

(1963) 08 PAT CK 0002
In the Patna High Court
Case No : A.F.O.D. No. 168 of 1950

Gulab Chand and Others

APPELLANT

Vs

Sheo Karan Lal Seth and Others

RESPONDENT

Date of Decision : 27-08-1963

Acts Referred:

Evidence Act, 1872 — Section 65, 74, 76, 77
Hindu Adoptions and Maintenance Act, 1956 — Section 22
Hindu Succession Act, 1956 — Section 14

Citation : AIR 1964 Patna 45

Hon'ble Judges : Tarkeshwar Nath, J;H. Mahapatra, J

Bench : Division Bench

Advocate : T.K. Prasad and Rai Sarda Prasad Choudhary, for the Appellant;
Prem Lal, Parmeshwar Prasad Sinha, Sachindra Chandra Mukherji, C.B.
Balwariar, K.P. Upadhya and Uday Sinha, for the Respondent

Final Decision : Partly Allowed

Judgement

Mahapatra, J.—Plaintiffs are the appellants. Plaintiff No. 1, who was the widow of Rai Bahadur Ramnarain Lal Seth, died during the pendency of the appeal in this Court and no one was substituted in her place. Plaintiff No. 2, who was minor, has now become major and plaintiff No. 3 is still minor under the guardianship of his brother plaintiff No. 2. The suit was for partition of the joint family properties in which plaintiff No. 1 claimed one-fourth and the other plaintiff one-sixteenth each.

2. One Ganesh Ram Seth died leaving two sons Rai Bahadur Ramnarain Lal Seth and Baiju Lal Seth. The latter died on the 20th of October, 1913, leaving his widow Mt. Lakshmi Bai who was defendant No. 6 (respondent No. 5) in this appeal. Ramnarain Lal also died in 1932 leaving his widow Mt. Jaraw Bai (plaintiff No. 1) and three sons Sheo Prasad Lal, Sheo Karan Lal and Sheo Lal. These three sons of Ramnarain Lal were impleaded in the suit as defendants 3, 1 and 4, respectively. Defendant No. 2 is the son of Sheo Karan. Defendant No. 5 was

Babu Lal, son of Sheo Lal who is now dead. Defendant No. 1 is also dead; but his son defendant No. 2 is already on record. Plaintiffs 2, 3 and 4 were the sons of Sheo Prasad, defendant No. 3 of them, plaintiff No. 4 Shree Ram is dead and expunged from the record under order No. 231, dated the 8th February, 1945 by the trial Court. From this short genealogy it would appear that the suit was by Ram Narain Lal's widow and three of his grandsons. It was claimed that all the parties belonged to a Hindu joint Mitakshara family owning the suit properties in which the plaintiff No. 1 would have 4 annas and each of the branches of her three sons Sheo Prasad, Sheo Karan and Sheo Lal would have 4 annas share. Defendant No. 6 will have no share as her husband died in 1918 in joint status with other coparceners.

3. In the plaint, by way of an amendment, it was stated that there was no partition of movable and immovable properties in the family in August 1936 as alleged by defendant No. 1. If there was any such partition it was not for the benefit of the minor plaintiffs and they were not bound by that. Plaintiff No. 1 was not a party to that partition and she was also not bound by that. The alleged partition was also not acted upon.

4. Defendant No. 1, Sheo Karan Lal set up his adoption to Baiju Lal. He also supported the previous partition by which he was given 8 annas share in the joint family properties. His son, who was minor defendant No. 2, adopted his case in the written statement through his pleader guardian. Defendants 3, 4 and 5 supported the plaintiffs.

5. In the written statement filed in Court on behalf of defendant No. 6 on the 26th May, 1942, the previous partition in the family on the 8th of August, 1936, and the adoption of defendant No. 1 by Baiju Lal were admitted. Later, on the 22nd February, 1947, another written statement was filed by defendant No. 6 in which she alleged that the plaintiffs' suit was in collusion with defendants 1 to 5 with a view to depriving defendant No. 6 of her inheritance of 8 annas share belonging to her husband Baiju Lal who died in a state of separation from his brother. She disputed the adoption of Sheo Karan Lal to Baiju Lal as alleged in the written statement of defendant No. 1. There was an unsuccessful effort on the part of the plaintiffs in the trial Court to discard the later written statement of defendant No. 6. I have not referred to other details in the pleadings of the parties as the point involved in this appeal does not make it necessary. In brief, the main controversies between the parties were in regard to a previous partition, adoption of defendant No. 1 and separation of defendant No. 6's husband before his death.

