

**Order passed below Exh.51 in Regular Civil Suit No.103/2013.**

This is an application filed by plaintiffs for grant of interim injunction restraining defendant No.1 from disturbing common possession over suit property, from selling suit property or creating third party interest and excavating, selling minor minerals, stone, soil, Murum or changing natural position of the suit property.

2. Block No.338 admeasuring 46 Are Pot Kharab 60 Are situated at Mouje Nandani, Tal: Shirol, Dist : Kolhapur more particularly described in plaint Para 1 is the subject matter of the present suit. Said property is hereinafter referred as 'the suit property' for the sake of brevity and convenience.

3. Plaintiffs are averting that Dada Ramji Kodole was original ancestor of plaintiffs and defendants. He was having 5 children namely, Ganpati, Shripati, Champabai, Tanubai, and Anusaya. Defendant Nos.1 to 4 are heirs of Ganpati. Plaintiff No.1, 2 and defendant No.7-D1 and 8A to 8C are heirs of Shripati. The genealogy is also given in annexure to plaint. Suit property is property of joint Hindu family of plaintiffs and defendants. Plaintiffs are having common possession in the suit property and they are cultivating the same. Original ancestor Dada died on 26/07/1962. Suit property was purchased in auction in the year 1949 by

original ancestor Dada Kodole from the income of joint family in the name of late Ganpati. Late Ganpati, Shripati and Dada were having agriculture as the only source of income at the time of purchase of the suit property. Therefore, suit property is purchased from the income of joint family. Ganpati was born on 14/09/1926 and at the time of purchase of the suit property Ganpati was of 23 years old only. He was having no separate income. In 1977, after demise of Dada there was partition of ancestral properties between Ganpati and Shripati, but as suit property was of joint family, it was not partitioned. Plaintiffs are having half share in the suit property. They issued notice to defendants on 30/08/2011 and demanded partition. Defendant No.1 denied it by reply notice. Therefore, present suit is filed for partition and separate possession. Initially, application at Exh.5 was filed, but for final decision at the earliest, it was requested to be heard alongwith suit. But taking undue advantage of said fact, defendant No.1 since 21/10/2015 is illegally excavating stone, soil and Murum, minor minerals from 60 Are Pot Kharab area of the suit property. He has not obtained any permission from the Government. He is selling minor minerals. Plaintiffs have filed complaint to Tahasildar Shirol, Circle Officer, Nandani, Gramsevak, Talathi, Nandani and Collector, Kolhapur. But defendant No.1 is still illegally excavating minor minerals and illegally selling it. If this continued, plaintiffs will suffer irreparable loss and suit property will come to an end. With these averments, plaintiffs have prayed for grant of interim injunction restraining

defendant No.1 from disturbing common possession over suit property, selling or creating third party interest in the suit property or excavating the suit property and selling minor minerals or to change the natural position of the suit property in any other manner.

4. Say of defendant No.1 is at Exh.57. He admitted the description of the suit property. All other adverse averments are denied by him. He contended that his father Ganpati was working as Kotwal in Gav Chavadi, Nandani and he was getting monthly salary of ₹75/-. Out of said separate income, he has purchased suit property in auction for ₹33/-. Therefore, neither Dada nor any other person is having any concern with the suit property. There are necessary entries in the Gav Chavadi to that effect. Plaintiffs cannot claim partition in the suit property. Said property is not ancestral property nor joint family property. During the lifetime of his father partition of ancestral agricultural lands and house properties was effected. Further his sisters and mother had relinquished their rights without consideration in favour of defendant No.1 on 14/01/2002. Defendant Nos.2 to 4 are his real sisters. He is levelling the suit property for making it cultivable. No permission is required for levelling the property. On 03/11/2015, he has filed application to Tahasildar, Shirol for permitting selling stone in the suit property in order to avoid any technical objection and after getting said permission, he can sale said stones. With these contentions, he prayed for rejection of the application.

5. Perused the record. Heard advocates for the parties. Following points arise for my determination and I record my findings thereon on for the reasons to follow.

Sr.No.	Points	Findings
1.	Whether plaintiffs prove <i>prima facie</i> case?	Yes.
2.	Whether balance of convenience lies in favour of plaintiffs?	Yes.
3.	Whether plaintiffs prove that they will suffer irreparable loss, if interim injunction as prayed is refused?	Yes.
4.	What order?	As per final order.

### **REASONS**

#### **As to point Nos.1 to 4 :-**

6. These points are interlinked and therefore, I am taking them together for my consideration.

7. Advocate for defendant No.1 argued that suit property is self acquired property of father of defendant No.1. No nucleus is proved. Father of defendant No.1 purchased the suit property in auction from his separate income. If partition of ancestral properties had taken place in the year 1977, then why plaintiffs remained mum till filing of this suit and had not

asked partition earlier. Defendant No.1 is merely levelling the suit property and had also obtained permission for selling 20 brass stones in the suit property. This application is filed to harass him. Permission is not required for levelling the property. There is no pleading that Dada had purchased suit property in the name of Ganpati by paying the required amount. Sisters of defendant No.1 had relinquished their rights in favour of defendant No.1 and therefore, written statement of defendant No.4 cannot be considered. Defendant No.1 has inherited suit property from his father and therefore, it is his self acquired property. There is no presumption that joint Hindu family is having joint property.

