

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

**Review Application No. 0035 of 2018**  
**(In 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.

.. Applicant.

**versus**

1. Iqbal s/o. Rajjak Kalal  
(Shaikh),  
Age : 61 years,  
Occupation : Agriculture,  
R/o. Bhoi Galli, Latur,  
Taluka & Dist. Latur.
2. Yasiminbee Umarsaheb Kothimbire,  
Age : 58 years,  
Occupation : Household,  
R/o. Near Beef Market,  
Taluka & Dist. Solapur.
3. Gulabanee Ayub Shaikh,  
Age : 66 years,  
Occupation : Household,  
R/o. Jahgaon Road,  
Taluka Koregaon,  
Dist. Satara.
4. Kathunbee Khajamiya Shaikh,  
Age : 60 years,  
Occupation : Household,  
R/o. Sadar Bazar,  
Taluka Ambajogai,  
District Beed.

5. Halimbee Halidmiya Soudagar,  
Age : 51 years,  
Occupation : Household,  
R/o. Jaidipura,  
Taluka Gangakhed,  
Dist. Parbhani.
6. Jamilbee Naushadmiya Kalal,  
Age : 53 years,  
Occupation : Household,  
R/o. P.W.D. Quarter,  
Gokulnagar, Khed Road,  
Satara,  
Taluka & Dist. Satara.
7. Rabiyaabee Javedmiya Qureshi,  
Age : 49 years,  
Occupation : Household,  
R/o. Karadnagar, Ahmedpur,  
Taluka Ahmedpur,  
Dist. Latur.
8. Rubinabee Mujibsaheb Soudagar,  
Age : 48 years,  
Occupation : Household,  
R/o. Ashoknagar, Mukhed,  
Taluka Mukhed,  
Dist. Nanded.
9. 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 & Dist. Latur. .. Non-applicants.

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*Mr. Sudhir K. Chavan, Advocate, holding for  
Mr. Zabiullah Z. Hussaini, Advocate, for the  
applicant.*

*Mr. Salim I. Shaikh, Advocate, for non-applicant  
nos.01, 07, 09 and 10.*

*Non-applicant nos.02 and 04 served (Absent).*

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**CORAM : SMT. VIBHA KANKANWADI, J.**

**Date of reserving  
the order : 05th March 2018.**

**Date of pronouncing  
the order : 15th March 2018.**

**ORDER :**

01. Present review application has been preferred by the original petitioner for the review of the order passed by this Court in writ petition no. 08866 of 2017 on 29.11.2017 whereby the said writ petition was dismissed.

02. The petitioner - applicant submits, that respondent no.01 and mother Julekhabi had filed Regular Civil Suit No. 003 of 2007 against eight defendants including present non-applicant no.02. The defendants therein had admitted the claim of the plaintiffs vide their written statement exhibit 10, thereby a consent decree was passed. The suit properties included land block no. 25, admeasuring 02 hectares 65 R. at village Nagapur; agricultural land block no.87 admeasuring 02 hectares 81 R. in village Pakharsawangi, Taluka & District Latur, as well as, residential house bearing no. 1188/4 at Bhoi Galli, Latur. In view of the said consent

decree, mutation entry no. 2287 was mutated and certified by the revenue authorities. The names of the petitioner as well as respondent nos.01 to 10 was recorded in 7/12 extract of the land bearing Gut no. 87 admeasuring 02 hectares 81 R. situated at village Pakharsawangi, Taluka & District Latur.

03. The petitioner has made construction of a house by taking due permission from the Grampanchayat in Gut no.87. She has spent more than Rs. 10,00,000/- for the construction of the house. However, respondent no.02 had then filed Special Civil Suit No. 11 of 2011 and claimed share in respect of land Gut no.87, Gut no.494 and Gut no.506. The said Special Civil Suit came to be decreed by the learned Civil Judge (Senior Division), Latur, on 30.04.2015. In fact, as per the decree, respondent no.02 was having 1/5th share and each daughter were having 1/10th share in the suit properties in those lands. The petitioner was having share in Gut no.87 in view of the consent decree passed in Regular Civil Suit No. 003 of 2007 and taking into consideration all the facts and witnessing the objection, she has preferred Special Civil Suit No. 134 of 2016 for declaration and perpetual injunction. She has also taken objection in Special Darkhast No. 05 of 2015 preferred by respondent no.02 in view of the decree passed in Special Civil Suit No. 11 of 2011 vide Exhibit 44. However, the said application for objection came to be rejected by the learned Civil Judge (Senior

Division) on 15.06.2017. The said order was challenged in Writ Petition No. 08866 of 2017 before this Court, which has been dismissed on 29.11.2017.

