

**(2013) 10 BOM CK 0157**

**In the Bombay High Court**

**Case No :** Appeal (L) No. 376 of 2013 in Notice of Motion No. 166 of 2013 in  
Suit No. 75 of 2013 with Notice of Motion No. 1800 of 2013

Gopal Bhagwandas Ahuja

APPELLANT

Vs

Jagdish Bhagwandas Ahuja and Others

RESPONDENT

---

**Date of Decision :** 08-10-2013

**Acts Referred:**

**Citation :** (2013) 10 BOM CK 0157

**Hon'ble Judges :** M.S. Sonak, J;D.Y. Chandrachud, J

**Bench :** Division Bench

**Advocate :** Shailesh Shah, Ms. Mamta Sadh, Mr. S.K. Srivastav, Mr. Gunjan Shah and Ms. Kavita Srivastav instructed by S.K. Srivastav and Co, for the Appellant; Aspi Chinoy, Dr. V.V. Tulzapurkar, Mr. D.D. Madon s, Mr. Zal T. Andhyarujina, Ravi Gandhi, Punit S. Damodar, Mahek Kamdar instructed by . Kanga and Co. for Respondent No. 1, Ms. Rajni Iyer instructed by . Kalpesh Nansi for Respondent No. 6., Mr. Janak Dwarkadas instructed by . Amarchand and Mangaldas and Co. and S.A. Shroff and Co. for Respondent No. 16, Mr. Girish Godbole, Vishal Kanade instructed by . Mr. Jayesh R. Vyas, for Respondent Nos. 2, 4, 5, 7 and 9 to 11 and Mr. Chirag Balsara instructed by . Desai Desai Curimjee and Mulla for Respondent Nos. 12 to 15 and 17 to 19, for the Respondent

**Final Decision :** Dismissed

---

## **Judgement**

D.Y. Chandrachud, J.—The Appeal arises from the judgment of a learned Single Judge dated 27 August 2013 dismissing a Motion for interim relief in a suit for partition. The Appellant is the original Plaintiff. For convenience of reference parties are referred to by their description in the suit. The Plaintiff and Defendants 1 to 8 are siblings, all of them being the children of Bhagwandas Ahuja who died on 14 April 1996. Between 1948 and 1969 Bhagwandas Ahuja carried on business of a kirana commission agency as a partner in a firm by the name of Mulchand & Co. The partnership firm had suffered larges losses and stopped its business activities in 1969. Bhagwandas was heavily indebted. On 5 February 1970 the first deed of partnership was entered into, with effect from

1969, under which the First Defendant commenced doing business in partnership under the name of Kanayalal Rameshkumar. The First Defendant was the eldest son of Bhagwandas, who had ceased to carry on any business. His other sons, Defendants 2 to 4 who were then minors were admitted to the benefit of the partnership. On 5 October 1973 Bhagwandas and his two partners in Mulchand & Co. filed a petition for insolvency in this court. Bhagwandas was declared as an insolvent on 5 October 1973. During the course of his examination in 1973 Bhagwandas stated that he had a liability of Rs. 25.80 lacs to 17 creditors; that he had not carried on any business since 1969 and that he had not invested any money with any firm or relatives. The First and Second Defendants were stated to be brokers in the kirana business. In 1976 Defendants 1 to 4 purchased a flat in Jolly Maker Apartments, Cuffe Parade, which was sold in 1982 to acquire four separate flats at Andheri.

2. In 1982, the First Defendant formed a partnership by the name of Rameshkumar Gopaldas together with the Plaintiff and the Second, Third and Fourth Defendants. In 1985 the Second, Third and Fourth Defendants exited from the firm of Rameshkumar Gopaldas and commenced their own businesses. Thereafter the business of the partnership was continued by the Plaintiff and the First Defendant. The Second, Third and Fourth Defendants cease to have any interest in the business, profits and funds of the partnership. The profits of the business have since been distributed between the Plaintiff and the First Defendant.

