

**Sadik Shaikh V/s. Mubarak Shaikh**

**ORDER BELOW EXH.11 IN R.C.S No. 885/2019**  
**(CNR NO. MHSO0130009882019)**

This order shall dispose of an application filed under Order XXXIX Rule 1 & 2 of Code of Civil Procedure, 1908 (Hereinafter referred to as 'CPC' for the sake of brevity and convenience) for temporary injunction, in order to restrain the defendant by himself or anyone on his behalf from carrying out any type of construction and any related work in the suit property as well as to restrain the defendant from carrying out any change in the suit property mentioned in para 1 of the plaint. (hereinafter called as 'suit property' for the sake of brevity and convenience)

**Contentions of plaintiff :-**

2. The suit is filed for allotment of separate possession of 5/8<sup>th</sup> share in the suit property by the plaintiff. However, defendant is in a preparation to start the unauthorized construction in the suit property. He has refused the plaintiff and has threatened the plaintiff on 19/12/2021 that, he is going to construct in the suit property. In RCS 529/2012 and RCS 516/2012, the Civil Judge, Junior Division had declared that, plaintiff is having 5/8<sup>th</sup> share in the suit property and in that regard plaintiff filed Darkhast no.42/2014 before Civil Judge, Junior Division, Barshi. The said darkhast was dismissed by the Court and it was mentioned that, plaintiff has to file the suit for partition and then, after taking the final decree, then only darkhast for partition of shares and allotment of separate shares would be necessary to be filed. Even if defendant has preferred an appeal against the decision in the aforesaid suit, yet no any stay has been granted over the decision of the subordinate Court. If the defendant is allowed to construct in the suit property, then plaintiff will suffer irreparable loss. Defendant cannot be allowed to permanently construct unless and until there is partition between plaintiff and defendant and unless the separate possession of the share is given. However, defendant is in a preparation to illegally construct on the

suit property. Plaintiff has a prima-facie case and balance of convenience. Plaintiff will suffer irreparable loss if the application is not allowed. Hence, plaintiff has prayed to allow the application.

**Contentions of the defendant :-**

3. Defendant submitted his say at Exh.17. He submitted that, he is the owner and possessor of CTS No.996/3. His entry as an owner was recorded in the city survey extracts of the suit property on 15/1/1946. Plaintiff and his predecessor in right had never objected those entries. Plaintiff and his predecessor in right have no right in the suit property. Plaintiff has no locus standi to file the present suit. Defendant is in possession as an owner of the suit property since the year 1946. Plaintiff and his predecessor in right Khatunbi Shaikh had sought accommodation from the defendant and defendant permitted them for accommodation. However, Khatunbi Shaikh took advantage of it and started declaring her right over the suit property. Hence, defendant filed the suit bearing RCS No.215/1997 for declaration, mandatory injunction and perpetual injunction. Thereafter, despite having no right in the suit property, Khatunbi Shaikh falsely declared that, she has a right in the suit property and thereafter filed suit bearing RCS 189/1998 against the defendant for declaration, mandatory injunction and perpetual injunction. Thereafter, both the suits i.e. RCS 215/1997 and RCS 189/1998 were given new numbers i.e. RCS 529/2012 (RCS 215/1997) and RCS 516/2012 (RCS 189/1998).

4. Defendant further submits that, during the pendency of these suits, Khatunbi died and her heirs were taken on record. Thereafter, both the suits were decided on 3/1/2014 and it was decided that, the predecessors in right of the plaintiff were having 5/8<sup>th</sup> share as an owner in the suit property and defendant was having 3/8<sup>th</sup> share as an owner in the suit property. Defendant preferred an appeal against both the suits. Prior to that, defendant sought to condone the delay in filing appeal by filing M.A.

No.237/2014 and M.A. No.238/2014 at Solapur. As the Additional District Court was established at Barshi, both these applications were transferred to Barshi and new numbers i.e. M.A. No.95/2014 and M.A. No.96/2014 were given to those applications. M.A. No.95/2014 was allowed and the appeal against the suit bearing RCS No.529/2012 was given Regular Civil Appeal No.4/2018. That appeal is currently pending.

5. Defendant further submits that, present suit and the present application is premature because the decree in the earlier suit is pending for appeal. Plaintiff and defendant are Muslim and the ownership right has to be established and their shares has to be decided and in that regard it is necessary to get the decree of declaration however, instead of availing such course, plaintiff has file the present suit and application which is illegal. The suit property and the parties in the decree of RCS 529/2012 and RCS 516/2012 and in the present suit are one and the same. The dispute between the parties relates to be the owner of the suit property. Plaintiff has brought the present suit on the basis of the decree in the earlier suits and as the appeal is pending against the decree before the Hon'ble District Court, it is necessary to stay the present suit and present application as per section 10 of Code of Civil Procedure. There is no cause of action to the present suit. No cause of action occurred on 19/12/2021. Defendant does not reside in the suit property. The wall of the suit property in possession of the defendant was damaged due to the construction of the house of plaintiff's neighbor. However, the neighbor had repaired the wall. Plaintiff might have misunderstood it. Plaintiff admits that, defendant has a share and ownership in the suit property and plaintiff is himself claiming an injunction against the owner and possessor of the suit property. Hence, plaintiff is not entitled to any legal relief. Application is not tenable. Plaintiff has no prima-facie case and balance of convenience. If the application is allowed, defendant would suffer irreparable loss as he is the owner of the suit property. Hence, defendant prayed to reject the application.

