

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 324 OF 2025

Balubi Bali Khan

...Petitioner

Versus

SANTOSH
SUBHASH
KULKARNI

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KULKARNI
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1. Fatimbi Hiralal Mullani
2. Khatija Jamal Mullani
3. Alisha Sameer Sheikh
4. Arman Jamal Mullani
5. Alfiya Barkat Korabu
6. Kamal Rahim Mullani
7. Maimunabi Rahiman Mullani
8. Salim Rahiman Mujawar
9. Altaf Rahiman Mujawar
10. Yusuf Rahiman Mujawar
11. Shanur Mohammad Sheikh
12. Shakila Ramjan Mullani
13. Sultana Ahmad Mullani
14. Nihal Kamal Mullani
15. Arbaj Kamal Mullani

...Respondents

Mr. Prasad Kulkarni, a/w Nakul Shukla, for the Petitioner.

Mr. A. B. Tajane, a/w Y. A. Tajane, for the Respondents.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 8th JANUARY, 2025

PRONOUNCED ON: 18th MARCH, 2025

JUDGMENT:-

1. Rule. Rule made returnable forthwith and with the consent of the learned Counsel for the parties, heard finally.

2. This petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of the order dated 6th May, 2024 passed by the learned Civil Judge, Madha,

whereby an application (Exhibit-84) preferred by petitioner – plaintiff No.3 for stay to the execution and operation of the decree in RCS/436/2001 dated 31st March, 2021 came to be allowed.

3. The background facts leading to this petition can be stated in brief as under:

3.1 For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed before the trial court.

3.2 Late Husain Mulani was the father of the plaintiffs and Rahiman Mulani, through whom the defendants, including Balubi Khan – defendant No.4 – the petitioner, claimed. Husain Mulani had acquired the agricultural land bearing Gat No.8/1 described in paragraph 1A of the plaint under a registered Sale Deed dated 28th December, 1977. The house property described in paragraph 1B of the plaint was the ancestral property of Husain. Husain Mulani passed away on 19th August, 1987. The plaintiff and her brother Rahiman succeeded to the estate of late Husain. The plaintiff claimed that she had 1/3 share in the suit properties and Rahiman had 2/3 share.

3.3 Maimunbi – defendant No.2 was the legally wedded wife of Rahiman. Defendant Nos.6, 11, 12, 13 and Arifa, the

predecessor -in-title of defendant Nos.8 to 10, and Kamal, the predecessor-in-title of defendant Nos.14 and 15, were the children of Maimunbi by Rahiman. The plaintiff claims Rahiman had relationship outside marriage with Shantabai, who was married to one Babu Barangule. Out of the said relationship, a son Jamal and a daughter, Balubi – defendant No.4, were born to Shantabai by Rahiman. Defendant Nos.1 to 3 are the successors in interest of Jamal. Rahiman passed away on 15th January, 1993.

3.4 The plaintiffs claim Shantabai and defendant Nos.1 to 4 instituted a suit being RCS/436/2001 for partition and separate possession of their share in suit properties claiming that Shantabai was the legally wedded wife and defendant Nos.1 to 4 were the legitimate children of Rahiman. In the said suit, the plaintiff was not impleaded as a party defendant. By a judgment and order dated 31st March, 2021, the said suit came to be decreed. The defendant Nos.1 to 15 were allotted defined shares in the suit properties.

3.5 The decree passed in the said suit was assailed by the co-defendants, in Regular Civil Appeal No.11 of 2021. However, the co-defendants - appellants subsequently withdrew the said appeal.

3.6 The plaintiff was, thus, constrained to institute the suit seeking partition and separate possession of her 1/3 share in the suit properties and the declaration that the deed executed in favour of Nihal (D14) and Arbaj (D15) on 29th August, 2007 by Kamal Rahiman Mulani is null and void and does not bind the share of the plaintiff and the decree passed in RCS/436/2001 dated 31st March, 2021 is also null and void and does not bind the share of the plaintiff in the suit property.

3.7 Initially, the plaintiff had filed an application for temporary injunction in the said suit and had also sought stay to the execution of the decree in RCS/436/2001. By an order dated 18th September, 2023 the said application was partly allowed restraining the defendants from alienating or creating any third party interest in the suit properties till the decision of the said suit. The prayer for stay to the execution of the decree was not considered as in RCA/11/2021 the Appeal Court had already granted stay to the delivery of possession of the suit properties in execution of the decree.

3.8 Post the withdrawal of the appeal, the plaintiff preferred application for stay to the execution and operation of the decree (Exhibit-84), purportedly under Section 151 of the Code of Civil

Procedure, 1908 ("the Code"). Defendant No.4 resisted the application.

3.9 By the impugned order, the learned Civil Judge was persuaded to order stay to the execution of the decree treating the said application as one for temporary injunction under Order XXXIX Rule 2 of the Code. The learned Civil Judge was of the view that since the plaintiff had undoubtedly a share in the property left behind by late Husain Mulani and she was not impleaded in RCS/436/2001, she was entitled to assail the decree as a nullity.

