

SPECIAL CIVIL SUIT NO.30 OF 2020.**Order below Exh.1 under Order-VII Rule-11**

[1] The suit of plaintiff is that defendant no.1 is the father of the plaintiff, defendant no.2 is the brother of the plaintiff and defendant no.3 is the mother of plaintiff. Grandfather of the plaintiff Govindbhai Popatbhai Parmar has been died 8 years before and there were three sons of him. Grandmother Dudhiben Govindbhai Parmar was living with the father of the plaintiff and she in her presence has made the division of the agricultural land and therefore, she possess no right or interest in an agricultural land. To the fact grandmother Dudhiben has brought from her paternal home, two agricultural lands admeasuring acre 5-15 guntha in revenue survey no.131/1 paiki 3 and acre 17-52 sq. mtr. and such an agricultural land has been entered through revenue entry no.2382 in revenue records and both the agricultural lands after the passing of the agricultural fragmentation act were consolidated together in revenue survey no.131/1 paiki 3 into acre 5-15 guntha. Such land after the consolidation of fragmented pieces of land has entered in the revenue records in revenue account no.120. Such an agricultural land after being consolidated and renumbered was divided among the lineal descendants

wherein Dhanji Govindbhai Parmar has received hect.1, acre 9 and 27 sq. mtr. and hect.1, acre 8 and 25 sq. mtr. of the agricultural land in revenue survey no.131/1 paiki 3 was given to the father of plaintiff which has been entered in the revenue records vide entry no.2395 in village form no.6 on 17/05/2005 (Hereinafter referred as suit property). As per revenue entry no.2395 made on 17/05/2005 grandmother Dudhiben, her daughter jasuben Govindbhai and Induben Govindbhai and her son Kanjibhai Govindbhai had relinquished their respective rights from the suit property wherein the suit property possess three dig wells and out of these three dig wells, defendant no.1 Dhirubhai Govindbhai possess two of the dig wells and his brother Dhanjibhai Govindbhai possess one of such dig well in his share. Defendant no.1 does not possess any other source of income apart from the suit property and out of the income of agricultural land, defendant no.1 has purchased non agricultural land in the municipal area of Gondal Town admeasuring 4-18 in revenue survey no.178/2 and 4 guntha in revenue survey no.180/4. Similarly, defendant no.1 has purchased plot no.71 admeasuring 397-55 sq. mtr. and 332-40 sq. mtr. in the consideration of Rs.13,000/- through registered document no.3107 on 09/10/2002. Defendant no.1 out

of the income of suit property has made construction in open plot no.71 so as to include three rooms and one worship room. Plaintiff has served the notice upon defendant no.1, 2 and 3 on 08/08/2020, but such notice has not been replied by either of the defendant.

Cause of action to the plaintiff arises on 08/08/2020, when defendant has not replied to the notice of the plaintiff.

Plaintiff prays for the; Declaration that suit property is a joint family property and plaintiff possess 1/2nd share in the suit property and the other properties that has been purchased from the earnings of the suit property.

[2] Following are the documents produced by the plaintiff for the inspection of Court.

Sr.	Mark	Descriptions
1.	3/1	Village form no.6, Hakpatrak Entry no.1243
2.	3/2	Village form no.6, Hakpatrak Entry no.1456
3.	3/3	Village form no.6, Hakpatrak Entry no.2382
4.	3/4	Village form no.6, Hakpatrak Entry no.2395
5.	3/5	Village form no.12, survey no.133/1 paiki 3 paiki 2

6.	3/6	Village form no.8-A, survey no.133/1 paiki 3 paiki 2
7.	3/7	Village form no.7 & 12, survey no.133/1 paiki 3 paiki 2
8.	3/8	Village form no.6, Hakpatrak Entry no.2382
9.	3/9	Registered Deed No.3107/02
10.	3/10	Measurement letter of Gondal Nagarpalika
11.	3/11	Receipt of tax paid of Gondal Nagarpalika
12.	3/12 to 3/16	Photograph of the local place (5)
13.	3/17	Bill No.815 studio namely Dharti
14.	3/18	Light Bill of Rs.359/-
15.	3/19	Light Bill of Rs.270/- and payment receipt no.7084852
16.	3/20	Light Bill of Rs.290/- and payment receipt no.929101
17.	3/21	Light Bill of Rs.110/- and payment receipt no.325821
18.	3/22	Light Bill of Rs.270/- and payment receipt no.039875
19.	3/23	Light Bill of Rs.460/- and payment receipt no.107704
20.	3/24	Light Bill of Rs.380/- and payment receipt no.863118
21.	3/25	Notice given by plaintiff to the defendant
22.	3/26	Refuse Notice of defendant no.1 with original cover

