
Vijaya Raje Scindia (Smt.) Vs Jyotiraditya Scindia and Others

Civil Revision No. 78 of 1991

Court: Madhya Pradesh High Court

Date of Decision: Feb. 16, 1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 39 Rule 1, Order 39 Rule 2, Order 7 Rule 11, Order 7 Rule 5, Order 7 Rule 7#Constitution (Twenty-Sixth Amendment) Act, 1971 " Article 362, 363A#Constitution of India, 1950 " Article 362, 363, 363(1), 363A, 366(22)#Hindu Succession Act, 1956 " Section 5, 6, 8#Specific Relief Act, 1963 " Section 34, 37#Trusts Act, 1882 " Section 13, 14

Citation: (1994) JLJ 6

Hon'ble Judges: T.N. Singh, J

Bench: Single Bench

Advocate: R.C. Shukla, for the Appellant; A.K. Chitale and N.K. Modi, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T.N. Singh, J.

This order shall dispose of two interlinked matters, heard analogously. Both matters arise out of a common order passed on

16.10.1990 in Civil Suit No. 9-A of 1990, by learned Fourth Additional District Judge, Gwalior. By that order, he disposed of simultaneously the

application of Plaintiff Jyotiraditya Scindia for temporary injunction and the application of the Appellant/revisionist, Shrimant Vijaya Raje Scindia,

impleaded in the suit as Defendant No. 1, for rejection of the plaint. He held that the Plaintiff's suit and his application for temporary injunction

could not be thrown out at the threshold and that no case was made out to do so under Order VII, Rules 5, 7 and 11 read with Section 151,

Code of Civil Procedure. In deciding the application of the Plaintiff for temporary injunction, he found a prima facie case made out and held that

balance of convenience was in favour of the Plaintiff who would suffer irreparable injury if Defendant No. 1 was not restrained from alienating,

transferring and parting with possession of any of the properties in dispute.

2. Shortly put, the Plaintiff's case is that the suit property was ancestral property. The relationship of parties and other members of the family is

reflected in the genealogical tree pictured at para 2 of the plant. Plaintiff's father, Defendant No. 2, Madhav Rao Scindia is the only son of late

Jiwaji Rao Scindia and Vijaya Raje Scindia (Defendant No. 1). He was born on 9.3.1945. Plaintiff was born on 1.1.1971 and he is also the only

male child of his parents. Plaintiffs grandfather Late Maharaja Jiwaji Rao was enthroned on 2.11.1936 and became Ruler of erstwhile princely

State of Gwalior. On 28.5.1948, there was a merger of certain princely States of Central India leading to the formation of United State of Gwalior,

Indore and Malwa (Madhya Bharat) when a covenant was executed by the Rulers of the concerned States setting out the terms and conditions of

their accession to independent India. Maharaja Jiwaji Rao Scindia expired on 19.7.1961. Before his death he filed his Wealth Tax return as an

Individual", for the year 1960-61, declaring therein his assets. During his life-time, he had created four separate trusts on 11.5.1947, 12.1.1948,

26.3.1954 and 15.5.1955, investing Rs. 5 lakhs in each trust for the benefit of each of his four daughters for enjoyment by them on their attaining

majority the accumulated income. On 11.11.1955, he had executed a gift-deed donating to his daughter Yashodhara Raje the property known as

Sakhya Vilas, Lashkar, Gwalior. On 12.7.1962, under a certificate issued by the Government of India Defendant No. 2 was recognised in terms

of Article 366(22) of the Constitution of India as the Ruler of Gwalior in succession to his father late Jiwaji Rao Scindia with affect from 17.7.1961

as the "sole successor of all private properties, movable, immovable", held by the deceased Maharaja.