6. The trial Court decreed the suit in part declaring the share of the parties as follows; Plaintiff No. 1 2 annas, plaintiffs 2 and 3, 1 anna 4 pies, defendant No. 3, 8 pies, defendants 1 and 2, 2 annas, defendants 4 and 5, 2 annas and defendant No. 6, 8 annas. A preliminary decree was passed accordingly. The findings of fact were that there had been separation between Baiju Lal and Ramnarain Lal before the former died and, as such, defendant No. 6 was entitled

to a half share in the family properties which belonged to her husband; there was no adoption by Baiju Lal of defendant No. 1; and the partition held in the family in 1936 was invalid, The plaintiffs felt aggrieved by this preliminary decree and came to this Court in appeal to challenge mainly the finding about 8 annas share of defendant No. 6 on the basis of separation of her husband from his brother. No other finding of the Court below is in dispute in this appeal.

7. The admitted position is that if Baiju Lal, husband of defendant No. 6, died in a state of jointness his widow will not be entitled to any share but only maintenance as Baiju Lal died in 1918. In that case defendant No. 1's widow, who has been substituted after the death of defendant No. 1 along with his son defendant No. 2 will get one-third share and defendant No. 4 will also get one-third and each of the plaintiffs 2 and 3 one-ninth share, while defendant No. 3 will have another one-ninth share in the suit properties. The position will be so as plaintiff No. 1, who would have been otherwise entitled to a share, has died in the meanwhile. The only point, for consideration in this appeal is, therefore, whether Baiju Lal was separate from his brother Ramnarain Lal which was the case of defendant No. 6. Defendants 1 and 2 have remained content with the finding against them on the question of adoption of Sheo Karan Lal by Baijulal. Similarly, there is no challenge to the finding that although there was a partition between the three sons of Ramnarain Lal in 1936, it was not for the benefit of any of the plaintiffs and, as such, they were not bound by that.

8. On the question of separation, the case of defendant No. 6 was that there was division of cash and movables of the family when the two brothers, Ramnaraina and Baiju Lal, separated but the immovable properties and the business remained joint. She did not disclose in the written statement or in evidence the date, month or year of separation. She was the only witness on her side, the other one being a pleader who attempted to prove a certain copy of the plaint which was filed in Court by the two brothers in a mortgage suit. About the exact date of death of Baiju Lal, the only evidence is from defendant No. 3 Sheo Prasad which was accepted by the Court below. That was the 20th October, 1918. Several documents pointed out by the plaintiffs indicating jointness between the two brothers were discarded by the trial Court on two grounds. Documents prior to March 1918 were not taken into account as proof of jointness as those documents were not inconsistent with the intention of separation of the two brothers as revealed from a certified copy of the plaint filed in a mortgage suit on the 9th March 1918. This was marked as Ext. E-2. Other documents subsequent to this date were rejected as they were inconsistent with the fact of separation mentioned in Ext. E-2. The trial Court did not hold that any of the documents relied upon by the plaintiffs to rebut the case of separation of Baiju Lal was not genuine or suffered from any infirmity.

The presumption of jointness between brothers in a Mitakshara Hindu family is a strong one and the onus to repeal it lies heavy on the party who alleges separation. Baiju Lal died at the age of 35 or 36. By then, he had married three

times and had four daughters. Defendant No. 6, his third wife, was only 16 or 17 when Baiju Lal died in October, 1918. She had joined her husband only about three or four years before that. The family was in affluent circumstances wielding great influence in the town. Ramnarain Lal was a Rai Bahadur. There was business of the family. Amity was not wanted between Ramnarain Lal and Baiju Lal, In such circumstances there was hardly any probability of a separation between the two brothers. If there would have been any, that would have ended with a complete division of immovable properties and business. A large number of houses was owned by the family in the town of Hazaribagh besides other landed properties.

