IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.1021 OF 2010
IN
SUIT NO.2715 OF 2004
…

Dilip Premji Dholi & ors. ...Appellants
v/s.
Bhargav Dilip Dholi ...Respondent
…

Mr.N.G.Thakkar, Sr.Counsel a/w Mr.A.Daver,Mr.Jariwala and Ms.Jyoti Ghag i/b Thakore Jariwala & Associates for the Appellants.

Mr.A.P.Rege for the Respondent.
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CORAM : A.S.OKA &
A.A. SAYED, JJ.

DATED : 16/17 JUNE 2016

JUDGMENT: *(Per A.S.Oka, J.)*

By this Appeal, the Appellants, who were the original Defendants, have taken an exception to the judgment and decree dated 30 June 2010 passed by the learned single Judge in a suit for declaration and partition filed by the Respondent-original Plaintiff. Apart from passing a decree of declaration that properties in question are properties of the Hindu undivided Family (for short `the HUF'), the learned single Judge held that even the business of the Firms namely M/s.Premji Odhavji & Company, M/s.Dholi Brothers and M/s.Dilipkumar & Company and the properties shown at Serial Nos.1, 4, 5 and 6 in the list of assets are the properties of the HUF.

2. We must note here that the sole Respondent-original Plaintiff had filed the suit in forma pauperis. The learned single Judge held that the Respondent-Plaintiff was not an indigent person and therefore, the learned single Judge directed the Respondent to pay the court fees payable in accordance with law, which have been admittedly paid. The Appellants were saddled with the cost of Rs.25,000/-.

3. With a view to appreciate the submissions made by the learned senior Counsel appearing for the Appellants and the learned Counsel appearing for the Respondent, a brief reference to the facts of the case will be necessary.

4. For the sake of convenience, hereinafter, we are referring to the parties with reference to their respective status before the learned single Judge. There is no dispute that the original Plaintiff is the son of the second Defendant. The second, third and fourth Defendants are brothers and the first Defendant is their mother.

5. The fifth and sixth Defendants are sons of the third Defendant. The seventh Defendant is the daughter of the third Defendant and eighth Defendant is the wife of the third Defendant. Ninth and tenth Defendants are the sons of the fourth Defendant and the eleventh and twelfth

Defendants are the daughters of the fourth Defendant. It is claimed that the fifteenth Defendant was the wife of the second Defendant. The allegation in the plaint is that thirteenth and fourteenth Defendants are the "illegitimate children" of the second and the fifteenth Defendants.

6. It is further stated that late Premji Velji Dhoi was the grandfather of the Plaintiff and the father of the second to fourth Defendants. The case made out in the plaint is that the said Premji Velji Dhoi died intestate. In paragraph 3 of the plaint, it is claimed that the Plaintiff being the grandson was entitled to a share in the estate of late Premji Velji Dhoi (for short "Premji"). Thereafter, the plaint was amended by incorporating certain sub-paragraphs in paragraph 3. The averments, in short, are that Premji was holding several ancestral immoveable properties at village Bara, Taluka Abrasa, District Kutch in the State of Gujarat. It is stated that after his marriage, Premji and the first Defendant came to Mumbai and brought with them the income of the HUF and by using the said income, he started the business as a grain dealer. It is contended that the said business was the business of HUF. Premji conducted it as the Karta and Manager of the HUF. Further allegation is that for the purpose of tax planning, Premji floated many firms such as Premji Odhavji & Company, Dilipkumar and Company and Dholi Brothers etc. As far as sixteenth Defendant M/s.Premji

Odhavji and Company is concerned, it is alleged that Premji was initially a partner in his capacity as the Karta and Manager of HUF and after the business commenced successfully, he retired and thereafter, the First to Fourth Defendants were inducted as the partners. It is alleged that the other two partnership firms namely seventeenth and eighteenth Defendants are the partnership firms of the HUF of the said Premji and are being controlled by the family members of the late Premji. Thereafter, it is alleged that late Premji, in his capacity as the Karta and Manager of the HUF, purchased the office premises and godown, more particularly described in paragraph 3(d) of the plaint. It is alleged that apart from immoveable properties, gold and silver ornaments made up of precious stones weighing about 500 totals were the assets of the HUF. It is stated that on the land at village Bara, there is a bungalow and a temple, which were constructed by Premji.

