

(1922) 07 BOM CK 0004

In the Bombay High Court

Case No : O.C.J. Appeal No. 17 of 1922 and O.C.J. Suit No. 1324 of 1921

Haji Oosman Haji Ismail

APPELLANT

Vs

Haroon Salleh Mahomed

RESPONDENT

Date of Decision : 27-07-1922

Acts Referred:

Specific Relief Act, 1877 — Section 25(b)

Citation : AIR 1923 Bom 148 : (1922) 24 BOMLR 978

Hon'ble Judges : Pratt, J;Lallubhai Shah, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Lallubhai Shah Acting C.J.

1. This is an appeal from a judgment of Mr. Justice Crump. The suit out of which the appeal arises was filed by the plaintiffs to enforce an agreement to sell certain Immovable properties to the defendant for Rs. 1,55,000. The defendant agreed to buy the properties in suit and paid Rs. 5000 as earnest money to the plaintiffs, The vendors had agreed to make out a marketable title. It is not necessary to refer to other terms of the agreement. Two of these properties had been previously purchased by the plaintiffs from the defendant, and there was no difficulty as to the title to those properties. The third property had been bought by the plaintiffs from one Fakir Mahomed, a Cutchi Memon, who conveyed the property to them on April 29, 1920, on behalf of himself and his minor brother. That conveyance is Ex. E. The property belonged to the father of Fakir Mahomed who had bought it in 1884 from one Hajee Adam Oosman Nurani. That conveyance is Ex, B.

2. It appears from the correspondence that there was some difficulty felt by the purchaser with regard to this property. By the letter of October 9, 1920, the defendant called upon the vendors to obtain letters of administration to the estate of the deceased Joosab Hajee Cassum Pirmahomed on the ground that the

recitals in the conveyance were not sufficient evidence of the fact that Joosab Hajee Cassum Pirmahomed had died intestate in 1911 and had left only two sons. The vendors did not accept the position taken by the defendant that letters of administration to the estate of the deceased father of their vendors were necessary. Subsequently in the requisitions for title an inquiry was made as to whether Fakir Mahomed had any male issue. It appeared that Fakir Mahomed had two sons, and in the letter of December 7, 1920, the defendant raised the objection that as the sons of Fakir Mahomed would have a vested interest in the property according to the law applicable to them the title was defective. The vendors did not accept the correctness of this position. In the letter of December 15 objections to the title were categorically stated on behalf of the purchaser, namely, first, that the objection as to the want of satisfactory proof of the fact that Joosub Hajee Cassum Pirmahomed had died intestate and had left only two sons Fakir Mahomed and Mahomed Saleh as his heirs was not removed, and that in order to meet that difficulty they insisted upon letters of administration being taken out to the estate of the deceased Joosub Hajee Cassum Pirmahomed, and, secondly, that the sons of Fakir Mahomed had a vested interest in the property in question, and that as their interest was not conveyed to the plaintiff's the title was defective. The plaintiff's offered by their letter of December 18 to give further proof by way of a declaration from two respectable members of the Jamat to the effect that Joosub Pirmahomed had died intestate and had left only two sons as his heirs according to the rules of Hindu law as to succession applicable to Cutchi Memons; and, as regards the second objection, they contended that according to the law applicable to Cutchi Memons the sons had no vested interest in the property of their father. The purchaser replied by his letter of December 22 that he was not prepared to accept a declaration of two respectable members of the Jamat as proposed.

3. In the end, on account of the difference between the parties on these two points, the present suit was filed by the vendors to enforce the agreement between the parties. The defendant in his written statement pleaded that he was right in insisting that letters of administration should be obtained to the estate of Joosub Pirmahomed, that the two sons of Fakir Mahomed had a vested interest in the property and, as the interests had not been conveyed to the plaintiffs, the title was not marketable. The defendant counter-claimed the earnest money paid by him and Rs. 15,000 by way of damages for failure on the part of the plaintiffs to make out a marketable title. Parties gave no evidence beyond the documents which have been put in, and which are printed in Part III of the Paper Book, subject to this that the proceedings in a certain suit were sought to be put in by the defendant but rejected by the Court as irrelevant. The notes of the trial Judge indicating that fact should have been printed : but they are not to be found in the Paper book. The issues raised were : (1) whether the plaintiffs deduced a marketable title to the property thirdly described in Schedule B of the plaint; and (2) whether the defendant should be entitled to his counter-claim, The learned trial Judge came to the conclusion that the plaintiffs had deduced a

