

VRJ

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

WRIT PETITION NO.14341 OF 2022

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Date: 2023.12.02
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Raksha Nikunj Dikshit

... Petitioner

V/s.

Rupa Shivdutt Joshi & Anr.

... Respondents

Mr. Bharat Joshi for the petitioner.

Mr. Mehul Shah for the respondents.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 1, 2023

P.C.:

1. The petitioner is challenging order dated 13th April 2022 passed by the Trial Court granting stay to S.C. Suit No.1100 of 2014 till the decision of probate petition pending in this Court.
2. The petitioner had filed a suit for declaration that she is joint owner of flat No.103, 1st floor, Building No.16, Azadnagar Sweet Sixteen Cooperative Housing Society Limited, Azadnagar, Andheri (West), Mumbai and other movable estate of deceased Jayantkumar Dikshit.
3. According to the defendants, Jayantkumar Dikshit on 25th September 2006 executed a will in favour of the defendants.
4. The defendants have already filed an application seeking probate bearing No.1131 of 2014 in this Court.

5. The defendants, therefore, filed an application under Order 7 Rule 11 and section 10 of the Civil Procedure Code, 1908. The Trial Court, by the impugned order, rejected the application under Order 7 Rule 11 of the Civil Procedure Code, 1908, however, stayed the suit for partition till the decision of probate petition.

6. Considering the nature of dispute involved, it appears that the finding regarding due execution of will shall have influence over issues to be adjudicated in a suit for partition. The probate Court has exclusive jurisdiction to decide due execution of will. Since the suit property is situated within territorial jurisdiction of this Court, probate certificate before passing actual decree in favour of beneficiary would be necessary. Therefore, the Trial Court rightly stayed the proceedings of partition suit.

7. However, at this stage it is necessary to consider judgment of this Court in case of **Khemraj Ratanlal Sancheti vs. Vasant Madhaosa Vyavhare** reported in 1981 Mh.L.J. 200. This Court in paragraph 6 expressed its agreement with the view adopted by the Madhya Pradesh High Court in relation to power of Trial Court once the Apex Court granted stay to the proceedings. This Court quoted with approval following passage:

“We are of the opinion that during the pendency of a stay order passed by the appellate or the revisional Court, although the trial Court or the Court below may not have any jurisdiction to proceed with the Trial of the suit on merits it can certainly take such other steps which are collateral or which may be protective or which would be for the purposes of keeping the lis alive and all such steps, in our opinion, such as any application under Order 22 Rule 3 or

Rule 4 of the Code of Civil Procedure or an application under Order 39, Rule 1 or Rule 2 or an application under Order 40, Rule 1 or an application under Order 38, Rule 5, would be maintainable in the Trial Court in spite of such stay order.”

8. This Court in paragraph 4 held that despite stay of proceeding of suit, such stay shall not prevent the Trial Court from passing interlocutory orders for the purpose of keeping proceedings alive or for preserving subject matter of dispute or for the purpose of protecting interest of parties to the suit.

9. Learned advocate for the respondents relying on judgment in the case of **Mulraj vs. Murti Raghonathji Maharaj** reported in AIR 1967 SC 1386 submitted that the order of stay prohibits the Trial Court from proceeding further with the proceeding and, therefore, the Trial Court cannot entertain any interlocutory application or any application even for the purpose of preservation of subject matter of the suit. On perusal of the judgment in the case of **Mulraj** (supra) is concerned, the Apex Court has observed as under:

“..... In the case of a stay order, as it is addressed to the court and prohibits it from proceeding further, as soon as the court has knowledge of the order it is bound to obey it and if it does not, it acts illegally, and all proceedings taken after the knowledge of the order would be a nullity. ...”

10. The observations made by the Apex Court nowhere precludes the Trial Court from entertaining interlocutory application for keeping proceedings alive or for preserving subject matter of dispute or for the purpose of protecting interest of the parties to the suit. Moreover, this Court in the case of **Khemraj Ratanlal Sancheti** (supra), in paragraph 8, has considered the

judgment in the case of **Mulraj** (supra) and, therefore, this Court is bound by the judgment in the case of **Khemraj Ratanlal Sancheti** (supra).

11. Therefore, clarifying the position that the petitioner shall be entitled to apply for relief as stated in paragraphs 4 and 6 of judgment in the case of **Khemraj Ratanlal Sancheti** (supra), the writ petition is disposed of. No costs.

(AMIT BORKAR, J.)