(1943) 08 BOM CK 0020

Bombay High Court

Case No: None

Champaklal Chimanlal and Others		APPELLANT
	Vs	
Amubhai Dahyabhai Sodagar and Others		RESPONDENT

Date of Decision: Aug. 4, 1943

Acts Referred:

- Transfer of Property Act, 1882 - Section 12

Citation: AIR 1945 Bom 28

Hon'ble Judges: Divatia, J

Bench: Division Bench

Judgement

Divatia J.

1. This is an appeal by defendants 7 to 11 in a suit for partition. The parties to the suit were the sons, grandsons and the widow of one Dahyabhai Sodagar who died in 1906 leaving eight sons. The eldest son Mohanbhai died in 1923. One of the other sons, Chimanlal, died on 20th September 1934, leaving five sons. The plaintiff in the suit is Amubhai, one of the sons of Dahyabhai. Defendants 1, 2, 3 and 4 are his brothers Hirabhai, Bholabhai, Manilal and Lalbhai. Defendant 5 was Shantilal who died on 10th April 1936, after the present suit was filed on 8th November 1935. Defendant 6 was Dahyabhai''s widow, Bai ''Mangu, who died pending the suit and defendants 7 to 11 are the sons of deceased Chimanlal. The family had moveable as well as immovable properties at Ahmedabad. There is no dispute with regard to immovable property. The only disputes between the parties with which we are concerned relate to the money value of a broker''s card in the Native Share and Stock Brokers'' Association of Bombay, and family ornaments which were alleged to have been in possession of Dahyabhai''s widow Mangu but disappeared after her death. It appears that in 1911 three of the brothers, i.e. the plaintiff Amubhai, Manilal and Chimanlal came to Bombay for business and service. They were all

members of a joint Hindu family and the family was doing business as, share brokers at Ahmedabad where they had two cards in the Ahmedabad Stock Exchange. The plaintiff''s case was that in the year 1911 a card was taken in the Bombay Stock Exchange in the name of deceased Chimanlal. The business on that card was done for and on behalf of the joint family and the profits and losses also, were shared by it. Another card was thereafter taken by the family in the name of Manilal, defendant 3, in 1924, but it was kept silent for? several years. The family seems to have got into financial difficulties on account of losses incurred by some of the brothers, and as a result, some of the Ahmedabad properties had to be sold to liquidate the debts. Thereafter, on 20th January 1933, the plaintiff gave a formal notice for partition to all the brothers, and since then severance has taken place between the members of the family. On 20th September 1934, Chimanlal died, and thereafter on 8th November 1935, the present suit was filed by the plaintiff. After Chimanlal''s death no broker''s business was done on his card till December 1935, when under its rules the board of the Stock Exchange accepted the nomination of his eldest son, defendant 7, for membership, and since then the business on that card has been done by defendant 7 alone. The plaintiff''s case was that all the four cards, the two cards in Ahmedabad as well as the two cards in Bombay, were taken on behalf of the joint family, that the profits and losses were also shared by the joint family, that the cards had a money value in the stock exchange and that therefore their value should be divided among the members of the family although the cards themselves cannot be divided. With regard to the. ornaments, the plaintiffs case was that there were ornaments worth about Hs. 5,000 in possession of the r ''her and that they must also be brought into hotchpot by those members who might be found to be in their possession.

2. About the Ahmedabad cards there is no dispute and it is conceded that their value belongs to the joint family. But with regard to the Bombay card, which stood in the name of deceased Chimanlal, his sons, defendants 7 to 11, contended that that card was purchased with the private moneys of Chimanlal by incurring a debt of his own, and that therefore the joint family had no concern with it and the business done with that card was his personal business. It was further urged that in any case the card represented only a personal right of membership and it was not property in any sense which could be divided and partitioned. As regards the family ornaments, they contended that they were in possession of Bai Mangu, who was living with defendant 1, and therefore, the latter must be deemed to be in their possession. Defendant 3, who held the other Bombay card, admitted in his written statement that it was purchased out of the joint family moneys but contended that that card created only a personal rigkt and that, therefore, its value was not divisible. With regard to the ornaments, he supported the case of defendants 7 to 11. Bai Mangu had filed a written statement to the effect that her sons the deceased Chimanlal and Lalbhai, defendant 4, had taken away some of the ornaments from her. She, however, died after filing the written statement and therefore could not be

examined in the suit. Defendant 4 and the other defendants support the plaintiff in his case for partition of the value of the cards. Defendant 1 denied his possession of any ornaments.

