IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 269 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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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

MULJI KANJI MAVJI GORASIA

Versus

KANJI MAVJI GORASIA,DECD.THRO HIS HEIRS HIRBAI WD/O RAMJI

Appearance:

1. First Appeal No. 269 of 1999

MR YS MANKAD for Petitioner No. 1

MR CH VORA for Respondent No. 1,3

..... for Respondent No. 1/1,1/4-1/8

NOTICE SERVED for Respondent No. 1/2-1/3,2

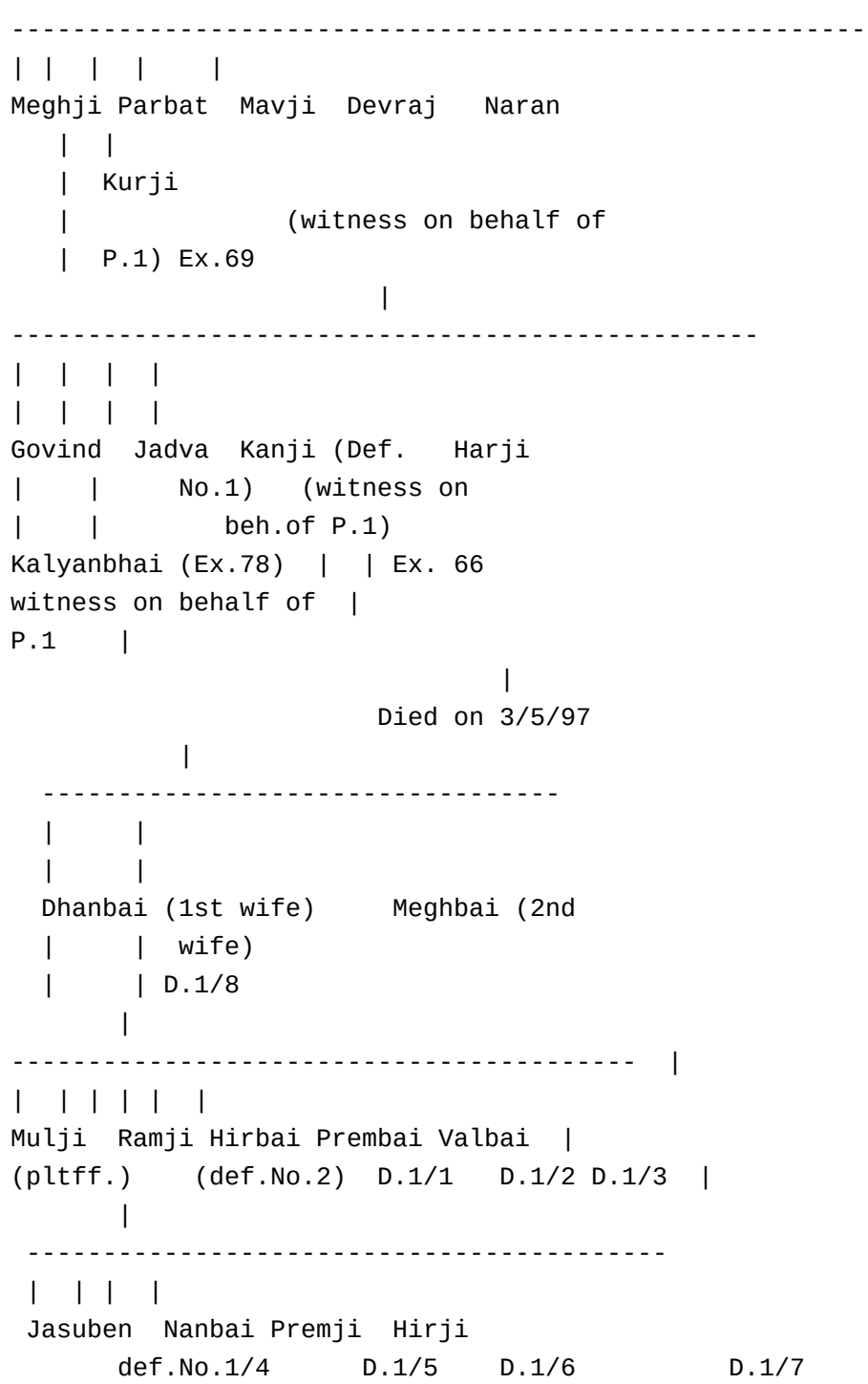
CORAM : MR.JUSTICE K.M.MEHTA

Date of decision:28/2/2003

C.A.V. JUDGEMENT

1. Mulji Kanji Mavji Gorasia - appellant original plaintiff has filed this First Appeal under Section 96 of the Code of Civil Procedure, against the judgment and decree dated 19-12-1998 passed by the learned Civil Judge (SD), Kachchh at Bhuj in Special Civil Suit No. 204 of 1991 whereby the suit of the plaintiff has been dismissed. The pedigree of the parties is as under :

PEDIGREE



2. As per pedigree Hira Vasta has five sons Meghji, Parbat, Mavji, Devraj and Naran. Out of that Mavji had four sons Govind, Jadva, Kanji (def. No. 1) and Harji. Govind had one son Kalyanbhai. Kanji had first wife Dhanbai and their sons were Mulji (plaintiff), another son Ramji (defendant No.2). Kanji had during the first marriage had also relation with another woman named Meghbai which has been described as a second wife in the

suit. Out of that alleged relationship, Kanji had Jasuben who has been described as defendant No.1/4, Nanbai defendant No.1/5, Premji defendant No.1/6 and Hirji defendant No.1/7. Megbai as shown as defendant No.1/8. Kanji died on 3.5.97 during the pendency of the suit and his heir via his daughters, Hirbai, widow of Ramji Khimji Ruda, was brought on record as defendant No.1/1 and Prembai Bhimji & Valbai daughter of Kanji has been brought on record as defendant No.1/2 & 1/3. Mulji Kanji Mavji Gorasia is the plaintiff who happens to be a son of Kanji through first wife Dhanbai. Kanji Mavji Gorasia is the original defendant no. 1 who happens to be the father of Mulji. Ramji Kanji Gorasia is brother of Mulji who is the defendant no. 2. All other relationship have been shown while describing the pedigree in this behalf.

