

Dorab Cawasji Warden

Vs

Coomi Sorab Warden and Others

Civil Appeal No. 2422 of 1989

(L.M. Sharma, V. Ramaswami-II JJ)

13.02.1990

JUDGMENT

V. RAMASWAMI, J. -

1. This appeal arises out of notice of motion taken by the plaintiff in civil Suit No. 2987 of 1987 on the file of the Bombay City Court at Bombay for interim injunction pending the suit restraining defendants 1 to 3 from parting with possession and defendants 4 and 5 from entering into or taking possession and/or remaining in possession or enjoyment of the suit property, namely, Dorab Villa, 29 Perry Cross Road, Bandra, Bombay, or any part or portion thereof. The appellant is the plaintiff and defendants 1 to 5 are respondents 1 to 5.

2. The appellant is the owner of an undivided half share in the suit property. The suit property was purchased originally under a deed dated January 12, 1934 by Cawasji Dorabji Warden, Banubai Warden and the appellant as joint owners. Cawasji Dorabji Warden and Banubai are respectively the father and mother of the appellant. It appears that the superstructure on the land was constructed subsequent to the purchase. At the time when the property was purchased the appellant was a minor. By a registered deed of declaration the appellant made a declaration that the appellant has an undivided share in the said piece of land and the building erected thereon as joint tenants with the declarants, and that in the event of the appellant's surviving the declarants, he shall by virtue of the said joint tenancy and his survival become solely and beneficially entitled to the said piece of land and the building thereon. However, this deed reserved a right to either or both the declarants and the appellant from severing the joint tenancy at any time. On the death of Banubai on June 9, 1946 the appellant and his father as surviving joint tenants came to own the entire property. Under an agreement dated August 23, 1951 the appellant and his father, who were then the joint tenants of the said property, agreed to hold the same as tenants common, each having an equal undivided share therein so that each can dispose of his undivided share in the property and each share become a separate stock of descent. On April 16, 1952 the appellant's father transferred his undivided half share in the suit property in favour of his another son by name Sohrab Warden in consideration of the said Sohrab releasing in favour of his father his undivided share in some other property described in the second schedule to that document. Thus the appellant and his brother Sohrab came to hold an equal undivided one half share each, as tenants in common in respect of the said property.

3. Sohrab died intestate on October 12, 1976 leaving behind him his widow respondent 1 and his two minor sons respondents 2 and 3 in this appeal. Respondents 1 to 3 sold their undivided one half share in the said property to respondent 4 and his wife under a sale deed dated April 16, 1987. On April 18, 1987 (sic) praying for a decree for a decree directing respondents 1, 2 and 3 from parting with possession of the said property or any part thereof and/or inducting any third party including

any third party including respondents 4 into the said property or any part or portion thereof, and for further directions against respondents 4 and 5 from entering into or taking possession and/or remaining in possession or enjoyment of the suit property from defendants 1, 2 and 3 or otherwise. Respondent 5 was impleaded on the assumption that he and respondent 4 jointly purchased the property but it is now accepted that he is not one of the purchasers and the property was purchased by respondent 4 and his wife. Pending the suit the appellant prayed for an interim injunction restraining the respondents 1 to 3 from parting with possession of the said property or any part thereof and/or inducing respondent 4 into the suit property or any part or portion thereof and a similar injunction restraining respondent 4 from entering into or taking possession and/or remaining in possession or enjoyment of the suit property or art thereof.

4. The suit was filed on the ground that the suit property is a dwelling house belonging to an undivided family, that there had not been any division of the said property at any time, that the plaintiff and his deceased different portions, the plaintiff occupying the first floor while the deceased Sohrab was occupying the ground floor. After the death of Sohrab respondents 1 to 3 continue to be in occupation of that portion which was in the occupation of that portion which was in the occupation of Sohrab. In the circumstances defendant 4 who is a stranger to the family has no right to have joint possession or common enjoyment of the property along with the plaintiff on the basis of the purchase of the undivided share. On this ground the appellant-plaintiff claimed that he is entitled to perpetual injunction as prayed for in the suit. He further claimed that pending the suit he is entitled to ad interim relief as prayed for and that if the said relief is not granted irreparable loss and great prejudice will be caused to him which cannot be compensated in terms of money, and that the equity and balance of convenience is in his favour and no prejudice or loss would be caused to the respondents.