7. There are allegations made in the plaint by the Plaintiff against the second Defendant about the alleged improper behaviour of the second Defendant with his mother. It is alleged that when the Plaintiff was nine months old, his mother was driven out of the house by the second Defendant. There are allegations made that the thirteenth and fourteenth Defendants were being given higher status than the status of the Plaintiff.

8. A Written Statement was filed by the Defendants disputing the claim of the Plaintiff. In the Written Statement, the Defendants disputed the existence of any such HUF of Premji. Various other contentions were raised as regards the matrimonial dispute of the second Defendant. It was contended that the godown at item No.1 in Exhibit `A' to the plaint was taken on lease by the sixteenth Defendant from the Agricultural Produce Market Committee. It is pointed out that the office at Anna Bhavan, Masjid Bunder, Mumbai was taken on the rental basis and the same was surrendered to GROMA Association. It is stated that this surrender was on account of shifting of the market from Masjid Bunder to Vashi. As regards the godown at item No.3 of Exhibit A, it was contended that no such godown is in existence. As regards the flat at item No.4 of Exhibit A, a contention is raised that the Flat No.1102 is purchased by the first Defendant under an Agreement for Sale dated 30 August 2000. It is contended that Flat No.1101 is purchased by the third Defendant under an Agreement for Sale dated 10 June 1998. It is contended that the said Defendants are the owners of the said Flats. As regards the item No.5 in Exhibit A to the plaint, it is again a flat. It was contended that the same was purchased by the fourth Defendant by an Agreement for Sale dated 24 July 1995. As regards the item Nos.6 and 7 in Exhibit A to the plaint, it was contended that there is no such property with the Defendants. A reliance

was placed on extracts of the Register of Firms as regards three Firms, which are the subject matter of the suit and it was contended that the business of the firm was not the business of HUF. It is contended that none of the suit properties including the partnership firms belong to the HUF. The Defendants prayed for dismissal of the suit.

9. The issues were recasted by the learned single Judge at the stage of judgment. The recasted issues and findings recorded thereon by the learned single Judge read thus:

> *(1) Whether the Plaintiff's grandfather Premji Velji Dholi / Joshi started his business from the funds of the Hindu Undivided Family (HUF) to which he belonged. - **Yes***
>
> *(2) Whether the partnership firms in which Premji and the Defendants carried on business are the businesses of the HUF. - **Yes***
>
> *(3) Whether the movable and immovable properties, in the list of assets, Exh.-A to the Plaint being 3 flats and 1 godown in the names of Defendant Nos.1, 2 and 4, purchased from the profits of the HUF businesses, the bungalow in village Bara and the ornaments can be taken as HUF properties in which the Plaintiff, as a coparcener, has 1/20th share. - **Yes***
>
> *(4) What relief,if any,is the Plaintiff entitled to ? - **As per final order**.*

10. The learned senior Counsel appearing for the Defendants has taken us through the pleadings, the evidence on record and the findings recorded by the learned single Judge. He submitted that apart from the fact that such HUF was not in existence, he urged that the existence of nucleus is not at all established by the Plaintiff. He pointed out that there is nothing placed on record to prove that an agricultural land in village Bara was sold and any sale consideration was received by Premji. He pointed out that the other property at village Bara, which is described as a bungalow is a temple and even according to the Revenue Record, the same has not been sold. He submitted that the finding of the learned single Judge as regards the existence of nucleus is based only on assumption that under the provisions of the Bombay Inams (Kutch Area) Abolition Act, 1958 (for short "the said Act"), Premji became Inamdar and the cultivator became the owner on payment of certain amounts as provided under the said Act. He submitted that there is absolutely no evidence to show that there was such a sale and that Premji received any consideration. As far as the finding regarding the extract of the Register of Firms is concerned, he submitted that no one had disputed the entries therein, as the same were marked as Exhibits by consent. He submitted that on the basis of surmises that the learned single Judge has commented upon the correctness thereof. He invited our attention to the evidence of the witnesses examined by the Plaintiff as well

