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C.R.P.(PD)No.4388 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.01.2025

CORAM

THE HON'BLE Mr. JUSTICE V.LAKSHMINARAYANAN

C.R.P.(PD)No.4388 of 2024

Anila Shashikant Bhai Kothari

... Petitioner

Vs.

Nipun Navnit Mehta

... Respondent

Prayer :- Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order passed in the I.A.No.5 of 2023 in O.S.No.270 of 2023 dated 25.06.2024 on the file of the learned I Additional District Judge at Salem, by allowing the above Civil Revision Petition.

For Petitioner : Mr.V.Manohar
For Respondent : Mr.G.Rajagopal, Senior Counsel
For Mr.B.Ravi Raja
& Ms.S.Vijayadharani

ORDER

This Civil Revision Petition is at the instance of the plaintiff. It challenges the order passed by the learned I Additional District Judge, Salem in I.A.No.5 of 2023 in O.S.No.270 of 2023.



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2. O.S.No.270 of 2023 is a suit for partition and separate possession.

According to the plaintiff, the suit schedule mentioned properties were the self-acquired properties of one Sreekant Surajmal Mehta. He passed away on 22.10.2021. Sreekant Surajmal Mehta did not have any class one legal heirs. He had six siblings in all - two brothers and four sisters. Of the six, four are no more and only two are alive. The plaintiff claims that she is the sister of the deceased Sreekant Surajmal Mehta. She pleaded she came to know that the third defendant, one Nipun Navnit Mehta, had projected a “WILL” said to have been executed by the said Sreekant Surajmal Mehta and had initiated proceedings before the High Court of Judicature at Bombay. Pleading that the “Will” is an act of fabrication and not a genuine one, she contended that intestate succession would operate and therefore she is entitled to succeed to the estate of the deceased.

3. On being served with summons, the third defendant filed his written statement. He pleaded that Sreekant Surajmal Mehta, the deceased had executed a Will on 19.06.2011, which had been duly attested by two witnesses. He conceded that the properties are self-acquired properties of



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the deceased Sreekant Surajmal Mehta and added that as they were his self-acquired properties, it is well within the right of the deceased to bequeath the properties as per his wish. He further pointed out that he had presented Testamentary Petition No.2599 of 2022 and Testamentary Suit No. 24 of 2023 before the Bombay High Court. He pleaded that as the “WILL” had come into operation on the death of Sreekant Surajmal Mehta, the suit for partition is not maintainable. Hence, he sought for dismissal of the same. By way of abundant caution, he also reserved his right to file an additional written statement after disposal of the proceedings before the Bombay High Court.

4. Simultaneously, he filed an application in I.A.No.5 of 2023. This was an application filed under Section 10 r/w. Section 151 of the Code of Civil Procedure pleading that the partition suit be stayed till the disposal of Testamentary Suit No.24 of 2023 and Testamentary Petition No.2599 of 2022 pending before the Bombay High Court. Notice was ordered in the application and the respondent filed a detailed counter.



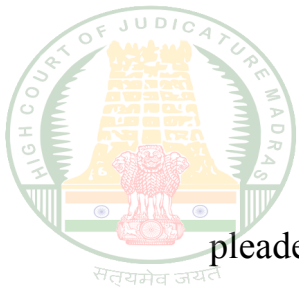
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5. The respondent pleaded that the proceeding before the Bombay

High Court is not a “suit” within the meaning of Section 10 of the Code of Civil Procedure. She added that the issue of jurisdiction had been raised in the Bombay High Court in the testamentary suit and testamentary petition. Therefore the partition suit need not be stayed. She further pleaded that the probate proceeding ought to have been initiated before the learned District Judge, Salem and having been initiated before the Bombay High Court, there is no necessity for the suit in Salem to be stayed pending disposal of the testamentary suit and testamentary petition in Bombay High Court.

6. The learned District Judge took up the application for disposal. He found that the issue whether Sreekant Surajmal Mehta had passed away intestate or had left behind a Will can be decided only after the Bombay High Court decides on the validity of the Will projected before it. Consequently, he allowed the application. Hence this revision.