The three circumstances from which the Court below drew an inference in support of separation were as follows: (1) Defendant No. 6 from the time of her marriage and after the death of her husband was living in the old house of the family, whereas other members of the family came to live in a new house; [2] defendant No. 6 used to go to Saraiya shops which admittedly belonged to both the brothers till Baiju Lal's death; and (3) separate items of deposits and withdrawals were shown in the bahi khata in the name of Baiju Lal. The Court below has not given any reference of the time of such entries. The residence in a separate house is no pointer in the present case because Baiju Lal was living in that house during his life time, and after his death his widow would naturally like to continue in the same house, particularly when she began to live with two of her own relations.

In a family of affluence and business, it is not a rare feature that different members live separately to have greater freedom and exclusive comforts. The mutation of that residential house with the municipality in the name of defendant No. 6, as was strongly pleaded on her behalf, was not accepted by the Court below to be above suspicion for It was found that another municipal register (Ext. 23) belied that. Thus the residence of defendant No. 6 in that house is of little consequence so far as the proof of separation between her husband and his brother is concerned. If there was any separation before his death, defendant No. 6 would not have waited for over 30 years without asking for a division of the immovable properties and business assets, particularly when, according to her case, she was not receiving sympathy and cordial treatment from the members of the other branch. Her brother, according to the evidence was taking interest in her affairs and he would not have allowed the complete partition to wait indefinitely. In my view, the probability and the circumstances of the case are against defendant No. 6.

9. I have already said that the time of the alleged separation between Ramnarain Lal and Baiju Lal was not stated in the written statement or in evidence of defendant No. 6 or of defendant No. 1. The trial Court has proceeded on the basis that both the brothers expressed their clear intention to separate from each other on the 9th of March, 1918, when a plaint in a mortgage suit was filed by them in Court. The certified copy of that plaint is Ext. E-2. Documents marked as

Exts. 15, 15-1 (of 1909). E-1, 10, 9, G-1 (of 1912), H series (of 1916), 11-c to 11-e (of 1917) and 12 (of 1917) were relied upon by the plaintiffs in the trial Court to show that the two brothers were joint.

The learned Subordinate Judge did not attach any importance to these documents although he did not find them to be otherwise unreliable, as they were of a period prior to March 1918 when Ext. E-2 was filed in a Court by the two brothers. Admittedly, therefore, there was no separation in the joint family of Ramnarain Lal and Baiju Lal till March 1918.

Other documents, such as, Exts. 11 to 11-b, war bond receipts, issued in the joint names of Ram Narain Lal and Baiju Lal on the 23rd August, 26th August and 16th July of 1918 and Exts. 13 and 13a, two letters from the Assistant Accounts Officer, Ranchi, to the Treasury Officer Hazaribagh on the 3rd September, 1918, directing the latter to pay Ramnarain Seth and Baiju Lal Seth jointly the interest accrued to their war bonds were dismissed from consideration of the trial Court for the simple reason that the two brothers had already on the 9th of March, 1918 broken the joint status by filing the plaint [Ext. E-2]. In one of the paragraphs of that plaint there was a recital that the two plaintiffs, namely, Ramnarain Lal and Baiju Lal had divided some properties between themselves after separation and in the bond in suit (Mortgage Suit No. 35) the share of each of the plaintiffs was half and half.

On this statement, the view taken by the trial Court was that there was a severance of the joint status between the two. In that context, joint war bonds by or joint payment of interest thereon to the two brothers did not impress the Court below as anything substantial to counteract the severance of the joint status as proved by Ext. E-2. Thus on the side of defendant. No. 6 the only proof of separation of her husband is the filing of the plaint (Ext. E-2) on the 9th of March, 1918. Baiju Lal died on the 20th of October, 1918, that is, about seven months after the filing of the plaint,

10. Learned counsel for the plaintiff-appellants raised objection against the admissibility of Ext. E-2 on the ground that it was only a certified copy put in evidence without proving the loss or destruction or unavailability of the original plaint. Section 65 of the Indian Evidence Act provides for the admission of secondary evidence of the existence, condition or contents of a document in some specified cases. Clause (c) of that section says that when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time, secondary evidence may be given of the existence, condition, or contents of that document. The original plaint, though called for by defendant No. 6, was not proved to have been destroyed. No objection appears to have been taken by the plaintiffs at the time of admission and marking of the certified copy as Ext. E-2. Learned counsel pointed out from the judgment of the trial Court that serious objection was raised before it about this document. That objection was that the certified copy was a forgery, and that although it had been

obtained in 1947, it was not produced in Court till July 1949. The objection was thus not about the mode of proof of the secondary evidence. A requisition for calling the original plaint from the Court was sent at the instance of defendant No. 6, but that came back as there was some defect in that requisition. If the correct objection was taken by the plaintiffs when the certified copy of the plaint was tendered in evidence, further steps could have been taken by the defendant to call for the original plaint.