3. The crux of the plaintiff's case is that whatever properties devolved by succession on his father, Defendant No. 2, was governed by Rule of

Primogeniture and the estate which his father inherited was impartible. Therefore, the Partition Deeds (Annexures P/XII and P/XVIII) executed on

31.12.1971 and 31.5.1976 and the Trust Deeds (Annexures P/XIII to P/XXVIII) executed by the Defendants Nos. 1 and 2 were void, as they

related to property of the said estate. The several trusts are impleaded in the suit as Defendants 3 to 17. The properties shown in Annexures C, D,

E and the properties held in the name of M/s. Scindia Potteries (Pvt.) Ltd. (impleaded as Defendant No. 20) and of Kusumpur Clay Mines, Ltd.

(impleaded as Defendant No. 21) are described as "disputed properties". It is stated that the shares of the Company (Defendant No. 21) were

owned by late Jiwaji Rao Scindia and that he was the lease-holder of the properties held in the name of Defendant No. 21. According to the

Plaintiff, the so-called partitions were engineered by the Appellant/Defendant No. 1 who prevailed upon her son, Defendant No. 2, to show the

properties as belonging to Hindu Undivided Family because she would not have otherwise got anything except maintenance. His further case is that

a simulated dispute was raised with respect to some of the properties and decision thereof was procured under award dated 1.4.1980 of a sole

Arbitrator. The cause of action for the suit arose as a result of different illegal transactions taking place during Plaintiff's minority and that the suit

was filed within three years of his attaining majority and acquiring knowledge thereof.

4. In the plaint and also in the application for temporary injunction, it is alleged specifically that Defendant No. 1 has executed several documents

alienating various suit properties and committed other acts of waste prejudicial to the interest of the Plaintiff of which particulars are furnished in

sub-paras (a) to (k) of para 34 (wrongly typed as para 33) in respect, inter alia, of the property situate at Sarojini Nagar, Delhi for which the said

Defendant has accepted as earnest- money a sum of Rs. 1 lakh, from the intended lessee with the object of transferring possession to him of the

said property. Similar agreements, it is alleged, the said Defendant has also executed in respect of the property situate at Vasant Vihar and Sarojini

Nagar, described as Kusumpur Clay Mines. Late J Jiwaji Rao Scindia had executed a will dated 8.4.1925 providing that the property known as

Samudra Mahal, Bombay, shall not be sold and shall be retained for personal use but Defendant No. 1 has alienated the same beside alienating

other valuable properties at Shivpuri, Gwalior and Ujjain. It is Plaintiff's case that Defendant No. 1 has no right, title and interest in the ""disputed

property"" which was of the ownership of late Jiwaji Rao Scindia and had devolved on Defendant No. 1 as a full owner thereof and that her several

acts of alienation and her threats to continue the same has jeopardised the right, title and interest of the Plaintiff in the disputed property of his

deceased grant-father. A declaration is prayed by him in respect of his right to succeed to the ""disputed properties"" by operation of Rule of

Primogeniture and that no right, title and interest vested in any manner in Defendant No. 1 in respect of the said properties. Prayer is also made for

declaring void the partition-deeds and the trusts and for permanent preventive injunction against Defendant No. 1 from alienating or parting in any

manner whatsoever possession of any part of the disputed properties.

5. Defendant No. 1 filed reply to the application of the Plaintiff under Order XXXIX, Rules 1 and 2 read with Section 151, CPC filed in the suit

for temporary injunction. According to her the Plaintiff's claim is not tenable because the ""impartible estate"" contemplated u/s 5(ii), Hindu

Succession Act, for short the "Act", ceased to exist as a result of amendment of the Constitution which took effect from 28.12.1971. She also

relied on admission of Defendant No. 2, Plaintiff's father, allegedly made in 1971 and 1980 in the deeds of trusts and other documents that the

disputed property"" was of joint Hindu family and he was Karta of that family and that partial partitions were effected with the object of reducing

the burden of Estate Duty payable on the demise of late Jiwaji Rao Scindia. Her plea is that the Plaintiff and Defendant No. 2, father and son, have

joined hands to augment their share in the HUF property and they were trying to avoid the effect of partitions validly made. She has also stated that

even under Rule of Primogeniture, the Plaintiff had only a chance of succession and he could, therefore, have claimed from the disputed properties

maintenance only and nothing beyond that. She denied that she had in any manner exercised any undue influence on her son, Defendant No. 2, in

effecting the partitions and that Plaintiff's father having accepted HUF character of the properties and share therein on partition, the Plaintiff cannot

separately agitate any claim for Anr. share therein. Importantly and interestingly, she has made no attempt to contest any fact stated in the plaint

and in the application for temporary injunction in specific terms about her alienations and other acts in respect of the ""disputed property""; in para

11 the bald statement made is - ""the factual allegations, if any, which fasten liability upon the answering Defendant are not admitted"", adding that ""it

is not necessary to give parawise reply to the injunction application"".