5. In the counter-affidavit filed by respondent 4 and respondent 1 on behalf of herself and two minor sons it was contended that though the appellant and respondents 1, 2 and 3 were owning the property in equal moiety they were holding it in their individual capacity and not as members of joint family and that the suit property is not joint family property or property belonging to an undivided family. The further case of the defendant was that since 1968 when Sohrab got married the appellant and his family had been in exclusive occupation of the upper floor of the bungalow and a garage while the entire ground floor of the building of the said property and another garage was in the exclusive use and possession of Sohrab and his family and that the compound, staircase and the terrace were in joint possession. They were also having separate mess, separate electricity and water meters and that they were paying proportionate taxes. After the death of the said Sohrab, respondents 1 to 3 continued to stay and occupy exclusively the said ground floor as well as the garage till the said one half portion of the property was sold and conveyed absolutely to respondent 4 and his wife. In the circumstances though the property was held as tenants in common, there had already been a partition as to the user of the property. Respondent 4 had taken possession of that portion of the property which was in occupation of respondents 1 to 3 in pursuance of the sale deed. The further contention was that it is not the appellant who would suffer irreparable loss and great prejudice if the injunction is granted but it is the respondents who would suffer the loss and prejudice and that the balance of convenience is not in favour of the appellant.

6. The trial court found that the suit property is dwelling house belonging to an undivided family, that there was no partition of the same by metes and bonds at any time, that the plaintiff and his father at the material time were undivided qua the entire suit property, that though the family of the appellant and the family of his brother Sohrab may be divided for food and worship they were not divided qua the suit property, that so far as the suit property is concerned the appellant and his

family and the family of respondents 1, 2 and 3 were joint and undivided and that the case would fall within the scope of the second paragraph of Section 44 of the Transfer of Property Act and that, therefore, respondent 4 and his wife as stranger were not entitled to joint possession of the said family dwelling house.

7. Since the defendant had claimed that he already entered into possession interim mandatory injunction was granted to the effect that respondent 4, his servants and his agents are restrained "from remaining in possession or enjoyment of the suit property" or any part or portion thereof. However, the learned Judge ordered that his injunction order would not prevent respondent 4 to occasionally enter the suit property to enquire that no one else other than the plaintiff and his family members is entering into possession of the portion of the ground floor and one garage which he has purchased.

8. On appeal the High Court was of the view that prima facie the facts indicate that throughout the parties have lived separately, that there appear to have been severance in status and it is not possible to give a finding that there has been no partition between the parties, that the matter require evidence on either side as to what extent the ground floor could have ever been considered as a family dwelling house, that granting of interim mandatory injunction will have the effect of virtually deciding the suit without a trial and that the plaintiff has not made out a prima facie case that the plaintiff would suffer irreparable damage, if any injunction is not granted or that the balance of convenience is in his favour. In that view the learned Single Judge allowed the appeal and set aside the order granting the injunction but directed that during the pendency of the suit respondent 4 and his wife shall not make any permanent alterations in the suit premises nor shall they induct any third party, or create any third party interest over the suit property.

9. Sale deed in favour of respondent 4 recites that the possession of that portion of the property which was the subject matter of the sale had been handed over to the purchaser and that purchaser can continue to be in possession without any let or hindrance by the vendees. At the time of the Commissioner's inspection immediately after filing of the suit except that there were some of the items belonging to respondents 1 to 3, it was found that respondent 4 had taken possession. That was the finding of the trial court and it was on that basis the injunction in a mandatory form was granted. In the fact, in this Court also the learned counsel appearing for the parties proceeded on the basis that the purchaser was inducted in the possession of the disputed portion of the house even by the time the Commissioner visited the place. We, therefore, hold that the purchasers have occupied the disputed portion and the question, therefore, for consideration is whether the appellant is entitled to the injunction in a mandatory form directing respondent 4 purchaser to vacate the premises.