23.	3/27	Refuse Notice of defendant no.2 with original cover
24.	3/28	Refuse Notice of defendant no.3 with original cover

[3] From the averments of plaint & documents submitted by plaintiff, following points arises for the determination of Court so as to determine the sustainability of plaint as under:-

- [A] Whether the issue of cause of action can be decided through preliminary issues?
- [B] Whether the plaint discloses the cause of action?
- [C] What shall be the order?

[4] My findings on the above points are as under:-

- [A] In the negative;
- [B] In the negative;
- [C] As per Final Order.

-: R E A S O N S :-

[5] The universal acceptability while dealing in the rival claims came from the admitted facts. These facts are clothed with legal authenticity in section 58 of the Indian Evidence Act and such facts not only reduces the friction at lowest but also provides an opportunity to Courts of law to form an

opinion while adjudging the sufficient inertia in those facts so as to allow the pleadings of plaint to mature into the full grown contested suit. Any deviation from the admitted facts is not only against the principles of equity but also restrained by the law in the form of section 115 of the Indian Evidence Act.

From the pleadings of plaint & the documents produced, it is admitted by the plaintiff that:

(i) Suit property and other non agricultural immovable property purchased from the income of suit property is owned and possessed by the defendant no.1.

(ii) Grandmother of plaintiff in her lifetime, on family settlement partitioned the respective shares of heirs & vests into the father of plaintiff.

(iii) No specific pleading is pleaded in plaint with regard to the income of the suit property from which the other immovable properties were purchased by defendant no.1.

(iv) Father of plaintiff i.e defendant no.1 is alive till the time of this order.

(v) Plaintiff is praying for the declaration, partition of suit property and possession of his 1/2 share thereof.

(vi) Plaintiff admits the possession of suit property in the hands of defendant no.1.

Issue No.A:-

[6] The learned advocate while relying on **Sunrise Industries India Ltd. Vs. PT OKI Pulp & Paper Mills Ltd. in an appeal from Order No.471 of 2016** poses a question before Court, whether plaint is barred by period of limitation or cause of action can be decided by framing preliminary issues as well? While carefully going through the judgment, it is observed that the ratio propounded by division bench adorned by Hon'ble Justice Mr.M.R.Shah & B.N.Karia is upon the territorial jurisdiction of the Court. Lack of jurisdiction is a issue of law and so can be decided by framing the preliminary issues. Lordships observed in para [8.8] that:

In the present case as observed hereinabove, solely relying upon the observations made while deciding the application Exh.5, the commercial Court, Vadodara has dismissed the suit which as observed hereinabove is not permissive. No opportunity has been given to the plaintiff to show cause why the suit may not be dismissed on the ground of lack of territorial jurisdiction by the commercial Court, Vadodara. As observed hereinabove no application has been preferred to raise the preliminary issue

with respect to territorial jurisdiction of the commercial Court, Vadodara. If the appropriate application would have been submitted by the original defendant no.1 to dismiss the suit on the ground of lack of territorial jurisdiction of the commercial Court, Vadodara and plaintiff would have been given the opportunity, the plaintiff would have submitted that despite the ouster clause still for the reliefs sought in the plaint the suit shall still be maintainable before the commercial Court, Vadodara and natural the Court would have jurisdiction to entertain such a suit for relief of injunction as prayed. In the absence of such application and the opportunity given to the plaintiff, the commercial Court, Vadodara is not justified in dismissing the suit. Under the circumstances, the impugned order passed by the commercial Court, Vadodara below Ex.1 dismissing the suit cannot be sustained and same deserves to be quashed and set aside.

The ratio of this case rests its strength upon the issues involving the jurisdiction especially the territorial jurisdiction.

