

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

TALLE  
SHUBHAM  
ASHOKRAO

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**FIRST APPEAL NO. 128 OF 2025.**

1. Atul Purshottam Borkar ]  
an adult of Mumbai, Indian Inhabitant, ]  
residing at 31/A, Kurla Kamgar Nagar, S.G. ]  
Barve Marg, Kurla (East), Mumbai 400 024. ] **...Appellant**  
] **(Org. Plaintiff)**

**VS.**

1. Mrs. Kumudini Ravindra Amrute, ]  
of Mumbai, Indian Inhabitant, residing at ]  
31/A, Kurla Kamgar Nagar S. G. Barve Marg, ]  
Kurla (East), Mumbai 400 024. ]
- 1(a). Kiran Ravindra Amrute, ]  
of Mumbai, Indian Inhabitant, residing at ]  
31/A, Kurla Kamgar Nagar S. G. Barve Marg, ]  
Kurla (East), Mumbai 400 024. ]
2. Mrs. Latika Sanjay Redkar ]  
of Mumbai, Indian Inhabitant, residing at ]  
28/D, Kurla Kamgar Nagar S. G. Barve Marg, ]  
Kurla (East), Mumbai 400 024. ]
3. Ashutosh Purushottam Borkar, ]  
of Mumbai, Indian Inhabitant, residing at ]  
181/10, Samarth Nagar, Kandiwali, Mumbai ]  
400 101. **(Deceased)** ]
- 3a. Smt. Aparna Ashutosh Borkar ]
- 3b. Ms. Charulata Ashutosh Borkar ]  
Both adults of Mumbai, Indian Inhabitants, ]  
residing at B001, Gokul Nagari 1 (A&B) CHS ] **...Respondents.**  
Ltd., 90 Feet Road, Thakur Complex, Kandivali ] **(Org.**  
East, Mumbai 101. ] **Defendants)**

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*Mr. Rajesh Kachare, Mr. Ajit Tamhane, Mr. Amit Potnis, Mr. Sandeep Suryavanshi  
i/b Tamhane and Co. for the Appellant.*

*Mr. Rupesh Sohoni for the Respondent.*

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**Coram : Sharmila U. Deshmukh, J.**

**Reserved on: March 20, 2025.**

**Pronounced on: April 2, 2025.**

**JUDGMENT :**

1. The First Appeal is at the instance of the Original Plaintiff being dissatisfied with the Judgment and order dated 30<sup>th</sup> August, 2024, passed by the City Civil Court, Greater Mumbai, dismissing Suit No. 3355 of 2009. Suit No. 3355 of 2009 was initially instituted before the High Court being Suit No. 863 of 2009 and due to enhancement of pecuniary jurisdiction was transferred to the City Civil Court and re-numbered as Suit No. 3355 of 2009. For sake of convenience parties are referred to by their status before the Trial Court.

**PLEADINGS:**

2. S.C Suit No 3355 of 2009 has been instituted seeking administration of estate and for partition and possession of 1/4th share of suit property of one Purshottam Shantappa Borkar claimed to have died intestate in Mumbai *qua* the suit property described in Exhibit-A as under:-

**"Ex- "A"***Description of the suit property*

**1.** *Sixty Three shares bearing Nos. 2014 to 2033, 5501 to 5514, 5892 to 5901, 8980 to 8988, 12614, 13984 to 13987 and 14929 to 14933 of the Kurla Kamgar Co. Operative Housing Society Limited, S. G. Barve Road, Kurla (East), Mumbai – 400 024, and of the face value of Rs. 50/- each.*

**2.** *Plot of land bearing No. 31/A admeasuring about 1250 sq. ft. with the Tenement No. 31/A having built-up area of about 700 sqr. ft. standing thereon out of the property of the Kurla Kamgar Co-Operative Housing Society Limited at Kamgar Nagar, S. G. Barve Road, Kurla (East) , Mumbai – 400 024."*