the documents on record. He urged that the evidence of the village Talathi is meaningless. He submitted that both the village Talathi and the witness Bhanushali examined by the Plaintiff had no personal knowledge. He submitted that as far as the existence of nucleus is concerned, it is a case of no evidence and therefore, the impugned decree will have to be set aside.

11. Learned Counsel appearing for the original Plaintiff apart from making oral submissions has tendered written submission. His submission based on section 114 of the Indian Evidence Act is that as none of the Defendants have chosen to enter the witness box, the Plaintiff was denied an opportunity to cross-examine them and extracting truth from them. He, therefore, submitted that in view of Section 114 of the Evidence Act, an adverse inference will have to be drawn against the Defendants. He submitted that the Mutation Entry No.66 shows Premji to be a mortgagee in respect of the land being Survey No.152 of village Bara. He submitted that the name of the grandfather of the Plaintiff appears in the Mutation Entry. He urged that Premji received consideration in respect of the said land in accordance wih the provisions of the said Act. He submitted that Premji received the occupancy price equivalent to 6 time the assessment of the agricultural land which is borne out from the revenue record. He urged that

the cultivator Bhanushali became the owner of the said land. He submitted that Premji received the consideration prior to 1960, which was used by him to commence the business in Mumbai and Premji used the income received by him for the formation of the firms. He invited our attention to the Partnership Deeds on record. He urged that there is not even a recital in the Partnership Deeds to show that any capital was brought by the partners. He submitted that on this aspect, the Defendants have adduced no evidence. He justified the observations made by the learned single Judge on the basis of the entries in the Register of Firms. He submitted that the Defendants have adduced no evidence to show the source of income, from which they could have acquired the suit properties and especially the flats and the office premises. He submitted that there is sufficient evidence on record to show the existence of nucleus from which Premji could have acquired the assets, which are the subject matter of the suit. He submitted that the issue about divorce of the Plaintiff's mother has no connection with the share of the Plaintiff in the Hindu joint family. He, therefore, urged that there is absolutely no merit in the Appeal and the same deserves to be dismissed.

12. Before we consider the merits of the submissions, it will be necessary to make a reference to paragraph 65 of the written submissions submitted

by the Plaintiff. The relevant portion of paragraph 65 reads thus:-

> *"The Appellants are taking the Court for granted and they feel that by engaging a senior counsel who is taking personal interest for them at various stages they will deprive the Respondent from getting justice from this Hon'ble Court. Such an attempt should be foiled by this Hon'ble Appellate Court and give justice to the Respondent who deserves the 1/20th share in the business of the joint family and various businesses."*

13. What the original Plaintiff wants to suggest by the said submission is that the Defendants will get undue advantage by engaging a senior advocate practicing in this Court. The Plaintiff wants to virtually suggest that this Court will get influenced by the presence of the designated senior advocate. Without using any harsh words, we must record our strong disapproval to the said submission made in the written submissions. We are showing restraint and leave the matter as it is by recording our strong disapproval.

14. Initially, there was no specific pleading of the existence of HUF. By an amendment, necessary averments were incorporated. The law is very well settled. Initial burden is always on the Plaintiff to prove the existence of nucleus from which the joint Hindu family property could have been

acquired. The Plaintiff is expected to prove the existence of the nucleus and once the existence of nucleus is proved by the Plaintiff, it is not necessary for him to specifically prove that the properties which are allegedly joint Hindu family properties were in fact acquired by using the said nucleus. If the Plaintiff adduces evidence about the existence of the nucleus from which the suit properties could have been acquired, the burden shifts on the Defendants to prove that the acquisition is self-acquisition. It is in this context that the entire case will have to be examined.

