

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

Writ Petition No. 08866 of 2017

District : Latur

Shamimbee w/o. Rajjak Shaikh,
Age : 60 years,
Occupation : Household,
R/o. Gat No.87,
House No.11979,
Wamankar Plot Pakharsangiv,
Taluka & District Latur.

.. Petitioner.

versus

01. Iqbal s/o. Rajjak Kalal
(Shaikh),
Age : 61 years,
Occupation : Agriculture,
R/o. Bhoi Galli, Latur,
Taluka & Dist. Latur.
02. Yasiminbee Umarsaheb
Kothimbire,
Age : 58 years,
Occupation : Household,
R/o. Near beef market,
Taluka & Dist. Solapur.
03. Gulbanee Ayub Shaikh,
Age : 66 years,
Occupation : Household,
R/o. Jahgaon Road,
Taluka Koregaon,
Dist. Satara.
04. Kathunbee Khajamiya Shaikh,
Age : 60 years,
Occupation : Household,
R/o. Sadar bazar,
Taluka Ambejogai,
Dist. Beed.
05. Halimbee Halidmiya Soudagar,
Age : 51 years,

Occupation : Household,
R/o. Jaidipura,
Taluka Gangakhed,
Dist. Parbhani.

06. Jamilbee Naushadmiya Kalal,
Age : 53 years,
Occupation : Household,
R/o. P.W.D. Quarter,
Taluka & Dist. Satara.

07. Rabiyaabee Javedmiya Quraeshi,
Age : 49 years,
Occupation : Household,
R/o. Karadnagar,
Taluka Ahmedpur,
District Latur.

08. Rubinabee Mujibsaheb Soudagar,
Age : 48 years,
Occupation : Household,
R/o. Ashoknagar, Mukhed,
Taluka Mukhed,
District Nanded.

09. Ibramoddin Iqbal Kalal
(Shaikh),
Age : 28 years,
Occupation : Education,
R/o. Bhoi Galli, Latur,
Taluka & Dist. Latur.

10. Jamiroddin Iqbal Kalal
(Shaikh),
Age : 22 years,
Occupation : Education,
R/o. Bhoi Galli, Latur,
Taluka & District Latur.

.. Respondents.

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Mr. Sandeep C. Swami, Advocate, for the petitioner.

*Mr. S.I. Shaikh, Advocate, for respondent nos.01,
07, 09 and 10.*

*Mr. Sachin S. Deshmukh, Advocate, for respondent
no.02.*

*Respondent nos. 03, 04, 05, 06 and 08 served
(Absent).*

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the order : 28th November 2017.**

**Date of pronouncing
the order : 29th November 2017.**

ORDER :

01. By consent, the matter is taken up for hearing at admission stage.

02. The factual matrix leading to the petition are as under :-

(a) Respondent no.02 herein has filed Special Civil Suit No. 11 of 2011 before learned Civil Judge (Senior Division), Latur, for declaration and for partition. It was against the petitioner as well as other respondents. The said suit came to be decreed on 30.04.2015. It was held that the respondent no.2 is having 1/10th share in the suit properties. So also, the share of the petitioner and other respondents was carved out. Respondent no.01 was held to be having 1/5th share.

(b) The said decree was challenged by respondent no.01 before this Court in First Appeal No. 1477 of

2015 with Civil Application No. 7299 of 2015 for stay of the decree. The Division Bench of this Court permitted the proceedings for execution to go on, however, it was directed that actual possession shall not be given. Thereafter since pecuniary jurisdiction of the District Court got increased, the said First Appeal was transmitted to the District Court, Latur.

