

Ashabai and anr. Vs. Haji Tyeb Haji Rahimtulla and ors.

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Court : Mumbai

Decided On : Feb-23-1882

Reported in : (1885)ILR9Bom115

Judge : Charles Sargent, C.J.

Appellant : Ashabai and anr.

Respondent : Haji Tyeb Haji Rahimtulla and ors.

Judgement :

Charles Sargent, C.J.

1. The plaintiffs in this suit are the widow and infant daughter of one Haji Adam Haji Esmail, and they seek to recover from the estate of his father Haji Esmail:

(1) The ancestral property which came to the hands of Haji Esmail from his grandfather Haji Joosub Bulladina and his father Haji Hubib.

(2) A sum of one lakh and 90,000 rupees which, it is alleged, was held by Haji Esmail in trust for his son Haji Adam.

(3) Ornaments and jewels belonging to the estate of Haji Adam.

2. The first throe defendants are the executors named in the will and are now in possession of the estate of Haji Esmail, who died on 19th August, 1878, having survived his son? Haji Adam, who died on 17th May, 1878, without male issue.

3. The fourth defendant Tyeb Haji Joonas is the grandson of Haji Esmail and a legatee under his will, and was made a party at his own request by an order of 26th March., 1881.

4. The first question of importance which presents itself for decision in this case is as to the law of inheritance applicable to Cutchi Memons, to which caste the parties interested belong. The ecclesiastical records of this Court show that Khojas and Cutchi Memons have ever since the decree in the case of the 'Khojas and Memons' before Sir E. Perry in 1847 (*Hirbai v. Sonabai* Perry's Cr. Cas. 110) been regarded in the Supreme Court and subsequently in this Court as Hindus who had been converted to Mahomedanism whilst retaining their Hindu law of inheritance and so far as Khojas are concerned, the decision of the Court of Appeal in the case of *Hirbai v. Gorbai* 12 Bom. H.C. Rep. 294 must be taken as conclusively deciding; that the onus of proving a custom of inheritance not in conformity with Hindu law lies upon those who set it up. The above records are even richer in instances of the application of Hindu law of inheritance to the estates of Memons than to those of Khojas, and establish a non-contentious practice extending over many years.

5. I think, therefore, that in the absence of any special ground of distinction, and none was suggested, no sufficient reason exists for placing Memons on any different footing from Khojas as regards the application of the Hindu law of inheritance in the absence of proof of any special custom, although undoubtedly it leaves the law, as pointed out by the Chief Justice in the above case of *Hirbai v. Gorbai* 12 Bom. H.C. 294 in an incomplete state, which can only be satisfactorily dealt with by express legislation.

6. Applying then, this rule to the circumstances of this present case, and assuming, as was admitted, that Haji Esmail and Haji Adam were an undivided family, it follows-and this was not denied-that, in default of any partition between the father and son during their joint lives, the ancestral property would pass to Haji Esmail as the surviving male.

7. It was argued, however, that, although there had been no actual partition in Haji Adam's life, what occurred on the occasion of a suit being filed by Haji Adam

against his father to compel immediate partition of the ancestral estate ought to be regarded as having had that effect. It appears that this suit was disposed of by a consent decree on 11th July, 1876, by which it was ordered that the defendants should pay a sum of Rs. 20,000 to trustees for paying the plaintiff's creditors and the costs of that suit, and paying the residue, if any, to plaintiff; further, that defendant should pay plaintiff, during his life, a monthly sum of Rs. 250 for his maintenance and to plaintiff's wife Rs. 50 for her life for maintenance; and lastly, that the plaintiff be permitted to withdraw the suit without liberty to bring a fresh suit for same causes of action, or any other claim arising from any account now or heretofore existing between the plaintiff and the defendants, until after the defendant's death.

8. Now it is plain that the very object of this consent decree was to prevent a partition of the ancestral property during Haji Esmail's life, and, therefore, it is difficult to understand how by any process of reasoning it can be held to have been equivalent in any sense to an actual partition. It was said that it assumes the right to a partition; but even assuming that it did, before a partition can be effected, there must be, in the absence of division by metes and boundaries, at any rate an agreement that each party interested shall henceforth enjoy the produce of a certain definite share of the joint property, which was not the case here. There cannot, therefore, be any doubt that no partition was effected during Haji Adam's life, and, therefore that the ancestral property became absolutely vested in Haji Esmail on his son's death.