3. In 1985, the First Defendant commenced a construction business in partnership with persons who were not members of the family, by the name of United Development Agency. In 1988 the First Defendant entered into a partnership with persons who were not members of the family in the name and style of CAMS Constructions for carrying on the business of construction. In 1989, the First Defendant entered into a partnership in the name and style of CAMS Developers for carrying on business as construction contractors with persons who were not members of the family. In 1989 the Plaintiff and the First Defendant formed a partnership with other partners including persons who were not members of the family in the firm name and style of CAMS India Corporation which carried on the business of construction contractors. In 1989 the Plaintiff who had joined the First Defendant as a partner in the business of CAMS India Corporation mortgaged his residential flat at Versova as security for obtaining a loan from the State Bank of India. In 1991 the Plaintiff and the First Defendant started carrying on the business in partnership by the firm name and style of Ahuja Constructions. Between 1991 and 2003, the Plaintiff and his wife were partners and shareholders in several partnership firms and companies set up by the First Defendant to undertake business initially as construction contractors and subsequently as developers.

4. In 2001 the partnership firms and businesses of the First Defendant are stated to have accumulated losses of Rs. 35 crores. Between 2000 and 2003 the First

Defendant proceeded to convert the partnership firms into private limited companies under Part IX of the Companies Act 1956. The erstwhile partners were allotted shares in the new companies in proportion to their capital ratio in the firms. When the companies raised capital by increasing their shareholding the Plaintiff did not subscribe to the additional shares. According to the First Defendant, in view of the accumulated losses of the partnership firm and businesses the Plaintiff wanted to exit from the business.

5. On 4 November 2003 the First Defendant and the Twelfth Defendant entered into a partnership, which came to be called Shree Ahuja Properties, for carrying on the business of undertaking slum rehabilitation projects. On 25 August 2004 the partnership firm was reconstituted to bring in private limited companies as partners of which the Plaintiff was a Director. On 6 August 2007 the partnership firm of Shree Ahuja Properties was converted into a Private Limited Company by the name of Shree Ahuja Properties and Realtors Private Limited, the Sixteenth Defendant. In 2008-2009, Defendant No. 16 allotted 49% of the equity to Citi Properties for a consideration of Rs. 198 crores and obtained a loan of Rs. 225 crores from ICICI Bank.

6. On 28 January 2008 the Advocates representing the Plaintiff and his spouse addressed a letter to Defendant No. 17 seeking inspection of various documents and registers of the company. On 1 June 2010 a letter was addressed by the Plaintiff asserting a claim of equal shares in the companies and partnerships

7. The suit for partition was instituted before this Court on the Original Side. The case of the Plaintiff is that he together with Defendants 1 to 8 (and Defendants 9, 10 and 11 who are the children of a deceased sister) constituted a joint and undivided family, referred to as the Ahuja Family. According to the Plaintiff the income from the kirana commission business was joint family income and the children of Bhagwandas Ahuja constituted members of a joint family. The Plaintiff has sought a declaration of his entitlement to a one tenth share in the assets and properties set out in Exhibits B and C to the plaint. A motion for interim relief was taken out in the suit.

8. By the impugned order dated 27 August 2013 the learned Single Judge has dismissed the Motion for interim relief. The learned Single Judge has held that:

(i) Bhagwandas Ahuja had stated in the insolvency proceedings on 2 November 1973 that he had been adjudicated as an insolvent on 8 October 1973; that his total liabilities were Rs. 25.80 lacs; that he did not own ancestral or self acquired immovable property and the business of his firm had been closed down in 1969 as the firm had suffered losses. Except for his income from the said firm, Bhagwandas stated that he had no other income;

(ii) Having due regard to the statements made in the course of insolvency proceedings and the statements of accounts and properties submitted by the insolvent in the insolvency proceedings, the Plaintiff was unable to establish that the father had a nucleus from his business which had been conducted prior to

