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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 6249 OF 2015

Nandkumar s/o Shankarrao Rasne,
Age: 72 years, Occu: Business,
R/o. 2542, Shahaji Road, Ahmednagar,
Dist. Ahmednagar

..PETITIONER
(Orig. Plaintiff)

VERSUS

1. Dharmavir s/o Govind Madan,
Deceased through L.Rs.
- 1A) Vidyawati Dharmavir Madan,
Age: 63 years, Occu: Household,
R/o Benglow No. 5, Irani Road,
Bhingar Camp, Ahmednagar
- 1B) Kewalkrushna Dharmavir Madan,
Deceased through L.Rs.
Smt. Shanta Kewalkrushna Madan,
Age: 47 years, Occu: Household,
R/o Benglow No. 5, Hirani Road,
Bhingar Camp, Ahmednagar
Dist. Ahmednagar
- 1C) Girish s/o Dharmavir Madan,
Age: 53 years, Occu: Business,
R/o Benglow No. 5, Irani Road,
Bhingar Camp, Ahmednagar
2. Dattatraya s/o Shankar Rasane,
Age: 90 years, Occu: Business,
R/o. Shahaji Road, Ahmednagar,
Dist. Ahmednagar
3. Ramakant s/o Shankar Rasane,
Deceased through L.Rs.
- 3A) Kusumbai Ramakant Rasane,
Age: 83 years, Occu: Household,
R/o. 2544, Shahaji Road, Karachiwala Bol,
Ahmednagar, Dist. Ahmednagar

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- 3B) Arvind s/o Ramakant Rasane,
Age: 67 years, Occu: Service,
R/o. Adv. Bhelande's Benglow,
Ramdas Peth, Akola, Dist. Akola
- 3C) Dr. Anil s/o Ramakant Rasane,
Age: 64 years, Occu: Business,
R/o. Vadzera, Tq. Parner,
Dist. Ahmednagar
- 3D) Sunil s/o Ramakant Rasane,
Age: 70 years, Occu: Business,
R/o. 2544, Shahaji Road, Karachiwala Bol,
Ahmednagar, Dist. Ahmednagar
- 3E) Manish s/o Ramakant Rasane,
Age: 41 years, Occu: Business,
R/o. 2544, Shahaji Road, Karachiwala Bol,
Ahmednagar, Dist. Ahmednagar
- 4. Suresh s/o Shankar Rasane,
Age: 77 years, Occu: Business,
R/o. 2542, Shahaji Road, Ahmednagar,
Dist. Ahmednagar
- 5. Sharad s/o Shankar Rasane,
Age: 78 years, Occu: Business,
R/o. 2542, Shahaji Road, Ahmednagar,
Dist. Ahmednagar
- 6. Satish s/o Shankar Rasane,
Age: 62 years, Occu: Service,
R/o. Washi, New Mumbai
- 7. Vimal Anandrao Khode,
Deceased through L.Rs.
- 7A) Pankat s/o Anandrao Khode,
Age: 35 years, Occu: Service,
R/o. Tumbalkar Bungalow,
Nandanwan Law Out, Nagpur
- 8. Kamal Kamalakar Tiwarane,
Age: 77 years, Occu: Household,
R/o. Pragati Compound,
Badnera Road, Amrawati
- 9. Shindhu Narayan Kolpkar,
Age: 70 years, Occu: Household,
R/o Sangamner, Dist. Ahmednagar

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10. Kunda Padmakar Murudkar,
Age: 68 years, Occu: Household,
R/o. Washi, New Mumbai,
D-795, Budhwar Peth, Pune
 11. Hirabai Shankarrao Rasane,
Age: 77 years, Occu: Household,
R/o. Washi, New Mumbai
- ..RESPONDENTS

Mr Balaji Shinde, Advocate holding for Mr V. P. Latange, Advocate for petitioner;
Mr V. D. Hon, Senior Advocate, instructed by Mr A. V. Hon, Advocate for respondent no 1C

CORAM : N.W. SAMBRE, J.

DATE : 17th November, 2015

ORAL ORDER :

Impugned in the present petition is an order passed by the learned 9th Joint Civil Judge Junior Division, Ahmednagar, on 27th January, 2015, below Exh.117, in Regular Darkhast No.175 of 2003, rejecting the application preferred by the present petitioner – decree holder, for issuance of warrant of possession of the property mentioned therein, for which he holds a valid decree.

