

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

WRIT PETITION NO. 6298 OF 2015

Abdul Hameed Sk. Ahmed
Age: 96 years, Occu.: Pensioner,
R/o Jalgaon. At present at Near Jama Masjid,
Rabodi, Thane City, Thane.

..PETITIONER

VERSUS

1. Abdul Majid Shaikh Ahmed
(Since deceased) Through L.Rs
- 1A. Smt. Safiya Abdul Majeed Shaikh
Age: 75 years.
- 1B. Naim Ahmed Abdul Majeed Shaikh
Age: 50 years.
- 1C. Wasim Ahmed Abdul Majeed Shaikh
Age: 48 years.
1A to 1C resides at 204, Shivajinagar, Jalgaon.
- 1D. Iftequar Ahmed Abdul Majeed Shaikh
Age: 44 years, R/o Second Floor,
Sheerin Apartment (Makra) Near Bohra Masjid,
Shivajinagar, Jalgaon.
- 1E. Smt. Nazema Dr. Aqil Mujawar
Age: 45 years, R/o c/o Dr. Aqil Mujawar,
Ausanagar, Warjayee Road, Near Young Boys
School, Dhule. Dist. Dhule.
- 1F. Israr Ahmed Abdul Majeed Shaikh
Age: 39 years, R/o House No. 308,
Neaer Dr. Gayasuddin Building Shivajinagar,
At post Taluka Dist. Jalgaon.

2. Abdul Samad Shaikh Ahmed
R/o Dharaongaon (Jamadarwada),
Dist. Jalgaon.
3. Abdul Aziz Shaikh Ahmed
(Since deceased) Through L.Rs.
- 3A. Shafiquoddin Abdul Aziz
R/o Poshe Chawal, Near Maple Shah
Baba Darga, Iind Robodi, Thane.
- 3B. Abdul Sattar Abdul Aziz
c/o Shafiquddin A. Aziz
R/o as above.
4. Abdul Gani Shaikh Ahmed
(Since deceased) Through L.Rs.
- 4A. Shaikh Ahmed Abdul Gani
R/o Tambe Apartment, Ground Floor,
Opposite Qazi Building, Near Jama Masjid,
Rabodi, Thane.
5. Raufkhan Vazirkhan (Major)
Occu.: Pensioner (MSEB Jalgaon)
R/o Master Colony, Mehrun, Jalgaon.
6. Mohammed Ali Rahmat Ali (Major)
Occu.: Railway Pensioner,
R/o Master Colony, Mehrun, Jalgaon.
7. Mrs. Tabassum Ara w/o Manzur Khan
c/o Mansur Khan Mahmood Khan
R/o 211/1, Shivajinagar, Jalgaon.
- 8A. Rashid Khan Hayat Khan (Major)
- 8B. Bismillabi Hayat Khan (Major)
c/o Hayatkhan Mohammed Khan
R/o 212, Shivajinagar, Jalgaon.

..RESPONDENTS

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Mrs. A.N. Ansari, Advocate for petitioner.

Mr. Syed Azzizoddin R., Advocate for Respondent Nos.1A to 1F.

Mr. A.I. Deshmukh, Advocate for Respondent No.5 and 6.

Mr. Shrikant S. Patil, Advocate for Respondent Nos.7, 8A and 8B.

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CORAM : T.V. NALAWADE, J.

DATED : 23rd SEPTEMBER, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith.

2. The petition is filed to challenge the orders made by Joint Civil Judge, Junior Division, Jalgaon in Miscellaneous Application No. 110 of 2010 filed in connection with Regular Darkhast No. 31 of 1976. The learned Counsel for petitioner was given time to produce copies of the order dated 02nd August, 2011 given by the High Court, with the observation that the Darkhast was itself closed and to show that order had become final due to decision given by the High Court.