1969 or that any income from the firm of the father had been used for the commencement of the business of the firm Kanayalal Rameshkumar;

(iii) The foundation of the case of the Plaintiff was that the father had commenced the business of the firm, Kanayalal Rameshkumar as a joint family business from the income generated from his past business which was conducted prior to 1969. The Plaintiff was unable to establish any nucleus on which it could be proved *prima facie* that the suit properties may have been acquired or that such business may have been started out of the income generated therefrom;

(iv) In view of the position in law, the onus was on the Plaintiff who asserted a particular property to be a joint family property to establish that fact and unless he discharged the onus which was cast upon him the burden did not shift to the First Defendant who claimed the property to be self acquired property;

(v) It was conceded before the court by the Plaintiff that in neither the personal income tax returns and/or books of accounts had the Plaintiff claimed any of the properties standing in the name of the partnership firms or private limited companies described in Exhibits B, B-1 and C to the plaint as properties belonging to a joint hindu family. Nor did the Plaintiff claim to have received any profits from the said businesses. Similarly the Plaintiff had not disclosed any liabilities of any such company or firm in his personal income tax returns and books of account;

(vi) After 1982 various businesses were commenced by the First Defendant and by other Defendants independently. It was not the case of the Plaintiff that in the businesses and properties standing in his name or in the name of his wife any profit or loss was distributed by the Plaintiff and his family to the Defendants. On the contrary the record would indicate that the Plaintiff had claimed exclusive share in some of the immovable properties which were given as security in respect of various loans;

(vii) The Plaintiff's letter dated 1 June 2010 *prima facie* indicated that the Plaintiff had claimed an equal share in the various businesses of the First Defendant. This claim was not on the basis of such businesses or properties being assets of a Hindu Undivided Family;

(viii) The Plaintiff had been unable to establish *prima facie* that any of the properties described in Exhibits B, B-1 and C or the businesses mentioned therein had been acquired or commenced out of joint family funds or that any of the properties standing in the names of the partnership firms and/or companies were ever considered to be HUF properties. There is no material to indicate that any of the properties were distributed to any of the members of the family on the basis that they constituted an HUF business.

(ix) In 1969 when the partnership firm of Kanayalal Rameshkumar was set up, there was no joint hindu family business in existence. Bhagwandas Ahuja, as demonstrated in the insolvency proceedings, had no income that could have

been used for commencing the partnership business in 1969. Unless it could be shown that the business in the hands of the other partners developed with the assistance of joint family properties or joint family funds or that the earnings of the business came to be blended with the joint family, the business remained free and separate. Properties which stood in the name of the partnership, or for that matter of a company or an individual and which were not thrown into the common stock would be governed by the agreement under which the properties were acquired and would not be considered to be properties or the business of a Hindu Undivided family;

(x) Merely because the Plaintiff or his wife or son were allotted shares in some of the companies, no inference could be drawn that such businesses in which the members of the family participated were joint family businesses. Where members have entered into a deed of partnership their rights, obligations and entitlements would be governed by such a contract and no inference of there being joint family business could be drawn;

(xi) Similarly in so far as the shareholding of the Plaintiff, his wife and son in other companies were concerned, all the properties acquired by the companies were properties of each company which is a separate legal entity. The properties and businesses started by a company, which is an independent entity in the eyes of law cannot be construed as properties of the joint family.

9. On these findings, the learned Single Judge concluded by holding that the Plaintiff has been unable prima facie to establish any rights in respect of the properties described in Exhibits B, B-1 and C to the plaint as properties of a Hindu Undivided Family. The Plaintiff had been unable to establish a nucleus by demonstrating before the court even prima facie that the income generated by his father prior to 1969 was used by the father for the purpose of commencing the partnership business of Kanayalal Rameshkumar and thereafter by the First Defendant. On these grounds, on the finding that no prima facie case has been made out, the Motion has been dismissed.