15. We have minutely examined the averments made in the plaint. Exhibit “A” to the plaint is stated to be the list of assets held by the late Premji. We may note here that the decree passed by the learned single Judge is in respect of the properties at items Nos.1,4,5 and 6 in Exhibit “A”.

16. In paragraph 3(a) of the plaint, it is stated that Premji started his career as a grain dealer at Dhana Bunder, Mumbai. In paragraph 3(a)(i), there is a specific pleading that Premji owned several ancestral properties at village Bara, Taluka Abrasa in Kutch District in Gujarat. It is further stated that Premji came to Mumbai with income of the HUF, which was used by him to set up a business. There are further averments that Premji started the partnership firms in his capacity as the Karta of the HUF. As far as the

nucleus is concerned, the only averment is in paragraph 3(a)(i), where there is a reference to ancestral properties at village Bara, Taluka Abrasa in Kutch District. However, there is no specific pleading that any of the said properties were sold and the sale-proceeds constituted the nucleus.

17. We have perused the affidavit in lieu of the examination-in-chief of the constituted attorney of the Plaintiff who is his mother. In paragraph 4, it is contended by the constituted attorney of the Plaintiff that the joint family properties were acquired by Premji by using the sale proceeds of the ancestral lands at village Bara, Taluka Abrasa, District Kutch in Gujarat. In this regard, three documents are relied upon. The first document is 7/12 extract in respect of the ancestral land. The second document is a certified copy of the panchanama made by the village Talathi and the third is the certificate issued by the Village Panchayat. In paragraph 5, she stated that photographs are produced showing the ancestral house in which a priest is seen performing the pooja. Though, it is not specifically pleaded in the plaint that by sale of ancestral immoveable properties at village Bara, the nucleus was created, still we are considering the case made out in the oral testimony of the constituted attorney of the Plaintiff.

18. Considering the ages of the respective parties, it is obvious that no one has any personal knowledge as to what transpired in the year 1960 or earier. Therefore, it is necessary to examine the documents on record. The Plaintiff produced a copy of Form 8-A, which contains the khata/account of Rameshchandra Shamji Bhanushali, which includes the agricultural land bearing survey No.152 at village Bara. There is a Mutation Entry No.392 in respect of the properties included in the said Khata Utara including Survey No.152. The Mutation Entry records that one Bhanushali Samji, Farmer Khatedar has handed over the agricultural land to his son Rameshchandra Samji during his life time. In 7/12 extract, the name of Joshi Velji is shown as `mortgage farmer'. At this juncture, we may make a reference to the extract of the Field-wise Register in respect of confirmation of number-wise acre-gunthas on survey carried out in village Bara. In the said Field-wise Register, the column No.6 is of the name of owner, Butadar or Dokadedar and farmer. Against the column No.6 in respect of Survey No.152, the name of the owner is mentioned as J.Mamubha Khanji, the name of the dokadedar is shown as Joshi Velji Gaga and the name of the farmer is shown as B.Shamji Umarshi. Thus, the said extract shows that the name of the great-grandfather of the Plaintiff appears as Dokadedar and the owner appears to be a different person.

19. It will be necessary to make a reference to cross-examination of the constituted attorney of the Plaintiff. In response to Question No.54, she answered thus:

> *"Q.54. Would it be correct to say that you have no personal knowledge as to the source of funds used by the said Premji when he first started his business as a Grain Dealer in Mumbai?*
>
> *Ans: In 1962 his father mortgaged the agricultural land and by those funds in 1963 he started company viz. M/s.Premji Odhavji, with 50% funds given by Premjibhai and in other 50% of funds 4 partners are there and all rights of the godown and office and transactions remain with Premjibhai, which is mentioned in 1963 Partnership Deed.*

