

Order below Exh. 5 in Spl. Civil Suit No.38/2016:-

1) Plaintiffs have filed this application restraining defendant No.1 from alienating property described in para No. 1-A and defendant Nos. 2 and 3 from taking forcible possession of the property described in para No.1-B till conclusion of the trial.

2) The brief facts of plaintiffs' case are as follows:-

Plaintiff No.1 is wife of defendant No.1 and plaintiff Nos. 2 and 3 are their off-spring. Defendant Nos. 2 and 3 are purchasers of the landed property. The suit property consists a house constructed in RCC on plot No. 26 of Gat No. 345/2 ad-measuring 03.21R situated at Mouje Dharangutti, Tal. Shirol, Dist. Kolhapur and land ad-measuring 1H 80R out of land bearing Gat No. 557 situated at village Alas, Tal. Shirol, Dist. Kolhapur. The house property is described in para No.1-A and landed property is described in para No. 1-B of the plaint.

3) Plaintiff No.1 married with defendant No.1 in the year 1977. She earns a fortune by tailoring work, tailoring classes, selling bangles and purse. Her post graduation completed in the year 1993. She had been worked as a Pygmy agent for 8 years with Veershaiv Co-Operative Bank, branch Jaysingpur. She had been worked as L.I.C. agent since 1994 till 1999. She joined as a teacher in the New High-school, Chinchwad in the year 1998. She worked as a head mistress from 2003 to 2013. She has independent source of income. The defendant No.1 worked as teacher. Both have their bank accounts and cash is in their accounts. Their marital relations have been cordial since marriage till 2013.

4) The suit property described in para No.1-A is purchased by plaintiff No.1 and defendant No.1 by contributing their own income and constructed house. The plaintiff Nos. 1 to 3 and defendant No.1 have been residing in same house till today. The marriage of plaintiff No.2 was performed in said house. The suit property described in para No.1-B is purchased by the plaintiff No.1 and defendant No.1 jointly by registered sale deed dated 27.4.2009. The plaintiff No.1 paid purchase amount through her bank account. The suit property is joint family property and acquired for welfare of joint family. Plaintiff Nos. 1 to 3 and defendant No.1 have 1/4th share each in suit property. No one can alienate suit property without consent of others.

5) The defendant No.1 has been developed extra marital relation with a lady from Sangli. He spent money on her. The defendant No.1 at the instance of that lady tried to sale suit property for which plaintiffs have objected by issuing notice through their Advocate on 20.11.2012. The defendant No. 1 is at present residing with the said lady. The defendant Nos. 2 and 3 informed to the plaintiff on 21.6.2016 by issuing notice for purchase of suit property described in para No. 1-B. Plaintiff No.1 replied notice through her Advocate on 24.6.2016. Despite it, defendant No. 1 on 8.8.2016 sold out 80.25R land by registered sale deed to them. The defendant No.1 has no right to alienate it as it is not partitioned by metes and bounds. A sale deed executed by defendant No.1 in favour of defendant Nos. 2 and 3 is illegal and not binding on their share.

6) The defendant No. 1 has further tried to create encumbrance on suit property described in para No.1-A of the plaint. He

tried to mortgage it to Karmaveer Bhaurao Patil Nagari Sahakari Pathsanstha. An advocate for Patsanstha issued public notice in daily Sakak on 7-11-2016 and called objections. The plaintiff No.1 has objected the said encumbrance. The plaintiffs have asked for partition to the defendant No.1, but he has refused. A sugar cane crop is grown in land described in para No.1-B of the plaint. The defendant Nos. 2 and 3 are trying to tress-pass forcibly in it. They have share in suit property. Therefore, they have prayed that, defendant No.1 is restrained from creating encumbrance on suit property described in para No.1-A and restrained defendant Nos. 2 and 3 from entering forcibly in property described in para No.1-B of the plaint till conclusion of the trial.

7) The defendants have denied all averments in the petition and filed their joint written statement and say at Exh. 21. They have denied description of the suit property. They have denied alleged income of plaintiff No.1. They have denied alleged contribution for purchasing the property by plaintiff No.1. They have denied plaintiffs' right to seek relief of declaration and perpetual injunction against them. They have raised objection about non-payment of requisite court fee stamp. Their subsequent objection is of non-joinder of necessary parties to the suit. They have contended that, defendant No.1 was teacher and was serving till 31.5.2012 in Udgaon Technical High-school, Udgaon. He purchased plot from Jayprakash Co-Operative Housing society, Dharangutti in the year 1982 and paid total costs of the plot Rs.6,250/- till 1990. He paid the said amount from his salary. He has purchased it from his own name. It is his self acquired property. He erected construction in the plot in the year 1992 by raising loan from L.I.C. and repaid it from his salary. He further raised loan Rs.45,000/- from Sangli Urban Co-Operative Bank for maintenance and other work. Plaintiffs

have no right to seek any partition in respect of house property.