10. The trial court gave an interim mandatory injunction directing respondent 4 not to continue in possession. There could be no doubt that the courts can grant such interlocutory mandatory injunction in certain special circumstances. It would be very useful to refer to some of the English cases which have given some guidelines in granting such injunctions.

11. In *Shepherd Homes Ltd. v. Sandham* ((1970) 3 All ER 402 : (1970) 3 WLR 348) Megarry J. observed :

"(iii) On motion, as contrasted with the trial, the court was far more reluctant to grant a mandatory injunction; in a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this was a higher standard than was required for a prohibitory injunction."

12. In *Evans Marshall & Co. Ltd. v. Bertola SA* ((1973) 1 All ER 992 : (1973) 1 WLR 349) the Court of Appeal held that :

"Although the failure of a plaintiff to show that he had a reasonable prospect of obtaining a permanent injunction at the trial was a factor which would normally weigh heavily against the grant of an interlocutory injunction, it was not a factor which, as a matter of law, precluded its grant;"

The case law on the subject was fully considered in the latest judgment in *Films Rover International Ltd. v. Cannon Film Sales Ltd.* ((1986) 3 All ER 772), Hoffmann, J. observed in that case : (All ER pp. 780-81)

"But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

Again at page 781 the learned Judge observed :

"The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction."

and concluded that : (All ER p. 782)

"These considerations lead me to conclude that the Court of Appeal in *Locabail International Finance Ltd. v. Agroexport* ((1986) 1 All ER 901, 906 : (1986) 1 WLR 657, 664) was not intending to 'fetter the court's discretion by lying down any rules which would have the effect of limiting the flexibility of the remedy', to quote Lord Diplock in the *Cyanamid* case (*American Cyanamid Co. v. Ethicon Ltd.*, (1975) 1 All ER 504, 510 : 1975 AC 396, 407). Just as the *Cyanamid* (*American Cyanamid Co. v. Ethicon Ltd.*, (1975) 1 All ER 504, 510 : 1975 AC 396, 407) guidelines for prohibitory injunctions which require a plaintiff to show no more than an arguable

case recognise the existence of exceptions in which more is required (compare *Cayne v. Global Natural Resources plc* ((1984) 1 All ER 225)), so the guideline approved for mandatory injunctions in *Locabail* ((1986) 1 All ER 901, 906 : (1986) 1 WLR 657, 664) recognises that there may be cases in which less is sufficient."

On the test to be applied in granting mandatory injunctions on interlocutory applications in Halsbury's Laws of England, 4th edn. Vol. 24, para 948 it is stated :

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

13. The law in United States is the same and it may be found in 42 American Jurisprudence 2nd page 745 et seq.

14. As far the cases decided in India we may note the following cases.

15. In one of the earliest cases in *Rasul Karim v. Pirubhai Amirbhai* (ILR (1914) 38 Bom 381 : 16 Bom LR 288 : 24 IC 625), Beaman, J. was of the view that the courts in India have no power to issue a temporary injunction in a mandatory form but Shah, J. who constituted a bench in that case did not agree with Beaman, J. in this view. However, in a later Division Bench judgment in *Champsey Bhimji & Co. v. Jamna Flour Mills Co. Ltd.* ((1914) 16 Bom LR 566 : 28 IC 121) two learned Judges of the Bombay High Court took a different view from Beaman, J. and this view is not the prevailing view in the Bombay High Court. In *M. Kandaswami Chetty v. P. Subramania Chetty* (ILR (1918) 41 Mad 208 : 1917 MWN 501 : 41 IC 384), a Division Bench of Madras High Court held that courts in India have the power by virtue of Order XXXIX Rule 2 of the Code of Civil Procedure to issue temporary injunctions in a mandatory form and differed from Beaman J.'s view accepting the view in *Champsey Bhimji & Co. v. Jamna Flour Mills Co.* ((1914) 16 Bom LR 566 : 28 IC 121) In *Israil v. Shamser Rahman* (ILR (1914) 41 Cal 436 : 18 CWN 176), it was held that the High Court was competent to issue an interim injunction in a mandatory form. It was further held in this case that in granting an interim injunction what the court had to determine was whether there was a fair and substantial question to be decided as to what the rights of the parties were and whether the nature and difficulty of the questions was such that it was proper that the injunction should be granted until the time for deciding them should arrive. It was further held that the court should consider as to where the balance of convenience lies and whether it is desirable that the status quo should be maintained. While accepting that it is not possible to say that in no circumstances will the courts in India have any jurisdiction to issue an ad interim injunction of the mandatory character, in *Nandan Pictures Ltd. v. Art Pictures Ltd.* (AIR 1956 Cal 428), a Division Bench was of the view that if the mandatory injunction is granted at all on an interlocutory application it is granted only to restore the status quo and not granted to establish a new state of things differing from the state which existed at the date when the suit was instituted.