3. The following ancestral properties belonging to the family of Kanji Mavji were situated at village Mankuva Taluka Bhuj-Kachchh.

	Old Survey No.	New Survey No.	Area A - Gs.
A	109-1	110/1	4 - 22
B	113	111/3	0 - 01
C	-	113/3	1 - 02
D	301/1	115/2	0 - 33
E	301/2	115/3	0 - 25
F	-	363	10- 38
G	-	365/1	9 - 18
		Total	27-19

4. In the plaint it was stated that Mavji Hira grand father died without making any will and therefore the aforesaid properties inherited to Kanji Mavji father of the plaintiff. After his death, all the properties are

ancestral Properties in which the plaintiffs and the defendants have common rights, title and interest in this behalf. It has been stated that since 10 to 15 years ago Kanji asked first wife Dhanbai to leave his matrimonial home. Thereafter Kanji married to another woman Meghbai who is the defendant no. 1/8 to the suit. Out of this alleged relation with Meghbai, issues namely Jashuben, Nanbai, Premji and Hirji were born. It is stated in the plaint that the plaintiff has 1/3 share in the suit properties. With a view to defeat the right of the plaintiff the defendants had transferred the suit properties and therefore the plaintiff filed the suit on 22-10-1991 for obtaining 1/3 share in the suit properties. The plaintiff has prayed that the suit properties be divided and out of the same his 1/3 share may be given to him and the defendants may be restrained from transferring the suit properties to any one in any way.

5. Defendant no. 1 Kanji Mavji field written statement vide exh. 11/B stating therein that the plaintiff has not joined necessary parties to the suit and hence the suit be dismissed on account of non-joinder of necessary parties. He has denied the contention raised by the plaintiff in this behalf. He has further submitted that it is true that Mulji happens to be his son. However, now they are staying separately since 20 years. According to him, all the properties belong to Meghbai and he has acquired the properties of his own earning and the plaintiff and the defendant no. 2 have no right, title or interest in the suit properties. It is further stated that originally the properties were inam lands. In the year 1962 the Government had given the the suit lands to the defendant no. 1 and he is enjoying the same since 1962 onwards and the suit properties have been entered into record of rights in his name and therefore the plaintiff has no right to interfere with the suit properties.

6. The trial Court has framed the issues at exh. 13 in this behalf.

7. So far as oral evidence is concerned, the plaintiff has examined himself at exh. 53 wherein he has clearly stated that the suit properties are ancestral properties and he is entitled to get 1/3 share along with his mother who is staying with him. In the cross-examination, the plaintiff has denied that the suit lands were "Inami" lands and the defendant no. 1 has been given right, title and interest in the same. He has stated that the plaintiff and his mother have right,

title and interest in the suit properties.

8. The plaintiff has also examined Harji Mavji Gorasia (Kanji's brother) vide exh. 66. He has stated that the properties in question was the ancestral property and originally the suit property belong to grand father Hira Vasta and today said Hira Vasta is not alive. He has also stated that some properties belonged Kanji also. He has admitted that there was no relationship between him and Kanji since long time. He has produced certain documents in this behalf.

9. The plaintiff has also examined another witness Kurji Devraj Halai at exh. 69 who is son of Devraj who happens to be son of Hira Vasta - a close family member. This witness also says that he was also family member of Manji Mavji. He has stated that when his grand father had died, all the properties were joint Hindu family properties and death of his grand father Hira Vasta some properties were purchased for which he has produced certain documents in this behalf. In cross-examination, he has admitted that some criminal proceedings were initiated against him.

10. The plaintiff has also examined another witness Kalyanbhai Govindbhai Gorasia vide exh. 78 who is another grand child of MavjiHira Vasta. He also happens to be family member of Kanji Manji. He has stated that the suit properties were ancestral properties. In the cross-examination he has stated that some criminal proceedings were initiated against him by Manji Mavji.

11. The plaintiff has produced following documents in support of his case. Exh.54 pertains to land Survey No.42 and regarding the land survey No. 301/1 and 301/2 there is no order of Mamlatdar dated 26-9-1962 which has been passed u/s 7/3 of the Bombay Inams (Kutch Area) Abolition Act, 1958. The said entry was made on 16-11-1961. He has also produced certain documents at exh. 54, 55 and 56 which show the lands admeasuring 27 Acres and 18 gunthas as ancestral properties by making suitable entries in this behalf. Exh. 57 is the record of right by which Kanji Mavji Gorasia is shown in possession through the old tenure. He has also relied on exh. 58 which shows the entry in the name of Kanji Mavji and Laxman Kanji was made in connection with land survey No. 301. It is also stated that right from 1952-53 to 1961-62 necessary revenue assessment was done on the property and the Mamlatdar had passed necessary order for the year 1961-62. He has also relied on exh. 59 which shows that Kanji Mavji was occupier of the lands survey

no. 109/1, 113 and 301 (Paiki). Similarly, exh. 60 also shows measurement of various survey numbers right from 1967 and there also the name of occupier of the said lands is shown as Kanji Mavji. He has also relied on exh.. 61, 62 and 63 which are record of rights which show the relevant entries and various orders and there also the name of occupier is shown as Kanji Mavji. He has also relied on exh. 65 which refer to the purchase of suit "wadi" by ancestral Hira Vasta and others. He has also relied on exhs. 70 and 71 which also substantiate his case and the fact as to how the property was divided between them and how he got the property.