6. Heard both the sides. Perused the record and proceeding of the case. The points for determination along with findings and reasons thereon are as under:

Sr.No	Points	Findings
1.	Whether the plaintiff has a prima facie case?	Yes
2.	Whether the balance of convenience lies in favor of plaintiff ?	Yes
3.	Whether plaintiff will suffer irreparable loss if injunction is refused?	Yes
4.	What order?	As per final order.

### REASONS

#### AS TO POINT NO.1 TO 4:

7. In order to prove his prima-facie case, plaintiff has relied upon the documents vide list of documents at Exh.4. Defendant has not adduced any documentary evidence.

8. The suit is filed for partition. Plaintiff is claiming temporary injunction in order to restrain the defendant by himself or anyone on his behalf from carrying out any type of construction and any related work in the suit property as well as to restrain the defendant from carrying out any change in the suit property mentioned in para 1 of the plaint. Perused the documents on record. I have heard both the sides in detail. In order to prove his prima-facie case, plaintiff need to have some legal right existing in his favour. In order to grant temporary injunction, regard shall always be had to the principle of probability of success and a bona fide case. Probability of success will depend upon the material on record and a bona fide case will depend upon principles of equity. In the present case, plaintiff must prove that he has a prima facie case. Plaintiff has relied upon the documents filed at list at Exh.4. The certified copy of judgment of Hon'ble Civil Judge Senior Division, Barshi in RCS 529/2012 and RCS 516/2012 at Exh.4/2 shows that, the heirs of Khatunbi, after her death were declared as owners of 5/8<sup>th</sup> share combined in the suit property and defendant Mubarak Shaikh was

declared as owner of the suit property to the extent of 3/8<sup>th</sup> share. The appeal against the execution of decree in both the suits is pending. It is submitted by defendant that, the present suit needs to be stayed as the appeal is pending against the decree in both the suits.

9. Plaintiff is seeking temporary injunction only with respect to restraining defendant from constructing and doing related work in suit property. It is not the case at this juncture that, plaintiff has no any ownership over suit property. The decree of earlier suits are yet to be executed which means which portion of which direction or side in suit property is to be allotted to plaintiff and defendant is yet to be decided. Moreover, appeal against decree in both suits is also pending. If defendant is allowed to construct or to do any similar work, there are chances that, nature of suit property might change. Status of suit property at this stage needs to be preserved. Construction by defendant on suit property would rather lead to complexity in execution of decree proceedings as well as complexity in the pending appeal. Right of plaintiff and defendant on particular portion in the suit property is yet to be determined. Hence, as carrying out the construction would cause complexity in further proceedings and might impact the pending proceedings, it is clear that, the nature of the suit property needs to be preserved. In the present case, the material on record prima facie shows that, plaintiff has been declared as an owner of the suit property to a particular extent. Hence, plaintiff appears to have proved his prima facie case.

10. In order to decide, who has the balance of convenience, the Court has to decide who will suffer great hardship or mischief in case injunction is not granted. If the application is rejected, plaintiff will be at hardship because it is prima facie position that plaintiff is declared as an absolute owner to a particular extent in the suit property. Plaintiff will suffer hardship because, if the construction is allowed, the nature of the suit property might be

changed and it might cause complexity in the pending litigations which might affect the plaintiff. Hence, considering such circumstances, balance of convenience appears to be in favour of plaintiff. As far as irreparable loss is concerned, it appears that, as the prima facie case is proved by plaintiff. If defendant is allowed to construct on the suit property, plaintiff will suffer irreparable loss because plaintiff has been declared as an absolute owner to a particular extent in the suit property by the judgment of Civil Court, Senior Division, Barshi and as mentioned earlier which portion of the suit property is allotted to which person is not yet decided as the execution of the decree is challenged before the appellate Court. The appeal against execution of decree is pending, hence the construction cannot be allowed to occur at this stage because it would affect the pending appellate proceeding and might cause complexity in the proceedings and the status of the suit property also needs to be preserved. Hence, considering the aforesaid reasons, accordingly, I answer point no.1 to 3 in affirmative.

11. In view of above-mentioned reasons, plaintiff has proved the prima facie case, balance of convenience and point of irreparable loss in his favour. In this backdrop and in answer to point no.4, the following order is passed.

**ORDER**

1. The application is allowed.
2. Defendant or anyone on his behalf are restrained from carrying out any type of construction and any related work in the suit property as well as from carrying out any change in the suit property mentioned in para 1 of the plaint till final disposal of suit or till execution of decree in RCS No.516/2012 and 529/2012, whichever occurs earlier.

(Pronounced in open Court)

Place: Barshi  
Date: 03/04/2023

(N.S. Sabnis)  
4<sup>th</sup> Jt. Civil Judge Junior Division, Barshi.

**CERTIFICATE**

I affirm that the contents of this PDF file Judgment/Order is same word to word as per the original Judgment / Order

(a)	Name of the Stenographer	:	Y. V. Sital, Steno Grade-III
(b)	Court	:	4 <sup>th</sup> C.J.J.D. & J.M.F.C., Barshi.
(c)	Judgment /Order signed by P.O. on	:	03/04/2023
(d)	Judgment /Order uploaded on	:	04/04/2023