marketable title, and accordingly decreed the plaintiffs' claim for specific performance of the agreement. The prayer for damages in the plaint was not pressed and a decree was passed on that basis, the defendant's counter-claim being rejected with costs.

4. In the appeal before us the questions raised relate to the marketable nature of the title of the plaintiffs with reference to the property in question. It has been contended on behalf of the appellant that the sons of Fakir Mahomed would have a vested interest in the property in question according to the Hindu law applicable to the Cutchi Memons. It is pointed out that the decisions on the point that the Hindu law applies to Cutchi Memons so far as it relates to succession and inheritance, and no further, are conflicting, and that there is no decision of the Court of Appeal on the point. It is contended that under the circumstances in spite of the later decisions limiting the application of Hindu law to the Cutchi Memons only to questions of succession and inheritance, the question may be raised by any son in this community that he has a vested interest in his father's ancestral estate, and that the title which the plaintiff's are in a position to make out is not free from reasonable doubt and not marketable on that ground. It is further urged that there is no satisfactory evidence in the case to show that Joosub who died in 1911 had only two sons, and further that he died intestate. It is pointed out that, though as a matter of law it may not be obligatory upon the sons to take out letters of administration, it is still open to the sons of Joosub to do so, and to place the fact of representation to the estate of Joosub beyond all doubt and dispute, and that as the plaintiffs have refused to adopt that course, the evidence on the record should not be accepted as sufficient to establish the two facts mentioned above beyond all doubt, and that in that state of things the title such as it is should not be forced upon the defendant.

5. Before dealing with these two points, I may mention that several English decisions were cited to us in the course of the argument on the question as to what is a marketable title which the Courts would force upon an unwilling purchaser. I do not propose to examine those decisions in detail. It is enough to refer to the summary as given in *Fry on Specific Performance*, paragraphs 890 and 891, indicating the result of the decisions on the point.

6. On the other hand for the respondents it is contended that the "marketable title" means "a title free from reasonable doubt," and for this purpose reliance is placed upon the provisions of Section 25(b) of the Specific Relief Act where the expression "free from reasonable doubt" is used. In support of this view reliance is placed upon the view taken by Mr. Justice Farran in *Haji Mahomed Mitha v. Musaji Esaji* ILR (1891) 15 Bom. 657 where "a good title" is treated as meaning "a title free from reasonable doubt" and also upon the observations of Lord Eldon in *Lord Braybroke v. Inskip* (1803) 8 Ves. 417 where the question for the Court was stated to be "whether the doubt is so reasonable and fair, that the property is left in his (purchaser's) hands not marketable." It seems to me that it would serve no useful purpose to attempt to define the exact meaning of the

expression "marketable title," or in other words to lay down what should constitute under the circumstances of a particular case a marketable title. If there is to be any general test it must be accepted as laid down in the Specific Relief Act that it should be "free from reasonable doubt." Whether the doubt under the facts and circumstances of a particular case is reasonable or not must necessarily depend upon the nature of the objections and the facts of that case. It is clear that so far as the objections to the title in the present case are concerned they are of such a nature that they must be examined on their own merits. The English decisions cited to us do not throw any light on those objections. The question whether among Cutchi Memons the position that a son has a vested interest in the ancestral property of his father, just as a Hindu son in this Presidency would have, is a point which must be examined with reference to the law applicable to the Cutchi Memons and the decisions bearing on that point. The other objection raised is purely one of fact and must be decided with reference to the evidence in the case.

