

**(1999) 02 BOM CK 0091**

**Bombay High Court**

**Case No:** Notice of Motion No. 3179 of 1997 in Suit No. 3729 of 1997

Homi F. Commissariat and  
another

APPELLANT

Vs

Gowani Developers Pvt. Ltd. and  
others

RESPONDENT

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**Date of Decision:** Feb. 24, 1999

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2
- Partition Act, 1893 - Section 4
- Transfer of Property Act, 1882 - Section 44(2)

**Citation:** (1999) 4 ALLMR 67 : (1999) 2 BomCR 395 : (1999) 2 BOMLR 259 : (1999) 2 CivCC 679 : (1999) 2 MhLj 307

**Hon'ble Judges:** S.S. Nijjar, J

**Bench:** Single Bench

**Advocate:** Bomi Zaiwala, instructed by Mulla and Mulla, Craigle Blunt and Caroe, for the Appellant; R.A. Kapadia and S.S. Shetye, instructed by Rahul M. Kadam, Pradeep Sancheti and Gautam Mehta, instructed by G.K. Kamath and D.D. Madon, instructed by Gagrath and Co., for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

S.S. Nijjar, J.

The plaintiffs and defendants No. 4 and 5 are members of an undivided family. They are co-owners and lessees and holders of the leasehold rights and interests in a piece and parcel of land being Plot No. 2 bearing C.S. No. 2-N/738 of Malabar Hill and Cumbala Hill Division within the city and registration sub-District of Mumbai containing by admeasurements 3349.53 Sq. metres which together with the buildings and outhouses thereon said land consist of the following :---

"(a) A main bungalow consisting of ground and one upper floor with terrace partially covered;

(b) Outhouse containing prayer room, kitchen, store room etc.;

(c) Servants Quarters;

(d) Structure containing garages.

The aforesaid is referred to hereinafter as "the suit property".

2. Plaintiff No. 2 is the son of plaintiff No. 1. Defendant No. 4 is the son of defendant No. 5. Plaintiff No. 1's late father Framji and defendant No. 5 were brothers. Defendant No. 1 (hereinafter called "the Company") is a private limited company. Defendants No. 2 and 3 are the only Directors of the Company. They are engaged in the business of development of the property. The company purported to enter into an Agreement of monthly tenancy dated 13th May, 1996, with defendant No. 4 at a monthly rent of Rs. 1,000/- in respect of the 4th defendant's undivided 1/6th share in the suit property. On 13th May, 1996, defendant No. 4 also purported to execute an Assignment in favour of defendant No. 2 for a sum of Rs. 4,80,000/- in respect of his undivided 1/6th share in the suit property subject to the monthly tenancy Agreement. These two agreements are impugned on the ground that they are fraudulent, unlawful and void in law.

3. By an agreement dated 9th March, 1937, the original lease in respect of the property was granted to the grand father of plaintiff No. 1 and great grand father of plaintiff No. 2 by the Secretary of State. On 8th May, 1940, the Governor of Bombay granted lease of 99 years to the grand father and grand mother of plaintiff No. 1 as joint tenants commencing from 15th February, 1937. The grand father of plaintiff No. 1 died on 16th May, 1952, leaving a Will dated 1st February, 1945, which has been duly probated directing his executors, including his daughter Mary @ Meherbai (since deceased) and his wife Shirinbai (since deceased) as follows :--

"5(e). Subject to the above bequests in favour of my daughter Mary alias Meherbai and of my wife to divide the corpus of the said immovable properties or the proceeds thereof between my sons Framjee and Sorabjee as tenants in common in equal shares absolutely."

By an Agreement dated 26th June, 1956, (Registered No. 4044/56) between Shirinbai, Framji and defendant No. 5, it was recorded that Shirinbai, Framji and defendant No. 5 held the suit property as tenants in common in 3 equal shares. By a Gift Deed also dated 26th June, 1956, (Registered No. 4044/ 56), Shirinbai gifted her undivided equal 1/3rd share to her grandsons, viz. plaintiff No. 1 and defendant No. 4 as tenants in common in equal shares. Framji expired on 30th August, 1992, leaving a Codicil dated 10th September, 1991, (to his Will dated 26th February, 1968) leaving his 1/3rd share in the suit property to his son and grandson viz., plaintiffs No. 1 and 2 in equal shares. Thus by devolution and transfer, the suit property came

to be and are presently owned by the plaintiffs and defendants No. 4 and 5 as tenants-in-common, each having an undivided share therein which is as under :--

(i) Plaintiff No. 1 : one/third

(ii) Plaintiff No. 2 : one/sixth

(iii) Defendant No. 4 : one/sixth

(iv) Defendant No. 5 : one/third

Thus it becomes quite apparent that for the last 60 years all the transactions relating to the suit property have been within the family viz, the Commissariat family of which the common ancestor was the said Hormusji Framji Commissariat. All the transfers effected have been to members of the same family.