3. The material issues framed by the lower ''Court were whether the broker''s cards in Bombay were the joint family property or the separate property of the defendants claiming them as their own and whether they were divisible in partition, and if not, what equitable order should for passed if they were held to be purchased for the joint family. The issue with regard to the ornaments was as to which of the parties was in possession of the ornaments. As regards the card, the learned Judge held on the evidence that both the Bombay cards were purchased with moneys belonging to the joint family, and the broker''s business, which was done with the aid of the two cards, was also treated as joint family business. He further held that although the cards may not be regarded as property in the legal sense of the term, their value was divisible in the partition, and that the brothers who would get the benefit of the cards in their names must account for an equivalent amount of their value in the partition of the joint family property. As regards their value the learned Judge fixed it at Rs. 16,000 each in 1940 when the evidence was taken and he directed that defendant 3 as well as defendants 7 to 11, should be debited Rs. 16,000 each as the price or value of the cards in the accounts. As to the ornaments, the learned Judge held that it was not proved that the ornaments in possession of Bai Mangu were worth Rs. 5000 and that, at the most they might be worth RS. 3000. He further held, relying on the evidence -of defendant 1, that ornaments worth about Rs. 1700 were taken away by defendant 4 Lalbhai from his mother for an alleged claim which he had for the palla ornaments of his wife in possession of the family, and that Chimanlal had taken away ornaments worth about RS. 1300 from the mother. The learned Judge, therefore, directed that as Lalbhai had taken away those ornaments for the palla debt, that debt did not exist at the date of the suit, and should not be taken into account, and that defendants 7 to 11 should account for Rs. 1300, i.e., the value of the ornaments taken away by their father.

4. Against this decree defendants 7 to 11 alone have appealed to this Court. We are, therefore, not concerned with the decree against the remaining defendants. The ease for the appellants is thus confined to the Bombay card in the name of their father and the liability thrown on them for ornaments worth about Rs. 1300. As regards the card it is contended by Mr. Thakor on the appellants'' behalf that it was purchased with the private moneys of Chimanlal and not by the joint family and that therefore there was no question of its partition. It was contended in the alternative that under the rules of the Bombay Stock Exchange the card is only a personal privilege in the nature of a license. If the board approves of a particular person, then the license to do business is given to him. But it is not transferable, and on the death of that person the interest devolves not on his heir but on the Share Brokers'' Association. On his insolvency nothing vests in the Official Assignee and the card-holder himself cannot dispose of the card by his will. On default being made by

a card-holder, the card could be forfeited and sold by the Association and the proceeds distributed among his creditors in the Stock Exchange. In certain cases a nominee of the card-holder is accepted by the board in its discretion, but there is no right in any heir of the card-holder to be recognised as such in place of the deceased. Now, on the point of purchase moneys, there is no doubt whatever on the evidence that the card was purchased for Rs. 1750 borrowed by the joint family, and the conclusion of the lower Court that it was so purchased seems to us to be clearly correct. The letters, Exs. 234, 208, 233, 247 and 250, which were written by some of the brothers from Bombay to their family head-quarters at Ahmedabad, show that not only was the card purchased by the family moneys but that it was treated as a joint family asset. One of these letters is written by the deceased Chimanlal himself and the others are written by defendant 3. In the oral evidence also defendant 1 as well as defendant 3 deposed that the card was purchased with the moneys borrowed by the joint family.