7. As regards the first point, it is a matter of great practical importance to the Cutchi Memons to know as to how they stand with reference to this point. Is the question whether the rules of Hindu law applicable to Cutchi Memons are strictly limited to matters of inheritance and succession settled beyond reasonable doubt or not ? If not, the appellant must succeed : if it is, his contention on this point must fail. On behalf of the appellant reliance is placed upon the decisions in *Ashabai v. Haji Tyeb Haji Rahimtulla* ILR (1882) 9 Bom. 115 and *Mahomed Sidick v. Haji Ahmed* ILR (1885) 10 Bom. 1 and it is pointed out that the later decisions in *Mangaldas N. Motivalia Vs. Abdul Razak Haji Sulaiman Abdul Wahed*, and *Advocate General of Bombay v. Jimbabai* ILR (1915) 41 Bom. 181 : 17 Bom. L.R. 799 conflict with the earlier decisions, and that there is no decision of the Court of appeal. Reference was also made in the course of the argument to the two cases relating to Khoja Mahomedans, viz., *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy* ILR (1889) 13 Bom. 534 and *Jan Mahomed Abdulla Datu Vs. Datu Jaffar*, . I have examined these decisions in detail. In *Ashabai v. Haji Tyeb Haji Rahimtulla* there was no decision on the question as to whether the application of the rules of Hindu law to Cutchi Memons extended beyond the rules of inheritance and succession. The point decided there was that the Hindu law applied to them as to inheritance and succession. In *Mahomed Sidick v. Haji Ahmed* the point is dealt with, and it was found that the custom of not recognising any distinction between the ancestral and self-acquired property among the Cutchi Memons was not proved. The decision assumes that a Cutchi Memon cannot deal with his ancestral property and the custom alleged to the contrary was held not proved. As there is a certain degree of similarity in the extension of the rules of Hindu law by custom to Khoja Mahomedans as well as to Cutchi Memons, it is relevant to point out that in *Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy*, which related to Khoja Mahomedans, it was held that the rule that the Hindu law as administered in this Presidency, in the absence of proof of custom to the contrary is the law applicable to Khoja Mahomedans is not

to be understood in its widest sense, but is confined to simple questions of inheritance and succession; and in that case the question as to the right of a son to claim partition of the ancestral property was held not to be within the scope of rules of Hindu law applicable to Khoja Mahomedans by custom. The observations which have been relied upon by Mr. Coltman in connection with this point from the judgment of the Court of Appeal do not, in my opinion, affect the main question which they decided, namely, that a son was not entitled to claim partition during his father's life-time, which would be possible only if the application of the rules of Hindu law was limited by custom only to rules of inheritance and succession. This, however, was a decision relating to the Khoja Mahomedans and would not directly apply to the case of the Cutchi Memons. The point was considered by Mr. Justice Beaman in *Jan Mahomed v. Datu Jafar* generally with reference to the question as to how far Hindu law applied to Khoja Mahomedans and Cutchi Memons by custom. But it was a case of Khojas and not of Cutchi Memons. The point arose directly later on with reference to Cutchi Memons; and in the two decisions which I have referred to, *Mangaldus v. Abdul Razak* and *Advocate General of Bombay v. Jimbabai*, this point was fully examined by Mr. Justice Macleod and Mr. Justice Beaman. It is true that those are decisions by single Judges on the Original Side, and those particular cases were not taken to the Court of Appeal. But, after a close examination of the law relating to Cutchi Memons on this point, the decisions distinctly lay down that the application of the rules of Hindu law by custom to the Cutchi Memons is limited to rules of inheritance and succession and does not extend to the rules relating to the joint family property as applicable to Hindus. They negative the view that a son has any vested interest by birth in the ancestral property of his father. The decision in *Mahomed Sidick v. Haji Mahomed* has been considered and explained.