10. Learned Senior Counsel appearing on behalf of the Appellant submits that:

(i) The father Bhagwandas Ahuja commenced the partnership business; however because he could not become a partner as a result of the insolvency proceedings, he constituted a partnership in which the First Defendant who was his eldest and major son became a partner with his other sons being admitted to the benefits of the partnership; and

(ii) Even on the assumption that the principal submission in (i) above is not accepted, the First Defendant and all the other brothers joined together in receiving the benefits of the partnership. All the brothers resided with the father in 1969 and from the income of the partnership other businesses were commenced or were acquired. Admittedly between 1970 and 1982 there was no other business. Between 1982 and 2005 the Appellant was made a partner or, as the case may be, a Director in 21 out of 34 partnerships or companies. In

support of the aforesaid submissions learned counsel urged that in 1967 the First Defendant was 17 years of age and had allegedly commenced a commission business. The business of the partnership firm which was set up in 1969 was the same as the business of the father who had carried on business at or about the same time. In the affidavit in reply which has been filed by the First Defendant to the Motion, no details have been furnished to show that the properties were self acquired properties or that the First Defendant had an independent source of income. In so far as the Appellant is concerned he has discharged the initial burden of establishing a nucleus for acquisition since the existence of the partnership which was formed in 1969 would be indicative of the availability of a nucleus from which other properties were acquired. On the other hand no material was produced by the First Defendant to show that the properties were self acquired and had no connection with the HUF. In fact, in paragraph 5 of the affidavit in reply it has been admitted that the profits of the partnership were utilised for establishing other businesses.

11. On the other hand it has been urged on behalf of the First Defendant by learned senior counsel that:

(i) Merely because there exists an HUF, that does not, in view of the well settled position, imply that the undivided family possesses properties which are impressed with an HUF character unless the existence of an adequate and sufficient nucleus is shown;

(ii) The burden was on the Appellant, as the Plaintiff to establish the existence of a nucleus out of which the properties could have been acquired. No particulars whatsoever of a nucleus flowing from the father to the partnership firm have been furnished. As a matter of fact the admitted position that the father had stopped business activity because he was heavily indebted and was facing insolvency proceedings is not in dispute;

(iii) In the circumstances, the Appellant had clearly failed to discharge the burden of demonstrating the existence of a nucleus on the basis of which the properties were impressed with a joint family character;

(iv) In so far as a joint family business is concerned, the test to be applied in holding that a business carried on by the members of a family constitutes joint family business is of a higher order and special circumstance must be demonstrated to exist. In the present case there is absolutely no evidence of participation in the business or a sharing of the profits of the business and there is no basis on which such an inference could have been drawn. Between 1985 and 2013, it is an admitted position that no other brother was involved except the Plaintiff and the First Defendant and there was no sharing or distribution of profits. The claim made by the Plaintiff in his letter dated 1 June 2010 that he was an equal partner with the First Defendant would completely displace the case which is subsequently sought to be set up of the existence of a joint family business. In the present case, it is not in dispute that save and except the

residential properties, everything else constitutes either the business or the assets of the business.

(v) In sum and substance in the present case the learned Single Judge was justified in coming to the conclusion that the Plaintiff had completely failed to demonstrate (i) the existence of a nucleus, let alone an adequate and sufficient nucleus; (ii) a participation by the members of the family in the activities of the business; or (iii) a sharing of the profits or for that matter allocation of the liabilities amongst the members of the family.

(vi) In so far as the alternate case that has been sought to be set up, it has been urged that the setting up of a partnership in 1969 could never be construed to be the establishment of a joint family business.

