

S Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE SIDE JURISDICTION**  
**WRIT PETITION NO.7685 OF 2018**

Anil Gurdas Katara ] Petitioner

Vs.

Anish Bengali ] Respondent

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Mr. Durgesh Kulkarni i/b Mr. Mayank Bagla i/b Mr. Jainish Jain, for Petitioner.  
Mr. Jaydeep Deo a/w Mr. Sanjay K. Gunjekar, for Respondent.

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**CORAM : R.G. KETKAR, J.**

**DATE : 19TH JULY, 2018.**

**P.C:**

Heard Mr. Kulkarni, learned Counsel for the petitioner and Mr. Deo, learned Counsel for the respondent.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as “plaintiff/respondent” has challenged the order dated 11<sup>th</sup> July, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in (A-1) Appeal No.111 of 2011. By that order, the Appellate Court directed the respondent/appellant/defendant to proceed with the arguments on the appeal itself and has fixed the matter today i.e on 19<sup>th</sup> July, 2018 at 2.45 p.m.

3. Rule. Mr. Deo waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

4. In support of this Petition, Mr. Kulkarni submitted that the suit instituted by the plaintiff was decreed by the trial Court on 18<sup>th</sup> October, 2011. The defendant filed appeal and took out application Exhibit 10 under Order-XLI, Rule-5 of the Code of Civil Procedure, 1908 (for short 'C.P.C') on 5<sup>th</sup> December, 2011. By order dated 16<sup>th</sup> January, 2012, the Appellate Court granted ad-interim stay to the eviction decree. Grievance of the petitioner is that the said application till date is not disposed of and, therefore, the Appellate Court has not fixed interim compensation in the matter. In paragraph 8 of the impugned order, the Appellate Court has observed thus;

“Whether there should be stay to the execution or not  
is the point that can be considered taking into  
consideration the progress in the appeal”

The Appellate Court has directed the parties to proceed with the arguments of appeal on 19<sup>th</sup> July, 2018 at 2.45 p.m. Apprehension of the plaintiff is that application under Order-XLI, Rule-5 will not be decided.

5. A perusal of the record shows that application dated 5<sup>th</sup> December, 2011 filed by the defendant/appellant under Order-XLI, Rule-5 is not yet disposed of by the Appellate Court. The Appellate Court has directed the parties to proceed with the arguments in the appeal. In my opinion, the Appellate Court should have disposed of the application Exhibit 10 when the reply was filed by the plaintiff. Be that as it may, in my opinion, it is necessary for the Appellate Court to decide the application Exhibit 10 filed under Order-XLI, Rule-5 and determine interim compensation along with the appeal and fix the interim compensation. The Appellate Court shall not decide the appeal without disposing of the application Exhibit 10 filed under Order-XLI, Rule-5. Impugned order is accordingly modified.

6. All the contentions of the parties in the application Exhibit 10 as also in the main appeal on merits are expressly kept open. It is made clear that this Court has not examined merits of application Exhibit 10 as also the main appeal. Rule is made absolute in the aforesaid terms with no order as to costs.

7. All the parties including the Appellate Court to act upon an authenticated copy of this order.

**[R.G. KETKAR, J.]**