4. Relying on the aforesaid history, Mr. Zaiwala, the learned Senior Counsel appearing for the plaintiffs submitted that both the agreements entered into by defendant No. 4 with defendant No. 1 and the plaintiffs are void and illegal. He submitted that even if there was a partition by metes and bounds of the property, the plaintiffs would be entitled to purchase the property in order to make sure that the suit property remained within the family.

5. Mr. Madon, the learned Counsel appearing for defendant No. 5, submits that although he has not joined the plaintiffs as co-plaintiff, yet he is supporting the plaintiffs and adopts the arguments advanced by Mr. Zaiwala. He submits that although defendant No. 4 may well be within his right to sell his undivided 1/6th share, yet defendants No. 1 to 3 have no right to enter the suit property. He further submits that even the so called Assignment of the leasehold rights has been done surreptitiously and fraudulently. In support of his prayer for interim relief, the learned Counsel has relied upon a judgment of the Supreme Court reported in [Dorab Cawasji Warden Vs. Coomi Sorab Warden and others](#), (hereinafter referred to as the "Warden"s case").

6. Mr. Kapadia, the learned Counsel appearing for defendants No. 1 to 3, however submitted that a perusal of the various documents shows that there has in fact been a division by metes and bounds. He submits that a perusal of the documents would show that in fact the plaintiffs have been insisting on a physical division of the property. On the other hand, it was defendant No. 4 who was not willing to divide the property. Therefore, he submits that having expressed their intention to live in separate portions of the property, the plaintiffs cannot now be permitted to say that there has been no partition by metes and bounds. He further submits that the plaintiffs cannot be permitted to approbate and reprobate at the same time. He further submits that Warden"s case would not be applicable to the facts and circumstance of this case as therein the Supreme Court proceeded on the basis that there had been no partition by metes and bounds. He further submits that even in these circumstances, the Supreme Court had granted partial relief to the purchaser

who was a stranger to the family. Therein the Supreme Court had approved the limited relief which had been granted by the learned Single Judge which was to the effect that the injunction order would not prevent the purchaser to enter the suit property to enquire that no one else other than the plaintiff and his family members are entering into possession of the portion of the ground floor and one garage which he had purchased.

7. I have anxiously considered the submissions made by the learned Counsel. In Warden's case, the matter was taken to the Supreme Court on an appeal from judgment of the Bombay High Court. The plaintiff therein had taken out a notice of motion in City Civil Court Suit No. 2987/87 for interim injunction pending the suit restraining defendants No. 1 to 3 from parting with possession and defendants No. 4 and 5 from entering into or taking possession and/or remaining in possession or enjoyment of the suit property. The trial Court found; that the suit property was dwelling house belonging to an undivided family; that there was no partition of the same by metes and bounds; that the plaintiff and his father at the material time were undivided qua the entire suit property. The Court further held 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 No. 4 and his wife a strangers were not entitled to joint possession of the family dwelling house. On appeal, the High Court was of the view that prima facie the facts indicate that throughout the parties have lived separately; that there appeared to have been severance in status and it was not possible to give a finding that there has been no partition between the parties. Thus the High Court held that granting of interim injunction would have the effect of virtually deciding the suit without a trial and that the plaintiff has not made out a prima facie case that he would suffer irreparable damage. The learned Single Judge allowed the appeal and set aside the order granting injunction. It was further directed that during the pendency of the suit, the 4th respondent and his wife shall not make any permanent alterations in the suit property nor shall they induct any third party or create any third party interest over the suit property. Aggrieved against the aforesaid judgment, the plaintiff filed the appeal in the Supreme Court. The appellant therein was the plaintiff and defendants No. 1 to 5 were respondents. After considering various aspects of the matter, the Supreme Court observed in para 16 that "In considering the question of interim mandatory injunction in a suit filed u/s 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". Section 44 of the Transfer of Property Act, was reproduced, which is as under :--

"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 of the other common or part enjoyment of the house."

Thereafter in para 17, the Supreme Court observed that "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". The Supreme Court also observed that "on the facts before the Court there is a strong probability of the plaintiff getting the relief prayed for by him in the suit". The Supreme Court also observed that "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. After considering the facts of that case, the Supreme Court observed that "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 metes 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".

8. A bare perusal of the second paragraph of section 44, as reproduced above, would show 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 the section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. After considering various other aspects, the Supreme Court held that non-grant of an injunction against a transferee in such cases would prima facie cause irreparable injury to the other members of the family.

9. In my view, the aforesaid observations clearly support the case put forward by the plaintiffs.

10. Mr. Kapadia sought to argue, as noticed earlier, that there is at least a deemed partition by metes and bounds on the basis of the averments made in para 17(b) and (d) of the plaint. He has made a reference to the letters mentioned in para 17(d)(iii), (iv) and (v). Letter Exhibit-I dated 30th October, 1996, has been written by