**3.** The Plaintiff and the Defendants are siblings. The plaint pleads that the deceased was the exclusive owner of immovable and movable properties including the suit property. The deceased Purshottam Borkar expired on or before 2<sup>nd</sup> June, 1993. The Defendant No 1 was married and was permitted by deceased to reside in the suit property alongwith her family as the Defendant No 1's husband had deserted her. The suit premises consists of seven rooms out of which four rooms are in use and occupation of Plaintiff and three room are in occupation of Defendant No 1. After the death of their father, the Defendant No. 1 had filed Petition No. 553 of 1998 for obtaining probate in respect of purported Will dated 10<sup>th</sup> May, 1991 alleged to have been executed by the deceased. Citations came to be issued which was duly served upon the Plaintiff and the Defendants however

the Plaintiff was assured by Defendant No. 1 that he need not take any steps take as the Defendant No. 1 will take all necessary steps to protect the interest of all. The Plaintiff was further assured that he need not worry about the residential premises since the same was in occupation of the Plaintiff along with his family members. Relying on the assurances the Plaintiff and the other defendants did not take any steps and probate was granted on 7<sup>th</sup> November, 2000 in respect of the purported last will and testament of the deceased. After obtaining probate, the Defendant No 1 called upon the Plaintiff to vacate the suit premises upon which the Plaintiff approached Defendant No 3, who assured him that he will take necessary steps and that he had sought legal advice. Relying upon the assurances of the Defendant No 3, the Plaintiff did not take any steps. In April-2006 the Plaintiff was served with summons of S.C. Suit No. 1803 of 2006 filed by the Defendant No. 1 seeking mandatory injunction against the Plaintiffs to remove themselves from the suit premises.

**4.** In view of the subsequent development, search was taken of the papers of Probate Petition No. 553 of 1998. It is contended that the Defendant No.1 never declared to the Plaintiff that there was Will in favour of the Defendant No. 1 and the Plaintiff had accepted the papers duly served upon him which were not known at that time to be citations in probate proceedings. The Plaintiff filed Petition for

revocation of the probate which came to be disposed of by order dated 17<sup>th</sup> December, 2008. It was pleaded that the Will makes it clear that the deceased had died intestate in respect of the suit property i.e. Tenement No. 31-A as the deceased has neither dealt with the said property nor there is residual clause in the Will qua the said property and therefore the said property is not covered under the Will dated 10<sup>th</sup> May, 1991. The suit came to be filed seeking declaration that the probate dated 7<sup>th</sup> November, 2000 granted by this Court is not enforceable against the suit properties and that the Plaintiff is entitled to 1/4<sup>th</sup> share in the estate properties left behind by the deceased and for prohibitory injunction against the Defendant.

5. The suit came to be resisted by the Defendant No. 1 denying that the deceased had died intestate in respect of the suit property or the others siblings had any right title and interest in the suit property. It was contended that the Will dated 10<sup>th</sup> May, 1991 contained a residuary clause in paragraph 6 wherein the deceased had bequeathed to the Defendant No. 1 all his remaining estate immovable as also movable absolutely and exclusively and in view thereof no portion of the deceased estate remained to be administered.

***EVIDENCE:***

6. The Plaintiff examined himself and deposed as to the contents of the plaint. He produced the copy of the order dated 18<sup>th</sup>

August, 2009 passed in Notice of Motion No. 1343 of 2009 in the suit, photocopy of the probate dated 7<sup>th</sup> November, 2000 photocopy of Judgment dated 29<sup>th</sup> November, 2012 passed in L. E. Suit No. 310 of 2008 dismissing the suit filed by the Plaintiff for a direction to the Defendants to remove themselves from the suit premises and certified copy of Judgment dated 9<sup>th</sup> October, 2015 passed by the Appellate Bench of the Small Causes Court, dismissing the Appeal filed by the Defendant No. 1. In cross-examination he has admitted that the Defendant Nos. 2 and 3 had never initiated any proceedings against Defendant No. 1 in respect of the suit property because they knew that after their fathers death Defendant No. 1 would be owner of the suit property as per the Will of the father.

7. DW-1, who is the grandson of the deceased, deposed as to the contents of the written statement. He produced original probate dated 7<sup>th</sup> November, 2000, authenticated copy of order dated 17<sup>th</sup> December, 2008 passed by the High Court, certified copy of order dated 25<sup>th</sup> March, 2011 passed by the Co-operative Court in Dispute filed by the Defendant No. 1 whereby the Society was directed to transmit the shares of the deceased in name of the Defendant No. 1, original share certificate issued by the Society in favour of the Defendant No. 1 and the property tax bills in respect of the suit premises issued in name of the Defendant No. 1.