12. On behalf of the defendant no.1, Kanji Mavji defendant no. 1 himself is examined at exh. 88 wherein he has stated that he owns the suit land admeasuring 22 Acres - 7 gunthas. He has also stated that when he was 14 to 18 years old, the Government had given the suit properties to him. He has denied that the suit properties were ancestral properties. He has further denied that the properties documents mentioned by the plaintiff at exh. 65, 70 and 71. He has admitted that the suit properties were "Inami" properties. He has stated that somewhere in the year 1946 the Government had given the land to him. However, he has not produced any order of the Government in support of his said statement. he has also stated that the divorce proceeding had taken place between him and Dhanbai. But he has not produced any document or evidence in support thereof.

13. The defendant no.1 has examined one Kamal Abbas Mahebubkhan at exh. 90 who was working as Talati at the relevant time. He has stated that Kanji Mavji was the owner of the land somewhere in the year 1963 and the Mamlatdar has passed the order on 26-9-1962 by which the property was given to Manji Mavji. However, the said order has not been produced by him on the record of the case. He has admitted that in the record of right the name of "Inamdar" is not mentioned. He has also stated that he has no personal knowledge regarding Entry No. 42 and he has not produced the order passed by the Mamlatdar in that connection.

13A The learned trial Judge after considering the oral and documentary evidence by his judgment and decree dated 19th December, 1998, held that:

(1) plaintiff failed to prove that he is entitled to get 1/3rd share in the suit property.

(2) The plaintiff failed to prove that he is entitled

to get permanent injunction as prayed for. The defendants were able to prove that the suit is barred by the law of non-joinder of necessary parties.

(3) The defendants proved that plaintiff is residing separately since 20 years after taking his share in cash from the defendant No.1.

(4) The learned trial Judge further held that after the death of the defendant No.1 as heir as per the provisions of Hindu Law as son has a right of a share in the ancestral property since his birth.

(5) In the suit of partition of the coparcenary property they are absolutely necessary parties and they are not joined as necessary parties in the suit. Defendants have been brought on record after the death of the defendant No.1 as heirs they were necessary parties right from the inception of the suit and as they were not joined as co-parceners, the suit suffers from non-joinder of necessary parties.

(6) The learned trial Judge further held that even though subsequently they were joined but the legal defect cannot be cured by impleading the sons as the heirs of the defendant No.1 as they were not joined as the parties initially, this would fatal to the suit.

(7) The Inam Abolition Act came into force in 1958 and the entry has been based on the said law.

(8) The ownership of the field has been conferred on him under the Inam Abolition Act and therefore the said field cannot be considered as an ancestral property. The Survey No.301 can not be considered as an ancestral property. The said fields are in occupation and possession of defendant no.1 since long time and the entries in the revenue records have never been challenged.

(9) The plaintiff has waived his right to ask for his share in the property of the defendant No.1 and ultimately dismissed the suit.

CONTENTION OF MR.MANKAD, L.A. FOR THE APPELLANT

14. Learned advocate for the appellant submitted that in this case the plaintiff No.1 is a son of Kanji Mavji. He submitted that plaintiff had therefore inherited the suit properties (which has been described in the earlier para 3 of the judgment which is extracted from the plaint) as ancestral property. Therefore plaintiff is entitled to obtain 1/3rd share in the suit properties. He has submitted that the question in the present appeal is about the ancestral properties and not joint family properties. He has submitted that the plaintiff has led oral evidence of himself at Exh.66 in support of the said contention. He has also submitted that the plaintiff had examined Kurji Devraj who happens to be a son of Devraj Hira Vasta who happens to be a family member who can depose about the ancestral properties. He has also stated that the plaintiff has also examined Kalyanbhai Ex.78 who happens to be a son of Govind Mavji. He also happens to be a close family members in support of his contention that the plaintiff is entitled to obtain ancestral properties.

14.A As regards documentary evidence, he has relied upon Exh.54 which pertains to Survey No.42 and regarding the land Survey No.301/1 and 301/2. He has also relied upon Exh.55 and 56 which shows that the land ad-measuring 27A 18 Gunthas were ancestral properties and for which a suitable entries have been made. Exh.57 is the record of right by which Kanji Mavji Gorasia is shown in possession through the old tenure. He has also relied upon Exh.58 which shows the entry was made in connection with Survey No.301. It was also stated that right from 1952-53 to 1961-62 necessary revenue assessment was assessed on the property and the Mamlatdar had passed necessary order for the year 1961-62. He has also relied upon Exh.59 which shows that Kanji Mavji was occupier of the lands Survey Nos.109/1, 113 and 301 (paiki). Similarly, he has also relied upon Exh.60 which also shows measurement of various survey numbers right from 1967 and there also the name of occupier of the said lands is shown as Kanji Mavji. He has also similarly relied upon Exhs.61, 62 and 63 which are record of rights which shows the relevant entries and various orders and there also the name of occupier is shown as Kanji Mavji. He has also relied on Exh.65 which refer to the purchase of suit "wadi" by ancestral Hira Vasta and others. He has also relied on Exhs.70 and 71 which also substantiate his case that the properties was of an ancestral properties. He submitted that the person who has a personal knowledge have been examined to show that the properties were of an ancestral properties and the persons examined were his uncle,

cousins and other co-parceners who had personal knowledge about the same. He further submitted that the suit properties being ancestral properties and their ultimate devolution upon defendant No.1 was proved and title was traceable through documents. These ancient documents came from proper custody of uncles and cousins. They were the copies of certified copies duly signed by the authorities.