Whether, according to the rules and practice, the original plaint in a mortgage suit was actually destroyed after 25 years of its filing is not definitely known. It is well-settled that objections about the admissibility or the mode of proof of a document should be raised at the trial. That kind of grievance at a later stage during the appeal brings inconvenience to the parties and frustrates the ends of justice on technical rules (see *Ramlochan Misra v. Harinath Misra*, 67 Ind Cas 628 : (AIR 1922 Pat 565); *U. Hanumanthu v. P. Samacharlu*, 33 Ind Cas 188 (1) : (AIR 1917 Mad 671); and *Shahzadi Begam v. Secy. of State*, ILR 34 Cal 1059 (PC)).

Learned Counsel for the appellants drew our attention to the case of AIR 1946 24 (Privy Council) , where Lord Thankerton, with reference to a power of attorney, given by a bank in favour of one Balakram, observed that as the principal of the power of attorney was not produced and its disappearance, or the impossibility of producing it in the view of the Courts in India had not been satisfactorily proved, the conditions u/s 65 of the Evidence Act were not fulfilled and, as such, the secondary evidence of producing a copy of that power of attorney was rejected. It does not appear from that judgment if or if not, objection in that respect was taken in the trial Court.

Another case relied upon was *Mohanlal Sah and Another Vs. Samal Ram Potdar and Others*, . There the loss of the original document was alleged to be due to fire which destroyed the house of the pleader's clerk to whose custody the original document was given. The trial Court as well as the first appellate Court did not believe the story of fire and thus the loss of the document was not proved. In that view, the secondary evidence in the shape of a certified copy of a mortgage deed was ruled out. The case of *Mt. Khedia Vs. Mt. Turia and Others*, , on which the appellants also relied has no application as the facts and the point of decision in that case were different. The salutary rule will, therefore, be that such objection should and must be raised, if the party wants to take advantage of it, at the trial stage and not in an appeal for the first time. The ordersheet and the list of exhibits maintained by the trial Court do not reveal that any objection was taken by the plaintiffs on this account.

11. Witness No. 2 for defendant No. 6 was a pleader who deposed that he had filed a mortgage suit on behalf of the two brothers Ramnarain Lal and Baiju Lal. On reading the certified copy he said in examination-in-chief that the contents were the same as in the original plaint which was drafted under the instructions of the plaintiffs (the two brothers). Thus the certified copy came to be marked as

Ext. E-2. In cross-examination, however, the witness" said that he could not remember the contents of the plaint and he had no independent recollection of that. The nature of that evidence could not have proved the contents of the plaint. Apart from that, the witness did not attempt to prove anything beyond the contents of the plaint.

Secondary evidence is given to prove the existence, condition or contents of a document and nothing more beyond that. If a document is alleged to have been signed by any person, the signature must be proved to be in the handwriting of that person, Section 67 makes that clear also. The whole, case of defendant No. 6, as accepted by the Court below on the question of separation of Baiju Lal, was that the two brothers had filed the plaint making a statement therein about their separation.

Mere statement in the plaint is not enough until the subscription to that statement is proved to have been made by both or one of the brothers. A plaint is signed and verified by the plaintiff. That is the way in which the plaintiff subscribes to the statements made in the plaint. In that mortgage suit, both the brothers" Ramnarain and Baiju were the plaintiffs. The signature of neither of them has been proved by the witness No. 2 for defendant No. 6 or any other witness in the case and that demolishes the very basis of proof of separation in this case. Contents of a document will not prove the execution of it.

In that view, neither Ramnarain nor Baiju Lal has been proved to have made any statement in the plaint to the effect that they were separate. The making of such statement or the filing of the plaint containing such statement cannot thus be used in the present case as any proof of the intention to sever the joint status of the family. Neither separation nor intention to separate has been proved. Baiju Lal cannot be said to have died in a state of severance from the joint family. As such, defendant No. 6 cannot be entitled to 8 annas or any share in the proper ties of the joint family. On the death of Baiju Lal, an undivided member of a joint family, other coparceners took the estate by survivorship, the widow being entitled to only maintenance.