9. Passing to the next claim, viz., the sum of Rs. 1,90,000 alleged to have been held in trust by Haji Esmail for his son, we find that this claim is based upon an account opened by Haji Esmail in his books in his son's name in the year 1912 (A.D. 1855-56) when his son was a year and-a-half old, and which was written off by carrying the balance to the credit of the profit and loss account on the 28th November, 1878. The items on the credit side consist of cash payments by Haji Esmail and of two credit transfers, the proceeds of the sale of gold and shares and money representing the value of the ornaments of Jambubai, Haji Adam's mother, used on the occasion of his marriage with the plaintiff Ashabai. The debits items consist of two debit transfers sums expended on the purchase of gold and shares

and ornaments for Ashabai, sums expended on the funeral ceremonies of Jambubai, and two sums, each of Rs 41,000, in 1920 and 1928, in respect of expenditure on a rest-houses and the purchase of lands for certain charitable and religious purposes. It was said that Haji Esmail in opening this account must be deemed to have created himself a trustee of all sums placed to the credit of the account, with large powers as to their application and investment; and the case of Sir Jamsetji Jibhai v. Sonabdi 2 Bom. H.C. Rep. 133 was much relied on in support of that contention. Now the principle to be drawn from the authorities-at any rate the more recent authorities-is that, in order that the owner of a fund may constitute himself a trustee of it, he must either expressly declare himself to be a trustee, or must use language which taken in connection with his acts, shows a clear intention on his part to divest himself of all beneficial interest in it, and to exercise dominion and control over it exclusively in the character of a trustee. It will suffice to refer to Richards v. Delbridge L.R. 18 Eq. 11 and Heartley v. Nicholson L.R. 19 Eq. 233 for the enunciation of the above rule and for its application, under circumstances analogous to those of the present case, to Sir Jamsetji Jijibhai v. Sonabai 2 Bom. H.C. Rep. 133 and Vandenburg v. Palmer 4 K. & J. 204

10. Now if the case for the plaintiffs rested exclusively upon the account as it appears in the books, no intention to create a trust by Haji Esmail could, I think, be safely inferred from it. No presumption could be raised that it was intended for the benefit of Haji Adam from the one circumstance of its being in his name. The remarks of the Privy Council in Gopeekrist Gosain v. Gungapersad Gosain 6 Moo. Ind. Ap. 53 are equally applicable to an account opened in a man's books in the name of his son as to a purchase by him in his son's name. The frequency of benami transactions in this country forbids any presumption being raised in either case contrary to that which arises in favour of the person who provides the fund.

11. However, the plaintiffs do not rely exclusively upon the account itself, but, in addition, upon a statement made by Haji Esmail in December, 1871, before the Commissioner in Insolvency, in which he explains the nature of the account. The question there 'arose as to whether Haji Esmail had duly accounted for all the shares which had been purchased in his partnership with one Soomer Ahmed and

handed over to the former. Two receipts, signed by Haji Esmail, were produced, acknowledging the receipt of 4,920 shares, and his defence was that they belonged to Sala Mahomed and 136 to his son. Haji Adam. These 136 shares were admitted by the defendants to form part of the Oriental Financial shares debited to Haji Adam in 1921, and in respect of which a dividend is credited to the account in 1924. In examination-in-chief he said that these shares were the private property of Haji Adam. In cross-examination he says: 'My son purchased these shares I received the dividend because I advanced the money for the purchase of the shares. My son is now twenty. He was fourteen when the shares were purchased The shares were my son's, not mine; he carried on business at that age; he had a deposit in my books. His money was de-positd by me on his account while he was young, and I carried on business in his name.' In re-examination he says: 'with reference to shares in my son's name, it is usual for wealthy gentlemen in my position to open credits in their son's names and carry on business for them till they are of age. My son is now of age, and carries on business for himself. I advanced him money when he came of age; his account is still in Ms name in my hooks; he can draw money whenever he likes. The proceeds of his financial shares have teen handed over to him in his accounts; he draws on such account, and everything to the credit of such account is his property. '