12. Learned Senior Counsel appearing on behalf of the Sixteenth Defendant submitted that between 1985 and 1990 five partnership firms involving the activities of construction or as the case may be of spices/dry fruits came to be set up with outsiders. Learned Senior Counsel urged that:-

(i) Partnership is a matter of contract and not of status;

(ii) Distribution at all material times has taken place of the income of the business on the basis of the deeds of partnership;

(iii) At no time was any return filed by any member on behalf of an alleged HUF, either for the purpose of income tax or wealth tax claiming such status; and

(iv) The claim made by the Plaintiff in his letter dated 1 June 2010 of an equal share was again silent with reference to any HUF property or business.

Learned Counsel appearing on behalf of the Defendant Nos. 2, 4, 5, 7, 9 to 11 has broadly adopted the same submissions.

13. The rival contentions now fall for consideration.

14. A recapitulation of the settled position in law is necessary. The fundamental principles of law which emerge from the judgments of the Supreme Court on the subject are thus:-

(i) Proof of the existence of a hindu undivided family does not raise a presumption that property which is held by a member of the family is impressed with a joint family character. Where a member of the family asserts that a particular property is property of a joint hindu family, the burden lies on the person making the claim. The burden can be discharged upon proof that the joint family had a nucleus at the time of its acquisition-an adequate nucleus-out of which the property could have been acquired. The authority for this principle is the judgment of the Supreme Court in P.S. Sairam and Another Vs. P.S. Rama Rao Pisey and Others,

(ii) There is no presumption under the law that a business which stands in the name of a member of a joint family constitutes the business of the joint family.

Unless it is established that the business in the hands of a coparcener grew with the assistance of joint family property, joint family funds or that the earning of the business came to be blended with the estate of the joint family, the business remains free and separate. The question as to whether the business was commenced or carried on with the assistance of joint family property or joint family funds or is a family business is a question of fact. This has been held by the Supreme Court in *G. Narayana Raju Vs. G. Chamaraju and Others*,

(iii) No such presumption can be applied to a business which is carried on by a member of the family. Special considerations apply to the question as to whether or not a business belongs to the family or to the individual member who carries on such a business. This was laid down in the judgment of the Privy Council in (1942) 12 AWR 25 (Privy Council)

15. Now it is on these well settled principles which have been formulated by the Supreme Court and Privy Council that the facts of the present case shall have to be considered.

16. Admittedly, Bhagwandas Ahuja had, in or about 1969, large liabilities to meet and had been in consequence subject to insolvency proceedings. Bhagwandas was declared to be insolvent on 5 October 1973 upon a petition for insolvency filed by him and his other two partners of Mulchand & Co. During the course of his examination in the insolvency proceedings he had stated that he had liabilities of Rs. 25.80 lacs, that since 1969 he had not carried on any business and that he had not invested any money in consequence. When the partnership firm of Kanayalal Rameshkumar was set up in 1969, prima facie at this stage, there is no material to indicate that the firm was constituted out of funds supplied by the father or that the father had a sufficient nucleus out of which the business of the firm came to be established. On the contrary, the poor financial position of the father which eventually culminated in his insolvency will mitigate against such an inference. There is no submission or for that matter, any material to indicate that the insolvency was only a ruse or an act of fraud. No nucleus would have been generated or sourced out of the business or estate of his father.

17. In 1982 the partnership firm of Rameshkumar Gopaldas was established between the Plaintiff and the First, Second, Third and Fourth Defendants. The Second, Third and Fourth Defendants exited from the firm in 1985 and commenced their own businesses. The business of Rameshkumar Gopaldas was thereafter continued between the Plaintiff and the First Defendant as partners and it is not in dispute that the profits and funds have been distributed as between the Plaintiff and the First Defendant. Between 1985 and 1989 the First Defendant commenced his first construction venture, United Development Agency with third parties or outsiders in which admittedly the Plaintiff was not involved. Between 1989 and 2001 the Plaintiff and the First Defendant were partners, shareholders or, as the case may be, Directors without the involvement of any of the other brothers or members of the family. Thereafter between 2001

and 2002 the partnership firms were converted into private limited companies under the Companies Act, 1956 and it is the case of the First Defendant that it was he who brought in additional capital; the Plaintiff having not invested any additional funds for the business of the companies.