7. When the matter came up for admission, I heard Mr.V.Manohar and Mr.B.Raviraja on behalf of the respective parties. Mr.V.Manohar



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pleaded that the parties being close relatives, there is a possibility of settlement. Therefore, I adjourned the matter repeatedly to enable the parties to settle the same. Unfortunately, the matter could not be settled. Hence I took up the revision for final disposal. Today, I heard Mr.V.Manohar for the civil revision petitioner and Mr.G.Rajagopal, learned Senior Counsel for Mr.B.Raviraja and Ms.S.Vijayadharani for the respondent.

8. Mr.V.Manohar, referring me to Section 10 of the Code of the Civil Procedure argues that the suit can be stayed only if the previously instituted proceeding is a “suit”. He pleads that the probate proceeding before the Bombay High Court not being a “suit”, Section 10 of the Code of the Civil Procedure itself is inapplicable. Secondly, he points out that as the issue of jurisdiction has been raised before the Bombay High Court and as the Division Bench of that Court directed the learned Single Judge, dealing with the testamentary suit and petition, to deal with the issue of jurisdiction as preliminary issue, even if one were to assume that the testamentary proceedings are “suits”, no suit is pending as on today. Thirdly, he urges that the stay that has been granted by the learned Trial Judge is till the



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disposal of Testamentary Suit No.24 of 2023 and Testamentary Petition No.2559 of 2022. He states that if the Bombay High Court were to return the plaint, then, the order of stay should not be held to be in operation. Finally, he urged that Section 10 of the Code of the Civil Procedure applies only for “**trial of suit**” and does not bar the learned District Judge to deal with the interlocutory applications filed in I.A.Nos.3 and 4 of 2023. He further pointed out that as the stay is only for trial, there is no bar for the parties to complete the pleadings. On these grounds, he urged that the order of the learned Trial Judge requires interference. He relied upon the following judgments:-

- (i) Dr.H.T.Veera Reddi Vs. Kistamma, (1973) 86 LW 776,***
- (ii) Vee Cee Yes Granites Chennai Vs. Central Bank of India - 2000 (II) CTC 664,***
- (iii) National Institute of Mental Health & Neuro Sciences Vs. C.Parameshwara - (2005) 2 Supreme Court Cases 256,***
- (iv) Aspi Jal & anr Vs. Khushroo Rustom Dadyburjor - (2013) 4 SCC 333,***
- (v) Mallika Dharmaraj and anr Vs. The Executive Officer of Arulmigu Visweswara and Arulmigu Veeraraghava Perumal Temple & ors - 2014-5-L.W.324 and***
- (vi) Lalit Upadhyay & ors Vs. The Civil Judge, Nathdwara & ors - 2019 (4) RLW 3180.***



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9. Per contra, Mr.G.Rajagopal states that the proceeding in

O.S.No.270 of 2023 had been initiated after the summon had been served in the testamentary suit and testamentary petition filed before the Bombay High Court. He invites my attention to paragraph No.8 of the plaint, wherein the plaintiff has conceded that the testamentary claim has been filed before the Bombay High Court, and points out that the plea of the plaintiff is that the “WILL” being an act of fabrication, she is entitled for partition. In other words, he points out that the plaintiff disputes the “WILL” presuming that Sreekant Surajmal Mehta had passed away intestate. Since there is a dispute over the “WILL”, it has to be appropriately addressed by the Court in which the probate proceedings are pending viz., High Court of Judicature at Bombay. He further points out that on the presentation of the plaint and on it being taken on file, it is deemed to be pending and therefore, the revision does not deserve any consideration. On the plea of written statement, he states that the third defendant has already filed his written statement and therefore, there cannot be any direction to file a written statement in the partition suit.



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10. I have carefully considered the submissions of both sides.