The further query that issues like plaint barred by period of limitation or cause of action can be decided by framing preliminary issues has

been made rest in peace by the division bench of Hon'ble Supreme Court of India through Hon'ble Justice Mr.Dipak Mishra & V. Gopala Gowda while discussing the case of Ramesh D. Desai and others V. Bipin Vadilal Mehta & others in the case of **Satti Pardesi Samadhi & Phillar Temple Vs. M. Sakuntala Tr. Lrs. & Ors. Civil Appeal no.5954 of 2014** as follows :

"In Ramesh D. Deasi and others V. Bipin Vadilal Mehta & others[3], while dealing with the issue of limitation, the Court opined that a plea of limitation cannot be decided as an abstract principle divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. The Court further proceeded to state that a plea of limitation is a mixed question of fact & law. On a plain consideration of language employed in sub-rule(2) of Order 14 it can be stated with certitude that when an issue requires an inquiry into facts it cannot be tried as preliminary issue."

The ratio of this case is ample clear that plea of limitation or cause of action is a mixed question of law & fact and thus cannot be decided through the preliminary issues.

As to the question when, on whose instance & how the powers under Order VII/Rule 11 shall be exercised by the Courts of law, Hon'ble Apex Court has guided through catena of judgments like as below:

T. Arivandandam Vs T.V. Satyapal (1977) 4 SCC 467 wherein it was held that *"If on a meaningful reading of the plaint it manifestly appears to be vexatious and merit less, not disclosing a clear right to sue, the trial Court should exercise its powers under Order VII Rule 11. If the clever drafting has created an illusion of a cause of action, the Court should nip it in the bud at the first hearing"*.

In case of **Popat and Kotecha Property Vs. State Bank of India staff Association (2005) 7 SCC 510** and in case of **Sopan Sukhdeo Sable & Ors Vs. Assistant Charity Commissioner and Ors. (2004) 3 SCC 137**, It was *inter alia* observed that the real object of Order VII Rule 11 of the code is to keep out of Courts irresponsible law suits. The word 'shall' used in the said provision clearly casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of the

Rule 11, even without the intervention of the defendant.

The above mentioned two authorities are loud enough to declare that powers under Order VII/ Rule 11 can be exercised at any stage of the suit whether it be with the order below Ex.5 or after the order been made under Exh.5 or in isolation below Ex.1, either upon the application of defendant or without the intervention of him but what *parens patriae* are giving the caution is that Courts of law shall not mechanically try the suit against the defendants without satisfying itself from the facts mentioned in the plaint or documents produced with it that suit is within the period of limitation & it discloses the cause of action.

This Court has raised the query to the plaintiff on 29/11/2022 as revealed from the Rojkam whether the plaintiff possess the cause of action to bring the present suit and if yes, then make known to the Court as to how the son possess the cause of action against the father to sue for partition and to recover the due share after making the partition during lifetime of the father. Plaintiff vide Exh.25 has submitted the reasons for the cause of action that arose in favour of plaintiff. The strong objection is taken by the plaintiff against the query of the Court with regard to the cause of

action asked by stating that as suit property being an ancestral property, the son can claim the partition and possession of his share even during the lifetime of his father. The second objection that is raised by the plaintiff is that the issue has already been framed and additional issue may be framed with regard to such query of the Court. The plaintiff has a prima facie case on account of being a lineal descendant of the common ancestor and thus, the plaintiff has a cause of action to bring the present suit.

When the plaintiff has already submitted his pleadings then it is up to the Court to verify it at any flash of time. Law obligated the Courts to weed out the time barred & causeless suits and if in discharge of such statutory duty in conformity with judicial precedents, the plaint found to be infirmed & consequently rejected then it does not amount to violation of natural justice and Court cannot be blamed to be imbued with prejudice and judicial arrogance. Legal duty imposed upon Courts in itself embodies the sense of judicial discipline with in partiality.