5. It is contended that there is no evidence that those borrowed moneys were repaid to the person who advanced them. At the same time, there is nothing to show that Chimanlal repaid the money if at all or that he treated the amount either as a loan given to him by the family or as a gift. In fact the conduct of Chimanlal as well as his brothers throughout shows that the card was not only purchased by the joint family but was regarded as a joint family asset, and from the date when the card came into operation up to nearly the time when the family separated, the profits and losses of the business done by the brothers as brokers on that card were put into the common purse. We must therefore proceed on the basis that as between the brothers the card was a joint family asset. The question then is whether its value can be debited to the account of the appellants'' branch in taking the accounts. It is not the respondents'' case that the card itself could be partitioned in the sense that it can be assigned to the share of a brother, other than the one in whose name it is taken, because the stock exchange is not bound to recognize such arrangement. Their case is that the coparcener in whose name the card stands, will after the partition carry on the brokers'' business as his own separate business which was till the date of separation the business of the joint family and he should therefore account for its value at that date to the family from whom he must be deemed to have purchased the card so as to make the business done on that card his separate business. The appellants, however, contend that the card being only a license or a privilege has no money value and cannot be regarded as his property. For that argument reliance is placed upon some of the rules of the Association and also upon three decisions. The rules relied on are 87 to 42.

6. Rule 37 is to the effect that a member shall not be entitled to assign, transfer, etc. his card or charge his card or right of membership; nor shall any right or interest in any card other than the personal right or interest of the member therein be recognized by the Association. Rule 38 also says that the right of membership shall be the purely personal privilege of the member attached to his membership and

shall not be deemed part of the property, estate or effects of such member and shall not pass from such member to any person or persons by act of the parties or by operation of law Rule 39 says that a member adjudicated an insolvent shall cease to be a member and his card shall stand forfeited to and become the absolute property of the Association. Rule 40 states that when a member of the Association is expelled, his card with all his rights and privileges shall be forfeited to and become the property of the Association. Under Rule 41 when a member of the Association dies, his card with all his rights thereunder shall, save as otherwise prescribed by any rule for the time being in force, vest in and become the absolute property of the Association. Rule 42 says that a card which under any rule for the time being in force is forfeited to or vests in the Association shall belong absolutely to the Association free of all rights, and if the board of directors sell such card, the sale proceeds thereof shall in the first place be applied in satisfying the liability of the member, whose card is sold, to other members in respect of any transaction made subject to the rules of the Association, and the balance thereof shall be paid into the funds of the Association, provided that the Association may in their absolute discretion direct such balance to be disposed of or applied in such other manner as they may think fit.

7. Two other rules may also be considered as they are relevant on this point. Under Rule 10 a candidate for admission must obtain the nomination of a member willing to resign in his favour or of the legal representatives or of the persons mentioned in Appx. C; and Rule 12 says that the legal representatives of a deceased member or the persons mentioned in Appx. C may with the sanction of the board nominate one of themselves or any other person otherwise eligible under the rules for admission to membership as a candidate for admission in the place of the deceased member. In Appx. C it is provided that in dealing with any application under Rule 10 or Rule 12, the board shall so far as practicable, be guided by the rules among others that if the widow and all the sons who are of age and the guardian of the minor sons consent to such new card being issued to any one of the sons and if such son is otherwise qualified to be admitted as a member, preference shall be given to such son; find that no admission fee shall be charged to any person to whom a card is issued under those rules.

8. Relying on these rules, it it contended that the family had no property in the card during Chimanlal''s lifetime. After his death also the board accepted in December 1935, the nomination by Chimanlal''s widow of her eldest son for membership. That gave him a personal right only, and he would not therefore be liable to the joint family to account for the value of that privilege. It is undoubtedly true that the relationship between the member in whose name a card is issued and the Association is governed by these rules. Under the rules no corporate body or a partnership can become a member. Only an individual can be a member. Even if a joint family wishes to do the business of brokers, it cannot have the card in its name but must obtain it in the name of one of its members. If the card is obtained with

the moneys belonging to the joint family, the business done by means of the card must be treated as a joint family business and its profits and losses must be shared by its members. If, therefore, the card has a money value, it must also form a joint family asset. That the card has a value there is no doubt whatever although it is not property in the legal sense of the term. Under the rules it cannot be inherited, transferred or bequeathed. It does not, however, necessarily follow that as between the members of a joint family the card cannot be regarded as a joint family asset. The President of the Bombay Stock Exchange has been examined in this case and he has deposed that a membership means a right to trade on the floor of the Stock Exchange, and the card by itself does not represent any sort of property. He, however, says that on the rights and privileges of a member ceasing either by forfeiture or by his death, the Association is at liberty to sell the card at its discretion; the amount fixed by the Association of a card from time to time represents its price and the Association fixes the price whenever it increases the number of membership. Rule 42 referred to above, also contemplates the board selling a card when it is either forfeited or vests in the Association. There is, therefore, no doubt that the card represents a valuable right or an asset, even though the card-holder has no absolute property in it.