8. After those decisions it appears that in response to a demand of the community the Legislature passed Act XLVI of 1920 with a view to enable those members of the community who so desired to get rid of the application of Hindu law as regards succession and inheritance. In the preamble of that Act the Hindu law as applicable to Cutchi Memons is referred to as relating to succession and inheritance. This Act received the assent of the Governor-General on September 17, 1920, shortly before the correspondence between the parties to the agreement in this case commenced. I refer to this Act only for the purpose of showing that the view taken in the later decisions has so far been accepted by the Legislature ; and indeed if the rules of Hindu law relating to joint family property, and in particular that relating to the vesting of property in a son by birth were believed to be applicable to Cutchi Memons, it is reasonable to infer that the Legislature would have made provision for that in the Act to which I have referred. It is, therefore, really a serious matter at this stage, in the absence of any evidence on the point, to hold that still it is a matter open to reasonable doubt whether the son of a Cutchi Memon has a vested interest in the ancestral property of his father according to the rule of Hindu law. It is no doubt theoretically open to the defendant to urge that any such son may seek to

establish such a custom at any time in spite of the decisions to the contrary of single Judges, and that he may take such a case to the Court of Appeal and then to the highest Court of Appeal and that he may be able to establish a special custom to the effect that a son has a vested interest in the ancestral property of his father. But the test in all these matters is, as pointed out in *Fry on Specific Performance*, whether the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable or, as it was put by Alderson B. in *Cattell v. Corral* (1840) 4 Y. & C. 228 whether there is "a reasonable, decent probability of litigation." The question is whether there is a reasonable and decent probability of litigation on that point against the purchaser or whether it is of such a remote character that it should not be considered to create any reasonable doubt. While I concede that it is possible that the son of a Cutchi Memon may hereafter seek to establish such a custom as would give him a vested interest by birth in the property of his father I am not prepared to hold that there is any decent and reasonable probability of such a claim being made : and speaking particularly with reference to the sons of Fakir Mahomed, there is no indication whatever on the facts of this case that it is anything more than a remote possibility which ought not to be allowed to weigh against the effect of the later decisions as now understood and accepted by the Legislature. I may further point out that in the decision in *Ahmedbhoy Hubibbhoy v. Cassumbhoy*, which was a case of Khoja Mahomedans, the Court of Appeal did not apply the Hindu law to the extent of giving a son a vested interest by birth in the ancestral property of his father, and so far as it suggests an inference as regards Cutchi Memons it is against the possible view that a son of a Cutchi Memon has a vested interest in the ancestral property of his father.

9. It may be relevant to point out in connection with this point that when Fakir Mahomed entered into this agreement on behalf of himself and his minor brother, Mahomed Saleh, he agreed to give a marketable title free from all reasonable doubts as would appear from Clause 3 of Ex. 1 at p. 21 of the Paper Book, Part III, and the present plaintiffs accepted that title as conveyed to them by Fakir Mahomed on behalf of his minor brother and himself. I do not say that that circumstance is in any sense binding upon the defendant; but so far as it is an indication, it is in favour of the view that in dealing with the property belonging to the Cutchi Memons, it is not considered necessary now to treat the sons of the owners as having any interest in the property by birth.

10. The second question is one of fact. It appears that when Fakir Mahomed agreed to sell this house to the present plaintiffs it was agreed, as would appear from Clause 4 of the agreement between them, that the vendor would obtain the necessary order from the Court sanctioning the sale by him of premises including the interest of his minor brother at his own costs. The property was described as having belonged to the estate of Joosub Hajee Cassum Pirmahomed who died on October 17, 1911, leaving Fakir Mahomed and his brother Mahomed Saleh as his heirs according to the Hindu law applicable to Cutchi Memons. After this Fakir Mahomed made an application to the Court for his appointment as guardian of

the property of his minor brother, and for leave to sell the property in question on behalf of the minor. That application was granted by the Court, and he was authorized to complete the conveyance. In that application he stated that Joosub Haji his father died on October 17, 1911, leaving behind him his only heirs and next of kin according to Hindu law applicable to Cutchi Memons, two sons, namely, a minor Mahomed Saleh Joosub and himself. He also made a declaration on the date of the conveyance in favour of the plaintiffs, i.e., on April 29, 1920, that Joosub Haji died on October 17, 1911, leaving only two sons who were his only heirs according to Hindu law as applicable to Cutchi Memons, namely, Mahomed Saleh and himself. This was accepted by the plaintiffs, and they now maintain that what was accepted by them as sufficient proof of the title of Fakir Mahomed and his minor brother is really sufficient to establish their title to the property and leaves no reasonable doubt as to that fact.

