

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

WRIT PETITION NO. 318 OF 2016

Sugrabi Ibrahim Shaikh
Since deceased Through her
Legal Heir and Representative
Abdul Gaffar Ibrahim Shaikh
Age: Major, Occu. Agri. & Business,
R/o Madina Nagar, Tq. Sangamner,
Dist. Ahmednagar.

..PETITIONER

VERSUS

1. Rafiq Abbas Shaikh
Since deceased through his
Legal Heirs and Representatives
- 1-A.) Arif Rafiq Shaikh
Age: 29 years, Occu.: Business,
R/o Kasar Galli, Akole,
Tq. Akole, Dist. Ahmednagar.
- 1-B) Asif Rafiq Shaikh
Age: 27 years, Occu.: Business,
R/o Kasar Galli, Akole,
Tq. Akole, Dist. Ahmednagar.
- 1-C) Motin Rafiq Shaikh
Age: 23 years, Occu.: Business,
R/o Kasar Galli, Akole,
Tq. Akole, Dist. Ahmednagar.
- 2) Shamim Abbasbhai Shaikh
Age: 62 years, Occu.: Labour,
R/o Akole, Tq. Akole,
Dist. Ahmednagar.
- 3) Shankar Jayaram Kolapkar
Age: 82 years, Occu.: Business,

R/o Akole, Tq. Akole,
Dist. Ahmednagar.

..RESPONDENTS

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Mr. S.S. Dixit, Advocate for petitioner.
Mr. A.N. Ansari, Advocate for Respondent No.1-B.
Mr. A.S. Bajaj, Advocate for Respondent No.3.

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CORAM : T.V. NALAWADE, J.
DATED : 17th OCTOBER, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard both sides by consent for final disposal.
2. The petition is filed to challenge the order made on Exhibit 97 in Regular Civil Suit No. 196 of 1998 pending before the Court of Civil Judge, Junior Division, Akole. Heard both sides.
3. The suit is filed by the present petitioner for relief of partition of ancestral property against her two brothers, the purchaser, the person in whose favour agreement of sale is made by brothers of the said property. It appears that in the year 1994, Respondent No.3 had filed suit for relief of specific performance of contract of sale against two brothers and present petitioner. The suit was dismissed and first appeal was also

dismissed. Today, copy of the order made by this Court in Second Appeal No. 125 of 2012 is produced to show that appeal filed by Respondent No.3 is admitted. In view of the circumstances that the appeal is admitted, it appears that this Court in Second Appeal No. 125 of 2012 has stayed the execution of the decree given in favour of the brothers of the present petitioner in respect of counter claim of possession.

4. This Court has perused the plaint. It is contended by the plaintiff of specific performance suit that the agreement was executed in his favour by brothers of petitioner. Vague contention is made that all the defendants had agreed to sale the property, but specific contention is that brothers had executed the agreement of sale. When parties are Muslims, even if best possible case is accepted in favour of Respondent No.3, it can be said that the present petitioner will be entitled to get the decree in respect of her share in the suit property and she will be entitled to get equitable partition in respect of property. If the Respondent No.3 succeeds in his suit even against the petitioner, the decree of partition cannot be executed. But the subject matters are different. In view of these circumstances, the Trial Court ought not to have stayed the suit under the provision of Section 10 of the Code of Civil Procedure.

5. Learned Counsel for Respondent No.3 argued on one circumstance. It appears that when the first appeal was filed against the decision given by the Trial Court in the specific performance suit, application under Section 10 was filed and that application was allowed by the Trial Court. The first appeal itself was dismissed and so it can be said that after dismissal of the first appeal, the order did not remain in existence.

6. This Court holds that such order of Trial Court cannot sustain in law. The suit was filed in the year 1998 and surprisingly the suit has not made any progress. It appears that pendency of the suit filed for specific performance of contract was taken as circumstance and due to that the progress was not made in partition suit. In the result, petitions is allowed. Order made by the Trial Court is hereby set aside. The application filed for stay of suit is rejected. The partition suit is to go on and it is to be decided within four months from the date of receipt of this order. Rule is made absolute in the above terms. Observations made by this Court are for the purpose of present proceeding only.

(T.V. NALAWADE, J.)

SSD