9. The appellants however strongly rely on three decisions in support of their argument. The first is a decision of the Privy Council in AIR 1932 186 (Privy Council) . In that case there was a dispute between the Official Assignee on the one hand and the Stock Exchange on the other. A card-holder having become insolvent the Official Assignee contended that his card had vested in him for the benefit of the insolvent''s creditors while the Stock Exchange contended that the card could not so vest as it was not property and that under the rules of the Stock Exchange it had become forfeited to the Association. Their Lordships came to the conclusion that under the rules the card (or right of membership) of a member who had become a defaulter would not, on his insolvency, vest in the Official Assignee for the benefit of the general body of creditors. It was further held that there was nothing contrary to the law of insolvency or to the provisions Section 12, T.P. Act, 1882, in the rules of the Association providing that as and upon the declaration of default, the defaulting member''s right and interest in the Association shall be extinguished and come to an end. The decision is that on default of a card-holder, the insolvent''s interest in the Association was, under the rules, extinguished. We do not think that that decision applies to the facts of the present case. We are not concerned with the rights between a person claiming to represent the card-holder''s estate on the one hand and the Association on the other. We are concened with the rights inter se of members of a joint family in the value of a card purchased from the family fund. In the case of the cardholder''s insolvency, the card is forfeited, but in the case of his death, the position would be different. It may be renewed in the name of his son without charging the entrance fee and in that case the rights of the joint family in the card might arise for consideration. We do not think, therefore, that this decision

supports the appellants'' argument.

10. The second authority relied upon is Tribhovandas v. Bhikhubhai AIR 1937 Bom. 477. In that case a card-holder died leaving a will in which he appointed his wife as his executrix. The testator gave most of his property to his wife for her life and after her death to one Basiklal who was related to him. The widow applied to the Association to allow her to sell the card to a person who was desirous of becoming a member of the Stock Exchange. After making enquiries the Association approved of that member, took Rupees 36,000 from him, being the purchase-money of the card, and gave them to the widow. The widow thereafter died leaving a will in favour of certain persons. Rasiklal having died in the meanwhile, his heirs brought a suit against the legatees under the widow''s will to recover the estate of the card-holder. One of the questions was whether the sale proceeds of the card belonged to the widow herself or whether they formed part of her husband''s estate. It was held that if a card was sold by the Association under its rules, the sale proceeds were at its absolute disposal, and that they might be given to the widow or any other heir in Appx. c of the rules.&#65533; The moneys were given to the widow, and as the card could not be bequeathed the legatee had no claim on the proceeds of the card. The appellants rely upon the observations in that decision to the effect that a card gives a merely personal right to the holder and does not constitute in the ordinary sense "property," and so they contend that the card or its value cannot therefore be partitioned also. The question in that case was about the disposal of the sale proceeds after the card was sold through the Association to a stranger, and the decision was that the sale proceeds paid to the widow under the rules would become her property. There is no question in the present case about the right to the sale proceeds. The card has not been sold by the Association to any one after Chimanlal''s death. It has been simply renewed in the name of Chimanlal''s eldest son according to the rules without charging any entrance furs. The son has not paid anything to the Association for acquiring the right of membership. As between him and the other members of the joint family, it represents the same card which was purchased with the joint family moneys, and the question between them is about the adjustment of their rights in the card among themselves and not about any rights in its sale proceeds under the rules of the Association. We do not think, therefore, that the decision relied upon applies to the present case.

