

## **BOMBAY HIGH COURT**

Gulabrao Fakirrao

Vs.

Baburao Fakirrao

Appeal No. 90 of 1955, Civil Suit No. 3 of 1953.

(Shah and V.S. Desai, JJ.)

19.11.1958

### **JUDGMENT**

**Shah, J.**

1. One Fakirrao Manikrao, a resident of the village of Fursungi in the district of Poona, died on 12-3-1999, leaving him surviving two sons - Baburao (Defendant) and Gulabrao (plaintiff) - and his wife Anusuyabai (plaintiff 2). At the time of Fakirrao's death, Baburao, the elder son, was about 19 years of age and Gulabrao was about 5 years of age. Fakirrao was the village Patil, and after his death the office of Patil devolved upon his son Baburao. The family was receiving an annual income of Rs. 150 whenever the duties of the office of the Patil were performed by members thereof. Between 1910 and 1920 Fakirrao officiated as the Patil, and between the years 1930 and 1940 Baburao, the elder son of Fakirrao, performed the duties of the Patil. Fakirrao was possessed of S. No. 41/2 admeasuring 6 acres 1 guntha, S. No. 31/2 admeasuring 7 acres 13 gunthas. S. No. 9/7 admeasuring 0.30 gunthas and two other lands S. Nos. 9/10 and 11 of Fursungi. S. Nos. 41/2 and 31/2 were irrigated from canal waters and S. No. 9/7 had a well in it. S. Nos. 9/10 and 11 were not valuable lands. Besides these lands, Fakirrao was possessed of three houses in the village of Fursungi. Fakirrao was not in affluent circumstances. Out of the land S. No. 41/2, one part admeasuring 3 acres 1 guntha, which was subsequently assigned S. No. 41/2B, was mortgaged with possession with one Undare for securing repayment of Rs. 800 by deed, dated 26-7-1913. The other part of S. No. 41/2, which was subsequently assigned S. No. 41/2A., admeasuring 3 acres, was mortgaged with possession with one Manilal by deed, dated 13-10-1920, for securing repayment of Rs. 700. Thereafter Fakirrao purported to sell S. No. 41/2A to Manilal for a consideration of Rs. 2,000. S. No. 9/7 was ostensibly sold for a consideration of Rs. 600 to one Gadgil on 5-2-1924, but the land remained in the possession of Fakirrao under some arrangement, the ostensible sale being in the nature of a mortgage. Fakirrao had in 1928 obtained S. No. 25, Pot Hissa No. 3, of Fursungi admeasuring 3 acres 15 gunthas on lease for a period of five years at an annual rental of Rs. 20, and it was cultivated by him and

