

ORDER BELOW EXH. 5
(Passed on 09/07/2014)

1] The plaintiff has filed the present application seeking temporary injunction under order 39 rule 1 & 2 of C.P.C., temporarily restraining the defendants from burdening the suit property with any encumbrance and interfering and obstructing the possession of plaintiff over the suit property.

2] Briefly the facts of of Exh.5 are as follow :

That the property to the extent of 2 acres situated in Survey No.66, Gat No.16 out of total portion of 9 H 41 R, is the subject matter of the present suit. (Hereinafter referred as suit property).

3] The plaintiff submitted that on 19.04.1974 he had mortgaged the suit property with the defendant against the loan of Rs.600/- for a period of five years. The re-conveyance was agreed to be made on payment of the loan amount after five years. The possession remained with the plaintiff. In fact the transaction was conditional mortgage deed. The plaintiff had repaid the loan amount, however, the defendant had not re-conveyed the deed. Hence, the plaintiff had filed a suit with the competent Court for declaration that the document dated 19.04.1974 is mortgaged one and not the sale one. On 19.07.1980 the suit was decreed as per prayer of the plaintiff. As the document dated 19.04.1974 stood in the name of the defendant, hence the name of the defendant was mutated with the revenue records. But in fact the present plaintiff remained in possession. In the year 2003 the defendant had filed a suit bearing No.

52/2003 against the plaintiff claiming the perpetual injunction in respect of the suit property. However, the suit came to have been dismissed for default. Moreover on 24.07.2008 the defendant had sent a notice to the plaintiff's son acknowledging the possession of plaintiff's son and asking the plaintiff for vacating the property.

4] As the sale deed dated 19.04.1974 came to have been cancelled however, the name of the defendants remained on possessor column in revenue record of the suit property. Hence, the plaintiff has apprehension that the defendant shall misuse the same and shall create the third party interest over the suit property leading to the multiplicity of the suit. Moreover on 12.06.2013 the defendant said to have threatened the plaintiff and obstructed the possession. Hence, the present application filed.

5] The defendant strongly resisting and denying the suit of the plaintiff filed his counter-claim below Exh.18. The defendant contended that he had purchased the suit property vide a sale deed dated 19.04.1974. Accordingly the name of the defendant came to have been mutated. He contended that the plaintiff had sought a decree from the Court of law behind his back suppressing the material facts from the Court. The plaintiff got the decree but never insisted for its execution. The judgment and decree of the Court dated 19.07.1980 is time barred and not binding on the defendant. In fact the RCS No.52/2003 came to have been withdrawn by the defendant on the assurance of the plaintiff that he shall not disturb the possession of the defendant over the suit property.

Lastly the defendant submitted that the judgment and decree passed dated 19.07.1980 in respect of the sale deed dated 19.04.1974 is not binding on him and he also claimed the declaration in this regard. The plaintiff has resisted the counter-claim stating that the relief of the defendant is time barred one as he was made known in respect of the decree passed dated 19.07.1980 in the defendant's suit itself vide written statement of the plaintiff.

6] Having regard to the nature of application and pleadings of the parties following points arose for my determination and I have recorded my finding against each point for the reasons stated below.

	<u>Points</u>		<u>Finding</u>
1]	Whether prima facie case is in favour of Plaintiff ?	...	Yes.
2]	Whether balance of convenience lies in favour of plaintiff ?	...	Yes.
3]	Whether irreparable loss will be caused to the plaintiff if injunction is not granted ?	...	Yes.
4]	What order ?		As per order below.

REASONS

AS TO POINT Nos. 1 to 3

7] In support of his contentions the plaintiff has filed the copy of judgment in RCS No.75/1979 passed on 19.07.1980, copy of 7/12 extract, copy of W.S.in RCS No.52/2003 and the copy of notice issued by defendant to the plaintiff's son. On the contrary, as rebuttal the defendant has not filed any document. I heard both the Ld. Advocates.

8] On perusing the pleadings of both the parties it appears that the document executed dated 19.04.1974 and the judgment dated 19.07.1980 holding the document dated 19.04.1974 as mortgage deed, is the bane of the contention. On perusing the copy of judgment dated 19.07.1980 it appears that it was an ex parte judgment against the present defendant in respect of the suit property. The transaction between the parties dated 19.04.1974 was declared as loan transaction and not of sale one. Moreover the defendant was perpetually restrained from disturbing the peaceful possession of the plaintiff over the suit property. In respect of the present judgment, the defendant contended that the plaintiff had got the decree behind his back by suppressing the material facts from the Court. Now he claims the setting aside of the ex parte decree passed against him. On the other hand, the plaintiff contended that the defendant was well aware of the judgment and also the plaintiff had brought to the notice of the defendant this fact vide his written statement in RCS No. 52/2003, filed by the present defendant against the plaintiff. The plaintiff has filed the copy of written statement filed in RCS No.52/2003. The perusal of plaintiff's written statement reveal that the plaintiff had agitated the fact of judgment delivered dated 19.07.1980. On perusing the Exh.1 of RCS No.52/2003 it appears that the suit came to have been dismissed for default. Despite having been made known to the fact of judgment dated 19.07.1980 in the year 2003 itself the defendant has not bothered to approach the Court of law for cancellation of the judgment passed dated 19.07.1980. Now by this counter-claim he claims the relief of declaration in respect of the judgment dated 19.07.1980. Hence, in view of documents

on record the defendant cannot be allowed to agitate that the judgment passed dated 19.07.1980 is behind his back and strange to his knowledge. The judgment and decree has not been yet set aside in any Court hence, holds good law.

9] Admittedly, the name of the defendant came to have been mutated in revenue records in pursuance to the document dated 19.04.1974. However, as the very document has been declared as mortgage deed hence, the entry of the defendant with the revenue record has no base and hallow one. It shall be so until the judgment dated 19.07.1980 is set aside. So in view of this it cannot be said that the defendant is in legal possession of the suit property.

10] The plaintiff has filed the copy of notice issued by the present defendant in the name of plaintiff's son through Adv.B.M.Thakre, dated 18.07.2008. Therein the defendant appears to have acknowledged the possession of plaintiff's son over the suit property and asked him to vacate the same. Hence, in view of this it goes to establish that it is the plaintiff and not the defendant is in possession of the suit property.

11] Thus, the plaintiff has proved his possession prima facie over the suit property. Factually as well as legally he appears to be in possession of the suit property. On the contrary, the defendant's possession through the revenue entry over the suit property appears to be hallow one. Moreover the counter-claim of the defendant appears to be time barred, prima facie. As plaintiff proved to be in possession of suit property, so

certainly balance of convenience lies in favour of the plaintiff and he shall suffer irreparable loss if the defendant is not restrained. The apprehension of the plaintiff is well founded and deserves to be protected. Hence, in view of this, holding the plaintiff entitled for the relief I pass the following order.

ORDER

- 1] The application is allowed.
- 2] The defendant is hereby temporarily restrained from burdening the suit property with any encumbrance, till the final disposal of the suit.
- 3] So also the defendant is temporarily restrained from causing obstruction and disturbance to the peaceful possession of the plaintiff over the suit property, till final disposal of the suit.
- 4] The copy of this order be sent to Sub-Registrar, Malegaon.
- 5] Costs in cause.

Date : 09/07/.2014.

(A.R.Sayyed)
Joint Civil Judge (Jr.Dn.), Malegaon