2. The present proceedings has somewhat chequered history.
3. The petitioner initially filed Regular Civil Suit No.632 of 1983, which came to be decreed on 15th April, 1999, which decree was confirmed in Regular Civil Appeal No.229 of 1999 on 25th February, 2003, as a

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consequence whereof, the petitioner was entitled to get possession of the property from the respondents, in the capacity of landlord. At the behest of the present respondents-tenants, the matter was taken up before this Court in Writ Petition No.2263 of 2003, which came to be decided on 3rd February, 2004, with following observations :-

“50. Having considered the law declared by the Apex Court in the cases of Abdul Alim and Imambi, relied on by Shri Dhorde, learned Advocate for the petitioners and one relied on by Shri Shah, learned Sr. Advocate for respondent in T. Lakshmipathi (supra), I will prefer to follow the judgment of T. Lakshmipathi, which is the latest one. Applying the law in T.Lakshmipathi's case and considering the finding recorded by both the Courts below, I hold that the suit for eviction of the defendant can be gone into even though the defendant has purchased same share in the joint family property of the plaintiff and defendant nos. 2 to 12.”

“51. Having considered the main contention, I will now deal with the alternative submission made by Shri Dhorde. Shri Dhorde, the learned Advocate for the defendant contended that the possession of the defendant be protected during pendency of partition suit filed by the defendant on the basis of the sale deed.”

“52. As the suit for partition is pending on principle of equity, the possession of the defendant is to be protected. Ultimately, it will depend upon the final outcome of the partition suit filed by the defendant and till then the possession of the defendant will have to be protected. The decree passed by the trial Court regarding injunction restraining the defendant from carrying out construction etc. stands maintained and the part of the decree directing the defendant to vacate the suit premises is kept in abeyance till the suit

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filed by the defendant is decided.”

“53. The petition is allowed to the extent mentioned hereinabove. It is made clear that in case the defendants' suit for partition fails, the decree passed in RCS No. 632/1983 shall stand revived and the plaintiff – Nandkumar Shankarrao Rasne will be entitled to receive possession. Special Civil Suit No. 67/1995 which is renumbered as Regular Civil Suit No. 890/2000 is required to be disposed of as expeditiously as possible. Therefore, I direct the learned Civil Judge JD Ahmednagar before whom the Regular Civil Suit No. 890/2000 is pending, to dispose of the said suit which is originally filed in 1995 before June, 2004.”

4. The writ court since was alive of the fact that a suit for partition is already pending and the present respondents – tenants have purchased undivided share, to the extent of 3 portions out of 7 portions, granted protection of possession.

5. Regular Civil Suit No.890 of 2000 (old Special Civil Suit No.890 of 2000), instituted by respondent no.1-C herein for partition and separate possession, came to be decreed on 6th December, 2004, as under :-

“1. Suit is partly decreed.

2. Counter Claim of defendant No. 3 is partly allowed.

3. It is declared that plaintiff is having 3/7th share, defendant No. 3 is having 2/7th share and defendant No. 1, deceased defendant No. 2 are having 1/7th share each in suit property more particularly described in plaint para 1.

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4. 1/7th share of deceased defendant No. 2 shall devolve amongst defendants No. 2(a) to 2(d).

5. The actual partition and separation of the shares declared above shall be made by appointing an expert Court Commissioner vide order 26 Rule 13 of C.P.C.

6. It is hereby declared that the sale deed dated 08.05.2000 executed by Suresh Shankarrao Rasne in favour of defendant No. 1 is illegal, null and void and not binding on the suit property.

7. Counter claim of defendant No. 1 is hereby dismissed.

8. The prayer of plaintiff and defendant No. 3 to allot the portion of suit property already occupied by them to their respective shares is rejected.

9. Parties to bear their own costs.

10. A Preliminary decree be drawn accordingly.”

6. The partition suit came to be decreed on 6th December, 2004 declaring that respondent no.1-C herein is entitled for 3/7th share which he has purchased, however, his prayer for allotment of the portion of the suit property which is in his possession, came to be rejected.

7. Mr Hon, learned Senior Counsel appearing on behalf of respondent no.1-C/tenant would urge that cross-objection was preferred by the petitioner herein in the first appeal, however, the same was rejected. The appeal of the present petitioner was also dismissed by the learned District

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Judge. As such, Second Appeal No.611 of 2010 was preferred, which was admitted by this Court on 30th September, 2014 with following substantial question of law :-

“Whether the learned trial court, while decreeing Regular Civil Suit No. 890/2000, has committed an error apparent on the face of record, in giving finding that all the sisters of defendant nos. 1 and 2 have relinquished their share in the suit property in favour of all the brothers, without examining the sisters or without considering the evidence in support of proof of the said relinquishment deed ?”