11. There is no dispute in the relationship between the parties. There is also no dispute that the properties, which are the subject matter of the suit, are self-acquisitions of the deceased Sreekant Surajmal Mehta. The plaintiff/civil revision petitioner pleads that the said Sreekant Surajmal Mehta passed away intestate. Whereas the third defendant pleads that the said Sreekant Surajmal Mehta had executed a testament dated 19.06.2011. Being a person to whom Section 57 of the Indian Succession Act applies, the third defendant has moved the High Court of Judicature at Bombay for obtaining a probate of the Will.

12. In case, the probate is granted, then, it is a certification by the Court, that the said Sreekant Surajmal Mehta did not die intestate, but had left behind a “WILL”. The issue before the Bombay High Court is whether the “WILL” is true and genuine. In case, the Bombay High Court were to come to a conclusion that the “WILL” is true and genuine, then the basis of the proceeding before the suit in Salem, that the said Sreekant Surajmal



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Mehta died intestate, would vanish.

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13. In case, the Bombay High Court comes to a conclusion that the “WILL” projected by the third defendant is an act of fabrication and dismisses the testamentary petition on that ground or on the ground that it does not have territorial jurisdiction to deal with the proceedings and further steps are not taken thereafter, then the suit in Salem deserves to be continued to its logical conclusion. The issue before both the Courts is whether Sreekant Surajmal Mehta died intestate or had left behind the Will.

14. As rightly contended by Mr.G.Rajagopal, the plaint before the Salem Court concedes to the fact that the third defendant has projected a “WILL” and has also initiated proceedings for grant of probate before the Bombay High Court. This implies the previously instituted proceeding is pending before the said Court.

15. This now takes me to the argument of Mr.V.Manohar that a testamentary original suit cannot be considered as “Suit” within the meaning



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of Section 10 of the Code of Civil Procedure. Here, I only have to refer to Section 295 of the Indian Succession Act. It states that where there is a contention as regards testament, then the proceeding shall, as nearly as may be, take the form of a regular suit, according to the provisions of the Code of Civil Procedure. It also declares that the propounder of the “WILL” shall be declared as plaintiff and the person who opposes the grant shall be the defendant. Section 295 of the Indian Succession Act makes it abundantly clear that contentious testamentary proceeding is deemed to be “a suit”. In the present case, summons have been served on the civil revision petition in the testamentary suit and testamentary petition pending before the Bombay High Court. Further, the civil revision petitioner, in those proceedings, has taken out an application disputing the territorial jurisdiction of the Bombay High Court. That being the case, it is only apposite to infer that the testamentary proceedings before the Bombay High Court has become contentious and therefore, squarely falling within the ambit of Section 295 of the Indian Succession Act. Hence I am not inclined to accept the arguments of Mr.V.Manohar.



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16. The next submission of Mr.V.Manohar is that as he has raised the issue of territorial jurisdiction before the Bombay High Court, the suit cannot be held to be “pending” for the purpose of Section 10 of Code of Civil Procedure. A proceeding is commenced on the date it is instituted. There is a difference between “institution” and “presentation”. “Presentation” implies that the papers have been presented to the Registry of a Court and are yet to receive scrutiny. “Institution” implies that the papers have been presented, scrutinised and have been taken on file in terms of the Original Side Rules or as per Order VII Rule 9 of the Code of Civil Procedure.

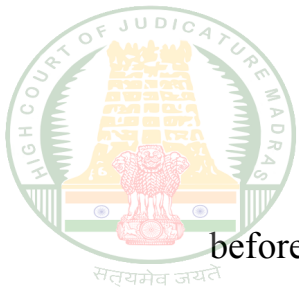
17. In the facts of this case, there is no dispute that Testamentary Petition No.2599 of 2022 and Testamentary Suit No.24 of 2023 were not only presented before the Bombay High Court but they have also been instituted. In other words, the papers have been presented, scrutinised and taken on file by the Court. The suit is deemed to be pending from the time it has been instituted till it is finally disposed of by the said Court. For the mere fact that the issue of territorial jurisdiction has been raised by the



