

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 623 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

SHETH NAVINCHANDRA CHOOTALAL

Versus

SHETH CHOTTALAL UJAMSHIBHAI -: DELETED :-

Appearance:

MR KG VAKHARIA for Appellant
MS AVANI S MEHTA for Appellant
MR DD VYAS for Respondents No. 1,3-5
NOTICE UNSERVED for Respondent No. 2

CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 30/09/2002

ORAL JUDGEMENT

1. This appeal by the original plaintiff is directed

against the judgment and preliminary decree dated 31st December, 1979 passed by the learned Civil Judge (S.D.), Surendranagar in Special Civil Suit No.21 of 1973.

2. The plaintiff's case was as follows:

2.1 The plaintiff and defendant no.2 were real brothers and they were the sons of defendant no.1 by his first wife Kantaben. After the death of Kantaben in 1943, the defendant no.1 had married defendant no.5 in 1945 and defendants no.3 and 4 were the sons from the second marriage. Thus, defendant no.5 was the step-mother of the plaintiff and the defendant no.2. Mohanlal Motichand, the uncle of defendant no.1 had gone to town Meiktala in Burma to earn his livelihood and he had started a business there. The father of defendant no.1 Ujamshi had joined Mohanlal in the year 1906. In 1916, Ujamshi had, out of his own earnings, purchased with goodwill the business in Timber and Hardware of Mohanlal. Thereafter, he ran the business. Ujamshi died in 1926 leaving behind his son, the defendant no.1 and his widow Chhabalben. After the death of Ujamshi, his widow managed the business. According to the plaintiff, the said business left by Ujamshi at the time of his death was an ancestral business inherited by the defendant no.1 and the plaintiff and the defendants no.2, 3 and 4 have the right and interest in the said business since their birth. Ujamshi and defendant no.1 had constituted a Joint Hindu family and the plaintiff and the defendant no.2 had constituted a joint family of which the defendant no.1 was the 'Karta'. The properties described in the list annexed with the plaint were acquired with the help of earnings made by the joint family business in Meiktila and all the said properties were undivided ancestral properties and the parties were in joint possession of the properties and they were held by the defendant no.1 as 'Karta' of the joint family. When war broke out in 1942, the defendant no.1, the defendant no.2 and Chhabalben, the grandmother of the plaintiff and Kantaben, the mother of the plaintiff came to India via Manipur and, during their absence in Meiktila, the joint family properties there were looked after by their servants. In 1946, the defendant no.1 again took over the business and continued the same. The plaintiff arrived in Meiktila in 1956 and the defendant no.2 went there in 1960 and joined the family business there. For a period of 12 months from 1962 to 1963 when the defendants no.1, 2, 3, 4 and 5 were in Limbdi in India, the plaintiff alone had run the joint family business in Meiktila. Ultimately, on account of

political situation, the parties had to leave Meiktila and they came back to India. All the properties in the list annexed with the plaint are purchased out of the earnings made in the said business. Shares and gold ornaments were also purchased and about Rs.60,000/- were invested in the banks. The plaintiff had one-fifth share in all these properties. The defendant no.5, who was the step-mother, was instigating the defendant no.1 to deprive the plaintiff and the defendant no.2 of their shares and the defendant no.1 accordingly had transferred some shares in the name of defendants no.3,4 and 5 and invested amounts in their names in different banks. The plaintiff, therefore, filed the suit for partition of all the joint family properties and for separate possession of his one-fifth share. He also prayed for accounts of the management of the said properties by defendant no.1 as 'Karta' and for a decree for his one-fifth share found due on taking such accounts.

2.2 Defendants no.1, 3, 4 and 5 filed a joint written statement at Exh.68 and contested the plaintiff's claim. They denied that Ujamshi had purchased the said business from Mohanlal Motichand and that after the death of Ujamshi, his widow used to run the business. They contended that the defendant no.1 had not inherited any ancestral business. They denied that there was a joint family since the time of Ujamshi. They denied that defendant no.1 was running any ancestral business. They denied that the properties described in the list annexed with the plaint were acquired by the earnings from the alleged ancestral business. They contended that all the properties consisting of shares and fixed deposits referred to in the list annexed with the plaint were self-acquired properties of defendant no.1 who had purchased the same out of his personal earnings. With respect to immovable properties, it was contended that all of them excepting the houses facing east were independent properties of defendant no.1. They contended that in consequence of the bombardment on Meiktila in 1942 during the World War, all the properties of the defendant no.1 came to be destroyed and the defendant no.1, on his return after the World War, had started a fresh business. They asserted that the plaintiff and the defendant no.2 had, at no point of time, participated in the business at Meiktila.

3. As many as 21 issues were raised by the Trial Court which were as follows:-

- (1) Whether the deceased Mohanlal Motichand went to Meiktila (Burma) and started

business there?