Issue No.B:-

[7] Before further divulging into the aspect of this issue it is pertinent to read the settled

position upon the cause of action under Order-7 Rule-11 made by Division bench of Hon'ble High Court of Gujarat through Lordship Hon'ble Mr. Justice Jayant Patel in **Chandrakant Kantilal Jhaveri V. MadhuriBen GautamBhai & Anr. 2011(1) GLR 270** as

When it is said that Court should take into consideration the averments made in the plaint for the purpose of deciding the question whether the averments made in the plaint disclose cause of action or not, it does not mean that the Court is precluded from applying the statutory provisions or case law to the averments made in the plaint. If the assertion made in the plaint is contrary to statutory law or case law, it cannot be considered as disclosing cause of action.

Hon'ble Mr. Justice while passing the reference of U.P. Cooperative federation case observed that the question whether a real cause of action has been set out in the plaint or something illusory has been stated with a view to get out of Order 7 Rule 11 of the C.P.C has to be decided with reference to averments made in the plaint and clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint.

This ratio permits the Court to apply the statutory provisions or case law to the averments made in the plaint.

Similarly as regards to the scrutiny of a plaint, for the purpose of ascertaining the cause of action, Hon'ble Apex Court in case of **The Church of Christ Charitable trust & Educational Charitable Society Vs. M/s Ponniamman Educational Trust AIR 2012 SC 3912** has observed in para 8 as below :

"8. While scrutinizing the plaint averments, it is the bounden duty of the Trial Court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of words ' ' cause of action ' '. A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue."

This authority at one hand impose a duty upon the plaintiff to spell out those material facts which are necessary to obtain a decree and at other hand gives a scale to measure the cause of action.

This judgment is like a beacon removing all the doubts when it comes to ascertain the cause of action from the averments of plaint.

To arrive at the conclusion whether plaintiff has cause of action for declaration of suit property as joint family property & consequently declaration of 1/2 share in it, basically depends upon an affirmative answer to a question whether a son can claim partition during the lifetime of his father over a property coming into the hands of father through succession from ancestors?

Similar issue was raised before Hon'ble **Madhya Pradesh High Court** in the case of **Vikrmasingh vs Anilkumar on 1 November, 2017** in Civil Revision. No.42/2017 wherein it was held in para 11 that

11. In the matter of Yudhishter Vs. Ashok Kumar, reported in AIR 1987 SC 558 referring to the earlier judgment in the case of Chander Sen (supra) it has been held by the Supreme Court that the property which devolved upon the father on the demise of the grand-father cannot be said to be HUF property in the hands of the father vis-a-vis his own sons. In the matter of Sheela Devi and others Vs. Lal Chand and another reported in (2006) 8 SCC 581, it has been further

clarified by the Supreme Court by holding that prior to the commencement of the Act as per the Mitakshara law usage once a son was born he used to acquire an interest in the coparcenary property as an incident of his birth, but now the Act would prevail over the Hindu law. In that case son's son was born prior to the commencement of 1956 Act therefore, it was held that he would retain his share of the property as a coparcener even after the commencement of the 1956 Act, while father who had died in 1889, his share will devolve upon his heirs according to the provisions of the Act. The Single Bench of this Court in the matter of Chandrakanta and another Vs. Ashok Kumar and others, reported in 2002(3) MPLJ 576 has also held that after coming into force of Hindu Succession Act, the theory of birth right does not exist and the son gets share in the property only after death of his father. Similar view has also been taken by another Single Bench judgment in the matter of Babulal and others Vs. Ramkali Bai & others, reported in ILR[2012] MP 1271."

The aforesaid judgment of this Court has been upheld by the Apex Court in case of Uttam Vs. Saubhag Singh & Others, reported in 2016(4) SCC 68, therefore, from the aforesaid law, the issue has been settled now that during lifetime of father the son cannot claim the right in the property during the lifetime.

Hence, the present suit filed by the plaintiffs is not maintainable. Impugned order 24.01.2017 is set aside and the revision petition stands allowed.

This judgment propounded by Hon'ble High Court of Madhya Pradesh has been rooted with the ratio laid down by Division Bench presided by Hon'ble Justice Kurian Joseph, Rohinton Fali Nariman in the case of **Uttam Vs Saubhag Singh & Others in CIVIL APPEAL NO. 2360 of 2016** wherein it is laid down that:

12. This Court, in dealing with the proviso and explanation 1 of Section 6, held that the fiction created by explanation 1 has to be given its full effect. That being the case, it was held:-

"13. In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step, to ascertain the share of the

deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to Section 6 resorts to the simple expedient, undoubtedly fictional, that the interest of a Hindu Mitakshara coparcener "shall be deemed to be" the share in the property that would have been allotted to him if a partition of that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which

flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition."