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defendant in the testamentary proceedings, it does not mean that the suit is not pending. The defendant can raise as many number of pleas as is permissible under law, but it is finally for the Court to decide whether it has jurisdiction or not. In fact, the Calcutta High Court in ***A.E.Forbes Vs. V.G.Peterson***, AIR 1941 Cal 417 and the Oudh Chief Court in ***re.Mrs.Violet Peterson***, AIR 1940 Oudh 113, have held that the date on which an application for probate is made must be taken to be the date on which the testamentary proceedings are instituted. Therefore, the mere filing of the application challenging the territorial jurisdiction of the Bombay High Court would not mean that the testamentary proceedings are not instituted.

18. If I were to concede to the argument of Mr.V.Manohar, then for the very fact that the defendant had raised a plea that the Court has no jurisdiction, I would have to hold that the suit is not pending. I am not willing to lay down such a drastic and startling proposition of law. As long as the Bombay High Court has not passed an order that it does not have jurisdiction, I have to take it as a matter of fact that the suit is pending



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before the said Court.

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19. With respect to the alternative plea that was placed by Mr.V.Manohar that the stay should be granted only till the disposal of the application which was taken out to decide the territorial jurisdiction of the Bombay High Court is concerned, I have the following to say.

20. If the Bombay High Court were to come to the conclusion that it does not have territorial jurisdiction, obviously it is going to return the plaint. In such an event, the suit can be said to be pending from the date on which it was instituted till the date on which an order is passed by the said Court returning the plaint. It does not matter whether the actual return of the papers is taken by the parties, but suffice it to state till such an order is passed, the suit is deemed to be pending. In the event that the Bombay High Court takes a view that the plaint has to be returned for want of territorial jurisdiction, then, automatically the stay granted by the learned Trial Judge under the impugned order will fall to the ground.



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21. Now turning to the authorities cited by Mr.V.Manohar, the first of the judgments in ***Dr.H.T.Veera Reddi Vs. Kistamma***, is one relating to whether the Court dealing with Section 9(1) of the Hindu Marriage Act has the power to grant an order of stay or injunction restraining the defendant from proceeding further with the other suit instituted in a different Court under the jurisdiction of a different High Court. The learned Judge, following the Supreme Court, held that such power is available. I am not in a position to apply the said judgment to the facts of this case since that case dealt with the situation of one Court granting an order as against the party before it not to proceed with a proceeding initiated by that party before another Court. The case that I am presented with deals with the situation where the Court has decided that it will stay the suit pending before it. It has not granted stay of the suit pending in a Court either subordinate to it or pending before any other Court. Anti-suit injunction cannot be compared with stay of a suit under Section 10 of the Code of Civil Procedure.

22. In the second judgment in ***Vee Cee Yes Granites Chennai Vs.***



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Central Bank of India, it was a situation where the suit was presented for recovery of money before the City Civil Court for alleged misdemeanour committed by the defendants in handing over the bills of entry. The plaintiff in that suit had taken loan from the Central Bank of India and had defaulted in payment of the same. Therefore, the Central Bank of India, subsequent to the presentation of the first suit, initiated proceedings before the Debt Recovery Tribunal at Chennai for recovery of amounts due to it. Hence, the plaintiff in the first suit filed application under Section 10 of the Code of Civil Procedure, seeking stay of proceedings before the Debt Recovery Tribunal, pending disposal of his suit.

23. This case too as pointed out above was the situation where the plaintiff wanted an order of stay of proceeding pending before another Court. In order for Section 10 of the Code of Civil Procedure to apply, it should be an order passed by the Court to which the application is filed to stay the proceeding pending before that Court and not before a different Court. In addition, factually it is seen that the learned Judge held that Section 10 of the Code of Civil Procedure applies to “Courts” and not between the Courts and Tribunal. Further, he found that the cause of action



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for the parties to file a suit before the High Court was not the same as the proceedings initiated before the Debt Recovery Tribunal. It was on those reasons, he came to the conclusion that the application under Section 10 of the Code of Civil Procedure deserves dismissal. None of the special characteristics that are found in that case are available in the present case. Hence, that judgment too does not apply.