3. The suit was filed for partition and separate possession in respect of three house properties. Two properties were situated at Dharangaon and one property was at Jalgaon. The present petitioner was defendant in the said suit and the suit was decreed. 1/5th share was given to the petitioner. That decree of partition has become final.

4. The execution proceeding was filed by the plaintiff but it was noticed that in view of the provision of partition Act, it was not possible to make five equal shares and so the Court decided to put all the three properties to auction sale. The purpose behind this order was to see that the sale proceeds are equally distributed amongst the five co-sharers.

5. The present proceeding is in respect of the property situated at Jalgaon. The auction sale was conducted in the year 1982 and in the month of June, the bid of Mohammad Ali was accepted. The present petitioner – one of the defendants challenged the sale in favour of Mohammad Ali by filing Miscellaneous Civil Appeal No. 26 of 1983 in District Court, Jalgaon. He made Rauf Khan as party respondent as Rauf Khan purchased property of Jalgaon from Mohammad Ali. On 01st February, 1988, appeal came to be allowed and the District Court set aside the sale by holding that there is material irregularity in the procedure followed for auction of sale. This decision has become final.

6. It appears that the present petitioner was under some misconception and he filed the proceeding in District Court in 2005 and same was pending till 2007. Then he approached Trial Court and filed application to see that the effect is given to the decision given by District

Court in aforesaid appeal. He had prayed for reliefs like giving back the possession to him as sale was set aside. Some orders were made initially in favour of the petitioner but then the orders were called back by the same Court and then the order of closer of execution proceeding was made in view of the submissions made by the plaintiff that he had no intention to prosecute the execution proceeding.

7. It appears that two revisions were filed by the petitioner i.e. 296 and 396 of 1993 in this Court in view of the aforesaid orders made by the Executing Court. This Court dismissed both the revisions. However, this Court observed that there was no necessity to interfere in the decision given by the District Court in the past. The said decision involved the setting aside of the sale made in favour of Mohammad Ali during auction sale.

8. In the application No.110 which was filed again before the same Court, first order was made and direction was given to the present petitioner to produce relevant record. It needs to be presumed that the decision given by the District Court was with the Court as it is a practice to send copy of the decision to the Trial Court and that decision needs to be tagged with the proceeding. Similarly, the decision given in revision

by the High Court ought to have been tagged with the proceeding but direction was given to the present petitioner to produce that record. It can be said that in the past also the decision of the District Court of setting aside of the sale in favour of the Mohammad Ali was brought to the notice of the Court. In view of these circumstances, it was necessary for the Court below to consider the effect of the decision given by the District Court which had become final. Instead of doing that and only due to the circumstance that the High Court had held that the Darkhast was closed, the present Court rejected the application. It needs to be kept in mind that the Darkhast was for giving effect to the partition and present petitioner was one of the decree holder of partition suit. The dispute was raised with regard to the sale and there was decision in his favour. When the sale itself is set aside by the District Court, further proceedings need to be conducted.

9. Mr. Deshmukh, learned Counsel for Rauf Khan and Mr. Patil, learned Counsel for new purchaser from Rauf Khan submitted that Mohammad Ali was necessary party in the civil appeal filed in the District Court. This submission is already dealt with and there is no need to make the observation against that the purchaser was in the shoes of Mohammad Ali. In the proceeding which is now dismissed by the Court below in

Miscellaneous Civil Appeal No. 110 of 2010 they can appear and make submissions with regard to their so called rights in the proceeding. In any case, the matter needs to be taken to the conclusion for deciding the rights of the parties and that needs to be done in the light of decision given by the District Court in the aforesaid appeal.

10. So the petition is allowed. Orders made by the Court below are hereby set aside and the matter is restored. Liberty is given to the purchaser to appear in the said proceeding to have his say. Rule is made absolute. All points are kept open. Parties to appear before the District Court before 07th October, 2016. Court to decide the matter within three months from 07th October, 2016.

(T.V. NALAWADE, J.)

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