after his death by the defendant on payment of rent to the landlord Yamajirao Narayanrao Harphale. At the time of the death of Fakirrao, the only male members of the family were his two sons Baburao and Gulabrao. Gulabrao was an infant and Baburao had recently attained the age of majority. Baburao assumed management of the joint family and exerted himself with a view to improve the condition of the family. In 1931 he acquired on lease from one Parubai S. Nos. 6/18 and 6/20, admeasuring in the aggregate 1 acre, at an annual rental of Rs. 45. Again, he obtained a part of S. No. 31, admeasuring 6 acres, on lease from one Babu Shivram for a period of five years at an annual rental of Rs. 100. Evidently the only ancestral land which was in the possession of Baburao was S. No. 9/7 and the two pieces of land S. Nos. 9/10 and 11 of Fursungi, S. No. 9/7 being subject to a mortgage. But by exerting himself in the lands S. Nos. 9/7, 25 Pot Hissa No. 1 and S. No. 31 part, and the two lands S. Nos. 6/18 and 6/20 which were obtained by him on lease, Baburao, was able to accumulate a sufficient amount with the aid of which he redeemed S. No. 41/2B from the mortgagee, Undare. Baburao commenced a suit for redemption of S. Nos. 41/2B and under a scheme of instalments in which the mortgage debt was made payable he paid to Undare a sum of Rs. 180 and the subsequent instalments accruing due from time to time and by 22-12-1943 that land was redeemed. In 1937 Baburao purchased S. No. 100 admeasuring 3 acres 32 gunthas from one Ranu Kule for Rs. 200. It appears that prior to the date of the purchase the land was in the possession of Baburao as mortgagee. Baburao had also commenced Suit No. 1008 of 1934 against Manilal for redeeming S. No. 41/2A alleging that the transaction, dated 4-3-1922, was in the nature of a mortgage. That suit was compromised on 19-2-1937 and Manilal agreed to resell the Land S. No. 41/2A to Baburao for Rupees 1,500. This amount was also paid and the land S. No. 41/2A was finally redeemed in 1943. In S. No. 31/2 which was taken on lease by Baburao in the year 1931 he planted orange saplings in an area of 3 acres. The orange saplings flourished and they were yielding fruit till the year 1948-49. Some time about 1941 an income of Rs. 600 was received from the orange trees, but thereafter possibly because there was no water available no substantial income was received from those trees. About the year 1948-49 the orange bushes were removed and sugarcane was cultivated in that land. In 1939 Baburao obtained on lease S. No. 50 admeasuring 6 acres from one Jaibai Shivram. This land continued in the occupation of Baburao as tenant till the year 1943 and thereafter he purchased the same. In 1940 Baburao purchased S. No. 212/4A for Rs. 300 from one Satyabhamabai but it was resold to Satyabhamabai on 29-6-1942 for the same consideration. On 5-12-1941 Baburao entered into an agreement to purchase S. No. 26/1A for Rs. 4,800 and paid Rs. 1,550 as earnest money, but Baburao could not collect the balance of the price agreed to be paid by him and by agreement, dated 16-2-1952, he assigned his rights under the agreement, dated 5-12-1941, to one Govind Ganji Harphale on 16-2-1942 for Rs. 6,000; and made a net profit of Rs. 1,200 and he also obtained refund of Rs. 1,550 which was paid by him to the vendor. In 1942 he agreed to purchase from Jaibai S. Nos. 50/4E, 50/4A/1-A and 50/4A/2 for Rs. 3,000, and Rupees 1,500 were paid as earnest on 25-2-1943. Again, the right to purchase this property was sold by Baburao to Fakira Shivram Kamathe for Rs. 4,800. By this transaction he made a net profit of Rupees 1,800 and he obtained refund of the amount of Rs. 1,500 paid by him on 25-2-1943. On 8-7-1943 Baburao purchased from one Anusuya a house at Fursungi for

Rs. 1,150. It was in this year that he repurchased the land S. No.41/2A from Manilal against whom he had obtained a consent decree in Suit No. 1008 of 1934. Till the year 1940 the younger brother Gulabrao was attending school, but immediately after leaving school Gulabrao migrated to Bombay. It is the case of Baburao that Gulabrao had taken a job in a mill as a labourer, but Gulabrao fell ill after he lived for about 18 months in Bombay and he was then taken back by Baburao to Fursungi. In 1943 the marriage of Gulabrao was performed and Rs. 500 were spent by Baburao for the marriage ceremony. The well in S. No. 9, which was one of the ancestral lands, had gone out of repairs and Rs. 900 were spent by Baburao for repairing that well. On 20-11-1944, Baburao entered into an agreement to purchase S. Nos. 31/3 and 31/6 for Rs. 5,000, and an amount of Rs. 700 was paid as earnest money. Possession of these lands was obtained by him on 9th June 1945. Some time about the end of 1944 there were disputes between Gulabrao and his brother Baburao, and early in the year 1945 Gulabrao migrated to Poona and took up private service. Before Gulabrao migrated to Poona, it was the case of Baburao that there was an arrangement to partition the joint family properties between the two brothers. It was the case of Baburao that the cattle, ornaments, utensils and the agricultural implements were partitioned between the two brothers and Gulabrao took his share of the ornaments, utensils and the furniture; that the agricultural implements were left with Baburao at Fursungi, and that the immoveable properties of the joint family were not divided because Baburao insisted upon receiving the share payable by Gulabrao for redeeming the ancestral lands which were redeemed by Baburao, as he claimed, at his own expense. It appears that on 31-3-1945 Gadgil, who was a transferee of S. No. 9/7, reconveyed the land to Baburao for Rs. 1,050 which was paid by the latter. On 11th August 1945, Baburao executed a rent note for five years in respect of S. No. 5/1, 2 and 3 and agreed to take those lands on lease at an annual rental of Rs. 500. This land admeasured 22 acres 5 gunthas and there were two wells in it. Possession of this land was obtained on 5-4-1946. He also executed a rent note in respect of S. Nos. 210 and 211 and obtained possession thereof on 6-3-1946 to be held on lease at an annual rental of Rupees 300. On 6-3-1948, he also obtained possession of the land S. No. 7/1, 4, 5, 6, 7 and 8 which were agreed to be purchased under the agreement, dated 14-12-1945, after paying the balance due by him. On 1-4-1947, he purchased S. No. 7/2 from one Gajabai and her son for Rs. 1,800. On 31-7-1947, he purchased S. Nos. 31/3 and 31/6 under the agreement, dated 20-11-1944, by paying the balance of the purchase price to the owner thereof. On 22-8-1947 he purchased from Prataprao son of Yamgirirao for Rs. 3,500 the land S. No. 25/3. This land, it may be noted, was originally with Baburao as a tenant, the tenancy initially having commenced in 1928. Sometime later, it appears that Baburao purchased a motor-car, a motor bicycle, a radio set, and expensive equipment for agricultural operations such as oil engines. On 8-1-1953, Gulabrao and his mother Anusuyabai commenced Suit No. 3 of 1953 in the Court of the Joint Civil Judge, Senior Division, at Poona against Baburao for a declaration that they had each a third share in the properties described in Schedules A to H in the plaint and for separate possession of their shares by division by metes and bounds. In the alternative, it was claimed that if the Court held that the second plaintiff Anusuyabai was not entitled to a share in the suit properties, provision be made for her maintenance and the first plaintiff be awarded his share in the properties. Gulabrao and