CONTENTION OF MR.C.H.VORA, L.A. FOR THE RESPONDENTS

15. Mr. C.H. Vora, learned advocate for the respondents - defendants has pointed out pedigree of the family members of the parties. He has also referred to the plaint and documentary evidence produced by the plaintiff in this behalf. He submitted that the plaintiff has contended that the suit property is an ancestral property and by virtue of that, he become the owner and occupier of the property in question. He submitted that the plaintiff has not properly pleaded his case and no adequate proof has been given in support of his contention. There is variance between the pleadings and proof and if there is variance between the pleadings and proof, the case of the plaintiff may not be accepted. In support of his aforesaid contention, he has relied on the decision of this Court in the case of VASUDEV DHANJI VASU VS. BHAGILAL M.VAISHNAV reported in 1998 (1) G.L.H. 728. In that case at para 9 of the judgment this Court has relied on the decision of the Apex Court reported in AIR 1956 SC 593 and in para 9 & 10, the Court has observed as under :

"para 9 - The well known exception to above rule is whether parties, notwithstanding pleadings goes on trial of an issue involving the facts and pleaded without demur and led evidence on it. Explaining the principle enumerated in Siddik Mahomed's case, Supreme Court observed in Nagarjibhai V. Sharma Rao AIR 1956 SC 593.

"The true scope of the rule in that evidence led it on issues in which parties actually went to trial should not be made foundation for decision of another and different issue which was not present to the minds of the parties and on which, they had no opportunity of adducing evidence. But that rule has application to a case where parties to go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and

adduced evidence thereto."

16. The next contention of learned advocate for the respondents is that in this case the plaintiff has asserted about acquisition of joint family property and hence the plaintiff must prove the same by sufficient evidence but he has failed to do the same and the Court may not presume about the same. In support of this contention, he has relied on the decision of the Hon'ble Supreme Court in the case of Shrinivas Krishnarao Kango Vs. Narayanan Devji Kango and others reported in AIR 1954 SC 379 wherein the Apex Court has observed on page 382, as under :

"The evidence is that Siddopant was a Tahsildar in the State of Hyderabad, and was in service for a period of 40 years before he retired on pension. Though there is no precise evidence as to what salary he was drawing, it could not have been negligible, and salary is the least of the income which Tahsildars generally make. The lower courts came to the conclusion that having regard to the smallness of the income from the ancestral lands and the magnitude of the acquisition made, the former could not be held to be the foundation for the later, and on the authority of the decision of the Privy Council in "Appalasswami - Vs. Suryanarayanamurti", AIR 1947 PC 189 at p.192 (C) - held that the initial burden which lay on the plaintiff of establishing that the properties of which a division was claimed were joint family properties had not been discharged.

The law was thus stated in that case :

"The Hindu Law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that the property held by any member of the family is joint, and the burden rests upon any one asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the parties alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family property: See - "Babubhai Girdharlal V.

Ujjamlal Hargovinddas", AIR 1937 Bom. 446 (D); "Venkataramayya V. Seshamma", AIR 1937 Mad 538 (E); Vythianatha V. Varadaraja, AIR 1938 Mad 841."

17. The learned advocate for the respondents has also relied on the decision of the Calcutta High Court in the case of Rajendra Nath Majhi V. Tustu Charan Das and another, reported in AIR 1979 CALCUTTA 105, wherein the Court has observed as under (para 5 - page 106) :

"Reference may be made to the Bench decision of Mr. Justice Paul and Mr. Justice Akram in 46 Cal WN 239 at p. 243 (AIR 1942 Cal. 553 at p.555) to show that when there is a Hindu joint family the onus of proof is on the person to prove that a separate acquisition by an individual member of the family is really joint property, He is to prove that whether property was acquired there was sufficient nuleaus of the joint family fund with which the acquisition could have been made and also that such fund was actually available to the acquirer. This case was followed in the case in (1954) 58 Cal WN 980. Following the decision of the Judicial Committee in the case in AIR 1947 PC 189 at p. 192 it has been held stated by Mr. Justice Venkatarama Ayyar in AIR 1954 SC 379 at p.382 to show that proof of existence of a joint family does not lead to the presumption that the property held by any member of the family is joint family property and the onus is on the person who asserts that any item of the property is his joint property to prove the same. Where it is found that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which that property may have been acquired, the burden shifts to the party alleging that it was a self-acquired property. The important thing to be considered is the income which the nucleus yields. This principle was also followed in the case of Narayana Swami V. Ramkrishna in AIR 1965 SC 289 and also in the case of Mudi Gauda V. Ramchandra in AIR 1969 SC 1076. Let the aforesaid principles of law be applied to the facts of this case.

18. The learned advocate for the respondents next contended that the plaintiff has failed to prove that the suit property is joint family property. He has relied on the Mulla Hindu Law (17th Edition) Page 339 para 230.,

which reads as under :

"230 - Separate property - Property acquired in any of the following ways is the separate property of the acquirer, it is called "self-acquired" property, and is subject to the incidents mentioned in para 222 above.

(1) Obstructed heritage - Property inherited as obstructed heritage (Sapratibandha daya), that is, property inherited by a Hindu from a person other than his father, father's father, or father's father's father {See Sec. 218,222 and 223 sub-sec. (20]

(2) Gift - A gift of a small portion of ancestral movable made through affection by a father to his male issue is his separate property (Sec.225)

As to gifts and bequests of separate property by a father to his sons see Sec. 223 sub-sec. (5)

(3) Government grant - Property granted by Government to a member of a joint family is the separate property of the donee, unless it appears from the grant that it was intended for the benefit of the family.

(4) Property lost to family- Ancestral property lost to the family, and recovered by member without the assistance of joint family property. See Sec. 232 below.

Property acquired by a father by adverse possession is his separate property and not ancestral property.

(5) Income of separate property - The income of separate property, and purchases made with such income.

(6) Share on partition - Property obtained as his share on partition by a coparcener who has no male issue. Sec. 223 (4) above.

(7) Property held by sole surviving coparcener,when there is no widow

in existence who has power to adopt.

(8) Separate earnings - Separate earnings of a member of a joint family (231)

(9) Gains of learning - All acquisitions made by means of learning are declared by the Hindu Gains of Learning Act 1930, to be the separate property of the acquirer (Sec. 231A).