8. In cross-examination, DW-1 has admitted that the suit premises is about 900 sqr. ft. out of which he is in possession of two rooms admeasuring 350 sqr. ft. and Plaintiff is residing in remaining area. He has admitted that his mother had not divided the property and Ankola, Karnataka equally between the siblings.

***ISSUES:***

9. The Trial Court framed and answered the following issues:-

| <b>Sr. No.</b> | <b>Points</b>                                                                                    | <b>Findings</b>     |
|----------------|--------------------------------------------------------------------------------------------------|---------------------|
| 1.             | Whether Plaintiff proves that he is entitled to partition of the suit property ?                 | In the negative.    |
| 2.             | Whether Plaintiff proves that he is entitled for 1/ 4 <sup>th</sup> share in the suit property ? | In the negative.    |
| 3.             | Whether Defendant No. 1 proves that the Will is genuine, properly signed and attested ?          | In the Affirmative. |
| 4.             | Whether Plaintiff is entitled for the reliefs as sought ?                                        | In the negative.    |
| 5.             | What Order and Decree ?                                                                          | As per final Order. |

***FINDINGS OF TRIAL COURT:***

10. The Trial Court held that the order passed in the probate Petition has attained finality and in present case there is no issue of title of testator and the issue of interpretation of Will cannot be re-opened. After observing thus, the Trial Court considered the deceased had died intestate in respect of the suit property. It opined that the

Will specifically disclosed that there are only two immovable properties and there is nothing on record to show that the testator has any other immovable properties which are not mentioned in the Will and thus the remaining property is the suit property which is bequeathed to Defendant No. 1. It held that the burden was upon the Plaintiff to prove that the remaining property does not mean the suit property however the Plaintiff has not led any evidence to show that the remaining property does not mean the suit property or the testator was having any other immovable property excluding property mentioned in the Will. It opined that it was possible for the Plaintiff to give extraneous evidence to prove this aspect which he has failed to do and dismissed the suit.

***SUBMISSIONS:***

11. Mr. Kachare, learned Counsel appearing for the Appellant would submit that it was only because of assurances given by the Defendant No. 1 that the Plaintiff did not contest the grant of probate. He would draw the attention of this Court to the provisions of Section 89 of the Indian Succession Act, 1925 and would submit that if the Will or bequest is not expressive of any definite intention, the same is void for uncertainty. Taking this Court through the Will, he submits that the Will speaks of the suit property, immovable property at Ankola, Karnataka and certain other properties and there is specific bequest in

respect of Ankola property and there is no specific bequest of the suit property. He submits that the suit property does not fall within the residuary clause governed by Section 103 of the Indian Succession Act as the Testator was perfectly capable to disposing of the suit property by specific bequest. He submits that as the bequest about the suit property is uncertain, the same is void under Section 89 of the Indian Succession Act and would be governed by law of intestacy. In support he relies upon the following Judgment:-

***Balasaheb Dattoba Pawar Decd. Thru LR vs. Lalasaheb Dattoba Pawar*** (passed by this Court in Civil Writ Petition No. 3788 of 2019 dated. 13<sup>th</sup> January, 2022).

***Gurswarup Joshi vs. Beena Sharma & Ors.***<sup>1</sup>

12. *Per contra*, Mr. Rupesh Sohoni, learned Counsel appearing for the Respondents-legal heirs of original Defendant No 1 submits that in the cross-examination, PW-1 has specifically admitted that Defendant Nos. 2 and 3 had never initiated the proceedings as everyone was aware that after the death of the father the Defendant No. 1 owner of the suit property. He would further pointed out the findings of the Trial Court that no evidence has been led by the Plaintiff to show that the testator was having other immovable property excluding the properties mentioned in the Will. He submits

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1 (2006) 5 Supreme Court Cases 119

that the suit premises is self acquired property of the deceased and he had full rights to bequeath the same. He submits that there is no objection to the title of the testator and the probate having been granted the Will cannot be challenged before the Trial Court. He would further submit that the Society has already transmitted all the share certificate in favour of the Defendant No. 1 and maintenance is being paid by the Defendant No. 1 as well as the property taxes. He would further submit that it is not the Plaintiff's case that the testator had more than two properties and admittedly Ankola, Karnataka property is ancestral property and therefore the bequest of the suit property would fall within the remaining estate which has been bequeathed to the Defendant No. 1. He would further submit that under the provisions of Section 142 of the Succession Act where testator bequeath to any person specified part of his property which is distinguished from the other part of the property the legacy is said to be specific. He submits that in the present case, the Ankola, Karnataka property has been specifically bequeathed and therefore the remaining estate would include the suit property which has been bequeathed to Defendant No. 1.