16. The relief of interlocutory mandatory injunction are thus granted generally to preserve or restore

the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are :

- (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
- (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
- (3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.

18. The suit is one filed under Section 44 of the Transfer of Property Act (hereinafter referred to as 'the Act'). In considering the question of interim mandatory injunction in a suit filed under Section 44 of the Act the court has also to keep in mind the restriction on the rights of the transferee to joint possession under that section. The section reads as follows :

"44. Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liability affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

19. In order to attract the second paragraph of this section the subject matter of the transfer has to be a dwelling house belonging to an undivided family and the transfer is a share in the same to a person who is not a member of the family. Therefore, in order to satisfy the first ingredient of clear existence of the right and its infringement, the plaintiff will have to show a probable case that the suit property is a dwelling house and it belonged to an undivided family. In other words, on the facts before the court there is a strong probability of the plaintiff getting the relief prayed for by him in the suit. On the second and third ingredients having regard to the restriction on the rights of a transferee for joint possession and the dominant purpose of the second paragraph of Section 44 of

the Act, there is danger of an injury or violation of the corresponding rights of the other members of the family and an irreparable harm to the plaintiff and the court's interference is necessary to protect the interest of the plaintiff. Since the relief of an interim injunction is all the same an equitable relief the court shall also consider whether the comparative mischief or inconvenience which is likely to ensue from withholding the injunction will be greater than that which is likely to arise from granting it, which means that the balance of convenience is in favour of the plaintiff.

20. The first point that has to be considered, therefore, is whether one can have a reasonably certain view at this stage before the actual trial that the suit property is a 'dwelling house belonging to an undivided family' within the meaning of Section 44 of the Act. As to what is the meaning of these words in the section, the leading case is the one decided by the Full Bench of the Allahabad High Court in *Sultan Begam v. Debi Prasad* (1908 ILR 30 All 324 : 5 ALJ 352 : 1 MLT 38). That was concerned with the meaning of the phrase "dwelling house belonging to an undivided family" in Section 4 of the Partition Act, 1893. That section provides that where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family, being a shareholder shall undertake to buy the share of such transferee make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder. The argument was that the words 'undivided family' as used in the section mean a joint family and are confined to Hindus or to Muhammadans, who have adopted the Hindu rule as to joint family property. The counter-argument was that the expression is of general application and means a family whether Hindu, Muhammadan Christian etc. possessed of a dwelling house which has not been divided or partitioned among the members of the family. The case itself related to a Muslim family to whom the house belonged. The Full Bench observe :

"... in it (Section 4 of the Partition Act) we find nothing to indicate that it was intended to apply to any limited class of the community. The words 'undivided family' as used in this section appear to be borrowed from Section 44 of the Transfer of Property Act. The last clause of that section prescribes that where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the dwelling house. This provision of the statute is clearly of general application, and the effect of it is to compel the transferee of a dwelling house belonging to an undivided family, who is a stranger to the family, to enforce his rights in regard to such share by partition. There appears to me to be no reason why the words 'undivided family' as used in Section 4 of the Partition Act, should have a narrower meaning than they have in Section 44 of the Transfer of Property Act. If the legislature intended that Section 4 should have limited operation, we should expect to find some indication of this in the language of the section. For example, instead of the words 'undivided family' the expression 'undivided Hindu family' or 'joint family' might have been used."

With reference to the object and purpose of such a provision the Full Bench further observe :

"... as was pointed out by Mr. Wells, Judicial Commissioner, in the case of *Kalka Parshad v. Bankey Lall* ((1906) 9 Oudh Cases 158) is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live, and that the words 'undivided family' must be taken to mean 'undivided qua the dwelling house in

question, and to be a family which owns the house but has not divided it."

