

**ORDER BELOW EXH.16**

(Passed on 05th day of February, 2025)

The application below Exh.16 filed by the defendant, i.e., plaintiff in counter claim seeking temporary injunction against the plaintiff, i.e., defendant No.1 in counter claim as per Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure, 1908. The defendant has filed counterclaim at Exh.14 and plaintiff has filed say on counterclaim at Exh.27. In order to avoid confusion, parties are called as per their position in the original suit.

2. It is the case of the defendant that the suit property is a total of 1 H 13 R situated in Gat No.195/1, Village Durgaon, Tal. Karjat, Dist. Ahmednagar having boundaries as per revenue record as described in paragraph No.1 of counterclaim at Exh.14 and application at Exh.16. Plaintiff and defendant are siblings. Defendant and Sarubai Sahadu Thombare, who is the mother of the plaintiff and defendant, jointly purchased the suit property by a registered sale deed on 25/08/1999. The property is in common and remained undivided. The defendant has mentioned that the consideration for the suit property was solely paid by the defendant and the name of the mother was only entered out of love. Since the year 2000, the defendant has constructed tin shed houses, borewell, cattle shed and leveled his share of suit property measuring 56 R by spending a lot. The plaintiff resides in Village Girim, Tal. Daund, Dist. Pune and she falsely promised Sarubai of constructing a house and got sale deed executed without possession. The defendant got to know about the sale deed dated

18/05/2023 only after receiving summons and notice of original suit. The defendant has preferential right over the area admeasuring 56 R of the suit property and he is willing to 4,32,000/- and receive it. It well take a lot of time to decide the suit and in the main time if the suit property is sold, then it may create multiplicity of proceedings. Hence, the defendant has prayed against the plaintiff from alienating the suit property till final disposal of the suit.

3. The plaintiff has resisted the counter claim at Exh. 14 and application at Exh.16 by filing say below Exh.27. The plaintiff has denied the contentions of defendant in toto and stated that plaintiff demanded partition on 01/03/2024 after the defendant started creating obstruction. The plaintiff has purchased the suit property. There would be no prejudice or loss to the defendant if the application is rejected. Hence, it is prayed that the application be rejected.

4. Heard Ld. Adv. Mr. S. J. Wakade for the defendant and Ld. Adv. Mr. A. S. Punde for the plaintiff. Perused the documents filed on record. On hearing both sides and perusal of documents on record, the following points arose for my determination along with my findings thereon:

Sr. No.	Points	Findings
1.	Whether there is prima facie case in favour of the defendant with regards to Exh.16?	No
2.	Whether balance of convenience lies in favour of the defendant with regards to Exh.16 ?	No.

3. Whether irreparable loss will be caused to the defendant if no injunction is granted with regards to Exh.16 ? No.

4. What order? The application is rejected.

5. Before moving ahead, it is necessary to state the admitted facts. There is no dispute with regards to relationship between the plaintiff and defendant. It is also undisputed that by a registered sale deed dated 25/08/1999, the defendant and Sarubai (who happens to be mother of the plaintiff and defendant). There is no dispute with regards to registered sale deed by which the plaintiff purchased 56 R area of the suit property from Sarubai.

As to Point No. 1 :

6. Now coming towards legal position, the present application of temporary injunction filed under Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure, 1908, which is as follows :-

Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure, 1908 :-

Rule -1 :- Cases in which temporary injunction may be granted :-

Where in any suit it is proved by affidavit or otherwise -

(a) that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess the plaintiff

or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienating, 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] as the court thinks fit, until the disposal of the suit or until further orders.

Rule -2 :- Injunction to restrain repetition or continuance of breach :-

(1) in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing a breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) the court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the court thinks fit.

7. For temporary injunction applications filed under Order XXXIX Rule 1 and 2, said applications are also related to legal provisions of section 36 and 37 of the Specific Relief Act,1963, which are as follows :-

The Specific Relief Act, 1963 :-

Section 36 :- Preventive Relief How Granted :-

“Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual”.

Section 37 :- Temporary and Perpetual Injunctions :-

“(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court, and they may be granted at any stage of the suit, and are regulated by the Code of Civil Procedure, 1908.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit, the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.”

8. The court may grant temporary injunction to any party if he proved that property in dispute in a suit is in danger of being wasted, damage, alienation, sale, removal, dispossession and dispose or any other way. Before issuing a temporary injunction pending disposal of a suit, the applicant has to make out, firstly that he has got a *prima-facie* title to properties. Secondly, the applicant must establish that he will suffer irreparable injury which is a matter which cannot be adequately compensated for by damages. Thirdly, the applicant must prove that the balance of convenience is in his favour, who is likely to suffer substantial mischief if the injunction is refused when compared to the mischief which might be caused to the non-applicant if the injunction is granted. Fourthly, the status quo must be maintained. The court has take into

consideration all these points while granting a temporary injunction.