(c) In the meantime, the petitioner has filed a separate suit i.e. Special Civil Suit No. 134 of 2016 against respondent nos.01 and 02 before Civil Judge (Senior Division), Latur, for declaration and perpetual injunction on the basis of consent decree passed in Regular Civil Suit No. 3 of 2007. It is contended that respondent no.02 has filed civil application in Special Darkhast No. 5 of 2015 for forwarding the decree to the District Collector for partition and possession as per the provisions of Section 54 of the Code of Civil Procedure, 1908, and for appointment of court commissioner for effecting partition of the house properties. Without hearing the respondents i.e. judgment debtors, the executing court allowed the application on 15.11.2016. Thereafter, an application has been filed by the present petitioner under Order XXI Rule 29 of the Code of Civil Procedure with Section 151 of the Code of Civil Procedure for staying the further proceedings of the execution. Say of the other side was called and after hearing both sides, the said application i.e. Exhibit 44 in Special Darkhast No. 5 of 2015 has been rejected on 15.06.2017 by the Civil

Judge (Senior Division), Latur. The said order is challenged here in this petition by invoking the writ jurisdiction of this Court under Article 227 of the Constitution of India.

03. Learned Counsel appearing for the petitioner has submitted that the stay application which was initially heard and ad interim order was granted by the Division Bench in First Appeal No. 1477 of 2015, is pending before the District Court, Latur, since the appeal has been transferred due to the enhancement of the jurisdiction and, therefore, under such circumstance, the learned Civil Judge (Senior Division) ought not to have sent the precept to the Collector for effecting partition. So also, he ought not to have appointed court commissioner for effecting partition of the house properties. If the possession is handed over in pursuant to the said order, the present petitioner would be dispossessed. She is in possession of the properties by virtue of consent decree passed in Regular Civil Suit No. 3 of 2007 and, therefore, she has filed Special Civil Suit No. 134 of 2016. All these aspects of the case ought to have been considered by the learned Civil Judge (Senior Division), Latur, before rejecting application Exhibit 44.

04. Per contra, it has been argued on behalf of respondent no.02, that while giving stay to the decree passed in Special Civil Suit No. 11 of 2011, the Division Bench of this Court had allowed the

proceedings of the execution matter to go on but specifically stated that the actual possession shall not be delivered. The said order is still in operation. The order that was passed in the execution petition on 15.11.2016 was, in fact, taking proceedings in the execution petition and, therefore, the question of stay to the execution petition does not arise.

05. The important part to be noted is that the first appeal i.e. First Appeal No. 1477 of 2015 was filed by respondent no.01. A specific order has been passed allowing proceedings of the execution to go on but with a rider that actual possession shall not be delivered. Though the petitioner is stated to be one of the party in that appeal, appears to have not pressed the application for stay to be heard finally when the matter is transferred to the District Court. Further, the present petitioner has filed Special Civil Suit No. 134 of 2016 for perpetual injunction and declaration. It is not made clear by the petitioner, as to why any relief has not been sought in respect of the decree that is running against her passed in Special Civil Suit No. 11 of 2011. The execution proceedings are taken up in pursuant to the order passed by the Division Bench and definitely as regards handing of actual possession is concerned, that order is still subsisting. Under such circumstance, it was not necessary to stay the execution proceedings. Further, it is to be noted that by application Exhibit 44, the petitioner was

praying that the proceedings of the execution to be stayed till the disposal of Special Civil Suit No. 134 of 2016.

06. When once the rights are crystallized, though they may be subject to the appeal and again put in question in subsequent litigation, under such circumstance, there is no necessity to stay the proceedings till the subsequent litigation comes to an end. Other point that is involved is also that whether the grounds taken in Special Civil Suit No. 134 of 2016 by the present petitioner were available to her when Special Civil Suit No. 11 of 2011 was decided. No efforts have been made by the petitioner to move the court where her suit is pending. Under such circumstance, the executing court cannot grant blanket stay. The application Exhibit 44 has been rightly rejected.

07. I do not find any merit in the present petition. The facts and circumstances in this case are not such that the writ jurisdiction of this Court under Article 227 of the Constitution should be invoked. Hence, the writ petition is hereby dismissed with no order as to costs.

(Smt. Vibha Kankanwadi)
JUDGE

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