**13.** The following points would arise for determination.

**(i)** Whether the deceased Purshottam Borkar has died intestate *qua*

the suit property?

**(ii)** Whether under the Will dated 10<sup>th</sup> May, 1991, the suit property falls in residuary clause and has been bequeathed to the Defendant No 1?

**(iii)** Whether the Trial Court had the jurisdiction to adjudicate the issue of intestacy of the deceased *qua* the suit property once Probate has been obtained by the Defendant No 1?

**As to point No. (i) to (iii):**

**14.** All the issues can be considered together as the discussion would be common for answering the issues. There is no dispute that the Defendant No 1 had obtained Probate of the Will of deceased and the application for revocation came to be dismissed as the Court found that the dispute was not about the probate but rights, title and interest of the parties in the immovable properties in question. It is well settled proposition that the testamentary proceedings are only concerned with the aspect of genuineness and authenticity of the Will. The testamentary Court does not have the jurisdiction to determine the issue of intestacy succession which only Civil Court can do. All that the testamentary Court does is establish the factum of execution of Will. The suit which was filed by the Plaintiff sought administration of the estate on the ground that the deceased had died intestate *qua* the suit property and the Plaintiff being one of the heir was entitled to 1/4th share of the suit property. The plaint did not question the

authenticity or genuineness of the Will, which was already decided by the testamentary Court. All that was sought was administration of estate of deceased *qua* the suit property and determination of right of Plaintiff in intestacy succession. The Civil Court therefore had the jurisdiction to adjudicate the issue raised in the suit.

**15.** The Plaintiff is seeking share in the suit property by way of intestacy succession as according to him, there was no testamentary disposition of the suit property. The Will is a short document and is reproduced as under:

***"LAST WILL AND TESTAMENT"***

*1) I, PURUSHOTTAM SHANTAPPA BORKAR aged about 79 years of Bomba, Hindu Inhabitant, residing at 31/A, Kurla Kamgar Nagar, S. G. Barve Road, Kurla (East), Bombay-400 024, do hereby cancel and revoke all the previous Wills and other testamentary writings heretofore made by me and do hereby declare this to be my last Will and testament.*

*2) I hereby appoint my elder daughter, Mrs. KUMUDINI R. AMRUTE, to be the sole executrix of this Will.*

*3) I am a member of the Kurla Kamgar Co-operative housing Society Ltd., Kurla ( East), Bombay- 400 024, and as such I am the holder of certain shares of the said society and also the owner of the Tenement No. 31/A in the property of the said Society at Kurla Kamgar Nagar, S.G. Barve Road, Kurla (East), Bombay – 400 024. I also have half share in certain immovable property at Ankola, North Kanara District. I also have certain other property.*

*4) I am residing in the said Tenement No. 31/A. My elder daughter Mrs. Kumudini R. Amrute and her family are residing with me in the said Tenement as*

members of my family. My younger son, Atul P. Borkar, and his family are also residing with me in the said Tenement as members of my family. For the sake of convenience, my name is included in the Ration Card of my younger son, Atul. Till recently, the names of my elder daughter, Mrs. Kumudini R. Amrute, and of her family members, were also shown in the Ration Card of my younger son, Atul. Recently, my said elder daughter has secured a separate Ration Card for herself and her family members at the address of the said Tenement.

5) I have two sons, Ashutosh and Atul, and two daughters, Mrs. Kumudini R. Amrute, and Mrs. Latika S. Redkar. I give my property at Aukola to all my children in equal shares. My elder son, Ashutosh, has separated from my family long back and is doing fine. Hence, I exclude him from my remaining estate. I have already given to my younger daughter, Mrs. Latika S. Redkar, whatever I wished to give her, and hence, I hereby exclude her from my remaining estate. Though my younger son, Atul, is residing with me, he does not look after me and he has been ill-treating me, as also my elder daughter. I have no desire to give him any portion of my estate and hence, I hereby exclude him from my remaining estate.