Separate property is also called self-acquired property Self-acquired property, in its technical sense, means property obtained by a Hindu without any detriment to ancestral property. As to property described in cll (1), (2) (3) and (5) of this section it is clear that it cannot be said to be acquired at the expenses of the patrimony of ancestral estate. Such property is, therefore, self-acquired in the technical sense of the term. As to property described in cl. (4), it is a question of fact as to whether it constitutes self-acquired property or not. In practice the expression 'self-acquired' property is used as referring to property acquired by Hindu by his own exertions without the assistance of family funds.

19. The learned advocate for the respondents further submitted that when the plaintiff originally filed suit he joined both Kanji Mavji and Ramji Mavji as defendants no. 1 and 2. However, other co-parceners and family members of the family were not joined as co-defendants in the main plaint filed on 22-10-1991. After death of Kanji Mavji the name of other family members have been shown in the capacity of heirs and legal representatives of deceased Kanji Mavji. He, therefore, submitted that the suit of the plaintiff should be dismissed for non-joinder of necessary parties. He has further submitted that before the trial Court there was specific issue that the suit is barred by law of non-joinder of necessary parties and the learned trial Judge has given finding that the heirs and legal representatives of deceased Kanji Mavji have been brought on record after death of the defendant no.1 as heirs, as they were necessary parties, right from the inception of the sit and as they were not joined as co-parcener, the suit suffers from non-joinder of the necessary parties. The learned trial Judge has also observed that the daughters namely Amarbai Kanji Gorasia is not joined as necessary party. He also held that daughters named Jasubai Kanji

Gorasia and Nanbai Kanji Gorasia are also not joined as necessary parties to the suit, the present suit suffers from non-joinder of necessary parties and this legal defect cannot be cured in this behalf. Even though subsequently they were impleaded as party defendants after demise of Kanji Manji, this would fatal to the suit in this behalf. He further submitted that the plaintiff has to join other heirs of deceased Kanji Mavji as codefendants as the plaintiff desires to obtain the reliefs against those persons. He has relied on Order I Rule 3 of the Code of Civil Procedure and submitted that the plaintiff cannot take advantage of Order 1 Rule 3 of the CPC.

20. The learned counsel for the respondents has relied on the decision of the Hon'ble Supreme Court in the case of Kanakarathanammal V. Loganatha reported in AIR 1965 SC 271, in which on page 276 in para 15 it is held as under :

"It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession u/s 12 of the Act. That, in fact, he is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order I Rule 1 of the Code of Civil Procedure no suit shall be defeated by the reason of the misjoinder of nonjoinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is,bound to be fatal. Even in such cases, the Court can under Order I Rule 10, Sub-Rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all three heirs are

before the Court if the appellant persisted in proceedings with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake. In Nabakuamr Hazra V. Radhashyam Mahish, AIR 1931 PC 229, the privy Council had to deal with the similar situation. In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end, it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of O.I R.9 of the Code in rejecting the said prayer, Sir George Lowndes who spoke for the Board that "they are unable to hold that the said Rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the parties concerned from the very out set of the proceedings and he has had ample opportunity of remedying it in India."

21. The learned advocate for the respondents has also relied on the decision of the Supreme Court in the case Mudigowda Gowdappa Sankh and others V. Ramchandra Revgowda Sankh (dead) by his legal representatives and another, reported in AIR 1969 Supreme Court 1076 in which on page 1080 para 6 it is held as under :

"We pass on to consider the next question arising in this appeal, viz. whether the High Court was right in holding that the 12 pieces of lands were joint family properties and were not the self acquisition of Goudappa. The case of the appellant was that these lands were self-acquisition of Goudappa, but the respondents contended that they were joint family properties. The law on this aspect of the case is well settled. Of course there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be

joint family property. this is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate."

CONTENTION OF MR.MANKAD, L.A. FOR THE APPELLANT IN REJOINDER:

21A He has relied on the judgement of the Hon'ble Supreme Court in the case of SRINIVAS KRISHNARAO KANGO VS. NARAYAN DEVJI KANGO reported in A.I.R. 1954 SC 379 particularly para 8 of the judgement which has also been relied upon by the learned counsel for the respondent. Over and above he has also relied upon para 13 of the said judgement on page 383 in which the Apex Court has observed thus:

"Apart from the Watan lands which are admittedly ancestral, and apart from the purchases made under Exhibits D-36, D-61 and D-64 and the houses which we have held to be self-acquisitions, there are certain plots mentioned in Schedule A in which the plaintiff claims a half share. These are the sites on which the houses have been constructed. The contention of the plaintiff is that they are ancestral properties.

The trial court held that in the absence of a title deed showing that the sites were acquired by members of the family thy must be held to be ancestral, and on that ground, decreed to the plaintiff a half share in S. Nos. 639 and 640. The High Court reversed this decision observing generally that the evidence relating to the house sites was not clear, "when they were acquired or by whom", and thatin the absence of evidence showing that they formed part of the joint family properties, they must be held to be self-acquisitions.

With respect, we are unable to agree with this view. Whie it is not unusual for a family to hold properties for generations without a title deed, an acquisition by a member would ordinarily be evidenced by a deed. When, therefore, a property is found to have been in the possession of a

family from time immemorial, it is not unreasonable to presume that it is ancestral and to throw the burden on the party pleading self-acquisition to establish it."

21B He further submitted that whole case of the plaintiff is that it is an ancestral property and not joint Hindu Family property and therefore the decision cited by the learned counsel for the respondent namely KANAKARATHANAMMAL Vs. LOGANATHA (supra) and principle of law of Mulla Hindu Law regarding separate property are not applicable to the facts of the case.