24. The third judgment that Mr.V.Manohar relied upon is the classic case of *National Institute of Mental Health & Neuro Sciences Vs. C.Parameshwara*. The facts reveal that the application under Section 10 of the Code of Civil Procedure was filed seeking stay of proceedings before a Civil Court, pending disposal of a money suit initiated by the appellant, before the Supreme Court. The facts are relevant for the purpose of showing how it is inapplicable to this case.

25. The respondent before the Supreme Court was an employee with National Institute of Mental Health & Neuro Sciences (NIMHANS). He allegedly malversed funds belonging to NIMHANS. Hence, NIMHANS presented a suit for recovery of that sum before the City Civil Court at Bangalore. Simultaneously, it also initiated disciplinary proceedings against



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the respondent. Consequent to the disciplinary proceedings, it dismissed the employee from service. He challenged the dismissal by way of proceeding under the Industrial Disputes Act. He succeeded in the said proceedings. NIMHANS challenged the order of the Labour Court, directing it to reinstate the respondent into service, by way of writ petition before the High Court of Karnataka at Bangalore in W.P.No.24348 of 2002. The respondent filed an application under Section 10 of the Code of Civil Procedure in the suit filed for recovery of money seeking stay of the proceedings pending disposal of the writ petition challenging the order of reinstatement.

26. The trial Court as well as the High Court took a view that the suit has to be stayed, pending the writ petition. This order was challenged before the Supreme Court.

27. The Hon'ble Mr.Justice S.H.Kapadia, as his Lordship then was, laid down the test for application of Section 10 of the Code of Civil Procedure. He held as follows :-

“8..... The object of Section 10 is to prevent Courts of



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concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical."

The test is that the finding given by the Court in a suit previously instituted should operate as *res judicata* on the subsequent proceeding. Coming to the conclusion that the order of reinstatement will not operate as *res judicata* for recovery of money, the Supreme Court allowed the appeal and held that the Section 10 of the Code of Civil Procedure is inapplicable.

28. If I were to apply the judgment to the facts of the present case,



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instead of going in favour of Mr.V.Manohar, it goes against him. This is because, as pointed out above, the issue before the Bombay High Court is whether the deceased Sreekant Surajmal Mehta died intestate or had he left behind a “WILL”. If the Bombay High Court were to answer the issue in favour of the third defendant, obviously, it will operate as *res judicata* on the learned District Judge, Salem.

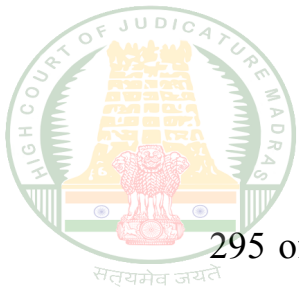
29. I now turn to the next judgment in ***Aspi Jal & anr Vs. Khushroo Rustom Dadyburjor, (2013) 4 SCC 333***. That was a case where a landlord instituted three separate proceedings for eviction on the same ground of ceasing to occupy the premises. It was argued by the tenant that as the ground for eviction in all the proceedings are same, the suits also have to be stayed. The Supreme Court pointed out that the cause of action for each of the suits are different and for the fact that the first two suits would fail, does not mean that the third suit would automatically fail. The cause of action being different, the Court refused to apply Section 10 of the Code of Civil Procedure. In our case, the cause of action for the partition suit as well as the probate proceedings is the death of Sreekant Surajmal Mehta. If he had



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died intestate, then, it makes sense to proceed with the partition suit. One of the defendants has taken a plea that he did not die so. Therefore, the cause of action being the death of Sreekant Surajmal Mehta and that being similar in both the cases, this judgment too doesn't apply to the facts of the case.