12. For the respondent [defendant No. 6) it was con-tended that Ext. E-2, being a certified copy of a plaint, it would prove, without any further evidence, the contents of the original plaint including the signatures of the plaintiffs on that point. In other words, the argument was that the plaint filed in a Court was a public document, a certified copy of which could be granted u/s 76 of the Indian Evidence Act, and when so granted, it will prove the contents of the original by the mere filing of it u/s 77.

What are public documents are stated in Section 74 of the Evidence Act: Documents forming the acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth or of a foreign country have been described as public documents. I cannot see how a plaint filed by a

private person in Court to institute a case against some others can come within the descriptions of the documents given in that sub-section. Sub-section (2) of Section 74 can in no way include a plaint. The plaint is neither an act nor the record of an act of any public officer. There can be no strength in the contention that when the plaint is presented and the Court makes an order admitting or registering it, the plaint becomes an act or the record of an act of a public officer presiding over the Court. At the most, it will become a part of the record maintained by the Court in that case after the plaint is admitted and registered, but that itself will not make it a public document. If it were, then anything filed in a case in a court of law either petitions or pleadings, private communications or documents which a party would file in a case would become public documents for the simple reason that they are on the record of a case in Court. The judgment and decree passed in a case are undoubtedly the acts of the Court, and they will be public documents on that account. Similarly, a petition of compromise which is made a part of the decree forms a part of the public document, but before its incorporation in the decree, it remains a private document, though filed in Court, forming a part of the case record.

13. Learned counsel for the respondent relied upon some cases to support the view that a plaint or a written statement filed in a case are public documents. The case of *Mahomed Shahaboodeen v. Wedgebarry*, 10 Beng LR App. 31, was very much relied upon. No doubt, in that case a certified copy of the plaint was admitted on the ground that the plaint was a public document as it formed a part of the record but a certified copy of a written statement which was filed in the case was rejected. If a plaint could be a public document, there is no reason why the written statement should not come in that category; but the view taken in that case about the plaint being a public document and, as such, provable by the production of a certified copy did not find favour in any other Court. Authors on evidence like Field and Woodroffe doubted the correctness of that view also in their commentaries.

A Division Bench of this Court in the case of *Tarkeshwar Prasad Tewari Vs. Devendra Prasad Tewari*, , rejected that view and noted that the Original Side of the Calcutta High Court did not accept the plaint and written statement to be public documents. In that case, a certified copy of a plaint dated the 10th of March 1900 which purported to have been signed by one Ramrup for self and for Ram Suraj Tewari, a minor, was tendered in evidence to prove the age of Ram Suraj. The learned Judges definitely held that the certified copy of the plaint should not have been admitted in evidence as the plaint was not a public document and, as such, not provable by a certified copy.

Learned counsel also referred to the case of *Somanna v. Subba Rao*, AIR 1958 Andh Pra 200. That case need not detain us long as that case dealt with the question whether an Income Tax return as well as a statement filed in support of it, were public documents within the meaning of Section 74 of the Evidence. Act and whether certified copies thereof would be admissible u/s 65(e) of the Act, in

spite of the provisions contained in 65(e) 54 of the Income Tax Act by which a Court is prohibited from requiring a public servant to produce any document mentioned in that Section, or to give evidence in support of that. An Income Tax return is on a different footing and cannot be equated with the plaint which a party chooses to file in a Court. The returns are filed under the Income Tax Act under the statutory obligations imposed by that Act.

In the case of *Bhinka and Others Vs. Charan Singh*, , a certified copy of a Khatauni (record of rights) came for consideration on the stand-point of its admissibility in evidence. Record of rights cannot be doubted to be a public document and, therefore, it can be proved by secondary evidence u/s 65(e). But in that case, however, as the certified copy was not issued in compliance with the provisions of law in that respect, their Lordships of the Supreme Court held that the presumption of genuineness arising from a certified copy of a public document was available to the party which sought to rely upon that. I do not find how this case could assist the respondent.