his mother Anusuyabai claimed mesne profits for four years prior to the date of the suit and also mesne profits after the date of the suit. It was the case of the plaintiffs that all the properties which were in the possession of the defendant Baburao were either ancestral properties or properties acquired with the aid of ancestral properties or properties which were thrown into the common stock or acquired by joint exertions by the parties and the same were accordingly impressed with the character of joint family property and that the plaintiffs had under the Hindu Law collectively a 2/3rd share therein and the defendant had the remaining one-third share. To the plaint filed by the plaintiffs as amended were annexed 8 schedules. Schedule A, set out the ancestral properties which were parts of Survey No. 9, part of Survey No. 31 and parts of Survey No. 41. Schedule B set out lands which were acquired after the year 1930. They were parts of Survey No. 31, parts of No. 7, and parts of Survey No. 25/3. Schedule C set out the description of five houses and an open plot of land. Schedule D set out the lands Survey Nos. 5, 210, 211 and 25 which were obtained on lease by the defendant Baburao. Schedule R gave a description of the oil engines and the flour mill together with the agricultural implements and cattle. Schedule F gave a description of the motor-car, motor bicycle, bicycles, radio sets and other furniture. Schedule G gave a description of ornaments and Schedule H of the cash, utensils of gold and silver and ornaments which were kept in the safe deposit vault in the Poona Central Co-operative Bank. The defendant Baburao by his written statement contended inter alia that the properties in which the plaintiffs claimed a share were not joint or ancestral estate, that the properties in his possession were his exclusive properties and that the plaintiffs had no share therein, that he had never blended the properties acquired by him with any joint family or ancestral property in his hand, that in any event there was severance between him and the plaintiffs some time after the year 1944 and that the moveables belonging to the plaintiffs and the defendant were divided but the immoveable properties could not be divided because the first plaintiff Gulabrao declined to pay his share of the debts charged upon the properties which were satisfied by the defendant. The defendant further contended that the houses, agricultural implements, ornaments, cash, motor-car, motor bicycle and the other furniture were not properties of the joint family and that the plaintiffs had no share therein. The learned trial Judge on a consideration of the evidence held that all the lands in Schedule A and lands Survey Nos. 7/1, 4, 5, 6, 7 and 8 in Schedule B were joint family lands. He also held that houses items Nos. 1, 2, and 5 and the open plot of land which is item No. 6 in Schedule C and the movables in Schedule E were also joint family properties. But, in his view, the lands Survey Nos. 31/6, 31/3, 7/2 and 25/3 in Schedule B, the lands in Schedule D, and items Nos. 3 and 4 in Schedule C and the moveables set out in Schedules F, G and H were not joint family properties. He ordered that in the properties declared to be joint family properties the plaintiffs had a 2/3rd share. He also ordered that in the land of houses Nos. 3 and 4 the plaintiffs had a 2/3rd share. He directed that an enquiry be made into mesne profits under Order 20, Rule 12, of the Civil Procedure Code for three years prior to the date of the suit and also from the date of the suit. Against that decree the defendant has not preferred any appeal. But the first plaintiff Gulabrao filed this appeal and claimed that the trial Court was in error in not awarding him a share in the properties in which a share was claimed by him by his plaint.