21. Again in construing the words "family" and "undivided family" and Division Bench of the Calcutta High Court in *Khirode Chandra Ghoshal v. Saroda Prosad Mitra* ((1910) 7 IC 436 : 9 MLT 117), observed :

"The word 'family', as used in the Partition Act, ought to be given a liberal and comprehensive meaning, and it does include a group of persons related in blood, who live in one house or under one head or management. There is nothing in the Partition Act to support the suggestion that the term 'family' was intended to be used in a very narrow and restricted sense, namely, a body of persons who can trace their descent from a common ancestor."

22. The decision in *Nil Kamal Bhattacharjya v. Kamakshya Charan Bhattacharjya* (AIR 1928 Cal 539 : 109 IC 67), related to a case of a group of persons who were not the male descendants of the common ancestor to whom the property in the suit originally belonged but were respectively the sons of the daughter of a grandson of the common ancestor and the sons of a daughter of a son of the said common ancestor. The learned Judge applied the principle enunciated in *Sultan Begam v. Debi Prasad* (1908 ILR 30 All 324 : 5 ALJ 352 : 1 MLT 38) to this family and held that it was an undivided family since the house had not been divided by metes and bounds among themselves. The Madras High Court also followed and applied the ratio of this judgment in the decision in *Sivaramayya v. Venkata Subbamma* (AIR 1930 Mad 561 : 58 MLJ 341 : 126 IC 593). The next decision to be noted is the one reported in *Bhim Singh v. Ratnakar Singh* (AIR 1971 Ori 198 : (1970) 1 Cut WR 183). In that case the undivided family consisted of the plaintiff and the defendants 1 and 2 therein. Defendant 1 had alienated 1/3 of his half share in the house property in favour of defendants 7 and 10 who were the appellants before the High Court. The suit was filed for a permanent injunction restraining defendants 7 and 10 from jointly possessing the disputed house along with the plaintiff and defendant 2. The facts as found by the courts were that by an amicable arrangement among plaintiff and defendants 1 and 2 they were living separately for a long time, had separated their residences and were living in different houses unconnected with each other but all situate in one homestead and that after defendant 1 had alienated his separate interest as well as his separate house in favour of the alienees and in pursuance thereof the alienees were put in possession. After referring to the judgments we have quoted above and following the principles therein, Ranganath Misra, J. as he then was held : (AIR p. 201, para 21)

"If in this state of things, a member of the family transfers his share in the dwelling house to a stranger paragraph 2 of Section 44 of the Transfer of Property Act comes into play and the transferee does not become entitled to joint possession or any joint enjoyment of the dwelling house although he would have the right to enforce a partition of his share. The object of the provision in Section 44 is to prevent the intrusion of the strangers into the family residence which is allowed in spite of the transfer of a share therein in favour of a stranger. The factual position as has been determined is that the property is still an undivided dwelling house, possession and enjoyment whereof are confined to the members of the family. The stranger-transferees being debarred by law from exercising right of joint possession which is one of the main incidences of co-ownership of the property should be kept out."

On the question whether the enjoyment of ascertained separate portions of the common dwelling house and the alienee taking possession made any difference the learned Judge quoted the following

a passage from *Udayanath Sahu v. Ratnakar Bej* (AIR 1967 Ori 139 : 33 Cut LT 1163), with approval :

"If the transferee (stranger) get into possession of a share in the dwelling house, the possession becomes a joint possession and is illegal. Courts cannot countenance or foster illegal possession. The possession of the defendant-transferee in such a case becomes illegal. Plaintiff's co-owners are entitled to get a decree for eviction or even for injunction where the transferee threatens to get possession by force. If there had been a finding that there was severance of joint status but no partition by metes and bounds, defendant 1 was liable to be evicted from the residential houses and Bari under Section 44 of the T.P. Act."

