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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

WRIT PETITION NO. 7764 OF 2016

Amarsinh Govindrao Nimbalkar. ... Petitioner.

V/s.

Vijaysinh Govindrao Nimbalkar and Anr. ... Respondents.

Mr. Sagar Rane i/b. Pradip Naik for the Petitioner.

Ms. Nivedita Kundaji i/b. Pushkraj Deshpande for Respondents 1 and 2.

CORAM : N.M. Jamdar, J.

22 August, 2016.

Oral Order :-

The Petitioner challenges the order passed by the Civil Judge, Senior Division, Malshiras dated 2 April 2016 rejecting the Application filed by the Petitioner – Plaintiff below Exhibit 214 taken out for stay of the Special Civil Suit No.18 of 2008.

2. The Suit was initially filed by the Petitioner seeking partition and separate possession of the property situated at Village Tandulwadi, Taluka Malshiras and house property situated at Village Tandulwadi. The Respondents filed counterclaim in respect of the

properties at Village Tandulwadi as well as for a house property situated at Jogeshwari, Mumbai. The learned Civil Judge by judgment and order dated 10 January 2013 decreed the Suit and partly allowed the counterclaim. The Respondents thereafter filed a Civil Appeal No. 12 of 2013 in District Court, Malshiras. By judgment and order dated 8 July 2015, the Appeal was allowed and the findings of the learned Civil Judge as regard Issues 1(A) to 1(C) and 1(D) were quashed and set aside and it was held that the learned Civil Judge had jurisdiction to decide suit for partition in respect of the property situated at Jogeshwari, Mumbai and the proceedings were accordingly remanded.

3. On 28 July 2015 a Testamentary Petition No.1543 of 2015 was filed by the Petitioner seeking Probate of Will stated to be executed on 1 August 1998. Thereafter, the Petitioner filed an application on 17 February 2016 for stay of the Suit under Section 10 of Code of Civil Procedure on the ground that the Petitioner has filed a Testamentary Petition. This application was opposed by the Respondents contending that the Suit is 10 years old and is fixed for final arguments and to prolong the argument the Application is filed. The learned Civil Judge, after hearing both the sides came to the conclusion that no case is made out for setting the Suit under Section 10 of the Code of Civil Procedure and rejected the Application.

4. The Suit is pending for last 10 years. Even while remanding the proceedings on 8 July 2015, the learned District Judge has noted that the Petitioner has not moved for seeking Probate of the Will relied upon by them. Thereafter, the Testamentary Petition has been filed and the Application is moved on 17 February 2016 and in the meanwhile, the trial in the Suit has continued and now reached at an advanced stage. The Suit is now placed for passing final orders. This position is recorded in the order dated 10 August 2016 passed by this Court and the learned Single Judge (K.K. Tated) has refused to grant any stay to the Suit observing that both the Counsel submit that the matter is kept tomorrow for judgment.

5. Considering the fact that the stage at which the application is moved for stay of the proceedings, I am not inclined to exercise equity jurisdiction of this Court to stay the pronouncement of order and direct the learned Civil Judge to keep the pronouncement in abeyance or keep the judgment in sealed cover, as requested by the learned Counsel for the Petitioner. Such course of action cannot be resorted to at the behest of the Petitioner who had ample opportunities. The appropriate action therefore would be to give opportunity to the Petitioner to make an application in the First Appeal which the parties may file against the decision in the suit. If

such application is made in the First Appeal, it will be considered on its own merits after hearing both the sides without being influenced by the order impugned in this Petition. It is clarified that I have not interfered with the impugned order only on the ground that it is moved at an extremely belated stage. Keeping all contentions of the parties as regard this aspect of the matter is concerned, the Writ Petition is disposed of.

(N.M. Jamdar, J.)