

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.7058 OF 2021

Syed Abdul Rahim s/o Abdul Rauf,
Age- 35 years, Occ. Business,
R/o Near Khijra Masjid, Azad Nagar,
Parli (V), Tq. Parli (V), Dist. Beed.

...PETITIONER
(Orig. Plaintiff)

V E R S U S

- 1) Qumar Begum w/o Abdul Rauf,
Age-65 years, Occ. Nil,
R/o Near Khijra Masjid, Azad Nagar,
Near Anjuman School, Parli (V),
Tq. Parli (V), Dist. Beed.
- 2) Nawab Khadar w/o Md. Zameer,
Age-32 years, Occ. Nil,
R/o as above.
- 3) Hamidoddin @ Dayyan s/o Gufran Ahamad,
Age – 27 years, Occ. Nil,
R/o; as above.

...RESPONDENTS
(Orig. Defendants)

...
Mr. Tripathi Manish P., learned Advocate for Petitioner
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CORAM : SANDEEP K. SHINDE , J.

Date :- 29th June, 2021.

ORAL JUDGMENT :

1. Heard learned counsel for the parties.
2. Petitioner/plaintiff instituted RCS No. 22 of 2021, in the

Court of Civil Judge, Junior Division, Parali, District Beed on 27.01.2021, seeking a declaratory relief and preventive injunction against the defendants. The defendant No. 1, mother; whereas, Nos. 2 and 3 are the brother-in-laws of the petitioner/plaintiff. It is the petitioner's case that the suit properties were owned by his father, who in his lifetime transferred the suit properties in the name of the defendant No. 1 (mother of plaintiff). Upon presenting the suit, plaintiff was apprehending that mother would frustrate the suit by alienating suit properties. He therefore, moved an application and requested the trial Court that the parties to the suit be directed to maintain a status-quo, in respect of the suit properties. The trial Court declined the request vide order dated 16th March, 2021. This order is challenged in the instant petition.

3. In my view, application moved by the plaintiff/petitioner, seeking the order, 'to maintain status-quo', qua suit properties, was an application under Order XXXIX Rule 1 or 2 of the Code of Civil Procedure ('the C.P.C.' for short), and therefore order passed therein was appealable under order XLI Rule 1(r) of the C.P.C. In the case of **Rajendraprasad R. Singh V. Municipal Corpn. Of Gr. Bombay – AIR 2003 Bombay 392**, this Court has held that;

“The order granting ex parte ad interim injunction as well as order declining to grant ex parte temporary injunction and issuance of a notice, are both orders passed under Rule 1 or 2 of Order 39 of the Code of Civil Procedure. If the first is appealable, so must be the second.

Rule 1 or Rule 2 of Order 39 are repository of the power to grant injunction. An order of injunction is always passed Rule 1 or Rule 2 of Order 39 save and except rare orders passed under Section 151 of the Code of Civil Procedure. Rule 1 and Rule 2 of Order 39 do not use the words “interim or ad interim”. These are the words coined by the lawyers and the Courts merely to indicate the state at which orders are passed. Rule 3 of Order 39 mandates issuance of a notice by the Court to the opposite party before passing of an injunction to prevent injustice that may be caused to the opposite side by grant of an order of injunction without giving it an opportunity of being heard. Rule 3 only prescribes the procedure for grant of an injunction and is not the repository of the power to grant injunction. Rule 3 would be superfluous and would not exist without Rules 1 and 2 of Order 39. The order, be it of a grant or of postponing the grant until service of notice is essentially passed in exercise of the powers under Rule 1 or 2 of Order 39. It cannot be doubted that the power to grant injunction under Rules 1 and 2 of Order 39 includes a power not to grant an injunction. Issuance of a notice under Rule 3 of Order 39 amounts to an order not to grant injunction till notice is served on the opposite party. Therefore, when the Court passes an order of issuance of a notice, it amounts to exercise of discretion by the Court not to grant injunction till notice is issued. As the order granting an ex parte injunction is appealable, so would be the order of declining to grant exparte injunction.

The plea that if an appeal against an order declining to grant ex parte ad interim injunction directing the issuance of a notice under Rule 3 of Order 39 is held to be appealable, the appellate Courts would be flooded with appeals. It is the job and function of the Court to decide every lis and the appellate Court cannot claim immunity from the said function on the specious ground that it would be flooded with work. It is one thing to say that an appeal is not maintainable and another thing to say that the appellate Court should exercise its discretion with circumspection”.

4. In view of the law laid down by this Court, since appeal under Order XLIII of C.P.C. is efficacious statutory remedy but has not been exhausted before invoking supervisory jurisdiction, petition is dismissed. However, petitioner is not precluded from challenging the impugned order in accordance with law.

5. Petition is disposed of.

(SANDEEP K. SHINDE)
JUDGE

mahajansb/