11. The last case relied upon is In re Framroz Dadabhoy Madan AIR 1942 Born. 33 It was held there that the right of membership of the Share Brokers'' Association is not property which can pass in succession or can be dealt with by a will, but it is a personal right which conies to an end on the death of the holder, and it is not, therefore, property on which probate duty can be levied. That decision follows as a corollary from the previous decisions in AIR 1932 186 (Privy Council) and Tribhovandas v. Bhikhubhai AIR 1937 Bom. 477 but does not apply to the present case for the same reasons as are given above. The effect of these three decisions is that a card by itself is not property in the legal sense of the term. It cannot be

inherited, transferred or bequeathed. But it does not follow that it is not a valuable right or an asset. It confers on the holder a right to do, broker''s business in the stock exchange. As I have stated above, even under its rules it can be sold by the Association and valued in terms of money. The card itself is not thus a partible property, but its money value can, in certain cases, be divided. In this very case this card was purchased by the joint family through the Association for Rs. 1750 in 1911, and therefore as between the members of the coparcenary the money value of the card belonged to the joint family and not to Chimanlal alone in whose name it was purchased. His brothers do not now say that the card itself should be partitioned in the sense that it should be assigned to the share of any coparcener other than the one in whose name it is renewed by the stock exchange. All that they say is that if it was purchased by the joint family moneys and the profits as well as the losses of the business done on that card went into the family purse, the brother in whose hands the card becomes his separate concern, should pay its value to the family. The crucial date for ascertaining its value is 20th January 1933, when a notice was given by the plaintiff and the family ceased to be a joint Hindu family. At that date Chimanlal was alive. The evidence shows that thereafter all the brothers treated themselves not as coparceners but as separated brothers, and any business which a brother did thereafter was regarded as his own separate business. The evidence does not show that any profits or losses in the business done by Chimanlal on the card after this date were put into the common purse. In the family partition to be made later, Chimanlal''s sons have therefore to account for the value of the card on that date.

12. It is no doubt true that on Chimanlal''s death it was open to the stock exchange to give the card to anybody whom it liked and not necessarily to his widow or to his eldest son, and that in such a case neither Chimanlal''s heirs nor any person representing the family would have got anything as its value. But Chimanlal was alive when the family separated in January 1933. His death took place in September 1934, and if as and from 20th January 1933, the card became the exclusive right of Chimanlal, he was bound to account for the value of the card on that date to the other coparceners. No rule of the Association prohibits the accountability or the divisibility of the value of the card apart from its sale proceeds among the members of a joint Hindu family, once it is held that the card has been acquired with joint family moneys. Strictly speaking, therefore, it is not necessary to consider whether when Chimanlal''s son got the card in December 1935, he got it as a personal right or whether he did so as representing his father who was a nominee of the joint Hindu family. As I said before, in January 1933 when the family separated, if Chimanlal had thought that the card was not an asset but a liability, it was open to him to renounce his right on the card as between the members of the family and to say. that the Association may be moved to transfer it to the name of any other coparcener. But he kept the card and did his own business thereafter, and whether it might be subsequently forfeited or vest in the Association absolutely if it did not

recognise the right of his son was his own concern, once he chose to continue the card in his own name. On this view what took place after the severance of the family in January 1933 is not material. But the matter does not rest there. Even after his death his son had been recognized by the Association, and under the rules the son had not to pay any admission fee which a new member would have been required to pay. That admission fee seems to be very high. It was Rs. 30,000 when these rules were framed although it was liable to be changed from time to time. To that extent it was undoubtedly a benefit which he derived from his father''s card, which was really the family card as among the brothers. The family can, therefore, legally and justly call upon him regarding him as their nominee in place of his father to account for that benefit. Qua the family members that benefit must be assessed on the value of the card when it became the sole business of his father. In any case therefore whether the liability to account to the family be regarded as Chimanlal''s or of his eldest son, so far as the family is concerned, Chimanlal''s branch should account for the value of the card. The learned Judge below has however fixed the value of the card at Rs. 16,000 on the basis that that was the value at the time when the evidence was being led. But as the date of severance, viz., 20th'' January 1933, is the material date for the purpose of ascertaining its value, the lower Court was wrong in fixing the liability of Rs. 16,000 on the appellants. It would have been necessary therefore to remand the case to the lower Court for the purpose of ascertaining its value on that date. But all the parties here have agreed that Rs. 10,000 may be regarded as the value of the card on that date, and that being so, it is not necessary to remand the case for that purpose. The figure of Rs. 16,000 fixed by the lower Court in the decree will be replaced by Rs. 10,000. With regard to defendant 3''s card the learned Judge has also fixed the value at Rs. 16,000 as the value at the date when the case was being heard. For the same reasons which we have given above, the value would be the one that prevailed on 20th January 1933, But he has not appealed to this Court against the decree and although he has been represented by a pleader as a respondent in this case, his pleader has not appeared before us. It is only at defendant 3''s instance, if at all, that we can extend the indulgence of varying the decree in his favour under Order 41, Rule 33. As he has not applied to us for exercising such indulgence, we do not think that we1 can vary the decree in defendant 3''s favour.