12. Now this statement, taken as a whole and in its plain and obvious sense, doubtless amounts to an admission, that the account was originally opened for the benefit of his infant son, and that during his minority Haji Esmail carried on business on his account; that when his son came of age (which happened before the shares were purchased, which was in 1912) he carried on the business for himself; and lastly, that whatever was then standing to the credit of the account was his son's property-in other words, that the balance of the account carried over when his son's minority ceased and the account henceforth carried on from year to year, belonged beneficially to his son and that whatever stood to the credit of the account was held by him as a trustee for his son. The relationship between them on this account would become one of trust and confidence, and does not admit of being described in any other terms. From 1922 (a.d. 1865-65), when Haji Adam married, clown to the time when he went, on pilgrimage at the end of 1873, the

balance is carried on with interest from year to year. In 1922 a considerable amount of ornaments, alleged to have belonged to Haji Adam's deceased mother, were credited to the account. In 1923 two sums of 60,000 and 10,000 are placed to its credit, said to have been paid in by Haji Esmail and some small sums in respect of ornaments taken from the box of Haji Adapa's mother; and so on from time to time sums are credited to the account as dividends on the Oriental shares before alluded to, or as paid in by Haji Esmail himself. During the same period we find Rs. 41,735 debited in December, 1871, to the account on account of the Bandar Trust created to celebrate the memory of deceased members of the family. A trust deed was executed on the occasion to which Haji Adam was made a party as trustee, and he executed it; and two further sums of Rs. 4,314 and Rs. 2,823 were also debited to it in January and July, 1872, for the same purpose, and on 24th November, 1872, a sum of Rs. 4,487 was debited to it for outlays on the Musafarkana at Aden, which was admittedly erected expressly in memory of Haji Adam's deceased mother. All these sums, however, were expended on purposes which, from a Mahomedan point of view, might well be considered as spent for the benefit of Haji Adam, and his having executed the trust deed makes it in the highest degree probable, as father and son were then on good terms, that the sums were debited to the account with his consent, although he afterwards claimed the entire balance in his suit without giving credit for these sums when he was quarrelling with his father in 1876.

13. Haji Adam left for Mecca on 24th November, 1873, and so far as appears on the books, the account was closed on 28th November, 1873, by carrying Rs. 1,50,000 to profit and loss account and the balance of Rs. 3,523 being paid in cash to Haji Esmail. In the books is also found what is called the pilgrimage account of Haji Adam commencing from 24th November, 1873, the day on which he left. Haji Adam returned in the middle of 1875, and soon afterwards towards the close of that year the father and son quarrelled, and the latter left his father's house with his wife. In the beginning of the following year the son filed a suit against his father, claiming his share of the ancestral estate and the balance of the account in question; and this suit was compromised by Haji Esmail paying 20,000, to be expended in defraying his son's costs of the suit and his debts, and undertaking to pay him an annual allowance the suit to be dismissed without

liberty to renew it until Haji Esmail's death. Rustomji Dosabhoy Setna, one of the executors of Haji Esmail's will, in his answer to interrogatories filed by the plaintiff, states that he was managing clerk for the solicitors who acted for Haji Esmail in the above suit, and that the latter then told him that the money appearing due in the account was his own private money as distinguished from his trade money. But this description of evidence is of the most unsatisfactory nature, whether we consider the time at which the statement was alleged to have been made or the character which Mr. Rustomji had previously filled. Again, if such was the object of opening the account, why was it closed when Haji Adam went on pilgrimage? Whereas, on the contrary, if it was considered as a fund belonging to Haji Adam, of which Haji Esmail was a trustee and considered himself the guardian, there would be nothing strange in his father closing the account in the way he did when his son was going to be absent for a year and-a-half. The question practically affects only volunteers; and upon the whole of the evidence I think it satisfactorily establishes that Haji Esmail did constitute himself a trustee of the sums standing to the credit of the account in question for the benefit of his son, and that it had always been so understood between himself and his son until they quarrelled after the 'son's return from Mecca when he repudiated that character, and refused to recognize his son's right to it, and that Haji Adam's representatives are now entitled to claim what was due on the account when it was closed, viz., Rs. 1,53,523, 2 qr., 49 res.