11. The defendant, however, insists upon the letters of administration being taken out to the estate of the deceased Joosub Hajee, because he contends that there is no satisfactory evidence, first, that Joosub died intestate, and, secondly, that he had only two sons and no more. On both these points it seems to me that the position of the defendant is not reasonable and the facts are not open to any reasonable doubt. It is quite true that in the present case beyond putting in the documents to which I have referred the parties have adduced no evidence. But beyond the suggestion that letters of administration are necessary to establish the fact of the representation beyond doubt, the defendant does not suggest any good reason to doubt the truth of the two statements which have been made by Fakir Mahomed in his petition to the Court and in the declaration to which I have referred. It is clear that the Indian Succession Act does not apply to Cutchi Memons who are Mahomedans and the Probate and Administration Act V of 1881, which would apply to them, does not contain any section corresponding to Section 190 of the Indian Succession Act. It was not obligatory, therefore, upon Fakir Mahomed when he executed his conveyance in favour of the plaintiff's to have taken out letters of administration. The whole question to my mind is whether the two facts, namely, that Joosub Hajee died intestate, and that according to the Hindu law applicable to him his heirs were only Fakir Mahomed and his brother Mahomed Saleh were satisfactorily established when the plaintiffs accepted them and whether on the same materials they can be said to be satisfactorily established in the absence of the letters of administration. I do not say that in no case in which it is not obligatory upon a vendor to take out letters of administration to establish his title to the property according to law, could the purchaser require such letters of administration to be taken out to put an end to the doubts as to any disputed questions of fact. The simple question of fact in this case is whether in the absence of such letters, the facts in question are proved beyond reasonable doubt. Both those are facts about which ordinarily there should not be any doubt; for instance, whether Joosub died intestate is a fact which would be within the special knowledge of Fakir Mahomed. He has stated so in terms on oath, and in a manner which makes him responsible for the

statement. There is no indication whatever on the present record to the contrary, and the mere suggestion that sometimes wills of deceased persons are put forward many years after their death, is not sufficient, in my opinion, to justify any reasonable doubt as to the fact that Joosub, who died so far back as 1911, died intestate, particularly when we have the fact that during this interval nobody is shown to have ever suggested or come forward to say that he left a will.

12. As regards the question whether he had two sons or more, ordinarily I should say that the statement of the son would be accepted as sufficient, and unless there is any real ground for doubting that statement, a mere suggestion of any doubt on that point would be considered either fanciful or unreasonable. In the present case there is no such ground. On the contrary we have the order of the Court appointing Fakir Mahomed as guardian of his minor brother on the footing that Joosub had only two sons and that the property belonged to the minor as an heir to his father along with Fakir Mahomed. On that point it appears that the plaintiffs offered to give further assurance to the defendant in the shape of a declaration from two respectable members of the Jamat. If there was any real doubt in the mind of the defendant, I think that that kind of assurance would be considered sufficient under the circumstances to satisfy any reasonable person. The plain fact seems to me to be that on these grounds of fact, which are not really open to any reasonable doubt, and which it is just possible may be even within the knowledge of the defendant, as he belongs to the same community and lives in the same locality, he wants to get out of the agreement.

13. I am, therefore, satisfied that in the present case a marketable title free from reasonable doubt has been made out; and I think that the conclusion reached by the trial Judge on this point is right.

14. I may refer to the decision in 21 CWN 558 (Privy Council) which has been relied upon by the defendant. As I have said the question whether a marketable title free from reasonable doubt has been made out or not must be answered with reference to the facts of each case. In that case the release relied upon was in terms only by one of the two brothers, and beyond the recital in that release, there was nothing to show that the other brother was dead or that the nearest heir to the deceased brother was the surviving brother who executed that release. That was held to be not sufficient to make out a title free from reasonable doubt. Here, however, the facts are different. In that case the test adopted with reference to the question whether the title was marketable or not was whether it was free from reasonable doubt. It appears that in the agreement preliminary to the conveyance sometimes the expression used is "marketable title free from reasonable doubt" or sometimes, as in the present case, "marketable title". But as I have said both practically mean one and the same thing; and I do not think that in that case any other test was adopted. It is difficult to apply the decision on the facts of that case to the facts of the present case. I would, therefore, affirm the decree appealed from, and dismiss the

appeal with costs.