8. On the other hand, advocate for plaintiffs submitted that relations of the parties are admitted. It is also not disputed that suit property is purchased in auction in the year 1949. Admittedly, at that time original ancestor Dada was alive. He died in the year 1962. There is specific pleading that Dada has purchased suit property from the income of joint family in the name of Ganpati. Said pleadings are also specifically admitted by real sister of defendant No.1 i.e., defendant No.4 in her written statement at Exh.46. She has specifically pleaded that amount of consideration was paid by Dada and said property is ancestral property. Defendant No.1 has filed copy of Register wherein father of defendant No.1 is shown as servant and getting the salary of ₹75/-. But said register is not of the year 1949. He was not in service in the year 1949 and such Register is not filed by defendant No.1 to

show his separate income. Suit property is not purchased for ₹35/-. Further, permission produced on record is dated 18/11/2015 and date of application is also mentioned differently which clearly shows that on the filing of present application and on 21/10/2015 defendant No.1 was having no permission to excavate or to level the suit property. If permission for levelling is not required then why said permission is obtained by defendant No.1 later on. Further, plaintiffs have filed photographs of the suit property which clearly shows that the pits dug are of 5 to 7 feet. Therefore, said excavation is not for levelling the suit property. Furthermore, the minor minerals and Murum which was excavated is also transported and not lying on the suit property. Even in the permission produced by defendant No.1 in condition No.3, it is specifically mentioned that excavation for 3 feet from the surface is only permitted. Plaintiffs have also filed voters list to show that at the relevant time house number was mentioned as one and the same which shows that they were having joint family.

9. In the present case, admittedly, suit property is purchased in auction in the name of Ganpati in the year 1949. Original ancestor Dada died in the year 1962. Therefore, at the time of purchase of the suit property he was alive. In the year 1949, Ganpati was 23 years old. Defendant No.1 has filed copy of Register wherein name of Ganpati is mentioned as servant and his monthly salary is mentioned as ₹75/-. However, no date or year is mentioned on said register to

show that Ganpati was working in the year 1949. Later on Advocate for defendant has submitted that record of the year 1949 is not available and therefore, he is not able to file it. Thus, at this stage, there is no *prima facie* evidence to show that in the year 1949 Ganpati was working as a Kotwal at the age of 23 years. Further, nothing is produced on record to show that suit property was purchased for ₹35/- only.

**10.** It is pertinent to note that defendant No.4 is real sister of defendant No.1. She has filed her written statement at Exh.46. She has specifically pleaded and admitted that amount of consideration for purchasing suit property was given by Dada and it was purchased in the name of Ganpati. Since then Ganpati and Shripati are having joint possession in the suit property. At that time, Ganpati was not having financial capacity to purchase suit property from his separate income. In short, she has admitted entire suit of plaintiffs.

**11.** In this regard, advocate for defendant No.1 submitted that defendant No.4 was not even born in the year 1949 and therefore, her pleadings cannot be considered. Further, now she has filed affidavit before the Court at Exh.72 withdrawing her pleadings and admissions in the written statement and corroborating case of defendant No.1. Therefore, her admissions in the written statement shall not be considered.

**12.** On the contrary, advocate for plaintiffs submitted

that defendant No.4 cannot withdraw her pleadings and admissions in the written statement by way of mere affidavit filed in support of interim application. Such a withdrawal of admission in the pleadings is not permissible and therefore, said affidavit cannot be considered.

13. Pleadings of the parties stand on much higher footings. No party can be permitted to withdraw the admissions given in the pleadings by mere affidavit filed in support of interim application. Therefore, in my view, the affidavit of defendant No.4 (Exh.72), which is filed later on, cannot be considered. Further, advocate for defendant No.1 cannot say that written statement of defendant No.4 should be considered because she was not born in the year 1949 and at the same time request the Court to rely on her affidavit file now. Therefore, said submissions also cannot be considered at this stage. Said admissions of real sister of defendant No.1 are really vital and *prima facie* supports case of plaintiffs.