**Shah, J.**

(After stating the facts and holding that there was in fact severance of the joint family status clearly in 1945 between the plaintiffs on the one hand and the defendant on the other, the judgment proceeded :)

The content of the presumption is set out by their Lordships of the Privy Council in *Appalaswami v. Suryanarayanmurti*<sup>1</sup>, in the following terms :

"Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which form its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-

<sup>1</sup>50 Bom LR 628

acquisition to establish affirmatively that the property was acquired without the aid of the joint family property".

The presumption applies only to property acquired during the subsistence of the joint family and not thereafter. Mr. Paranjpe has not been able to invite our attention to any rule of Hindu law which supports the submission that property which is acquired, after severance of the joint family status must, even if there be no agreement in that behalf, be regarded as acquired for the family. Evidently by the severance of the status effected in the year 1945 the plaintiffs and the defendant became tenants in common of the property held by them. The entire immoveable property of the family, which consisted of the ancestral lands and the subsequent acquisitions till the year 1945, remained after severance with the defendant, and it is admitted by the defendant that he did not maintain separate accounts of the income received from the properties in which the plaintiffs had a share, and the properties acquired by him after the partition. The defendant also, it is conceded, dealt with the income derived from his share and the share of the plaintiffs.

2. Mr. Paranjpe says that when the defendant continued to receive the plaintiffs share of the income even after partition in the ancestral and the joint family properties and mixed up the income belonging to the plaintiffs' share with the income of his own share and acquired properties from time to time, all the properties so acquired must be deemed to be impressed with the character of the fund out of which the properties were acquired, i.e., that the properties belonged to the three parties to the suit as tenants in common. Counsel does not rely in support of this contention upon any agreement express or implied in that behalf, because no such plea was raised in the Court below. He merely asserts it as a proposition of law that a co-sharer in possession of immoveable property belonging to himself and other shares is a trustee for the

other co-sharers, and when he mixes up the income received by him from property in which he is a co-sharer with his own fund and acquires property with that fund, the property so acquired is impressed with the same tenure in which the other property of which the income is received is held; and in support of this argument Mr. Paranjpe relies upon Sections 90, 94 and 95 of the Trusts Act. In our judgment, the argument of Mr. Paranjpe proceeds, upon several assumptions which are not warranted. Because the defendant continued to receive the rents and profits of the share of the plaintiffs in the properties which were originally ancestral or joint family properties he did not thereby become a trustee of the rents and profits so received for the plaintiffs. As a co-sharer, it is true, the defendant was and continued to be liable to account for the rents and profits received by him, but the fact that the defendant failed to maintain separate accounts of the income of the plaintiffs' share collected by him did not impress the fund accumulated by him after severance with the character of a fund belonging to the plaintiffs and the defendant; the fund in the hands of the defendant was still a fund, of which he was the owner. It was not impressed with any trust in favour of the plaintiffs: and the property acquired with the aid of that fund was the exclusive property of the defendant and the plaintiffs had no claim or share in that property. Mr. Paranjpe also urged that when the income received by the defendant from the properties held by him as a tenant in common with the plaintiffs was blended by the defendant with the other income received by him, the defendant was guilty of conversion and the property which was acquired by that conversion must be regarded as impressed with the rights which the plaintiffs had in the property from which the income was received from time to time. But this is the same argument in another guise; and in support of this contention also Mr. Paranjpe has not been able to cite any authority or to advance any substantial argument.

3. In *Kennedy v. De Trafford*<sup>2</sup>, it was observed :

"There is no fiduciary relation between tenants in common of real estate as such. Nor can one tenant in common of real estate, by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character."

A co-sharer collecting rents and profits of the entire property is therefore not a trustee for the other co-sharers. It is then difficult to accept the argument of Mr. Paranjpe that when the defendant collected the rents and profits of the immovable property after the plaintiffs left Fursungi and migrated to Poona, and mixed up the same with the income of his separate acquisitions, the total fund became impressed with a trust in favour of the plaintiffs, so that in the property acquired with the aid thereof, the plaintiffs acquired an interest.