There were two other cases from which help was sought : *Unide Rajaha Raje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo*, 7 Moo Ind App 128 (P C) was of the year 1858 before the Indian Evidence Act came into force. A copy of Kaifiyanamah which purported to have been addressed to the East India Company by one of the defendants in that suit came to be judged about its admissibility. The document was of the 19th July 1842. Objection against the document being taken in evidence was ruled out by their Lordships of the Judicial Committee, but that was not on the ground that the Kaifiyanamah was a public document or that its copy, certified to be a true copy by the Collector, was admissible under the principles now contained in Clause (e) of Section 65 of the Indian Evidence Act. The learned Judge, while dealing with that matter, observed that no strict rule could be prescribed with regard to the admissibility of evidence in the Courts in India in spite of the fact that the rules of evidence, as acknowledged and carried out in the English Courts, were highly valued by the Judicial Committee. Those rules were not applicable with the same strictness in the Courts in East Indies at that time where the practitioners and the Judges did not have the intimate acquaintance with the principles which governed the reception of evidence in the English Tribunals. It cannot be argued now that the Indian Courts or the legal practitioners in India suffer from that disability at the present time, long after the rules of evidence were very carefully codified and put into practice by the Indian Evidence Act since 1872.

The case of *Naragunty Luchmedevama v. Vengama Naidu*, 9 Moo Ind App 66 (PC), can be dismissed from our consideration on the similar ground that the case was decided in 1861. From the facts stated in that judgment, it appears that the plaintiffs in that case produced a document which, if genuine and correct, established beyond doubt that the plaintiffs and the appellant's husband were members of the same family and the suit property was ancestral. That document was a copy of the paper in the custody of the Collector Chittoor who

had received the original sometime in 1802.

Objection was taken against that document on the ground that it was only a copy in a loose paper of which the original had not been produced; how the Collector came in possession of that was not satisfactorily accounted for and that there was no signature on that copy. Their Lordships discussed the circumstances under which that paper had been lodged with the Collector and were fully satisfied by them. The paper purported to be a copy of the returns made to the East India Company by the then Polligar (zamindar) giving the particulars of the property which was in his possession but was seized by the Company at the time of conquest. The accuracy of the copy so produced and its genuineness were accepted by the Judicial Committee beyond controversy; and in that view, they held that it was a proper evidence for consideration.

Besides the fact that the admissibility of that document was judged not with reference to any code on evidence which had not by that time come into force in this country, the Judicial Committee accepted that document not as a public one nor as proved by the certified copy. It was taken, if it can be said so, as a secondary evidence of which the original could not be produced for satisfactory reasons. All the cases thus relied upon by the respondent do not support her contention that the plaint of which Ext, E-2 is a certified copy was a public document and capable of being proved by the production of a certified copy.

14. I have already referred to the case of Tarkeshwar Prasad Tewari Vs. Devendra Prasad Tewari, , where a plaint was held not to be a public document and the certified copy thereof was rejected from evidence. In the case of Akshoy Kumar Bose and Others Vs. Sukumar Dutta and Others, , a written statement filed in a previous suit was set down as not a public document and its certified copy was not admissible in evidence without calling for the original. Mere production of a certified copy in such a case was found to be not sufficient secondary evidence of its contents without any further evidence. An admission in that written statement was sought to be relied upon by the defendants and for that purpose they had marked its certified copy as Ext. 3 in the trial Court. In the High Court, it was dismissed from consideration as it was not a proper secondary evidence under the provisions of Section 65 of the Evidence Act.

In the case of AIR 1943 54 (Oudh) , it was similarly held that the plaint is a private document and it must be proved by direct evidence. No formal evidence was given about that plaint. The lower Courts had drawn a presumption from the certified copy of the plaint about its genuineness but that was held to be an incorrect approach. A similar view that a plaint is not a public document and that it should be proved like any other private document was taken in the case of Manbodh v. Hirasai, AIR 1926 Nag 339. I need not multiply citations except to make a reference to the case of Lakshan Chandra Mandal Vs. Takim Dhali and Others, , where the celebrated Judge, Sir Ashutosh Mukherjee observed that the distinction between the admissibility of a document as evidence of a transaction and the admissibility of a document in proof of a statement contained therein is

of a refined but of a fundamental character though frequently overlooked. For that, the learned Judge referred to several cases including Tripurana Seethapati Rao Dora Vs. Rokkam Vencanna Dora and Others, .

