prove that the consideration moneys which were provided for the purchase of this immovable property No. 7 were provided by him out of his separate income or earnings. Shanker has failed to do so and, therefore, the result is that his immovable property No. 7 can be rightly claimed to be, and was rightly held by the lower Court to be, joint family property.

In regard to the immovable properties Nos. 3 and 4 also, the evidence of the same witnesses exhibits 149 and 150 was relied upon by Shanker, apart from his own testimony. These witnesses, as we have already pointed out, have not been believed by the learned trial Judge and they do not carry the case of Shanker any further. The onus lay on Shanker to prove that there was an agreement by Gangaram to pay one half share of the purchase moneys of these properties before he would claim a share therein. This onus he has failed to discharge. There is also a further position which obtains here, and it is that both Gangaram and Shanker continued to be joint until the present suit was filed by Gangaram for partition of the joint family properties between Shanker and himself. If both Gangaram and Shanker continued to be members of the joint family, it is curious to observe that when properties were thus purchased in the joint names of Gangaram and Shanker there should be an agreement of the type alleged by Shanker that Gangaram would pay his half share of the consideration moneys for the purchase of these properties. In all probability the consideration moneys came out of the coffers of the joint family, and if that was so, there was no case of any such agreement of the type alleged by Shanker having been arrived at between Gangaram and himself. We are, therefore, of the opinion that the decision of the learned trial Judge in this behalf also was correct and that there was no such agreement ever arrived at between Gangaram and Shanker as alleged by Shanker.

This is sufficient to dispose of the appeal, and the result, therefore, is that the appeal of Shanker, i.e., First Appeal No. 137 of 1949, will be dismissed and dismissed with costs in favour of Narayanibai.

Certain cross-objections were filed by Narayanibai and Mr. V. S. Desai urged before us that there were sufficient

materials on the record in the Court below to enable the Court to come to the conclusion that the grocery shop, the confectionery shop as well as the money-lending business were all the businesses belonging to the joint family. The grocery shop, we have already dealt with. The confectionery shop had been started by Nathu during his lifetime for the benefit of his daughter Lalibai who was a child widow. Lalibai, however, died 3 or 4 years before the filing of the suit and whatever was left of that business certainly belonged to the joint family. The money-lending business also was being conducted by the family, though not as a regular business in the manner in which shroffs or money-lenders do. There were, however, various amounts which had been advanced by the family to various impecunious persons. Promissory-notes were executed in favour of the family by these debtors. Decrees were also obtained in several suits which Gangaram and Shanker had both filed against the debtors and there is no escape from the conclusion that some sort of a money-lending business was being done by the family throughout. In regard to these businesses Mr. V. S. Desai contended before us that even though Shanker being the managing member of this family was not bound to render an account of his dealings therewith prior to the institution of the suit, Gangaram, and, after him, Narayanibai would certainly be entitled to an account from Shanker of all the assets and outstandings of these businesses, existing as at the date of the institution of the suit and of the recoveries, if any, he made after the date of the suit. We agree with the contention which Mr. V. S. Desai has urged in this behalf. So far as these businesses belonged to the joint family there must have been certain assets and outstandings thereof, and Shanker, the managing member of the joint family, as at the date of the institution of the suit for the partition, would certainly be accountable to Gangaram and Narayanibai in regard to these assets and outstandings and also the recoveries, if any, made by him thereafter. We, therefore, confirm the decree of the Court below, but add the following at line 7 on page 10 of the print after the words "Civil Procedure Code" and before the sentence "The rest of plaintiff's claim is disallowed." :—

"Defendant No. 1 will render to the plaintiff the accounts of the assets and outstandings, if any, of the grocery shop, the confectionery shop and the money-lending business belonging to the joint family as at the date of the institution of the suit

1951

SHANKAR
NATHU
v.
NARAYANI-
BAI
GANGARAM
Bhagwati
J.

1951
 SHANKAR
 NATHU
 v.
 NARAYANI-
 BAI
 GANGARAM
 Bhagwati
 J.

and will also account to the plaintiff for the recoveries, if any, made by him after the date of the suit, he being in his turn entitled to credit for the disbursements, if any, made by him and the debts, if any, paid by him".

There will be no order as to costs of the cross-objections, each party bearing its own costs thereof.

Decree confirmed.

K. B. S.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice.

1951
 July 27

VENILAL RANGILDAS PATEL (ORIGINAL OPPONENT), PETITIONER v. GANDABHAI BHAGWANDAS (ORIGINAL DECREE-HOLDER), OPPONENT.*

Civil Procedure Code (Act V of 1908), s. 73—Execution of decree for money—Attachment of judgment-debtor's fund lying deposited in another Court—Application by another judgment-creditor for execution after said attachment but before actual receipt of fund by executing Court—Whether latter judgment-creditor is entitled to rateable distribution.

A mere attachment by a judgment-creditor under O. 21, r. 52 of the Civil Procedure Code, 1908, of the judgment-debtor's fund in the custody of another Court without more does not result in the assets being received by the executing Court within the meaning of s. 73 of the Code. If another judgment-creditor of the judgment-debtor makes an application for execution of his money decree after such attachment but prior to the actual receipt of the fund by the executing Court, he is entitled to claim rateable distribution along with the first attaching creditor.

Narsingh Das v. Gulab Rai,⁽¹⁾ *Dattatraya v. Pundalik*⁽²⁾ and *Galstaun v. Woomes Chandra Bonnerjee*,⁽³⁾ distinguished.

CIVIL REVISION APPLICATION against the decision of R. K. Saklikar, Esquire, Joint Civil Judge (Junior Division) at Surat.

Execution proceedings.

One Venilal (petitioner) obtained a money decree against Gangaram Narsi in Regular Civil Suit No. 55 of 1938 in the Court of the Civil Judge (Junior Division) at Surat. Regular

* Civil Revision Application No. 990 of 1950.

⁽¹⁾ [1935] A. I. R. Pat. 201. ⁽²⁾ (1920) 22 Bom. L. R. 1001.

⁽³⁾ (1916) 44 Cal. 789.