6. The main thrust of the argument of learned Counsel, Shri R.C. Shukla, appearing for Appellant/revisionist in these two matters, is on absence of

any prima facie case for trial and he contended that the impugned order had to go in its entirety because the plaint was liable to be rejected and

there was no scope for any temporary injunction to be granted against Defendant No. 1. Shri Chitale, who appears for the Plaintiff/Respondent

contends that a single question is only to be answered to resolve the twin controversy because of the limited scope of the temporary injunction

granted by the trial Court under the impugned order. According to him neither the trusts nor any other Defendant suffer any restraint or disability

under the impugned order of temporary injunction and it is, therefore, to be seen if justly and justifiably the Appellant/revisionist is restrained from

alienating, transferring and parting with possession of any of the properties during pendency of the suit because she has not cared to deny, to do

the least, the Plaintiff's allegation that she was making reckless alienation and waste of ancestral properties in which Plaintiff's interest is

undisputed. Indeed, Shri Chitale submitted that the Appellant/revisionist is not restrained from receiving income from any property of which she has

already parted possession by leasing out the same prior to the institution of the suit and in no manner she is destituted because sufficient income she

is receiving a huge amount as rent from the property at Chanakyapuri in New Delhi, leased to an Embassy. He has also submitted that the Plaintiff

could not be refused interim relief against Defendant No. 1 merely on the ground that he did not pray that any other Defendant including his father,

Defendant No. 2 be also likewise restrained; he did not do so as no threat emanated from them and the suit had to be instituted because of several

alienations made and threatened by Appellant/revisionist about which there is no denial on her part. Indeed, it is not the case set up anywhere by

the Appellant/revisionist in pleading or even in the course of argument of her learned Counsel that her son, Defendant No. 2, was alienating or

transferring any of the properties in dispute. Even so, Shri Shukla contended that the said Defendant is now in a position to manipulate affairs in the

trusts as a result of his gaining majority in the Board of Trustees after induction on it of his son (the Plaintiff) as a trustee along with him and his wife.

That apprehension apparently impairs in no manner Plaintiff's entitlement or validity of the impugned order.

7. With the Revision, I propose to deal first although the moot question, common to the revision and the appeal is of ""prima facie"" case because, if

the plaint does not disclose any cause of action on that ground it may be rejected. But, it is to be examined also if from any ""statement in the plaint

if it can be said if the suit is barred by any law and on that ground too the plaint is to be rejected. Apart from other reasons to follow hereinafter, I

have found no merit in the revision because I have found it difficult to accept any of the grounds pleaded for rejection of the plaint inasmuch as the

revisionist herself has admitted in her pleading that if the Plaintiff's claim based on the Rule of Primogeniture is accepted, he would still have the

right to be maintained out of the disputed properties. For that short reason, it cannot be said that he has no cause of action at all and the suit is

frivolous or speculative. Similarly, if her own specific case is accepted that the properties in question did not constitute an impartible estate because

it was property of a Hindu Undivided Family, in that event, the Plaintiff's case will rest on a stronger footing in virtue of his being a coparcener who

had a right to be allotted a share when the partition was made during his minority and on attaining majority challenge the partition as unfair and

adversely affecting his interest because on the own admission of Defendant No. 1, the said ""partial partitions"" were fake and made with the sole

object of reducing Estate Duty liability of the parties, namely, Defendant Nos. 1 and 2. It is to be noted that the main relief claimed in terms of

Section 34, Specific Relief Act, of Plaintiff's legal character to succeed to the estate of his deceased grand-father by operation of Rule of

Primogeniture and of his right, title and interest in the ancestral property in that character cannot be said to be illusory and suit cannot be thrown out

merely because Defendant No. 2 is not interested in denying his right and also his legal character and Defendant No. 1 is challenging the same.