- (2) Whether the deceased Ujamshibhai joined Mohanlal in Burma in 1906 A.D.?
- (3) Whether the deceased Ujamshibhai purchased the business carried on by Mohanlal Motichand in 1916 A.D. along with the defendant No.1 who was minor at that time?
- (4) Whether the deceased Ujamshibhai developed the business and he died in year 1926 A.D. leaving behind him his widow chhabalben and defendant No.1?
- (5) Whether the mother of the defendant No.1 (Chhabalben) was running the business after death of Ujamshibhai?
- (6) Whether the defendant No.1 inherited the ancestral business after the death of Ujamshibhai?
- (7) Whether the defendant No.1 was managing the joint hindu family?
- (8) Whether the Ujamshibhai and defendant No.1 constituted joint hindu family?
- (9) Whether the defendant No.1 was running the ancestral business as manager of joint hindu family?
- (10) Whether the properties shown in schedule annexed with the plaint is ancestral and joint family property?
- (11) Whether during the war time in 1942, the alleged joint property at Meiktila (Burma) was managed through the servant by defendant No.1?
- (12) Whether the defendant No.1 took control of the joint properties in 1946?
- (13) Whether the plaintiff joined in the business at Meiktila in 1960 with the defendant No.1?
- (14) Whether the defendant No.1 proves that

the properties shown in para-18 of written statement is self-acquired property and whether the plaintiff has no right, title or interest therein?

(15) Whether the plaintiff is entitled to partition of the suit properties?

(16) Whether the plaintiff has 1/5th Share in the suit properties?

(17) What properties are liable to partition?

(18) Whether the plaintiff is entitled to separate possession of his alleged 1/5th share in the suit property?

(19) What orders should be made as regards mesne profits?

(20) To what relief is the plaintiff entitled?

(21) What orders to be made?

4. After recording the oral and documentary evidence produced by the parties, the learned Trial Judge found that there was no evidence on record to prove the existence of the business of Mohanlal in Meiktila. He also found that the plaintiff had failed to translate into evidence the story of Ujamshi having purchased the business of Mohanlal in Meiktila or the story of Ujamshi having business in Meiktila. He found that the plaintiff had neither joined the defendant no.1 nor participated in the business at Meiktila. He accepted the evidence on behalf of defendant no.1 on the fact of the destruction of the shop of defendant no.1 in bombardment and hence he held that there was no business left to be entrusted to the servants when the defendant no.1 left Meiktila. He further held that whatever properties he had acquired were acquired by him out of the earnings from the business he had started in Meiktila in 1926. He recorded the finding that the defendant no.1 had, out of his personal earnings, started his personal business at Meiktila. However, he held that the defendant no.1 had so blended his personal fund in the immovable properties that all the immovable properties including those purchased by the defendant no.1 were joint family properties. Since neither of the parties claimed that there was severance of the status of the joint family, he found that the plaintiff and each of the defendants were entitled to one-sixth share and separate possession

thereof in respect of the immovable properties. He held that the plaintiff had failed to prove that the movable properties were joint family properties. He held that the plaintiff had succeeded in proving that Ujamshi and defendant no.1 constituted a joint Hindu family and that the defendant no.1 was managing the joint Hindu family and that the plaintiff was entitled to claim partition and seek one-sixth share in the immovable properties. The learned Judge, therefore, passed the preliminary decree declaring that the plaintiff and the defendants were each entitled to one-sixth share in the immovable properties and each of the parties was entitled to partition and, hence, secure separate possession thereof. He, therefore, ordered the said properties to be separated by a Commissioner to be appointed by the court. It was also ordered that in the event it was found difficult to divide the said properties in six fair and equal shares conveniently, the said properties should be properly assessed and the value thereof should be distributed among the parties according to their respective shares. The plaintiff's claim for partition of the movable properties was dismissed.

5. The original plaintiff has filed this appeal against the said preliminary decree to the extent his claim was disallowed.

6. The original defendants have not filed any appeal against the said decree.

7. The appellant - plaintiff is aggrieved by the said decree on two counts. It is contended on behalf of the appellant that the learned Judge has erred in dismissing the plaintiff's claim for partition as to movable properties. Secondly, it is contended that only the father and the four sons were entitled to a share in the HUF and the defendant no.5 who was the mother of defendants no.3 and 4 was entitled to a share from them and not from the shares of the plaintiff and defendant no.2 who were her step-sons and hence the plaintiff was entitled to one-fifth share.

8. However, on going through the judgment, I find that the learned Trial Judge has given cogent reasons for not accepting the evidence of the plaintiff's witnesses to the effect that it was Mohanlal who had started the business and subsequently Ujamshi had purchased the said business from Mohanlal. The plaintiff had examined Samjuben, the daughter-in-law of Mohanlal, as a witness. She claimed to be 80 years of age when she gave evidence but she admitted in her evidence that she does not know

what her age was and how old she was. According to her, her daughter who was now 35 years of age was born in about 1925 when Ujamshi died. The learned Trial Judge observed that, in that case, her daughter would be aged 52 years when the witness was examined. The learned Judge, therefore, rightly observed that no reliance may be placed on her evidence relating to the facts concerning the business or any activity of Ujamshi. The learned Judge has not committed any error in recording the finding that the business in Meiktila was not a joint family business and that movable properties were not proved to be joint family properties. It is well-settled that the mother is entitled to a share at the time of partition between father and the sons and the mere fact that defendant no.5 was the step-mother of the plaintiff and defendant no.2 did not disentitle her to a share in the joint family property. The learned Trial Judge, therefore, rightly held that each of the parties was entitled to one-sixth share and there is no substance in the contention of the appellant that he was entitled to a one-fifth share in the properties when the suit was filed.

9. The result is that the appeal fails and is dismissed with no order as to costs.

(M.C. Patel, J.)

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