14. As to the claim of the executors to set off what was expended by Haji Esmail on his son's pilgrimage, I think it must be allowed. The account in Haji Esmail's books shows that he considered the money as advanced to his son. The plaintiffs say the account was concocted after Haji Esmail and Haji Adam had quarrelled; there is, however, no evidence to support this statement. It is true, also that the account was written off a few days after Haji Adam's death; but, in so doing, Haji Esmail must fairly be taken to have done so on the supposition that he would not have to pay anything on the other account. However, the set-off must, I think, be confined to payments which can properly be regulated as made on his account. If a reference is insisted on, the account should be taken on the basis of the entries in the pilgrimage account in Haji Esmail's books with liberty to the plaintiff to object to the items as not coming within the above description.

15. With respect to the claim to ornaments belonging to the estate of Haji Adam, it must be assumed, upon the evidence afforded by Haji Esmail's own books, that his wife Jambubai had a considerable amount of ornaments in her possession at the time of her death, and it was assumed on both sides that, in the absence of proof of special custom, they must be treated as her stridhan according to Hindu law. The fourteenth issue raised the question of custom, but no evidence was called, and the issue was withdrawn. That being so, it was admitted by Mr. Latham that as Jambubai left two daughters, Zalekhabai (the mother of the fourth defendant) and Hafibai, such part of the above ornaments as were given to Jambubai at her marriage would on her death pass to her daughters, and therefore, form no part of Haji Adam's estate. As to such of the ornaments that were given to her after marriage or by her husband or kindred, he (Haji Adam) would at least according to the Mayukha-a very high authority in Bombay -be entitled to share equally with his two sisters. It is, however, to be remembered, that Haji Adam was credited with Rs. 7,185 in his account in his father's books as the value of the ornaments belonging to Jambubai which were appropriated to his marriage with Ashabai, and he will have the benefit of it in the account already under discussion; and as he must be, I think, taken to have been a party to this transaction in 1866, when he married, he cannot now claim anything against Haji Esmail's estate in respect of his one-third share of ornaments constituting Jambuba Asantaka, unless that share exceeded Rs. 7,135 in value; this however, is quite independent of any right Ashabai may have to recover from Haji Esmail's estate the ornaments so appropriated to the marriage as her stridhan, or their value in default of their not being forthcoming.

16. Assuming the one-third share to have exceeded Rs. 7,135 in value, the question as to the, Statute of limitations would arise. Now, it is to be remarked, that after Jambubai's death in 1862, when Haji Adam was only eight years old, Haji Esmail must be deemed to have taken possession of them in the character in which by law he would have been entitled to do so, viz., as being one, at least, of the natural guardians of his son and daughters according to Mahomedan law. Moreover, his crediting his son with the value of his mother's ornaments, which were appropriated to his son's marriage shows that he treated them at that time as belonging in whole or in part, to his son. Haji Esmail's possession of the

ornaments must, therefore, be considered from its commencement as that of a trustee for the specific purpose of protecting his children's property, and if he retained some portion of his son's share of those ornaments, the case falls under Section 10 of the Limitation Act; and his son's claim, and, therefore, that of his widow as his, representative, is not barred.

17. With respect to the ornaments given by outsiders on the occasion of Haji Adam's marriage included in Exhibit H, I think the evidence satisfactorily shows that they must be regarded as having been given to Haji Esmail, except such as are specially mentioned in the account as having been given, to Haji Adam, of which there is only one instance, viz., a diamond ring of Rs. 800, which the account states that Haji Adam lost; and there is no evidence, except Ashabai's, upon which, I think, it would be very unsafe to act, that it is one of the rings in Haji Esmail's possession at his death.

18. I think, therefore, the plaintiffs are entitled to a reference, if they wish for it, to ascertain the value of Jambubai's ornaments given to her subsequently to marriage.