8. Reliance of Shri Shukla on Section 8 and the ""proviso"" to Section 6 of the Act is obviously misplaced because Section 5(ii) makes that

inapplicable to Plaintiff's case based thereon. In any case, the ""proviso"" obviously contemplates a notional partition and no actual partition results

when succession opens in terms of the section as is made clear by Explanation-I. Although shares are determined when succession opens, the real

quantification thereof results when actual partition takes place by metes and bounds. The two processes and two events are not to be confused;

each operates independently of the other. Neither Section 6 nor Section 8 has to do anything with the right of Karta making partition of

coparcenary property or of a coparcener challenging such a partition. It is trite law that a female is not a coparcener in a Mitakshar Joint Hindu

Family though a wife or a mother of a coparcener, among Ors. , is a member of the joint family. In a coparcenary property, although the widow's

share gets ascertained u/s 6 proviso when succession opens, her interest like the coparceners" is subject to Karta's ordinary right of management

and representation until actual partition takes place by metes and bounds as there is no disruption of the joint family on notional partition. Thus, on

31.12.1971 and 31.5.1976 when the impugned deeds of ""partial partitions"" were executed there existed a joint family comprising of the Plaintiff

and Defendant No. 2 and other female members including Defendant No. 1 though right to enforce partition against her and Defendant No. 2

vested in the Plaintiff and Defendant No. 1 could not enforce that right against the Plaintiff and Defendant No. 2. Accordingly, Plaintiff is entitled to

challenge the partition deeds not only on the ground that there could be no partition of the impartible estate but also on the ground that Defendant

No. 2 had unauthorisedly forced a partition of the joint family property.

9. Reliance, Shri Shukla also placed on Article 363 of the Constitution to contend that the suit was barred thereunder because the Plaintiff relied on

the ""Covenant"" in support of his claim arising from Rule of Primogeniture traced to the provisions thereof. I do not think if that too has any merit

because Article 363(1) bars jurisdiction of Courts to deal with a dispute ""in respect of any right accruing under or any liability or obligation arising

out of any of the provisions of the Constitution relating to any such treaty, agreement Covenant...."" In the instant case, though the ""Covenant"" is

referred to in the plaint, the right which is sought to be enforced by the Plaintiff with respect to the disputed property is claimed in virtue of the

provisions of Section 5(ii) of the Act and not of any provision of the Constitution. The provisions of the Act according to Section 5(ii) do not apply

to ""any estate which descends to a single heir by the terms of any Covenant....."" in case of intestate succession of a person who is Hindu by

religion. The incidence of impartibility in such a case arise in terms of Section 5(ii) made in the plaint, it would appear that the suit is barred by

Article 363 of the Constitution.

10. I would reiterate, therefore, that the revision has no merit and it is liable to be dismissed. I have found it difficult to hold that the Plaintiff has no

cause of action or that from any statement made in the plaint, the suit is barred by any law. The trial Court, accordingly, in my view, has not acted

illegally in the exercise of its jurisdiction in rejecting the plea set up in that regard by Defendant No. 1. It has been rightly held that the plaint is not

liable to be rejected. The revision accordingly stands dismissed.