A plaint may be admissible in proof of the fact that a particular suit was brought by a particular person against someone on a particular allegation; but it cannot be admissible to prove the correctness of a statement contained therein unless it is proved by direct evidence or by secondary evidence as provided in the Evidence Act. In instant case before us, the question was whether the statement that the two brothers Ramnarain Lal and Baiju Lal were separate as contained in the plaint (Ext. E-2) was made by both or one of them in March 1918. That could not be proved by definite evidence that they made such statement in that plaint. This could be done either by direct or by secondary evidence but certainly not by merely producing a certified copy of the plaint, or by the kind of evidence given by D.W. 2 on the side of defendant No. 6.

15. It was urged on behalf of the defendant No. 6 that u/s 22 of the Hindu Adoptions and Maintenance Act, 1956, the heirs of Baiju Lal are bound to maintain defendant No. 6 as one of his dependants out of the estate inherited by them from Baiju Lal. Sub-section (2) of that section says:

"Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the deponent shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate".

There cannot be any manner of doubt that the provisions of Section 22 are prospective and cannot be taken advantage by the widows of persons who died before the commencement of this Act. Even otherwise, she was entitled, as the widow of a deceased coparcener, to be maintained by the joint family after the death of her husband.

16. According to the finding of the trial Court, which is not challenged before us, she has been since the date of Baiju Lal in possession of the "old house" of the family. It is not the plaintiffs' case nor that of any one that she got into possession of that joint family property in lieu of her maintenance under any agreement with the members of the family. Her stand was that her husband had died as separate from the coparceners and the "old house" belonged to him and after his death she continued in that building. In that case, her possession over this building was adverse to the other members of the family including the plaintiffs. (See Satgur Prasad v. Rajkishore Lal 46 Ind App 197 : (AIR 1919 PC 60), Mst. Kirpal Kaur Vs. Bachan Singh and Others, and Penumarthy Veera Panasa Ramanna Vs. Penumarthy Sambamoorthy and Others, .

Such adverse possession has been since 1918 when Baiju Lal died, and by the 17th June, 1956, when Hindu Succession Act came into force, she had prescribed her limited title to that property against other members of The family. u/s 14 of that Act (Hindu Succession Act 1956) she has become full owner of that

property. Even if she was in possession of that property in lieu of maintenance, her title will be absolute also. In any view that "old house" cannot now be partitioned as belonging to the joint family. Holding No. 920 in Ward No. 7 of the Municipality of Hazaribagh has been referred to as the "old house".

17. For the defendant No. 6, it was also pressed that her maintenance should be settled in this suit on the lines indicated in the case of AIR 1929 128 (Privy Council) , as all the coparceners who succeeded to her husband's estate by survivorship are breaking the joint family which was bound to maintain her. That she has a legal claim for being maintained by the plaintiff and other defendants out of the joint family property, both before and after its partition, cannot be doubted or disputed. And in a suit for partition the determination of such maintenance is not foreign. If the person entitled to maintenance asked for it. Unfortunately the attitude of the defendant No. 6 was different -- so far we have no materials before us, as no evidence on this aspect was tendered, to ascertain what will be a reasonable amount for her maintenance for which other parties will remain liable and for which some of the joint family property could be charged, irrespective of their allotment to any of the parties. It will remain open, in case of necessity, to the defendant No. 6 to bring a suit for that purpose, unless the parties agree to incorporate that in the final decree in this suit.

18. In view of the finding that the family was joint, the properties in suit other than holding No. 920 in Ward No. 7 of the Municipality referred as "old house" will be partitioned. Plaintiff No. 1, Mt. Jaraw Bai, widow of Ramnarain Lal, having died in the meanwhile, plaintiffs 2 and 3 will each set one-ninth share, defendant No. 3, their father Sheo Prasad will also get one-ninth share. The original defendant No. 1 having died, his widow, who is respondent No. 1 (3) in this appeal and defendant No. 2 Loknath, her son, will get one-third share. Similarly, defendant No. 4, Sheo Lall, will be entitled to one-third; share. The preliminary decree passed by the trial Court will be modified in aforesaid manner.

19. The result is that the appeal is allowed in part, but there will be no order for costs in this Court.

Tarkeshwar Nath, J.

20. I agree.