6) I hereby bequeath all my remaining estate, movable as also immovable, to my elder daughter, Mrs. Kumudini R. Amrute, absolutely and exclusively. No other person shall have any share whatsoever in my said remaining estate. My said elder daughter has been looking after me and taking good care of me, and I am sure she will continue to do so for the rest of my wife.

IN WITNESS WHEREOF I have executed this last will and testament at Bombay this 10<sup>th</sup> day of May 1991.

sd/- P. S. Borkar.

(PURUSHOTTAM SHANTAPPA BORKAR)

*Signed by the abovenamed Testator as his last Will and testament in our presence who at his request and in his presence and in the presence of each other signed hereto as witnesses.*

*(1) I have examined the abovenamed Testator and found him to be in good mental and physical health and of sound mind and understanding.*

*Sd/- C. S. Vartak  
Dr. Chandrakant S. Vartak, 11, Gulab  
Baug, Dr. A. Soares Road, Chembur,  
Bombay – 400 071.*

*sd/- K. V. Tembe.  
Kishor V. Tembe, Advocate High Court,  
417, D. K. Sandu Marg, Chembur,  
Mumbai – 400 071.”*

**16.** The sum and substance of Plaintiff's case is that the intention of Testator was to exclude the Plaintiff and other Defendants except Defendant No 1 from remaining estate which did not include the Ankola property and suit property and as there is no residuary clause in the Will *qua* the suit property and no specific bequest, the suit property will devolve by intestacy.

**17.** First let us ascertain the estate of the deceased. The estate of the Testator is stated in Clause 3 which mentions certain immovable property at Ankola, North Kanara District, the suit property and “certain other property.” Unlike the Ankola property and suit property, there is no specific description of the other property mentioned in

Clause 3. There are no details about its location or even whether it is movable or immovable. Section 75 of Indian Succession Act, 1925, permits an inquiry to be conducted for the purpose of determining as to what property is denoted by any words used in a Will. The Will does not give any indication of the other property referred to in Clause 1. No evidence has been produced by the Plaintiff to prove that the Testator owned any other property except the Ankola property and suit property. Thus there is no material on the basis of which it can be determined which property is referred to in Clause 1 of Will. The Testator has made a general reference to certain other property and in the absence of any evidence to determine which property was referred to by the Testator, it must be held that apart from Ankola property and suit property, there was no other property owned by the Testator.

**18.** Next issue to be considered is the bequests in the Will. As far as Ankola property is concerned, in Clause 5, the Ankola property is bequeathed to all the children in equal shares. The Will then states that the Testator excludes his other children excluding the Defendant No 1 from his remaining estate. The Will uses the words “remaining estate” after making specific bequest of Ankola property.

**19.** It is settled that in determining the real intention of the Testator, the entire document has to be construed as a whole. The wordings in the Will have to be given meaning in accordance with the

desire of the Testator. In interpreting as to what the Testator meant by the words “remaining estate”, the entire Will has to be read as a whole. When so read, it is evident that the Will first sets out the testator’s estate, which as discussed above can mean the Ankola property and suit property. After specific bequest of Ankola property, there is only the suit property remaining. The Testator by using the words “remaining estate” meant the suit property. As the Testator was well aware of the suit property and specifically described the suit property in Clause 3, there is no reason why the Testator would leave the suit property to devolve by intestacy. It is trite that Law favours construction of the Will that will prevent partial intestacy. In present case, there is no reason to treat the case as one of partial intestacy considering that the Testator makes express mention of the suit property as one of his assets.

**20.** The intention of the Testator was to bequeath his estate except Ankola property to Defendant No 1. After the specific bequest of Ankola property, the Will expresses the desire of the Testator to exclude his elder son Ashutosh, younger daughter Latika and younger son Atul-present Plaintiff from the remaining estate. The Testator has expressly stated that the Plaintiff has been ill-treating him and the Defendant No 1 and he has no desire to give him any portion of the estate. After making his desire clear in Clause 5, he bequeaths the

remaining estate movable as also immovable to the Defendant No 1 absolutely and exclusively. It is clear from Clause 6 that the bequest contained therein is residuary bequest comprising of the remaining estate belonging to the testator after specific bequest of Ankola property, which is the suit property, with the Defendant No 1 being the residuary legatee.