11. Coming to the appeal, let it be recalled that in terms of Section 37, Specific Relief Act, temporary injunctions are granted in accordance with

the provisions of the Code of Civil Procedure, for short, Code of Civil Procedure. Since 1.2.1977, the ambit of the power has been enlarged in

terms of new Clause (c) inserted in Order XXXIX, Rule 1 CPC and that rule being amended in other manner also. In a case when the Defendant

does any act which merely ""threatens to dispossess the Plaintiff or otherwise cause injury to the Plaintiff in relation to any property in dispute in the

suit"", an order of temporary injunction may be granted by the Court to restrain such an act ""for the purpose of staying and preventing the waste,

damage, alienation, sale, removal or disposition of the property or dispossession of the Plaintiff, or otherwise causing injury to the Plaintiff in

relation to any property in dispute in the suit"". Accordingly, the concept of ""prima facie"" case has also undergone a considerable change providing

the Plaintiff greater leeway to claim temporary injunction pending adjudication on merits of the right agitated in the suit. Shri Chitale rightly

submitted that the Court deciding an application for temporary injunction is not required to adjudge the merit of the rival contentions or, in other

words, prejudice issues raised or likely to be raised in as much as in some cases, without filing a written statement, the Defendant may insist on the

Court's rejecting the prayer of the Plaintiff. He submitted that Shri Shukla having advanced weighty arguments on the basis of available and

anticipated pleadings raising important questions of law, he conceded thereby existence of triable issues on which finally the Court is to pronounce

its judgment after the written statement is filed, issues are struck and parties have adduced evidence in support of their respective cases. I am

definitely of the opinion that the following questions raised by Shri Shukla in course of his arguments rather enable the Plaintiff to invoke Court's

jurisdiction in terms of Rule 1 of Order XXXIX, Code of Civil Procedure, to make order thereunder, to maintain status quo of the property in

dispute. It cannot be disputed, therefore, in my opinion, that the Plaintiff has a prima facie case to go to trial because he has some manner of

interest, irrespective of its nature, character and extent, in the property in dispute; and that is to be protected by the Court.

12. On some of the questions which are raised by Shri Shukla, Appellant's counsel, in his arguments, I have already expressed my tentative view

on some aspects, but it is occasion to enumerate the same in the context of the conclusions recorded in the preceding paragraphs:

(i) Whether succession in the right of primogeniture can be claimed by the Plaintiff and in virtue thereof if he can have any claim in the ""disputed

properties"" of the suit?

(ii) Whether the rule of primogeniture stood abolished in virtue of the Constitutional amendment when Article 362 was deleted and new Article

363A was inserted by the Constitution (26th Amendment) Act, 1971?

(iii) Whether Section 5(ii), Hindu Succession Act, was impliedly repealed when the Constitution was amended in above manner w.e. from

28.12.1971?

(iv) What are the powers of the holder of the estate in terms of the Rule of Primogeniture?

(v) What is the effect of the derecognition as a "Ruler" of Defendant No. 2 in virtue of Article 363A (a)?

(vi) Whether Plaintiff's suit was barred by Article 363 of the Constitution?

(vii) Whether the "partial partitions" (Annexures P/XII and P/XVIII) could be validly challenged in the suit?

(viii) Whether the Trusts (impleaded as Defendant Nos. 3 to 17) can be declared void validly in the suit?

(ix) Whether the suit is maintainable in the face of the subsisting decree dated 11.7.1980 of Bombay High Court in Award No. 26/80?

(x) What is the effect of the two applications filed by the Plaintiff in the trial Court during the pendency of the instant appeal for amending the plaint

and for impleadment in the suit of the Trustees of the Trusts impleaded as Defendants?

13. In dealing with and deciding an application for temporary injunction for the purpose of determination of "prima facie case" on the basis of which

the trial of the suit is to proceed, it is not necessary to decide finally and conclusively the questions mooted in this appeal. At this stage, it is to be

seen only if the questions are fair and substantial which call for a decision to be rendered finally. Indeed can it be denied that the

Defendant/Appellant having raised the questions, whether Plaintiff's right, if any, was not infringed in terms thereof and he was not entitled to

enforce the same? The question rather is of existence of foundation only of the legal right claimed by the Plaintiff who seeks aid of the Court to

establish the right sought to be enforced; it is not necessary at this stage to decide eventually what relief, if any, can be granted to the Plaintiff. The

Court is required merely to examine at this stage the likelihood of the "injury" resulting to the Plaintiff, if status quo of the property is not maintained

pending trial. That "injury" may arise in various manners from any act of omission or commission of the Defendant against whom the temporary

injunction is sought. The question obviously, also, is of "waste" of the property in dispute being prevented and the necessity to restrict the