20. On the aspect of the revenue entry, it will be necessary to make a reference to the evidence of Mr. Kaushikbhai Joshi, the village Talathi, the second witness examined by the Plaintiff. All that the said witness says is that he furnished a certified copy of Form-6 on the request made by the constituted attorney of the Plaintiff. He stated that he made a panchanama in the presence of five panchas on 22 December 2006 in the office of the Talathi. In paragraph 3, he has come out with the case that the great-grandfather of the Plaintiff was having lease hold rights in the agricultural land bearing survey No.152. This statement is not supported by the revenue record produced by him. In paragraph 3, he stated that about 35

to 40 years ago, Premji sold the agricultural land to a farmer and went away to Mumbai. Obviously, the village Talathi, whose age is disclosed as 45 years in the affidavit dated 19 December 2009, had no personal knowledge about any alleged sale of the agricultural land by Premji 35 to 40 years back. We have also perused the panchanama. The panchanama recorded on 22 December 2006 shows that the respective ages of the witnesses were between 48 to 55 years. It records that about 35 years back, Premji sold the agricultural land to a farmer and went away to Mumbai for the business purpose. Obviously, the witnesses to the alleged panchanama had no personal knowledge about what transpired 35-40 years back.

21. The Village Talathi was cross-examined. In the cross-examination, he admitted that it is correct to say that he did not know the said Premji. He admitted that the village Sarpanch had not directed him to prepare the panchanama. He stated that the panchanama was drawn on the basis of an oral application of the constituted attorney of the Plaintiff. He also accepted the correctness of the suggestion that neither Premji nor his father had any agricultural account in Panchayat revenue record. He accepted the correctness of the suggestion that the father of Premji had not sold any lease hold rights to Shyamji Umaishing Bhanushali or to Rameshbhai Bhanushai. He stated that in the revenue record, there is no entry of sale

of leasehold rights of Mr.Veljibhai Giga to Mr.Shyamji Umaishing Bhanshali. He stated that after implementation of the said Act, the rights of mortgagees are extinguished and tenants of the agricultural lands became owners of the lands. He also accepted that the panchanama of the type made by him was never made by him in his entire tenure.

22. The third witness Bhanushali Keshavji. He accepted in the cross-examination that he had not seen Veljibhai. In the affidavit in lieu of examination-in-chief, it is stated that 35 to 45 years back, Premji sold his agricultural rights in the land as a farmer. He also accepted that he does not know when Premji left the village Bara. He pleaded ignorance about the fact whether the Premji had sold and taken the money in respect of the property of Velji. He accepted that in the residential premises/bungalow in the village Bara, there is a temple. He accepted that the affidavit in lieu of examination-in-chief is in English and that he does not know the English and the contents thereof were not explained to him.

23. Thus, the case made out by the second witness Kaushikbhai Joshi is that Velji had sold his “agricultural rights” to a farmer. The case made out by the constituted attorney of the Plaintiff is that Premji acquired the assets by using the proceeds of the sale of the agricultural lands at village Bara. Thus, none of the witnesses has made out a case that there was a

compulsory sale of the said agricultural land under the provisions of the said Act and that Premji received certain amounts equal to certain multiple of the revenue assessment in respect of the said land. The case specifically made out by the constituted attorney in paragraph 4 is of the sale of ancestral land at village Bara.

24. In none of the documents produced by the Plaintiff, there is even an indication that Bhanushali paid an amount payable as per the said Act and became owner under the provisions of the said Act. We have carefully perused the findings recorded by the learned single Judge on this aspect. In paragraph 16 of the judgment, the learned single Judge observed that the case of the Plaintiff is that Premji sold the land bearing survey No.152 at village Bara to a farmer. In paragraph 17, by referring to Form-6, the learned Judge observed that the name of Velji is shown as a mortgagee. In paragraph 20, the learned single Judge observed that Bhanushali was entitled to be declared as an owner with full rights and obligation of ownership upon payment of 12 times the assessment of the land out of which 6 times the assessment was to be paid to the Inamdar. Further, the learned Judge observed that Bhanushali would become owner upon payment of aforesaid assessment. In paragraph 21, the learned Judge records a finding that the Plaintiff's great-grandfather received the