30. Now, I have to refer the judgment in ***Mallika Dharmaraj and anr Vs. The Executive Officer of Arulmigu Visweswara and Arulmigu Veeraraghava Perumal Temple & ors, 2014-5-L.W.324***. That was the case where a suit for declaration and injunction was presented. Simultaneously, proceedings had been initiated under the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963. The proceedings were pending before this Court in S.T.A.No.39 of 1976. The defendants pleaded that since the STA proceedings were pending, the suit must be stayed till the disposal of the former proceedings. The trial Court also granted relief of stay. This Court came to a conclusion that settlement proceedings before a Settlement Tahsildar under the Ryotwari Settlement Act are not “suits” and hence, Section 10 of the Code of Civil Procedure is inapplicable. In the previous portion of the judgment, I have already discussed that the testamentary original suit, which became contentious in terms of the Section



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295 of the Indian Succession Act, is “a suit” for the purpose of Section 10 of the Code of Civil Procedure. Therefore, I am not in a position to apply the said judgment.

31. Finally, I turn to the judgment in ***Lalit Upadhyay & ors Vs. The Civil Judge, Nathdwara & ors, 2019 (4) RLW 3180***. It was a case where the learned Judge applied the judgment in the celebrated ***National Institute of Mental Health & Neuro Sciences Vs. C.Parameshwara*** case. I have discussed the said case in detail and I have concluded that the issue of the genuineness of “WILL” will operate as *res judicata* on the Civil Court. In fact, the probate proceeding is *one-in-rem* and therefore, this judgment too does not help Mr.V.Manohar.

32. Therefore, I do not find any error in the order passed by the learned I Additional District Judge, Salem in staying the suit pending before him, till the disposal of the probate proceedings initiated before Bombay High Court. As regards, the plea that the defendant must be called upon to file his written statement. The papers reveal that the third defendant has filed his written statement. Hence, no direction to complete the pleadings is necessary.



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33. At this stage, I should refer to Rule 2(6) of the Civil Rules of Practice and Circular Orders issued by this Court in the exercise of the power under Section 122 of the Code of Civil Procedure. According to Rule 2(6), the “first hearing of the suit” has been defined as “includes the hearing of a suit for settlement of issues and any adjournment thereof”. This implies the suit will be “called on for hearing” for the purpose of “trial” only after the pleadings are complete. In terms of Section 10 of the Code of Civil Procedure, the stay granted by the Court is only for trial pending before it. Therefore, an order under Section 10 does not prevent a Court from calling upon the parties to file their respective written statements. Insofar as the third defendant is concerned, the question of calling upon him to file his written statement does not arise because he has already filed written statement in September, 2023. The Court may call upon the defendants who have not filed their written statement, to do so.

34. Before I bring down the curtain of this judgment, I have to point out that in terms of Section 10 of the Code of Civil Procedure, the Court is



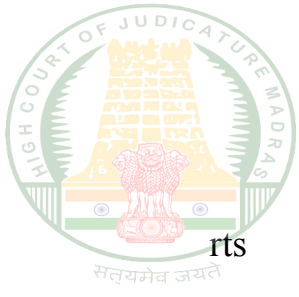
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not barred from dealing with any interlocutory applications. This is because the very reading of the Section 10 of the Code of Civil Procedure makes it clear that it commences with the following words “No Court shall proceed with the **trial** of any suit”. Interlocutory applications, if any pending, can be dealt with by the Court, even if the suit is stayed under Section 10 of the Code of Civil Procedure. Therefore, there is no bar on the learned I Additional District Judge, Salem to deal with the interlocutory applications in I.A.Nos.3 of 2023 & 4 of 2023, filed for interim-injunction and to vacate the same or any other interlocutory application that may be presented during the pendency of the stay.

35. In the light of the above discussion, apart from the observations as regards to the filing of written statements and interlocutory applications, the Civil Revision Petition is dismissed. No costs.

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Index : Yes/No
Neutral Citation : Yes/No
Speaking order/Non-speaking order



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1. The I Additional District Judge,
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V.LAKSHMINARAYANAN, J.

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