9. On perusal of the plaint, it is observed that specifically in paragraph No.3 of the plaint, the plaintiff has mentioned that she started her occupancy in the eastern part of the suit property which is in common. Similarly, the defendant has mentioned in his written statement along with counter claim Exh.14 in paragraph No.15A that he has constructed tin shed houses, cattle shed, erected borewell and leveled 56 R area out of the suit property in his possession. Prima facie from recitals of the plaintiff in the plaint it appears that she is in possession of the eastern side of the suit property which admeasures 56 R. Similarly, the defendant is in possession of only 56 R of the suit property and has constructed and erected structure in that area. The defendant has also filed a memo (pursis) at Exh.29 stating that his construction is in the western side of the suit property. It is clear from the combined reading of plaint, written statement at Exh.14 and memo at Exh.29 that the plaintiff is in possession of the eastern side and defendant is in possession of the western side. It is also undisputed that there is no partition till date. The original suit is filed for partition as per Section 4 of the Partition Act. The plaintiff has filed photocopy of registered sale deed dated 18/05/2023 along with list of documents at Exh.3 at document No.2. The registered sale deed is undisputed and unchallenged by the defendant.

10. There is an authority of the Hon'ble Supreme Court of India in *Rattan Singh Vs. Nirmal Gill, Civil Appeal Nos. 3681-3682 of 2020* wherein, the Hon'ble Supreme Court of India has relied upon its previous authority in *Prem Singh and Ors. Vs. Birbal and*

Ors. (2006) 5 SCC 353 and clearly laid down that where the registered document is presumed to be genuine and the onus of proof lies upon the plaintiff who challenges it. The relevant portion of the authority cited above reads as follows:

“32. To appreciate the findings arrived at by the Courts below, we must first see on whom the onus of proof lies. The record reveals that the disputed documents are registered. We are, therefore, guided by the settled legal principle that a document is presumed to be genuine if the same is registered, as held by this Court in Prem Singh and Ors. v. Birbal and Ors⁸. The relevant portion of the said decision reads as below:

“27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption.”

(emphasis supplied)

In view thereof, in the present cases, the initial onus was on the plaintiff, who had challenged the stated registered document.”

11. In the present case, the sale deed dated 18/05/2023 is a registered sale deed. In paragraph No.6 it is also stated that possession is handed over to the plaintiff. Hence, prima facie it appears that plaintiff is in possession of the eastern side of the suit property and not the whole property along with the defendant in common. Similarly, it appears defendant is in possession of the western side of the suit property.

12. The counterclaim of the defendant revolves around the claim of preferential right. Section 22 of the Hindu Succession Act deals with the concept of preferential right. Section 22 of the Hindu Succession Act reads as follows:

“22. Preferential right to acquire property in certain cases.—(1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section, “court” means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.”

13. On perusal of Section 22 of the Hindu Succession Act, it is clear that preferential right comes in to action only in case of a person dying intestate. In the present case, the mother of the plaintiff and defendant is a purchaser and she has sold her share to the plaintiff by a registered sale deed. The mother of the plaintiff and defendant is still alive. There is no succession at all, let alone intestate succession. Hence, prima facie there appears no application of Section 22 to the original suit or the counterclaim.

14. It is undisputed that there is no partition taken place till date. However, there is admission of separate possession. The plaintiff has herself filed the suit for partition as per Section 4 of the Partition Act. It is clear that the boundaries not demarcated and there is no partition till date. The plaintiff has right to alienate the undivided share in the suit property. However, the subsequent purchaser or any person in whose favour interest is created will be bound by decision of the present suit as per Section 52 of the Transfer of Property Act and cannot claim possession. There appears no prima facie case in the favour of the defendant. Therefore, I answer as to point No.1 in the negative.

As to Point No.2 and 3:

15. The right to enjoy property is a constitutional right enshrined under Article 300A of the Constitution of India. Restraining a person from alienating property which a person can legally alienate would cause the person irreparable loss. Hence, if the injunction is granted, the plaintiff will suffer irreparable loss. The interest of the defendant is well protected by the principle of lis pendence as per Section 52 of the Transfer of Property Act. Therefore, the balance of convenience tilts in favour of the plaintiff. Hence, I answer as to point No.2 and 3 in the negative.

As to Point No. 4

16. The defendant has failed to satisfy all the 3 conditions for grant of temporary injunction. Therefore, the application is liable to be rejected. Hence, I pass the following order:

ORDER

1. The application at Exh. 16 is rejected.
2. Costs in main cause.

Place: Karjat,
Dist. Ahmednagar

(Rohan Vijaykumar Thayil)
2nd Joint Civil Judge, Junior Division,
Karjat, Dist. Ahmednagar

Date: 05/02/2025