18. On 28 January 2008 the plaintiff and his wife addressed a letter to the Seventeenth Defendant seeking inspection of documents and registers of the company. On 1 June 2010 a letter was addressed by the Plaintiff to the First Defendant where the Plaintiff claimed to be "an equal partner" with "our equal share in the businesses" which the First Defendant was managing. In that letter the Plaintiff also claimed an equal share in a disclosure made by the First Defendant under a voluntary disclosure scheme for the purposes of income tax. The letter addressed by the plaintiff on 1 June 2010 is significant in that, there is a total absence of the assertion of any claim to the existence of an HUF or to any entitlement of the Plaintiff as a member of a HUF to share in the assets or properties of the HUF or in the funds of any HUF business. The claim to be an equal partner or to receive an equal share will mitigate against the acceptance of the claim now sought to be advanced in this motion.

19. The learned counsel appearing on behalf of the Appellant led stress on the averments contained in paragraphs 4 and 5 of the affidavit of the First Defendant in reply to the Motion. In paragraph 4 the First Defendant states that he was carrying on the business of a broker on his own since 1967. Paragraph 5 states that the First Defendant entered into a partnership which came to be known as Kanayalal Rameshkumar which in due course started generating profits and that the profits generated by the firm were used for starting his other businesses. In our view, paragraph 5 does not establish either that the properties of the partnership firm were purchased out of a nucleus emanating from an HUF or that the businesses which were carried out thereafter of the partnership firm had the character of a joint family business. Prima facie there is nothing to indicate that the business in the hands of the partners developed with the assistance of joint family properties or joint family funds. There is nothing to indicate that the earnings of the business were blended with a joint family.

20. The learned Single Judge has on the basis of the material on record come to the conclusion that the Plaintiff has failed to discharge prima facie the burden at the interlocutory stage of demonstrating the existence of a nucleus on the basis of which it could be asserted that properties were acquired by an HUF. This finding, in our view, is based on a due consideration of the relevant material on record and would not call for interference in appeal. The principal contention that it was the father who commenced the partnership business and that since he was unable because of the insolvency proceedings to become a partner, he had established the partnership consisting of his sons has not been prima facie established by any cogent material on the record.

21. Even the alternative case in our view cannot be accepted. The material on record would indicate that in the long years which led up to the institution of the

suit there was:

- (I) No claim by any member of the family to receive a share out of the business on the ground that these were businesses of the joint family;
- (II) No evidence of participation in the business on the basis that these were businesses of a joint family;
- (III) No rendering of accounts on that basis;
- (IV) No sharing of benefits, profits or, for that matter, an allocation of liabilities.

On these facts the view which has been taken by the learned Single Judge that the relationship between the parties which arose out of partnerships or, as the case may be, corporate entities are governed by contract and not by status requires acceptance particularly at the interlocutory stage. Significantly there is no material to indicate that any return was filed by any member of the family either for the purposes of income tax or for wealth tax evidencing the existence either of an HUF or reflecting the existence of either any property or businesses as the business of the HUF.

22. The learned Single Judge has, in our respectful view, correctly appreciated the position in law. The finding of fact by the learned Single Judge is not shown to be perverse or contrary to the weight of the evidence on record. As a court of an appeal, this court would in any event have not been inclined to interfere even if a possible view was taken by the learned Single Judge. The view is in fact a correct view, as we have indicated earlier. For these reasons, we find no merit in the Appeal. The Appeal is dismissed.

23. On the request of the learned Senior Counsel appearing on behalf of the Appellant we extend the ad interim order which was passed during the pendency of the Appeal by a further period of four weeks from today so as to enable the Appellant to seek recourse to the remedies in appeal. In view of the dismissal of the appeal, Notice of Motion No. 1800 of 2013 in the appeal will not survive and is accordingly disposed of.