Pratt, J.

15. The plaintiffs, on April 29, 1920, purchased the property in this suit from Fakir Mahomed and Mahomed Saleh Joosub and the conveyance recited that these two had inherited the property from their father Joosub Pirmahomed as his only heirs.

16. On July 30, 1920, the defendant agreed to purchase this property from the plaintiffs who consented to give a marketable title.

17. The phrase "marketable title" is equivalent to the phrase "a title free from reasonable doubt" in Section 25 of the Specific Relief Act, This simpler definition practically embodies the English law. Many English cases have been cited to us but it is safer to rest upon the plain words of the Indian section; for most of the English cases turn upon the difficulties of the complex English Property Law-difficulties which do not appear in the simpler system of the Transfer of Property Act.

18. The sole question then is whether the doubts raised by the defendant as to plaintiffs' title are reasonable. The doubts are doubts of law and of fact.

19. The doubt of law is whether the vendors, Fakir Mahomed and his brother, being Cutchi Memons took a vested interest at birth on their father's property. There was a time when it was assumed that the Hindu law of joint property applied to Cutchi Memons : *Ashabai v. Haji Tyeb Haji Rahimtulla* ILR (1882) 9 Bom. 115 and *Mahomed Sidick v. Haji Ahmed* ILR (1885) 10 Bom. 1. But these decisions are now obsolete and the application of Hindu law is now restricted to cases of succession and inheritance as it would apply in the case of an intestate separated Hindu possessed of self-acquired property : *Mungaldas v. Abdul Razak* (1914) 17 BOM. I.R. 224 and *Advocate General of Bombay v. Jimbabai* ILR (1915) 41 Bom. 181; 17 Bom. L.R. 799. This statement of the law has received legislative recognition in the Cutchi Memons Act XLVI of 1920. I do not think the law on the point is now doubtful, and indeed it would be disastrous if it were, for many titles must have been taken on the faith of these decisions.

20. The doubts of fact are : (1) whether Fakir Mahomed and Mahomed Saleh Joosub are the only sons of Joosub Pirmahomed; (2) whether Joosub Pirmahomed left a will.

21. On the first point much reliance is placed on the Privy Council case of *Shrinivasdas v. Meherbai* ILR (1916) 41 Bom. 300; 19 Bom. L.R. 151. In that case there was an incumbrance to Darnodardas and a release by Gordhandas. The question then arose whether Damodardas was dead and, if so, whether Gordhandas was his sole heir. When the purchaser asked for these doubts to be cleaned the vendor refused to do so and took his stand solely on the recitals. The Privy Council held that that was not sufficient as the recitals would not bind Damodardas if he proved to be alive or a third person claiming to be his heir.

Here then the purchaser raised the question of another possible son of Joosub Pirmahomed, he was given a declaration of Fakir Mahomed and offered a declaration of two members of the Jamat. The purchaser replied that he did not consider the first sufficient and he would not accept the latter. I think this refusal was unreasonable. The vendor offered the only possible evidence and the purchaser refused even to consider it. This fact differentiates the case from Shrinivasdas v. Meherbai. The vendor did not rest solely on recitals but offered evidence. The purchaser refused even to consider the evidence but insisted on letters of administration to Joosab Pirmahomed's estate. It is not clear how the purchaser could have procured such letters of administration and the purchaser's conduct shows that he in fact had no doubt but was only seeking for an excuse to avoid performance.

22. The second point of fact is whether Joosab Pirmahomed left a will. This is possible of course but it is extremely improbable, for ten years had elapsed since his death I do not think this bare possibility can be said to introduce a reasonable doubt in the title. I agree that the appeal should be dismissed and the decree of the lower Court confirmed.