22. Mr. Mankad learned advocate for the appellant in reply to the aforesaid contentions of learned advocate Mr. Vora for the respondents submitted that there is no primary evidence of documents of title to show that Kanji alone was the owner and the properties were his self acquired properties. He has not traced this title. He has not stated as to how and by which documents he has purchased the same. He has only produced the secondary evidence of revenue entry about is being an occupant under Sec.7(3) of the Inam Abolition Act, 1956. He submitted that it is a settled law that revenue entry does not prove title. That only prove as to who is responsible to pay land revenue to the State. Now to prove the title the original documents on which the entry is based are to be proved. That is not done by the defendant. He submitted that the original documents could be:

(1) Sale Deed in his name (which is not in evidence - Not proved).

(2) Grant of Land by the State in the Santhani or Land Kacheri. For this SANAD in H Form is to be produced which the defendants has not produced.

(3) There is no evidence that the State has granted the land to him is Inam. The respondents cited an authority about grant but in this case there is no proof of grant. The entry is about "occupancy" only. This grant is of limited right of cultivation only and not of absolute right.

23. Learned advocate for the appellant has invited my attention to provisions of The Bombay Inams (Kutch Area) Abolition Act, 1958. He has invited my attention to definition of Sec.2 of "Butadar" which means a person who holds heritable and transferable right in land, and who is in possession thereof on payment of land revenue or

rent. Sec.2(7) provides "Dharmada land" means land or village held for religious or charitable institution. Sec.2(8) provides "gharkhed land" means land which is the private property of an inamdar and which is cultivated by him personally. Sec.2(9) provides "Inam" means a tenure commonly known in Kutch as Girasdari, Mulgiras, Jagiri, Bhayati, Chakariat, Danodi, Dharmada, Kherati, Varduka, Kamipasa or by other name (including service inam but not including the tenure on which land is held for service as revenue or police patel) under a grant, or recognition as a grant -

(a) of the soil, with or without exemption from payment of land revenue, or

(b) of the assignment of the whole or a share of land revenue, or

(c) of total or partial exemption from payment of land revenue.

23.1 Sec.2(10) provides definition of "inamdar" means the holder of an inam and includes his co-sharer, and also any person lawfully holding an inamdar or through him. Sec.2(16) provides "ret butadar" means a person -

(a) who holds a grant of land in an inam village whether on payment of land revenue or rent, or both, on condition that the land shall revert to the grantor or his successor-in-interest on the failure of the heirs male of the body of such person, or on the happening of a definite event, or

(b) who not being an inamdar or a holder of sub-inam [or a mortgagee in possession or a person claiming through or under such mortgagee] is in continuous possession of land in an inam village for a period exceeding twenty years immediately preceding the commencement of this Act.

23.2 Sec.3 provides Power of the State Government or an authorised officer to decide certain questions. Section 7 provides confernment of occupancy rights in respect of land in inam village or of inam land to which section 6 does not apply. Sec.7(3) reads as under:

"Sec.7(3) In the case of land referred to in clause (b) of sub-section(1), if such land is held by a person as a Kamipasa or Varduka

sub-inam such person shall be liable to pay to the Inamdar an occupancy price equal to six times the amount of the full assessment of such land [and in addition the cost of improvement if any, determined under section 7A] within [such period not later than the 31st March, 1967 as may be prescribed] in lump sum or in such annual instalments as may be prescribed.

(ii) In the case of land referred to in clause (c) of sub-section (1), -

(a) the ret butadar shall be liable to pay occupancy price equal to three times the amount of the full assessment of such land, [and in addition the cost of improvement, if any, determined under section 7A], and

(b) the person holding as tenant shall be liable to pay occupancy price equal to six times the amount of the full assessment of such land, [and in addition the cost of improvement, if any, determined under section 7A]

to the inamdar within [such period not later than the 31st March, 1967 as may be prescribed] and in the manner provided in sub-section (4):

Provided that in the case of a tenant the occupancy price [and the cost of improvement, if any], may be paid in three equal instalments at such intervals as may be prescribed:

Provided further that the payment of the occupancy price [an the cost of improvement, if any] to the inamdar shall be subject to the provisions of sections 8 and 9."

23.3 After relying upon the aforesaid provisions, he submitted that under sec.3 of the Inam Act, occupancy rights are given. That only shows that the defendant was cultivating only, but in which capacity that is the main question namely Inamdar, Butedar, Ret-Butedar and Tenant.

(1) Inamdar : It has been submitted that the defendant has not proved that he was inamdar. No judgments or authorities under this section are forthcoming. Eventhough talati says some order is their but it is not produced nor proved.

(2) Butedar : The owner of transferrable and heritable rights. The defendants has not proved as to from who he has purchased Buta (absolute ownership right) from original inamdar or from State or from other 3rd party owner. No documents are produced.

(3) Ret Butedar : (Limited rights of ownership with heritable rights but without transferrable rights).

(4) Tenant : The defendant has not proved how he has become tenant or as to from whom he got tenancy right or whose tenant he was before the Inam Act. He has not proved as to from which inamdar or butedar or ret butedar or any person he was a tenant. Nor he has given the name of any independent landlord, no rent note, lease deed is forthcoming. No proof about paying crop share (Bhog) to any body. No receipt of payment of vighoti (Revenue Assessment) is proved on the contrary he has admitted in the cross-examination that he has not paid any Vighoti. Thus it is not proved by evidence of independent witnesses or tile documents or judgments that he was tenant. To show his primary title, no rent note or lease deed is produced which would show who was owner or landlord before Abolition.

23.4 After contending the aforesaid, learned advocate for the appellant submitted that only question which is required to be proved that who was occupant and who was in charge of cultivation and, therefore, the only conclusion can be drawn is that he was cultivating as occupant or as owner through his forefathers as the heir and being in last occupation and cultivation as owner as he was granted the occupancy right. Learned advocate submitted that this fact is not inconsistent with rights of the son as father of the plaintiff and the heirs of grandfather the defendant No.1 is bound to be in the occupation and cultivation and therefore the revenue entry shows only that fact. That entry is secondary evidence only. Therefore plaintiff had no reason to challenge the entry. In this way, as against the defendant No.1, the plaintiff has discharged the onus as

per his limited capacity, once he has done that the onus was on the defendant No.1 to prove otherwise by leading independent evidence in which he has failed.