14. Further, from the permission of Tahasildar dated 18/11/2015 filed at Exh.59/6, it is clear that said permission was given for the period from 18/11/2015 to 27/11/2015. Further, in said permission firstly reference of application of defendant No.1 dated 24/09/2015 was given and later on it was referred as application dated 03/11/2015. Further, said permission is granted for levelling and transporting 20 brass stone. Said permission itself shows that even for levelling permission of Tahasildar is necessary. Further, it also clarifies

that on 21/10/2015 defendant No.1 was not having permission to excavate and transport or sale the minor minerals, stone and Murum. Even on the date of filing of say of defendant No.1 i.e., 17/11/2015 said permission was not granted. Therefore, said excavation and transportation was illegal. Further, from the photographs filed on record, it is clear that excavation is made of 5 to 7 feet pit and therefore, it cannot be said that said excavation is for the purpose of levelling suit property. Even in the permission condition No.3 is mentioned to dug till 3 feet from the surface. Therefore, even the act of defendant No.1 is not inconsonance with the permission which was obtained later on. *Prima facie*, it seems that said excavation in the suit property was going on unauthorizedly. Plaintiff No.2 has also filed separate affidavit (Exh.66) in support of averments in the application.

15. Advocate for defendant No.1 relied on following judgments.

**1.T.K. Kamala and others Vs. A.R. Thulasi Rao,[2002] 1 MLJ 382.**

In this judgment, it is held that if the son inherits property in the situation mentioned in Section 8 of Hindu Succession Act, he does not take it as Karta of his own undivided family, but takes it in his individual capacity.

**2.Makhan Singh Vs. Kulwant Singh, [2007] 0 AIR (SCW) 3018.**

In this judgment, it is held that property could not be presumed to be a joint Hindu family merely because of existence of joint Hindu family and a son who inherits his father's assets under Section 8 of Hindu Succession Act does so in his individual capacity and not as a Karta of Hindu Undivided family.

16. There can be no dispute about the ratios laid down in above cited judgments. However, it is not the case of plaintiffs or defendant No.1 that Ganpati inherited suit property under Section 8 of Hindu Succession Act. Therefore, with due respect ratios laid down in above cited judgments are not applicable to the present case.

17. On the other hand, advocate for plaintiffs placed reliance on following judgments.

**1.Mallesappa Bandeppa Desai and another Vs. Desai Mallappa alias Malleshappa and another, AIR 1961 SC 1268.**

In this judgment, the Hon'ble Supreme Court held that where a manager claims that any immovable property has been acquired from his own separate funds and not with the help of joint family funds, the burden of proving it is on the manager and not on his coparceners.

18. In the present case, Ganpati is the eldest son of Dada. Defendant No.1 is alleging that Ganpati had purchased

suit property from his separate income and therefore, burden to prove separate source of income is on defendant No.1.

**2.M/s.Kalloomal Tapeswari Prasad (HUF), Kanpur Vs. The C.I.T. Kanpur, AIR 1982 Supreme Court 760.**

In this judgment, Hon'ble Supreme Court held that as per Hindu Law there can be partial partition as regards persons or as regards properties. There can be no dispute about said proposition.

**3.Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass [2005 (1) Mh.L.J. 1043].**

In this judgment, the Hon'ble Supreme Court held that unless case of irreparable loss is made out, court should not permit nature of property being changed which includes also alienation or transfer of the property.

19. In present case, it is *prima facie* proved that excavation in the suit property made by defendant No.1 is illegal and without any permission. If minor minerals of the Pot Kharab 60 Are are sold, that portion of suit property will be lost. *Prima facie*, defendant No.1 has not shown separate income of Ganpati. Case of plaintiffs that Dadaso purchased suit property out of family income in the name of the eldest son Ganpati seems probable and is admitted by defendant No.4 who is real sister of defendant No.1. In such situation, in my view, plaintiffs have proved *prima facie* case. Further as

per the ratio laid down in **Maharwal Khewaji Trust's Case** (supra) unless case of irreparable loss is made out, Court should not be permit nature of property being changed. In the present case, defendant No.1 has not shown irreparable loss. Further, if the suit property is excavated and entire Murum is sold, plaintiffs will suffer irreparable loss. Therefore, as per ratio laid down in **Maharwal Khewaji Trust's Case** (supra), the principles of balance of convenience and irreparable loss are also in favour of plaintiffs. Needless to say that the observations made and inferences drawn in this order are made only for this order and are limited to it. Hence, for the reasons stated above, I answer point No.1 to 3 in the affirmative and in answer to point No.4, pass following order.

### **ORDER**

Application is allowed in following terms -

Defendant No.1 is temporarily restrained from alienating or creating third party interest in the suit property or excavating or selling minor minerals or changing the natural position of the suit property till final decision of this suit.

Sd/-

Jaysingpur.  
Date: 27/11/2015.

(Mahesh T. Patankar)  
Jt.Civil Judge, Jr.Dn., Jaysingpur.

I affirm that the contents of this P.D.F. file Judgment/Order are same, word to word, as per the original Judgment/Order.

Name of the Stenographer	Shri.D.R.Joshilkar.
Name of Court	Jt.C.J.J.D.& J.M.F.C., Jaysingpur.
Date of Dictation.	27/11/2015.
Judgment/order signed by the PO on	30/11/2015.
Judgment/order uploaded on	30/11/2015.