13. The next question is about the ornaments. There is no doubt that certain ornaments were in possession of Bai Mangu while she was alive. It appears that those ornaments were kept in a safe in the house. According to defendant 1, who is the eldest son and with whom she was living, the part of the house in which the safe was kept has been sold along with the safe to another person, and defendant 1 says that he has not opened the safe, and therefore he cannot say whether the ornaments are in the safe or not. It is however alleged by him in his deposition that his mother told him that out of the ornaments which she had, ornaments worth about Rs. 1700 were taken away by Lalbhai, defendant 4, in lieu of the palla

ornaments of his wife which he had to recover, and that ornaments worth about Rs. 1300 were removed by Chimanlal during his lifetime. The mother has also alleged the same thing in her written statement but she died after that and could not be examined, and therefore the statement made by her in the written statement would not be evidence. The lower Court has accepted the evidence of defendant 1 and held that defendant 4 as well as Chimanlal''s heirs were liable to account for the value of the ornaments taken away from the mother. We are not concerned in this appeal with the ornaments taken by defendant 4 because he has not appealed against that order. The only question therefore is whether it is proved that Chimanlal had removed ornaments worth Rs. 1300 from the possession of the mother. It is significant that although defendant 1 says in his deposition that his mother told him about the removal of these ornaments, he has not referred to that talk in the reply to the plaintiff''s notice, as well as in his written statement filed in the present suit. He admits that in his reply to the plaintiff''s notice he did not say that Chimanlal had taken away the ornaments. He also admits that he had not talked about the removal of the ornaments to any of his brothers. That being so, it is difficult to accept his story which is given out for the first time during his deposition about the talk which he had with his mother. If the story were true, one would certainly have expected defendant 1 to have referred to it at the very first opportunity when he replied to the plaintiffs notice in which he had referred to the ornaments. It is no doubt true that the khata of defendant 4''s palla is not carried forward from the year in which it is alleged that the ornaments were removed and that gives some support to defendant l''s story that defendant 4 had removed the ornaments. But even if that part of the story may be true, it does not necessarily follow that the other story of the removal of the ornaments by Chimanlal must also be true. We think, therefore, that it is not proved beyond doubt that Chimanlal had removed ornaments worth Bs. 1300 from his mother''s possession, and we, therefore, set aside the lower Court''s finding on that point.

14. It is, however, urged by Mr. Thakor for the appellants that it must be held on the evidence that defendant 1 had himself removed all the ornaments worth about Rs. 3000 in possession of the mother, because the mother was living with him and he had both the keys of the safe after the death of the mother. This point is not taken in the memorandum of appeal in this Court. If the appellants claimed to be entitled to their share in the ornaments from defendant 1, they ought to have paid court-fees on the amount of their share in the ornaments. But they have not done so, and we do not think, therefore, that the appellants are entitled to take the point in appeal. The result, therefore, is that so far as the ornaments are concerned, the appellants'' liability to account for Rs. 1300 to the family in the partition will go. The decree of the lower Court is, therefore, modified by deleting the decretal order that defendants 7 to 11 should account for RS. 1300 to the family for the ornaments. There will be a further modification that so far as the Bombay card is concerned, the appellants will be debited in taking accounts with Rs. 10,000 and not Rs. 16,000 as

fixed by the lower Court. With these modifications the decree of the lower Court is confirmed and the appeal is dismissed. There will be no order as to the costs of this appeal and each party will bear its own costs. As regards the order of costs passed by the lower Court, it is not necessary to interfere as it is directed that costs will be costs in the cause.