4. Mr. Kulkarni, the learned Counsel for the petitioner, submitted that the learned Civil Judge transgressed the jurisdictional limits in directing stay to the execution and operation of the decree passed in RCS/436/2001, which has attained finality. The appeal preferred by the defendant in the said suit came to be disposed as withdrawn. The plaintiff, who claims to be the daughter of late Husain Mulani, could have worked out her remedies by filing an appeal against the said judgment and decree. Therefore, the plaintiff could not have sought the relief of declaration qua the said decree in RCS/436/2001, by filing an independent suit.

5. Mr. Kulkarni nextly urged that the application was also barred by the principles of *res judicata*. By an order on an application for temporary injunction (Exhibit-5), the trial court had already rejected the prayer to stay the execution and operation of the decree in RCS/436/2001. Therefore, since the principles of *res judicata* operate at different stages in the same proceedings, the trial court could not have granted the stay to the execution and operation of the decree in RCS/436/2001.

6. Mr. Tajane, the learned Counsel for the respondent – plaintiff, supported the impugned order. It was submitted that the relationship between the parties was not put in contest. In fact, in the written statement, defendant No.4 conceded that the plaintiff was the daughter of late Husain Mulani. The fact that late Husain Mulani had acquired the suit property 1A and suit property 1B had devolved upon late Husain Mulani, was also not put in contest. Therefore, the right of the plaintiff to inherit the properties left behind by Husain Mulani alongwith late Rahiman Mulani is incontrovertible. Indisputably, the plaintiff was not impleaded as a party defendant in RCA/436/2001 wherein the Court had determined shares of all the parties, but plaintiff. In this view of the matter, the learned Civil Judge was

well within his rights in staying the execution and operation of the decree passed in RCS/436/2001.

7. The facts are rather incontrovertible. Late Husain Mulani had left behind his widow Jannatbi, son Rahiman and daughter Fatimabi, the plaintiff. It seems dispute arose between the children of Rahiman born to Maimunbi and Shantabai, resulting in institution of RCS/436/2001. Eventually a decree came to be passed in the said suit. The plaintiff was not impleaded as a party defendant to the said suit. Since the said suit for partition was in respect of the properties, which devolved on Rahiman from late Husain Mulani, the plaintiff was indubitably a necessary party to the suit. *Prima facie* the plaintiff has a right to succeed to the suit properties left behind by Husain Mulani.

8. The submission of Mr. Kulkarni that the plaintiff ought to have filed an appeal against the decree passed in RCS/436/2001 does not merit countenance. The plaintiff has instituted the suit for partition and separate possession of her share and has also sought declaration regarding the invalidity of the instrument executed by Kamal Mulani, the son of late Rahiman Mulani, in favour of Nihal (D14) and Arbaj (D15), and that the decree in RCS/436/2001 does not bind the plaintiff.

Such a substantive suit seeking a declaration that the decree passed in RCS/436/2001 does not bind the plaintiff is legally tenable. It is true, the plaintiff could have sought permission to file appeal against the decree passed in RCS/436/2001. However, that is not the only remedy which the plaintiff could have availed, especially when despite being entitled to a share in the property of late Husain Mulani, she was not impleaded as a party defendant in the said suit.

9. The learned Civil Judge was fully justified in treating the application which was preferred purportedly under Section 151 of the Code, as the one under Order 39 Rule 2 of the Code. It is trite nomenclature of the application or the incorrect description of the provision under which the application is preferred, is not of decisive significance. If the order passed by the Court is referable to a source of power, which the Court possesses, an incorrect description of the provision or nomenclature of the application is of no significance. The learned Civil Judge, thus, correctly applied the principles in treating the application to be one under Order XXXIX Rule 2 of the Code.

10. The submission of Mr. Kulkarni that the application was barred by the principles of *res judicata* is equally untenable. It is imperative to note that while passing order on the application

for temporary injunction (Exhibit-5) the trial court had specifically refrained from considering the prayer for stay to the execution and operation of the decree in RCS/436/2001 as the Appellate Court had already passed an order in RCA/11/2021 staying the delivery of possession of the property under the decree, which was assailed in the said appeal. Thus, the said order does not operate as a *res judicata* as the issue cannot be said to have been decided by the Court. In any event, the said order is in the nature of an interlocutory order. The principles of *res judicata* are not attracted to interlocutory orders with the same force and vigor as they apply to the final adjudication.

11. In the face of the hard fact that a decree for partition of the suit properties came to be passed without impleading the plaintiff as a party defendant thereto, when the relationship between the plaintiff and late Rahiman Mulani, through whom the plaintiffs in the said suit claimed, and the entitlement of the plaintiff to a share in the suit properties is *prima facie* incontestable, the learned Civil Judge cannot be said to have committed any error in directing stay to the execution and operation of the decree in RCS/436/2001 till the final disposal of the suit. Lest, the plaintiff would have suffered irreparable loss.

12. The conspectus of the aforesaid consideration is that this Court does not find any infirmity in the impugned order. Thus, no interference is warranted in exercise of the supervisory jurisdiction. The petition, therefore, deserves to be dismissed.

13. Hence, the following order:

: O R D E R :

- (i) The petition stands dismissed.
- (ii) Rule discharged.

No costs.

[N. J. JAMADAR, J.]