4. Sections 90, 94 and 95 fall in Chapter IX of the Trusts Act, and they deal with certain obligations in the nature of trusts. A person who is not an express trustee but who holds a position qua another which may be regarded as fiduciary in character, will be subject to certain obligations set out in the various sections of that chapter. Section 90, on which reliance is placed, requires a person who has qualified ownership in any property to hold, for the benefit of all the

persons interested, any advantage gained by him by availing himself of his position in derogation of the rights of the other persons interested in the property. In order that Section 90 of the Trusts Act may apply, it must be established that the party against whom relief is sought availed himself of his position, that he gained an advantage by so doing and that the advantage was gained in derogation of the right of the person interested in the property. In other words, a person standing in a fiduciary relation to another cannot by taking advantage of his position gain exclusively for himself an advantage which he could not have obtained but for the position which he occupied. That the defendant when he collected the rents and profits of the property may be liable to account for the same is undisputed. But it is difficult to appreciate when the plaintiffs left the defendant in enjoyment of their share of the property and the latter collected the rents and profits thereof how he may be regarded as having availed himself of his position and having obtained an advantage in derogation of the rights of the plaintiffs, which rendered him liable to hold for the benefit of the plaintiffs the property acquired by him out of the fund with which the income of the plaintiff's share was mixed up. In our judgment, Section 90 can have no application to this case.

5. Section 94 only extends the obligations prescribed by Sections 81 to 93 of the Trusts Act to constructive trusts in cases not otherwise expressly provided for; and does not add substantially to the provisions of Section 90 on which reliance has primarily been placed.

6. Section 95 of the Trusts Act provides : "The person holding property in accordance with any of the preceding sections of this Chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if

<sup>2</sup>1897 AC 180

he were a trustee of the property for the person for whose benefit he holds it". If however, the defendant be not regarded as holding the property in a fiduciary capacity in accordance with any of the preceding sections of Chapter IX by reason of Section 95 he will not evidently be subject to the liabilities and disabilities of a trustee. There is, in our judgment, nothing in Sections 90, 94 and 95 which expressly or by implication renders the self-acquisition of the defendant liable to be held for the benefit of the plaintiffs merely because the defendant has not maintained a separate account of the income received by him out of the share of the plaintiffs in the property.

7. But Mr. Paranjpe relied strongly upon a judgment of this Court in *Ramabai Govind v. Raghunath Vasudeo*<sup>3</sup>, in support of his argument. In that case, the Court held that where a trustee had purchased property from a fund, which consisted of the income received from trust property and the other property belonging to the trustee, the property so purchased will be held by the trustee as if the beneficiary had the same right therein as in the trust property. In that case, the person who acquired the property in the view of the Court occupied the position of an express trustee. He had collected the income of the trust property as well as of other properties, and had mixed up the income and out of the fund so collected he had acquired the disputed property. The

question then arose whether to the disputed property the beneficiary of the trust could have recourse; and this Court held that the property so acquired must be held by the trustee as if it was trust property. It was conceded in that case that Martand son of the trustee Trimbak took upon himself the powers and duties of the trustees under the will of Govind though he was not a trustee or Executor nominated in that behalf by the will. Martand collected the income of the property held by him under the will and mixed up that income with the other income belonging to him. It was observed by Mr. justice Bhagwati in delivering the judgment of the Court at page 892 : (of Bom LR) : "There is no doubt whatever that all the properties inclusive of Govind's share therein were managed as a single unit and at no time was there any demarcation or separation of the properties which fell to Govind's share from the rest of the properties. It can, therefore, be taken as established that Martand, who was in the position of a trustee qua Govind's estate, mixed up the properties which came to the share of Trimbak's branch with the properties which came to Govind's share. If that is so, the trustee did mix up his own properties with the trust properties, and the position in law in such cases is well established and set out in Lewin on Trusts, 15th ed., at p. 225; 'The trustee, wherever the trust property may be placed, must always be careful not to amalgamate it with his own, for, if he do, the cestui que trust will be held entitled to every portion of the blended property which the trustee cannot prove to be his own'." We are unable to agree that the principle of this case has any application to the facts of the present case. As we have already pointed out, the defendant Baburao was not a trustee either express or even by implication of the property held by him, and by recovering the rents and profits of the share of the plaintiffs in the property in dispute he did not become liable as a trustee for the plaintiffs. If the defendant was not a trustee, the principle in Ramabai's case can have no application to the present case. (The rest of the judgment has been omitted as it is not considered material for the purposes of this report.)

Appeal dismissed

<sup>353</sup> Bom LR 883