8. In the above referred background, learned Counsel appearing on behalf of the petitioner-decree holder would urge that the petitioner is entitled for execution of the decree passed in Regular Civil Suit No.632 of 1983, as he is litigating for the same since last more than thirty years and he is unable to enjoy the fruits thereof. He would then urge that even if presuming that the second appeal is continuation of suit for partition, still in absence of any cross-objection from respondent no.1-C herein, who has suffered a decree for possession, cannot claim the relief more than the one ordered by the Trial Court in the judgment dated 6th December, 2004, i.e. the respondent is not entitled for continuation of possession of the property of which he is in possession by virtue of his status as a tenant. According to the petitioner, the decree for eviction needs to be taken to its logical end and pendency of Second Appeal will hardly be of any assistance to the respondent-tenant. According to him, the learned executing court, while rejecting the application for issuance of warrant of possession vide order dated 27th January, 2015, has lost sight of above referred issues.

9. Mr Hon, learned Senior Counsel appearing on behalf of respondent no.1-C would urge that once the writ court has protected possession of the tenant till the final outcome of the partition suit and in view of pendency of the Second Appeal, which is termed to be continuation of the suit for partition, the respondents cannot be evicted by ordering issuance of warrant of possession. According to him, if this Court considers grant of relief of issuance of warrant of possession, then the Court will be passing an order contrary to the view taken by the writ court in Writ Petition No.2263 of 2003. He would then advance argument that the present writ petition needs to be clubbed with the Second Appeal and it is open for the present petitioner-decree holder to get the hearing of the Second Appeal expedited and as such, according to him, this Court should show restraint by passing order in the writ petition.

10. Having considered rival submissions and bestowed my anxious thought over the same, it is required to be noted that when Writ Petition No.2263 of 2003 was decided on 3rd February, 2004, the writ court was alive of the fact that partition suit was pending and as such, made observation that since respondent-tenant has purchased 3/7th share from the suit property, his possession needs to be protected till the final outcome of the partition suit. The partition suit bearing Regular Civil Suit No.890 of 2000 came to be decided on 6th December, 2004, i.e. after pronouncement and protection granted in favour of the tenant by the writ court. Learned 3rd Joint Civil Judge Junior Division, Ahmednagar has

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refused the relief claimed by the tenant for allotment of the portion of suit property, which is already in possession of the tenant. It is, no doubt, true that it is held that respondent-tenant is entitled for 3/7th share, which judgment is *sub judice* in Second Appeal No.611 of 2010. The said Second Appeal appears to be to the extent of entitlement of share of the sisters in the suit property. Presuming that if the Second Appeal will be dismissed, still fact remains that the portion of which the respondent-tenant is in possession, cannot be allotted to him, as the prayer to that effect was already rejected vide order dated 6th December, 2004 by the Trial Judge and there is no further appeal carried against the same or pending before this Court. Apart therefrom, it is required to be noted that the respondent-tenant cannot ask for more than what is granted by the court while ordering decree for partition, as the executing court need not to travel beyond the decree. Once the decree states that the respondent-tenant will not be entitled to occupy the portion of which he is already in possession, it is required to be read down that the protection of possession ordered in Writ Petition No.2263 of 2003 was subject to order passed in favour of the tenant by the court, which has passed the partition decree noted above.

11. The above referred aspect was lost sight of by the learned executing court while rejecting the prayer for issuance of warrant of possession. In that view of the matter, in my opinion, it will be appropriate to set aside the order dated 27th January, 2015, passed by 9th Joint Civil Judge Junior Division, Ahmednagar, below Exh.117 in Regular Darkhast No.175 of 2003 and to grant application Exh.117. Accordingly, the order

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dated 27th January, 2015, passed by 9th Joint Civil Judge Junior Division, Ahmednagar, below Exh.117 in Regular Darkhast No.175 of 2003 is set aside and application Exh.117 stands allowed. The learned executing court, as such, is directed to pass consequential orders of issuance of warrant of possession.

12. Writ Petition stands allowed in above terms with no order as to costs.

13. At this stage, Mr Hon, learned Senior Counsel appearing on behalf of respondent no.1-C submits that the judgment be stayed for a period of eight weeks, which will enable the tenant to take appropriate steps in the matter. Learned Counsel appearing on behalf of the petitioner consents for four weeks time. However, in the interest of justice, it will be appropriate to grant eight weeks time and accordingly it is granted.

(N.W. SAMBRE, J.)

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