Defendant, even when he is in possession of the property, to exercise his right in respect thereof in such manner that the corpus of the property is

not destroyed or impaired substantially. The concept of "threat" introduced in the amended provision arising "in relation to any property in dispute

in the suit" explicitly contemplates Court's power to impose restraint on the Defendant in that regard. The corpus of the property can be validly

protected by injunction the Defendant not to alienate the same during trial while retaining possession or continuing in joint possession with the

Plaintiff if by that status quo is maintained. At this stage, the Court is not required to make any indepth analysis of the nature or character of the

right claimed by the Plaintiff to be enforced in the suit; it is the imminent likelihood of his suffering any injury as a result of any anticipated act of

omission or commission of the Defendant with respect to the right asserted by him which is of the essence of the matter. This position obtained

even under the unamended provision as will be clear from this Court's D.B. decision in Durg Transport Co. Private Ltd. Vs. Regional Transport

Authority and Others, the Court held, ""the real point, which has to be decided when an application for stay or for a temporary injunction is made,

is not how the question ought to be investigated; but it is whether the matter should not be preserved in status quo until the question can be finally

disposed of"".

14. Having taken that view, I propose to deal with the arguments of Shri Shukla to test merely apparent merit of the several defence pleas which

he has raised. I have already expressed my tentative view that at this stage, it is not possible to hold Plaintiff's suit barred by Article 363 of the

Constitution. Although he cited the decision in Colonel his Highness Sawai Tej Singhji of Alwar Vs. Union of India (UOI) and Another, that is

distinguishable on facts. In the ""dispute"" raised in the civil suit in that case, the Union of India was arrayed as a party and interpretation of the

Covenant with respect to certain items of properties of the ex-Ruler was agitated. In the instant case, no provision of the Covenant is to be

construed and whether the ""disputed properties"" are not the private properties of the ex-Ruler is also not the issue to be decided. Similarly, I have

also expressed my tentative view with respect to Plaintiff's right to challenge the ""partial partitions"". The question whether the Trusts (impleaded as

a Defendants 3 to 17) can be declared void in the suit, in my view, need not be decided at this stage in this appeal because the impugned order of

the trial Court has nothing to do with the working of the Trusts. Shri Shukla relied on Sections 13 and 14, Indian Trusts Act in support of his

contention to submit firstly that the Plaintiff himself being a trustee, cannot challenge title of the trusts and secondly that the other trustees being not

impleaded, suit cannot proceed against the trusts only. Suffice it to recall in that connection, that an application of the Plaintiff for impleading the

trustees is pending disposal before the trial Court and nothing needs to be pronounced by me on that at this stage excepting stating the law that if

the amendment is allowed it shall relate back to the date of institution of the suit. That part, evidently, the restraint on Defendant No. 1

contemplated under the impugned order is against her in her personal capacity and not as a trustee and she is free till today to exercise her

functions as a trustee of Defendants 3 to 17. Although it is also not necessary to decide at this stage whether the suit is maintainable because of

subsisting decree of the Bombay High Court, I may still observe that the Plaintiff not being party to the arbitration award in respect of which the

decree was passed that docs not bind him. Otherwise too, that decree has little impact on the instant suit because that was in respect of transfer

and exchange of some shares between Defendant Nos. 1 and 2 of the Company, impleaded as Defendant in that suit as also in the instant suit.