**21.** According to Plaintiff, there are three properties – the Ankola property, the suit property and certain other property and the bequest *qua* the suit property is void for uncertainty as the Will does not make specific bequest. As discussed above, there is no evidence adduced to show that apart from Ankola property and suit property there is any other property to constitute the estate of the deceased. Under Section 82 of Indian Succession Act, the meaning of any clause is to be collected from entire instrument and all its parts are to be construed with reference to each other. Now the Will in Clause 1 mentions the Ankola property, the suit property and certain other property. In Clause 2, there is mention of the persons residing in the suit property. In Clause 5, there is specific bequest of Ankola property and specific exclusion of all children except Defendant No 1 from remaining estate and in Clause 6 all remaining estate movable and immovable is bequeathed exclusively to Defendant No 1. The various clauses of the Will when read together do not contain any uncertainty

or ambiguity as regards the bequests.

**22.** By the residuary Clause 6 of the Will, the Testator has bequeathed all his remaining estate movable as also immovable to Defendant No 1 to the clear exclusion of all others. By making specific bequest of Ankola property, all remaining estate which will include the suit property will fall in the residuary clause and the Defendant No 1 being the residuary legatee will be entitled to the same.

**23.** Though Mr. Kachare, would emphasize that the bequest is void for uncertainty, the submission is premised on the ground that in absence of specific bequest of suit property, the use of words “remaining estate” would make the bequest uncertain and therefore void by placing reliance on Section 89 of the Indian Succession Act. If the provisions of Section 89 are perused, it provides for a Will or bequest not expressive of any definite intention to be void for uncertainty. In the present case as the Testator has bequeathed his remaining estate, which includes the suit property, in favour of Defendant No 1, there is no uncertainty. That apart, even if the bequest in respect of the suit property is considered void, in view of Section 103 of Indian Succession Act, the suit property would fall in the residuary clause as void legacy and Defendant No 1 will be entitled to the bequest of suit property unless some intention of testator is shown which is inconsistent with its falling in residuary clause. The illustration

under Section 103 of Indian Succession Act makes it clear that lapsed legacy or void legacy falls in the residue.

**24.** It will also be pertinent to note Section 102 of the Indian Succession Act which says that the residuary legatee will be constituted by any words that shows an intention on the part of the testator that the person designated shall take the surplus or residue of his property. There is clear intention of the Testator to bequeath all properties to the Defendant No 1 except Ankola property which is equally distributed amongst all the children.

**25.** The Trial Court had rightly construed the stipulations in the Will and has held that the Will makes specific reference to two immovable properties of the testator and there is no evidence which has been brought on record to show that the testator has any other immovable properties which are not mentioned in the Will. Upon considering the evidence on record the Trial Court has interpreted the bequest of the remaining estate to include the suit property. The Trial Court has further noted that it was possible for the Plaintiff to give extraneous evidence to prove the ambiguity which the Plaintiff has failed to prove.

**26.** The Trial Court has rightly interpreted the Will as what was required to be considered is the intention of the testator to be gathered upon the reading of the entire Will. The stipulations in the

Will makes it evident that except the property at Ankola, Karnataka, the Testator did not desire to give any part of his estate to his children except Defendant No 1.

**27.** In light of the discussion above, it is held that the deceased Purshottam Borkar did not die intestate *qua* the suit property and under the Will, the suit property fell in the residuary clause and has been bequeathed to the Defendant No 1. As the suit sought share in the suit property in intestacy succession, the Civil Court had the jurisdiction to entertain and try the suit.

**28.** Resultantly, the First Appeal fails and stands dismissed.

**29.** In view of the dismissal of First Appeal, nothing survives for consideration in the pending Civil/Interim Applications and the same stand disposed of.

**[Sharmila U. Deshmukh, J.]**

**30.** At this stage, a request is made for continuation of interim relief which was operating in favour of the Appellant for a period of eight weeks from today. The interim relief is operating since long and is therefore extended for a further period of eight weeks from today.

**[Sharmila U. Deshmukh, J.]**