consideration for sale of the agricultural land bearing survey No.152. There is absolutely no documentary evidence of whatsoever nature even to indicate that under the provisions of the said Act, the said Bhanushali became owner of the land. Apart from this, there is absolutely no evidence on record to show that an amount equal to 6 time assessment of the said land was paid by Bhanushali, which was received either by Premji or his father. The findings recorded by the learned Judge in paragraphs 17 to 21 are based on presumption that there must have been a sale under the provisions of the said Act and Bhanushali must have paid an amount equivalent to 6 times assessment of the land. However, there is no evidence in support of the said finding. As stated earlier, in the plaint, there was no specific pleading about the existence of the nucleus. In the examination-in-chief of the constituted attorney of the Plaintiff, it is not the case made out that the sale of the land at Bara was under the provisions of the said Act and certain amount was received on account of the sale either by Premji or his father. It was not the case made out by the village Talathi and the third witness examined by the Plaintiff that the sale was on payment of the amount equivalent to 6 times or 12 times the revenue assessment. The said conclusions are drawn by the learned single Judge without there being any evidence whatsoever, only on the basis of conjectures and surmises. Even Section 114 of the Evidence Act is of no help to the Plaintiff.

It is not the case made out by the Plaintiff that there was a sale under the provisions of the said Act and secondly it was not the case made out that there is any entry in the revenue records showing the sale or transfer under the provisions of the said Act. Admittedly, the residential house in which a temple is there is not sold till the date on which evidence was recorded. Thus, the only conclusion which can be recorded is that the original Plaintiff failed to prove the existence of nucleus from which the properties which are subject matter of the suit could have been acquired, and therefore, no burden shifted on the Defendants to prove that the properties were self-acquired properties.

25. As far as three partnership firms are concerned, the case made out by the Plaintiff is that Premji started business by using the amount earned from the land at village Bara and ultimately by using the profits of his business that he commenced the business of partnership. Neither the Deeds of Partnership nor the extract of the Register of Firms show that the business was of the Hindu Undivided Family. Even the Income-tax Returns, which are placed on record, do not support the theory that the partnership firms were the business of HUF.

26. Once we hold that the Plaintiff has failed to prove the existence of nucleus from which the properties of HUF or the suit properties could have

been acquired, all the discussion about the entries in the Register of Firms becomes completely inconsequential.

27. In the premises, the impugned decree is completely unsustainable. The same deserves to be quashed and set aside. We, however, make it clear that the only issue we have dealt with in this Appeal is whether the assets/properties claimed by the Plaintiff were properties of the HUF. The relief claimed in the plaint is only on the basis that the Plaintiff had 1/20 share in the properties of HUF.

28. Subject to the above clarification, the Appeal must succeed and we pass the following order:

(i) The impugned judgment and decree dated 30 June 2010 is hereby quashed and set aside;

(ii) Suit No.2715 of 2004 stands dismissed;

(iii) There will be no order as to costs;

29. At this stage, the learned Counsel appearing for the original Plaintiff prays for stay of execution and operation of this judgment. By this judgment, the suit filed by the Plaintiff has been dismissed. Therefore,

there is no question of grant of any stay. However, he submits that during the pendency of the suit there was an order restraining the Defendants from creating third party interests in the suit properties. Our attention is also invited to the order dated 22 December 2010 passed on Notice of Motion No.2795 of 2010.

30. In view of the said order, we direct that the Defendants/Appellants shall not part with possession and/or induct any third parties in the properties mentioned at items Nos.1,4,5 & 6 of Exhibit `A' for a period of twelve weeks from today. As far as the property at item No.5 in Exhibit `A' is concerned, the direction incorporated in the order dated 22 December 2010 will continue to operate for a period of twelve weeks from today.

(A.A. SAYED, J.) **(A.S.OKA, J.)**