15. What survives consideration is the question relating to the Rule of Primogeniture about which Shri Shukla's several contentions are being dealt

with cummulatively. In so far as the effect of the Constitution (26th Amendment) Act, 1971, is concerned, that is obviously a substantial question

and that has far-reaching effect on the right agitated in the instant suit. I have seen no apparent merit in the plea raised by Shri Shukla construing

Article 363A that as a result of Defendant No. 2 being derecognised, there is nothing left for the Plaintiff to agitate. In my view, it is of no

consequence even if Plaintiff cannot claim the right to succeed to the estate of Defendant No. 2 as a "Ruler" as the latter ceased to be so

recognised on and from 28.12.1971. However, the provision is explicitly prospective and care is taken to protect vested right by use of the

expression "on and from such commencement" with reference to the enforcement of the Constitution (26th Amendment) Act, 1971, namely,

28.12.1971. Plaintiff being born on 1.1.1971, he can claim to have a vested right to invoke the Rule of Primogeniture because on that date, his

father, Defendant No. 2, had not ceased to be recognised as a "Ruler". In this connection, it may be useful to point out that Section 5(ii) of the Act

does not use the word "Ruler", but the words "a single heir" with respect to the rule of succession contemplated thereunder. Shri Shukla's stress,

therefore, on the words "such Ruler" of Article 363A(a), in my opinion, has little effect on Plaintiff's vested right accrued, as discussed, before

commencement on 28.12.1971 of the Constitution (26th Amendment) Act.

16. The other two questions as to whether deletion of Article 362 and insertion of Article 363A in the Constitution resulted in the Rule of

Primogeniture being abolished and Section 5(ii) impliedly repealed are also loaded questions and these too are equally substantial questions

meriting deferred decision. I have already pointed out that right of succession according to rule of primogeniture arises in terms of Section 5(ii) of

the Act itself and the Constitution amendment does not affect his right. However, even if it is accepted that the Rule of Primogeniture was abolished

by the Constitutional amendment, it would have its effect on and after 28.12.1971 because the vested right is protected, in terms, by the

amendment. Having taken that view, it is not necessary to deal with the argument of Shri Shukla of Section 5(ii) being impliedly repealed as a result

of the Constitutional amendment. The moot question to be decided would be of any vested right surviving to the Plaintiff after the Constitutional

amendment. That is a substantial question which must await trial of the suit for final decision to be rendered therein at the conclusion of the trial.

17. Shri Shukla cited decisions on the powers of the holder of the estate in terms of the Rule of Primogeniture, but that question, in my view, is of

academic interest at this stage. Indeed, he contended that even if it be accepted that succession in the family was according to Rule of

Premogeniture, Defendant No. 2, as last holder of the estate had the power to deal with the estate as absolute owner thereof and he had,

therefore, right to make partitions and create trusts which the presumptive heir, the Plaintiff, cannot assail. However, in Kunwar Shri Vir Rajendra

Singh Vs. The Union of India (UOI) and Others, cited by him, it was held that right to hold private property of the last deceased holder depends

upon personal law of succession applicable to the property. Therefore, at this stage, without evidence on the customary personal law of succession

of Rulers of Gwalior State, it would be presumptuous to pronounce on the power vested in Defendant No. 2 on his succeeding to his father, the

erstwhile Ruler of Gwalior State, to hold that the partitions and trusts created by him are valid and Plaintiff cannot challenge them. Similarly, in the

case of Sri Rajah Velugoti Kumara Krishna Yachendra Varu and Others Vs. Sri Rajah Velugoti Sarvagna Kumara Krishna Yachendra Varu and

Others, the family customs pertaining to the ""impartible estate"" were considered and it was held that though for the purpose of devolution of

property, it was assumed to be a joint family property, the junior members did not have, by birth, any interest in the property and some members

could claim maintenance only out of the property on the basis of family customs. Sri Sudhansu Shekhar Singh Deo Vs. The State of Orissa and

Another, cited by him, deals, however, with a different question of interpretation of provisions of Orissa Agricultural Income Tax Act and Orissa

Merged States (Laws) Act. In Bhaiya Ramanuj Pratap Deo Vs. Lalu Maheshanuj Pratap Deo and Others, the question arose if the family custom

pertaining to the Rule of Primogeniture was saved by Bangal Regulations and that was protected by Section 5(ii) of the Act. In Thakur Shri

Vinaysinghji (AIR 1988 SC 274), the decision is rendered on the basis of family custom that the holder of an impartible estate had power of

alienation.