17. This Court examined the legal position and ultimately approved of the view of 4 High Courts, namely, Allahabad, Madras, Madhya Pradesh and Andhra Pradesh, while stating that the Gujarat High Court's view contrary to these High Courts, would not be correct in law. After setting out the various views of the five High Courts mentioned, this Court held:

"It is necessary to bear in mind the preamble to the Hindu Succession Act, 1956. The preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.

In view of the preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under Section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in Section 8 . Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be HUF in his hand vis-à-vis his own son; that would

amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-à-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc.

Before we conclude we may state that we have noted the observations of Mulla's Commentary on Hindu Law, 15th Edn. dealing with Section 6 of the Hindu Succession Act at pp. 924-26 as well as Mayne's on Hindu Law, 12th Edn., pp. 918-19.

The express words of Section 8 of the Hindu Succession Act, 1956 cannot be ignored and must prevail. The preamble to the Act reiterates that the Act is, inter alia, to "amend" the law, with that background the express language which excludes son's son but includes son of a predeceased son cannot be ignored.

In the aforesaid light the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court, and the Andhra Pradesh High Court, appear to us to be correct. With respect we are unable to agree with the views

of the Gujarat High Court noted hereinbefore.” [at paras 21- 25]

20. The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized as follows:-

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception en-grafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in

the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 8 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 8 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Section 4 ,8 and 19 of the Act, after joint family property has been distributed in accordance with Section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants.

It was concluded in last para that

21. Applying the law to the facts of this case, it is clear that on the death of Jagannath Singh in 1973, the joint family property which was ancestral property in the hands of Jagannath Singh and the other coparceners, devolved by succession under Section 8 of the Act. This being the case, the ancestral property ceased to be joint family property on the date of death of Jagannath Singh, and the other coparceners and his widow held the property as tenants in common and not as joint tenants. This being the case, on the date of the birth of the appellant in 1977 the said ancestral property, not being joint family property, the suit for partition of such property would not be maintainable. The appeal is consequently dismissed with no order as to costs.

The combined effect of both of the judgments is that once by operation of section 8 & fictional partition under section 6 of Hindu Succession Act property has been divided then it loses the character of joint family property and the property which thus devolved on a Hindu under Section 8 of the Hindu Succession Act would not be a HUF in his hand vis-à-vis his own son. The ratio of Uttam's

case *supra* while applying section 4 has removed all the customary application of Hindu laws prevailing before the amendment in Hindu Succession Act, 1956 and specifically laid down that after coming into force of Hindu Succession Act, the theory of birth right does not exist and the son gets share in the property only after death of his father.

The facts admitted by plaintiff that Suit property since the time of his grandfather had been succeeded and fell into the share of his father and after the demise of grandfather of plaintiff, reveals that property has already been fictionally & physically divided and becomes vested at the disposition of father of plaintiff. Moreover, father of plaintiff is alive at the time when the suit is filed.

Admitted facts of plaintiff & ratio laid down by Hon'ble Apex Court are in sharp contrast with each other and the suit property has already been fictionally partitioned since the time of his common ancestor and by being so, suit property lost the character of joint family property.

Thus, plaintiff does not have cause of action for partition during the lifetime of his father of the suit property which had admittedly received after the operation of fictional irrevocable partition.

Upon the strength of above facts & circumstances and the settled principles of law and judicial pronouncements, Court passes the following order.

:-Final Order :-

The plaint is rejected & suit stands dismissed for the reason:

1)Does not disclose the cause of action.

As the suit stands dismissed any order below Exh.5 stands vacated.

Pronounced in the open Court today on 25th day of the Month of May, in the year 2023 at Gondal.

Gondal
Dt. 25/05/2023.

Arya Ram Kumar
3rd Addl. Sr. Civil Judge
Gondal, at Rajkot
(GJ 01324)