23.5 Learned advocate for the appellant submitted that the defendant No.1 father stated in his evidence that he was only 14 or 15 years when he came into possession. Now, no land can be granted to a minor. A minor cannot be owner in his own right unless he was hereditary owner. He can not be given land as Inam. He can not be a tenant at the age of 14 years. No lease deed is there. In short, except his bare words he has not been able to rebut what ever evidence was led by the plaintiff about suit properties being ancestral. Even if for the sake of arguments was exclude documentary evidence even then the oral evidence of other co-parceners namely other cousins and uncle is sufficient to prove case of the plaintiff about ancestral properties which does not stand rebutted by the evidence to the contrary. The plaintiff being a minor at the relevant time is not supposed to have personal knowledge but the other co-parceners have such knowledge. So the plaintiff could prove his case through them which the defendant has not been able to rebut but the defendant has thus miserably failed to prove his case of properties being self-acquired.

24. Leaned advocate Mr. Mankad for the appellant submitted that in absence of any such documentary evidence the Court can only come a conclusion that the defendant was occupant and was in charge of the cultivation and therefore only conclusion can be drawn is that the defendant no. 1 was cultivating the land or occupying the land as an occupant through his forefather, as heir and being in last occupation and cultivation as owner as he was granted occupancy right. He has submitted that as the suit property was ancestral property, naturally Kanji who was son of Mavji Hira obtained the right of cultivating the land in question. He has submitted that Kanji Mavji married to Dhanbai and naturally all the heirs of Kanji Mavji through Dhanbai got share in the ancestral properties. He submitted that cause of action arose only when Kanji decided to alienate or transfer the property in favour of Meghbai who happens to be second wife of Kanji and also heirs and legal representatives through Meghbai and till then there was no question of any quarrel in this behalf.

25. As regards non-joinder of necessary party to the suit, the learned advocate for the appellant has relied on Order I Rule 9 of the Code of Civil Procedure. He submitted that when the suit was filed Kanji Mavji

Gorasia and Ramji Kanji Gorasia were codefendants and during pendency of the suit proceedings, Kanji Maji defendant no.1 died and therefore other family members of Kanji Mavji have been joined as heirs and legal representatives of Kanji Mavji. Therefore, they were the necessary parties before the trial Court. So, non-joinder of the necessary parties to the suit at the initial stage has not prejudiced their rights and they had never opportunity to put their case before the trial Court. After joining them as parties, they have not led any further evidence by recalling the witnesses nor they have produced any additional evidence. They were satisfied with the evidence led by the defendant no. 1 and they have acquiesced. So, the suit cannot be dismissed on the ground of non-joinder of necessary party to the suit. The finding recorded by the trial Court to that effect is erroneous and illegal and the same requires to be quashed and set aside.

26. As regards the difference between the pleading and proof, learned advocate for the appellant submitted that decision of the High Court of Gujarat cited by the learned advocate for the respondent, that was the case of suit on one mortgage without giving debts etc. and subsequently new mortgage deed was sought to be proved. He submitted that the plaintiff in his plaint stated that only pleading is to be shown and there is no necessity to lead any evidence in the plaint. The suit has been transferred before the trial Court in small village of Bhuj and so moffusil pleadings are to be construed liberally. In any event, the plaintiff has tried to produce all relevant and necessary documents in support of his say.

27. As regards measurement of the property in question, the learned advocate for the appellant has referred to the evidence of father and son and this being very old documents there may be some difference and dispute regarding the measurement of the property. However, the plaintiff has proved that he has inherited the suit properties and they are parcels of the original "wadis" or additions. The only question is as to when he obtained all the survey numbers and how, that is not explained.

28. The learned advocate for the appellants submitted that the learned trial Judge has erred in holding that the plaintiff has waived his right to immovable properties by accepting cash and no case of waiver can be made out. He has also submitted that in partition share in the ancestral property is different from the father's

movable properties. Therefore, he submitted that by the oral as well as documentary evidence led by the plaintiff appellant, the appellant has been able to prove his case regarding ancestral and the finding of the learned trial Judge is erroneous and the same is contrary to the facts and circumstances of the case and the record of the case namely oral as well as documentary evidence.

CONCLUSION:

29. I have considered the case of the plaintiff appellant and the oral evidence led by him. I have also considered the case of the defendant, written statement, evidence produced by him and the contention raised. I have also considered the judgment of the learned trial Judge and the reasonings given. In my view, it is true that in para 3 of the plaint there is mention of the Joint Hindu Family but in the beginning of para 1 itself pedigree from grandfather Mavji Hira to plaintiff is given. That is done for the very precise purpose to show the source of the hereditary devolution of the property. Had there been a case of Joint Family Property there was no need to trace and state pedigree. The intention is thus clear from the very first para of the plaintiff. Again in para 3 in the earlier sentence it is written "that our Grandfather Mavji Hira Gorasia has not made any will and his properties have come to our father defendant No.1 after his death." Moreover in para 7 of the plaintiff it is averred and there is specific mention about the Hindu Succession Act and it is averred that in the above agricultural lands and other properties the plaintiff is co-sharer as owner as per the Hindu Succession Act. Thus the plaintiff has 1/3rd share in the above properties. From the pleading it is clear that with a view to deprive the plaintiff of his share the defendant No.1 is trying to alienate or sell joint family properties. The "agreement of sale is also entered into in respect of Vadiloparjit (Ancestral) properties in respect of the above survey numbers with others.