18. Even if the question raised by Shri Shukla is involved and complex one and does not yield to a simple and single answer, it cannot yet be

disputed that there is a basic difference between alienation and partition; the power to partition is antithetic to the concept of an impartible estate

and it cannot be equated to the power of alienation. The Privy Council, in (1941) 9 ITR 695 (Privy Council) observed that the present holder of

the impartible estate receiving income from house property could not claim to be ""owner"" of the property which was of the joint family and had to

be assessed as such. The Apex Court in Chinnathayi alias Veeralakshmi Vs. Kulasekara Pandiya Naicker and Another, in dealing with an

impartible estate, observed that although a person in whom the inheritance to impartible estate vests is competent to alienate a part of it, still that

right does not imply a right to partition the estate. In Nagesh Bisto Desai and Others Vs. Khando Tirmal Desai and Others, their Lordships have

observed that mere fact that the estate is impartible does not make it separate and exclusive property in the holder; it will be part of the joint estate

of the undivided family and the right of survivorship is not destroyed.

19. Reliance, Shri Shukla placed on Dharangadhra Chemical Works Vs. Dharangadhra Municipality and Another, and Yogender Pal Singh and

others Vs. Union of India others, on the question of implied repeal of Section 5(ii) of the Act, but I have left open that question for the reasons

stated. I may reiterate yet that even that question is not a simple and straight one as the different tests enumerated in the decisions cited would have

to be applied to decide the contention. Merely because there is a subsequent enactment dealing with statutory right earlier accrued, there is no

presumption of implied repeal; the law rather is that there is presumption against implied repeal and in any case legal presumption also exists against

vested rights being impliedly impaired.

20. Two decisions which Shri Chitaley cited may also be referred to because he contended that Plaintiff's suit was not a suit for declaration of spes

successionis and that even a reversioner could maintain a suit and get temporary injunction for preservation of the estate as held in Janikamma's

case, AIR 1956 AP 141 (FB). The case of the right agitated by future Shebait in a similar manner is one of *Giris Chandra Saw and Another Vs.*

Upendra Nath Giridas and Others, also cited by him. On the question of maintainability of the suit, he cited *Veruareddi Ramaraghava Reddy and*

Others Vs. Konduru Seshu Reddy and Others, wherein a declaration was claimed that the compromise was not binding on deity; the suit was held

maintainable though not instituted by the Shebait to uphold the right of devotees interested in protecting deity's property. Reliance he also placed

on *Supreme General Films Exchange Ltd. Vs. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and Others*, for the proposition that

declaratory decree cannot be claimed by a person who is a complete stranger whose interest is not affected by Anr. "s legal character while

Plaintiff's interest in the ""disputed property"" of the instant suit is at once present, real and vital and he is no busybody.

21. To sum up now, I hold that there is no scope for my interference with the impugned order of temporary injunction by which Defendant No. 1,

claiming ownership and possession in virtue of partial partitions in several items of the properties, is restrained from alienating, transferring or

parting with possession thereof during trial. For reasons aforesaid, I uphold the finding and conclusion of the trial Court that there is a strong prima

facie case for trial and indeed, as observed above, several serious and triable issues are raised in the suit which are agitated before me in this

appeal. On the question of balance of convenience and irreparable injury also, I uphold the view of the Court because of what is stated herein

earlier and indeed for the obvious reason also that in her reply, the Appellant/Defendant has not at all contested the allegation of the

Plaintiff/Respondent of her making alienations and threatening to make the same in future of which details are furnished in the plaint.

22. It is necessary, however, to make it clear that any tentative finding reached in this order with respect to the questions mooted in this appeal by

the Appellant's counsel, shall have no effect on the course of proceedings in the trial Court. When written statement is filed, issues are struck and

evidence is led, it shall be open to the trial Court to reach its own findings and conclusions on the issues framed to decide finally all questions raised

in the course of trial including those which are raised and are discussed in this order for the purpose of disposal of this appeal.

23. In the result, the appeal fails and it is dismissed. Parties are, however, left to bear their own costs in the revision as also in the appeal.