04. The petitioner contends that she is in possession of 50 feet X 50 feet i.e. 2500 square feet in Gut no.87. She is entitled to have 1/10th share in that land. It ought to have been considered while rejecting the writ petition by this Court, that stay ought to have been granted to the extent of portion in possession of the applicant or at least equity to that effect would have been granted by the learned executing court. It ought to have been considered that as per the consent decree passed in R.C.S. No. 003 of 2007, the mutation has been effected and possession has been delivered to the parties. Under such circumstance, when this fact has not been considered by this Court, the petitioner has prayed for review of the order and set it aside or modify the same.

05. Notice was issued to non-applicant no.02 who was only contesting party. The report shows that the notice is served. Thereafter also, on two dates, this Court waited for the appearance of the non-applicant no.02. However, when she failed to appear, the matter was heard.

06. Heard Mr. S.K. Chavan, learned Advocate appearing for the applicant (original writ petitioner) and perused the documents on record.

07. The facts which were agitated in the writ petition have been elaborately stated in the writ petition itself and, therefore, they are not required to be reproduced here. It appears that as per the contention of the petitioner, by way of consent decree she was already possessing some portion in land Gut no.87 and she has made construction over the same. Now, she wants protection of the same and the said area on which she has made the construction to be put in her share. The question, therefore, that is posed here and even it would have been raised in the writ petition, whether that could have been granted. Respondent no.02 had filed Special Civil Suit No. 11 of 2011. The present petitioner and other respondents were parties to the said suit which was for declaration and partition. Definitely, the present petitioner was in a position to raise a ground before the trial court which was trying Special Civil Suit No. 11 of 2011, that a consent decree is already in existence which was passed in R.C.S. No. 03 of 2007. It has not been made clear even now by the applicant - petitioner, as to whether the said fact of consent decree was brought on the record of the trial court while deciding Special Civil Suit No. 11 of 2011 or not. If the said fact was brought to the notice and still the decree is passed on 30.04.2015, then that point can be considered only in first appeal that has been preferred against the said decree by respondent

no.01.

08. As the facts emerged in the writ petition, the decree that was passed in Special Civil Suit No. 011 of 2011 was challenged by respondent no.01 before this Court in First Appeal No. 1477 of 2015 with Civil Application No. 07292 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 was increased, the said First Appeal was transmitted to the District Court, Latur. It is interesting to note that the petitioner - applicant has not stated that she has also filed any appeal challenging the decree passed in Special Civil Suit No. 11 of 2011. She says, that she has filed Special Civil Suit No. 134 of 2016 for declaration and perpetual injunction.

09. It is to be noted that by virtue of the order passed by the Division Bench, the execution proceedings appears to have been continued by way of Special Darkhast No. 05 of 2015. When there is no stay to the steps being taken in decree and only it was directed that actual possession shall not be given, then definitely the executing court was justified in sending precept to the District Collector and appoint court commissioner for effecting partition of landed as well as house properties, respectively. Now, the petitioner -

applicant says that her interest should be protected. That option is still there for her because she can agitate the same point before the executing court when the question of actual possession will arise.

10. What was before this Court in Writ Petition No. 08866 of 2017 was that challenge to the order of rejection of Exhibit 44 which was preferred by the petitioner under Order XXI Rule 29 of the Code of Civil Procedure, 1908, with Section 151 of the Code for staying further proceedings of the execution. Definitely, when the matter was before the higher court and the higher court was not in favour of giving a blanket stay to the execution proceedings, the executing court was justified in rejecting Exhibit 44. It has been observed by this Court while dismissing the said writ petition, that no efforts were moved by the petitioner either before this Court when a first appeal was before the Division Bench or when the appeal was transmitted to the District Court, Latur, to move an application for stay or for dismissal of the separate application being Civil Application No. 07299 of 2015 which was filed along with the first appeal for stay. The said application would have been transmitted to District Court, Latur, along with the first appeal itself. Therefore, there is no question of reviewing the order of dismissal.

11. Learned Advocate appearing for the

applicant - petitioner has not shown any error apparent on the face of the record when the writ petition was dismissed and, therefore, the review application is not maintainable. Hence, the review application is rejected.

( Smt. Vibha Kankanwadi )  
JUDGE

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