defendant No. 4 to plaintiff No. 1. In this letter, defendant No. 4 is complaining about certain repair work and removal of portraits of the ancestors from a particular place of the dwelling house. The letter makes a reference to the minutes of a meeting held between the parties on 15th October, 1996. These minutes provide for no changes in shades of colour when painting the common areas of Sylmoyne. The minutes also talk about common use of the library. There is however nothing mentioned in the letter about any partition being effected. This letter therefore is of no assistance to Mr. Kapadia. Next letter dated 2nd January, 1997, is written by plaintiffs to defendant No. 4. This letter quite categorically states that there has never been any physical division of the property between the co-owners. However, it goes on to state that till recently the parties had no problem but now apparently defendant No. 4 has been trying to impose his will upon the use and enjoyment by the plaintiffs and their family of the ground floor. Therefore, it is suggested that it is now high time that they divide the property. This in their view will eliminate the friction between their families and each family will be able to live peacefully and hopefully in harmony. In my view, this letter conciliatory in nature. It only appears like a mild rebuke from an elder member of the family to a younger member of the family. But later it is categorically stated that there has been no partition of physical property between the co-owners. At best, it could be said that the plaintiffs would be willing for a partition by metes and bounds provided a suitable agreement had been reached between the plaintiffs and defendant No. 4. As noticed earlier, defendant No. 5 is supporting the arguments put forward by the plaintiffs. Thus this letter is also of no assistance to defendants No. 1 to 3. The last letter referred to by Mr. Kapadia is Exhibit-K which is dated 3rd January, 1997, written by defendant No. 4 to the plaintiffs. In this letter, defendant No. 4 has categorically stated "Please note that Sylmoyne was built as a Bungalow for the use of one family and there is no question that this property can be divided. He further states that all the entertainment areas are on the ground floor such as the hall, dining room, library pantry, anti room, prayer room, gardens, verandahs, garages, servants quarters and the kitchen store room. He reiterates that "There is no way that this property can be divided".

11. On a bare perusal of the above, it becomes clear that the property has not been divided by metes and bounds. If the property has not been divided by metes and bounds, then clearly it is a dwelling house belonging to the undivided family. Thus in view of second paragraph of section 44 of the Transfer of Property Act, no stranger can be permitted to have joint possession or common possession with the members of the family. The balance of convenience is clearly in favour of the plaintiffs. In similar circumstances, the Supreme Court in para 25 of the judgment in Warden's case has observed that "While section 44 does not give a transferee of a dwelling house belonging to an undivided family a right to joint possession and confer 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". The Supreme Court further observed 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". The Supreme Court also observed that "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". Thus the Supreme Court, after considering the whole matter, came to the conclusion that not granting an injunction against the transferee in such cases would prima facie cause irreparable injury to the other members of the family.

12. In view of the above, I find no substance in the submissions made by Mr. Kapadia.

13. This notice of motion came up for hearing on 14th October, 1997. After hearing the Counsel for the plaintiffs, this Court granted relief in terms of prayer (a) for appointing a Commissioner to find out who is in actual possession of the suit property and the manner of occupation of all different parts of the suit property, including the main bungalow, outhouse, servants' quarters and garage. It was further observed that as per the Commissioner's Report, defendants No. 1 to 3 are not in possession of any part of the property, there would be ad-interim injunction against defendants No. 1 to 3 in terms of prayer (c) till 21st October, 1997. Thereafter on 22nd October, 1997, the Court observed that the Commissioner visited the suit premises on 14th October, 1997. So far as defendant No. 3 is concerned, the Commissioner clearly finds that he was present in the premises and was claiming that he has purchased some books. Apart from that, the Commissioner did not find anything to show that defendant No. 3 was in actual and physical possession of any part of the property. Keeping in view the Report of the Commissioner, ad-interim injunction in terms of prayer (c) was directed to be continued till the hearing of the motion.

14. In view of the above, I find that the plaintiffs have made out a prima facie case for the grant of injunction. Prayer (a) does not survive. Notice of motion is made absolute in terms of prayers (b) and (c) except the bracketed portion. Prayers (b) and (c) read thus:

"(b) that pending the hearing and final disposal of the suit, for an order and injunction of this Hon<sup>ble</sup> Court restraining defendants No. 4 (and 5) from doing any act or thing to put or induct defendants No. 1 to 3 or any of them or their servants, agents, nominees or any other person whomsoever into possession of the said property or any part thereof or from permitting defendants Nos. 1 to 3 or their servants, agents or nominees from using or occupying or enjoying the suit property or any part thereof, including any part of the structures;

(c) That pending the hearing and final disposal of the suit for an order and injunction of this Hon"ble Court restraining defendants Nos. 1 to 3 from in any manner using, enjoying or occupying the said property or any part or portion thereof or from claiming any right (of any nature whatsoever or over or in respect of or relating to the said property or any part thereof including any rights) relating to user of F.S.I., T.D.R. or of any other nature whatsoever, or developing or taking any steps to develop the said property or any part thereof any manner whatsoever."

It is however made clear that defendant No. 4 would be permitted to entertain defendants No. 2 and 3 as his guests.

Mr. Kapadia, at this stage, submits that similar relief should be granted to defendants No. 2 and 3 as is granted by the City Civil Court in Warden"s case which was approved by the Supreme Court in para 7 of the judgment, that is to say that defendants No. 2 and 3 should be permitted to occasionally enter the room which is in occupation of defendant No. 4 on the first floor of the bungalow. I do not see any justification for granting such relief.