30A Ancestral property - (1) Property inherited from paternal ancestor -

"All property inherited by a male Hindu from his father, father's father or father's father's father, is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest in it by birth. The rights attached to it and the rights attached to such

property at the moment of their birth. Thus if A inherits proerty, whether movable or immovable, from his father or father's father or father's father's father, it is ancestral property as regards his male issue. If A has no son, son's son, or son's sons' son in existence at the time when he inherits the property, he holds the property as absolute owner therof, and he can deal with it as he pleases." (Principles of Hindu Law, Mulla Hindu Law, 17th Editiion, page 326, para 223)"

31. In the modern Hindu Law, Joint Family Property is divided into two parts; (I) Joint Family Property (sometimes this is also called coparcenary property), and (II) Separate property which is also called self-acquired property. Joint Family Property can be of following heads:

(a) Ancestral property
(b) Accretions
(c) Property obtained on partition
(d) Gift by father of his separate property
(e) Property thrown into common stock, and
(f) Recovered joint family property.

32. Now what is ancestral property. Dr.Paras Diwan on Hindu Law, 1995 Edition on page 176 described ancestral property as under:

"Ancestral Property : In the common parlance, property inherited from any ancestor or ancestors is called ancestral property. But Hindu law uses the term in a restricted sense. It has a technical meaning. Inherited property, for the purpose of the subject under discussion, may be classified as under:

A. Property inherited from father, father's father and father's father's father.

B. Property inherited from the maternal grandfather.

C. Property inherited from any other relation.

According to the Dharmasashtrakars, the ancestral property is classified under two heads; one : head A and head C. (above) But on account

of interpretation given by the Privy Council, the head B became necessary.

Property inherited from father, father's father and fathers' father:

When sons inherit property from their father, vis-a-vis each other they take it as separate property, but if they have sons, or later on sons are born to them, the property becomes joint family property and they constitute a coparcenary.

33. In view of the aforesaid facts and circumstances of the case, the whole case of the plaintiff is to obtain 1/3rd share in the ancestral property. The plaintiff has produced enough documentary evidence to show that the property is an ancestral properties. The documentary evidence produced at Exhs.65 to 71 are consistent with the case pleaded. In my view, after examining the case of the plaintiff particularly in light of the documentary evidence and the oral evidence, I am of the view that the plaintiff has been able to prove that the property is an ancestral property and the plaintiff has right to obtain 1/3rd share in the suit property.

34. It is no doubt true that the pleadings are loose pleadings but I have to consider the substance and not the words used in a moffusil pleading. It is incorrect to say that there is no pleading at all or that there is no foundation. They are very much there in the plaint as pointed out above. Therefore there is no variance between pleading and proof as observed by the trial court and contended by the respondent.

34.A I have considered the contention of the learned advocate for the respondents. It is true that there is variance between pleadings and proof to some extent. However, if one consider the drafting at the moffusil stage, same can be considered that it has written in a language but that is not fatal to the plaintiff's case. I have also considered Vasudev Dhanji's case (supra). I have also considered the contention of the respondents and in my view the properties is not HUF but ancestral property for which the plaintiff has led sufficient oral and documentary evidence in this behalf. What is ancestral property which has been quoted by me in law by Mulla Hindu Law as well as Paras Diwan has also been considered by me in this behalf. I have produced the pedigree and the contention of the learned advocate for the appellant and in my view the plaintiff has

successfully proved that it was an ancestral property and he has a 1/3rd share in the property. I have considered the judgment of the Hon'ble Supreme Court in the case of Kanakarathanammal and also Mudigowda Gowdappa Sankh (supra).

34.B The non-joinder of parties which has been held by the learned trial Judge is not fatal to the case of the plaintiff and it may be considered that when suit was filed Kanji Mavji and Ramji Kanji were co-defendants and during the pendency of the suit Kanji Mavji died and other family members had been joined as an heirs and legal representatives after Kanji Mavji. They were necessary parties before the trial court. So the contention of the defendants that non-joinder of parties is fatal to the suit is not maintainable at law.

34.C The power to strike or add parties may be exercised at any stage of the proceedings even before the issues are framed and the court can pass order under Order I Rule 10 at appropriate times. As suit proceedings were pending, the trial court was able to add the parties being heirs and legal representatives of Kanji Mavji.

35. It may be noted that the only case of the defendant was that it was a Inam land and by virtue of the provisions of the Act, he was able to obtain the land in question. Admittedly when the land was granted as Inam, the defendant was aged 14 to 15 years and therefore he has no personal knowledge about the same. I have also considered the provisions of the Act and in my view the defendant failed to prove that he has acquired property as contended by him. In my view the defendant has also failed to prove that it was his self acquired property. Moreover he has also not been able to produce any evidence to show that how he has acquired the property in question. As per provisions of Sec.7(3) of the Act which shows that he is only occupant but he has no title in this behalf. The question is what was the position before coming into force of Inam Abolition Act or before 1963 when mere revenue entry, which is secondary evidence is posted. Its source is not forth coming. It is not proved as to how and when he got lands as Inam from State or as grant under Land Revenue Code under Section 65 or purchased from independent owner or got as a tenant from independent landlord. In the absence of this proof only conclusion can be that he has got properties from the father in succession. The defendant was minor at that time. So he cannot be purchaser or Inamdar, Butedar, Ret-Butedar or tenant of the land in question. Thus the

defendant has claimed his title only through his father. In my view therefore only conclusion that could be drawn is that defendant No.1 got the properties from his father and therefore the conclusion reached by the learned trial judge is not right.

The judgement and decree of the learned trial court dated 19.12.1998 passed by the learned Civil Judge, Kutch at Buch in Special Civil Suit No. 204 of 1991 is quashed andset aside. The appeal is allowed with no order as to costs. The plaintiff is entitled to 1/3rd share of the properties in question.

(K.M. Mehta, J.)

/JVSatwara/