8) They have further contended that, the land bearing Gat No. 557 is ad-measuring 3H 31R which is purchased by plaintiff No.1, defendant No.1 alongwith Shrikant Jadhav and Sou. Savita Jadhav in the year 2009 from Anant Baburao Kokatnur and others. Plaintiff No.1 and defendant No.1 jointly with separate 1/4th share purchased land ad-measuring 1H.60R by registered sale deed dated 27.4.2009. The plaintiff No.1 and defendant No.1 orally partitioned it in the year 2014. The eastern portion remains with defendant No.1 and western portion is with plaintiff No.1. They have separately cultivating their share. The plaintiff No.1 leased out her share i.e. 0.80R land to Gundappa Borgave and Ganpati Jadhav in the year 2015. She has executed agreement to that effect with them on 24.8.2015. The defendant No.1 has also leased out it to the same persons for cultivation.

9) The defendant No.1 has need to sale his share, hence, after negotiations he sold out his share to defendant Nos. 2 and 3 for consideration of Rs.19,00,000/-. Shrikant Jadhav, Savita Jadhav, plaintiff No.1 and defendant No.1 have agreed to sale their property to defendant Nos. 2 and 3 for consideration of Rs.77,12,025/-. Accordingly, the defendant No.1, Savita Jadhav and Shrikant Jadhav have executed sale deed in favour of defendant Nos. 2 and 3. However, plaintiff No.1 refused to execute sale deed of her share, though she has accepted earnest amount, as she wants more money. The defendant Nos. 2 and 3 are in possession of 1/4th share of each defendant No.1, Shrikant Jadhav and Savita Jadhav in land bearing Gat No. 557. The plaintiffs have no concerned with the suit property except her 1/4th share. Their share is separated. The landed property is never joint

family property.

10) The defendant No. 1 is residing with his age old mother and sister but the plaintiff No.1,2 are harassing him. He has bona-fide intention to keep his mother for better medical service in Jaysingpur. Therefore, he intent to raise loan on house property and sold out landed property. An injunction is jeopardized their rights to possess and enjoy the suit property. Hence, they have prayed that application be rejected.

11) The following points arise for determination:-

<u>Points</u>	<u>Finding.</u>
1) Do plaintiffs show prima-facie case ?	... In the negative.
2) Do plaintiffs show irreparable loss sustained to them?	... In the negative.
3) Do plaintiffs show balance of convenience lies in their favour?	... In the negative.
4) What Order?	... As per final order.

REASONS

As to point Nos. 1 to 3 :

12) The following facts are not in dispute.
Plaintiff No.1 is wife of defendant No.1 and plaintiff Nos. 2 and 3 are their off-spring. Defendant Nos. 2 and 3 are purchasers.

Plaintiff No.1 was served as head mistress and defendant No.1 was served as teacher. The plaintiff No.2 is their married daughter.

13) The learned Advocate for the plaintiffs has submitted that, the suit property described in para No.1-A is joint family property and purchased by plaintiff No.1 and defendant No.1. Both have contributed for its construction.

14) The learned Advocate for defendants has submitted that, the suit property described in para No.1-A is self acquired of defendant No.1 and plaintiffs have no concerned with it.

15) In view of their counter submissions, the court has to assess status of suit property described in para No.1-A of the plaint. Learned advocate for plaintiff has submitted that house property is undivided joint family property. Plaintiff has shown need to purchase house property. In support of his submission he relied on **Dorab Cawasji Warden Vs. Coomi Sorab Warden and others cited in AIR 1990 SUPREME COURT 867(1)**. Their Lordships ruled that vendee of undivided property taking possession cause irreparable loss to other co-sharer. Admittedly, plaintiff No.1 married with defendant No.1 in the year 1977. She was joined for service in the year 1998. She has alleged that, she earns from tailoring work, tailoring class, selling of bangles and purse, Pigmy and L.I.C. agency. However, not a single document produced by plaintiff No.1 to show that she earns from such activities. Admittedly, the plot No. 27 in Jayprakash Housing Society stands in the name of defendant No.1. The construction was completed in the plot in the year 1992. The contribution of the construction was from defendant No.1 as he raised loan from L.I.C. and Sangli Urban Co-Operative Bank

which supported with documentary evidence produced by defendant No.1. It means till the year 1992 plaintiff was not in service and her contribution cannot be seen with documentary evidence. Plaintiffs have produced bank statements to show the nucleus of joint contribution. But they are not for the relevant period. They have no prima facie material to that effect. Hence, ratio in above citation is not useful to plaintiffs. Therefore, in view of 7x12 extract and bank statement in the name of defendant No.1 and entire contribution of the construction of the house and purchase the plot bears by defendant No.1. No doubt, plaintiff Nos. 1 to 3 are residing in the said house. A claiming share by succession from property of father devolve after the death of father. Father is alive. The house property is self acquired property of defendant No.1. Wife as well as son and daughter have no right to claim any share in self acquired property by father during his lifetime. Mere existence of joint family cannot raise presumption that such family owns property jointly as held in **Trimbak Vithoba Kadlag and others Vs. Subhardrabai W/o Madhav Kadlag and others cited in 2009(2) B C J 640:1**. Therefore, their claim of 1/4th share in house property is apparently non-maintainable under the provisions of Hindu Succession Act.