The learned Judge further held : (AIR p. 202, para 23)

"The last contention of Mr. Pal is that the plaintiff sued for injunction only. The learned trial Judge, however, has decreed ejectment of the transferee defendants and that decree has been upheld. Once it is held that the plaintiff is entitled to protection under the second part of Section 44 of the Transfer of Property Act and the stranger purchasers are liable to be restrained, it would follow follows that even if the defendants have been put in possession or have come jointly to possess they can be kept out by injunction. The effect of that injunction would necessarily mean ejectment. In that sense and to the said extent, the decree of the trial court upheld by the lower appellate court must be taken to be sustainable. The remedy of the stranger purchaser is actually one of partition. Until then, he is obliged to keep out from asserting joint possession."

23. We may respectfully state that is a correct statement of the law. There could be no doubt that the ratio of the decisions rendered under Section 4 of the Partition Act equally apply to the interpretation of the second paragraph of Section 44 as the provisions are complementary to each other and the terms "undivided family" and "dwelling house" have the same meaning in both the sections.

24. It is not disputed that prior to 1951 the suit dwelling house belonged to the undivided family of the appellant and his father and they were owning the same as joint tenants. The High Court has relied on a letter dated March 12, 1951 of the appellant to his father in which the appellant had expressed a desire to retain his share separately so as to enable him to dispose of the same in a manner he chooses and also enable his heirs to succeed. In pursuance of this letter the appellant and his father executed an agreement dated August 23, 1951 by which they declared that they have severed their status as joint tenants and that henceforth they were holding the said piece of land and building as tenants in common in equal undivided half share. In the view of the High Court this conversion of joint tenancy of an undivided family into a tenancy in common of the members of that undivided family amounts to a division in the family itself with reference to the property and that, therefore, there shall be deemed to have been a partition between the appellant on the further fact that subsequent to the death of the father and marriage of Sohrab the appellant's family and Sohrab's family were occupying different portions of the suit property and enjoying the same exclusively. We are afraid that some notions of coparcenary property of a Hindu joint family has been brought in which may not be quite accurate in considering Section 44; but what is relevant for the purpose of these proceedings was whether the selling house belonged to an undivided family. We have already pointed out that even if the family is divided on status in the sense that they were

holding the property as tenants in common but undivided qua the property that is the property had not been divided by metes and bounds it would be within the provision of Section 44 of the Act.

25. We had also noticed earlier that Cawasji, the father of the appellant transferred his undivided half share in the suit property in favour of his son Sohrab under a deed dated April 16, 1952. Two questions may arise for consideration whether this transaction is covered by Section 44 of the Act and whether after the transfer, the appellant's brother and the appellant can be said to be holding the property as undivided family. The transfer by the father in favour of Sohrab was a transfer in favour of a member of a family as Sohrab was living with them. Sohrab attained the age of 18 only on December 25, 1951 and as seen from the other documents he was living with his father and brother till 1968 when he got married. It is only after he was married the appellant and Sohrab were occupying different portions of the suit property and having different mess. In the absence of a document evidencing partition of the suit house by metes and bounds and on the documentary evidence showing that the property is held by the view that the plaintiff-appellant has shown a prima facie case that the dwelling house belonged to an undivided family consisting of himself and his brother.

26. The two brothers, therefore, shall be deemed to be holding the property as members of an undivided family and in the absence of the partition by meter and bounds qua this property they shall be deemed to have been holding the dwelling house as an undivided family. Prima facie, therefore, the transfer by defendants 1 to 3 would come within the mischief of second paragraph of Section 44 of the Act.

27. The next question for consideration is whether irreparable injury would be caused to the appellant which could not be compensated in terms of money and whether the balance of convenience is in favour of the appellant. While Section 44 does not give a transferee of a dwelling house belonging to an undivided family a right to joint possession and confer a corresponding right on the other members of the family to deny the right to joint possession to a stranger transferee, Section 4 of the Partition Act gives a right to a member of the family who has not transferred his share to purchase the transferee's share on a value to be fixed in accordance with law when the transferee filed a suit for partition. Both these are valuable rights to the members of the undivided family whatever may be the object or purpose for which they were conferred on such members. As we have pointed out in some cases it is stated that the right to joint possession is denied to a transferee in order to prevent a transferee who is an outsider from forcing his way into a dwelling house in which the other members of his transferee's family have a right to live. In some other cases giving joint possession was considered to be illegal and the only right of the stranger-purchaser is to sue for partition. All these considerations in our opinion would go only to show that denying an injunction against a transferee in such cases would prima facie cause irreparable injury to the other members of the family.