16) It is averred by plaintiffs that, the landed property ad-measuring 1H 60R described in para No.1-B of the plaint is joint Hindu family property. The defendant No.1 has denied alleged status of property and contended that 1H 60R is purchased only with joint sale deed. But it is self acquired property of plaintiff No.1 and defendant No.1 with their respective 1/4th share. At this juncture, recitals in sale deed dated 27.4.2009 is material document to show the status of property. It is admitted to both parties have purchased an area ad-measuring 1H 60R out of land bearing Gat No. 557 to the extent of 8

Ana share for consideration of Rs.5,80,000/- from Anant Kokatnur and others by registered sale deed. The recitals show that a purchaser has purchased 1/4th share each. It further recited that an independent 8-A extract is prepared and seller has given his help to enter the name of purchasers to revenue record. The recitals further show that, 1H 60R land is purchased by both with their respective 1/4th share. Their names have been accordingly recorded to the 7x12 extract as well as 8-A extract. No doubt, this property is adjacent to each other, but 8-A extract is different. It is not the case of any party that either plaintiff No.1 or defendant No.1 have not contributed for purchase. There are many documents produced by the parties to show that they have purchased the suit property independently and paid the money falls to their share. It is pertinent to note that, plaintiff No.1 leased out her 1/4th share to Gundappa Borgave and Ganpati Jadhav on 24-8-2015 for cultivation to the extent of her share. Both persons have filed their affidavits before Court to show that they took 0.80R land from plaintiff for cultivation for one year. This fact clearly shows that, plaintiff No.1 is enjoying her 1/4th share ad-measuring 0.80R land independently and defendant No.1 enjoying his share independently which supports the plea of defendant No. 1 that there is oral partition of landed property between plaintiff No.1 and defendant No.1. Therefore, the fact is very clear that defendant No.1 and plaintiff No.1 are cultivating their separate share ad-measuring 0-80R out of land bearing Gat No. 557. No doubt, plaintiff No.1 is owner of her share ad-measuring 0-80R and defendant No.1 is owner of his share ad-measuring 0-80R out of said land Gat No.557. Their cultivation and possession are different. There is no law that joint family members does not possess independent property. On the contrary, there is no presumption that joint family possess joint property.

17) It is not disputed that, defendant No.1 sold out his share ad-measuring 0-80R to defendant Nos. 2 and 3 by sale deed dated 8.8.2016. Defendant Nos. 2 and 3 have been in possession of 0-80R land from the date of sale deed. Their possession is substantiated by the affidavits of Gundappa Borgave and Ganpati Jadhav as the defendant Nos. 2 and 3 gave the land to them for cultivation. It means defendant Nos. 2 and 3 are in possession of the said land. They spent money to purchase the land. Their names have been entered in 7x12 extract. The revenue record is not challenged by the plaintiffs till today. This fact shows that, defendant Nos. 2 and 3 are in possession, therefore, question of forcible entrance does not arise. It is to be noted that, plaintiffs seek the relief of declaration and perpetual injunction. It is the case of the plaintiffs that, the suit property is joint family property. The question arises in my mind as to why the plaintiffs missed the relief of partition, though it is available to them. The law is clear on this point that, the party who seeks the relief has to seek entire relief in one suit. But the plaintiffs have not claimed the relief of partition in this suit. From the above discussion the plaintiffs have failed to prove that, the property described in para Nos. 1-A and 1-B is joint family property. In absence of their right in property they are not entitled to claim the relief of perpetual injunction. Therefore, plaintiffs have failed to show prima-facie case.

18) Admittedly, the defendant No.1 is residing in the said house. He has shown prima-facie right to self acquisition of suit property. Therefore, he has every right to enjoy his property as per his wish. Therefore, preventing his right of enjoyment is irreparable loss to him. On the contrary, plaintiffs have no irreparable loss if injunction is

refused. In absence of plaintiffs right no inconvenience will be caused to them as plaintiff No.1 has her own property ad-measuring 0.80R in Gat No. 557. It is not disputed that, she is residing in house property. Considering the above circumstances balance of convenience never lies in favour of plaintiffs. Hence, my findings on point Nos. 1 to 3 are in the negative and I pass the following order.

Order

1. The application at Exh. 5 is rejected.
2. The order of status-quo passed below Exh.5 dated 14-11-2016 is hereby vacated.
3. Costs in main cause.

Sd/-

Date : 3-10-2017.

(J.S.Mali)
Civil Judge Sr. Division, Jaysingpur.

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

Name of the Stenographer	S.R. Ladekhan
Name of Court	Civil Court, Sr.Dn. Jaysingpur.
Date of order	03/10/17
Order signed by the P.O. on	10/10/17
Order uploaded on	11/10/17