28. Mr. Sorabjee the learned counsel for the appellant brought to our notice a number of circumstances which go to show that respondent 4 was fully aware of the limited and restrictive title of respondents 1, 2 and 3 and the bar for joint possession provided in the second paragraph of Section 44 of the Transfer of Property Act and having purchased with such full knowledge tried to overreach the court by keeping the whole transaction secret and taking possession of the property purchased before the appellant could get legal redress from the court. Apart from the fact that the various recitals in the agreement to sell dated December 31, 1986 and the sale deed dated April 16, 1987 executed by respondents 1 to 3 in favour of respondent 4 clearly show that respondent 4 was fully aware of the provisions of Section 44 of the Act and that he had purchased the property with

the full knowledge of the rights of the other members of the family taking, a complete risk. Clause 6 of the agreement also specifically provided that :

"In case pending the completion of this sale any suit be filed by the said co-owner Dorab or other person against the Vendors, or any one or more of them, and an injunction (not being an ad interim injunction) is obtained restraining the Vendors from selling or disposing of the said property, then the Vendors shall have the option to keep this sale in abeyance or to cancel and rescind this agreement. In the latter case, the earnest money will be returned and the Vendors shall transfer their right, title and interest in the said bungalow property to the purchaser or his nominee ..."

29. This provision in the agreement clearly shows that respondent 4 knew that respondents 1 to 3 have only a limited right to transfer their undivided one half share to a stranger purchaser and they contemplated litigation in this regard. The said sale was itself hurriedly executed in a hush-hush manner keeping the entire transaction secret from the appellant. The purchasers were also inducted in the premises in a manner which clearly suggests that the respondents were attempting to forestall the situation and to gain an undue advantage in a hurried and clandestine manner defeating the appellant's attempt to go to court for appropriate relief. The suit itself was filed on April 18, 1987 within two days of the sale without any delay. On that very day the appellant obtained an interim ex parte order in the injunction application but when it was sought to be executed it was reported that respondent 4 had already taken possession and in view of that the interim order was granted by bracketing the words "remaining in possession" without giving effect to it pending further consideration of the interim application. By consent of parties a Commissioner was appointed on April 22, 1987 itself. The report of the Commissioner showed that not all the articles of vendors have been removed and the movables of the purchasers were also only the process of being brought into the house. These facts showed the anxiety of respondent 4 to complete the taking of possession before any order could be obtained by the appellant from the court. The learned counsel also referred to the affidavit filed by respondent 1 wherein she has still claimed that she is residing in the suit property and the affidavit filed by respondent 4 in the suit as if he is residing somewhere else and not in the suit property. The learned counsel also referred to some telephone directories, telephone numbers and addresses given therein which also show that respondent 4 is residing and having an office in some other places also other than the suit premises. These evidence go to show that the purchaser has occupied the disputed property merely for the purpose of establishing his claim and he did not vacate his earlier permanent residence. On the other hand the appellant had to leave from the portion of the house where he was living as it was not possible for him to reside there with a stranger. The respondents in such circumstances cannot be permitted to take advantage of their own acts and defeat the claim of the appellant in the suit by saying that old cause of action under Section 44 of the Transfer of Property Act no longer survived in view of their taking possession. In such circumstances it is but just and necessary that a direction should go to the respondents to undo what they have done with knowledge of the appellant's rights to compel the purchaser or to deny joint possession.

30. These facts in out view clearly establish that not only a refusal to grant an interim mandatory injunction will do irreparable injury to the appellant but also balance of convenience is in favour of the appellant for the grant of such injunction. In the result we allow the appeal, set aside the judgment of the High Court and restore that of the trial court with costs in this appeal.

31. We may add that our observations on facts are not to be taken as binding at the time of final disposal of the suit after trial. We also make it clear that if the vendors desire to come and stay in the

portion of the house which was in their possession earlier, they may indicate it to the court and the trial court on such request will pass appropriate orders in that regard.

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