

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

**4 LETTER PATENT APPEAL NO. 139 OF 2009
IN
WRIT PETITION NO. 3822 OF 2006**

Shri. Sahakari Gruh Nirman Sanstha
Throug it's Secretary
Sector N-8, CIDCO,
Aurangabad.

...Appellant

VERSUS

1. Kantilal Dwarkadas Shah
Since Deceased Through
his Legal Representative
- 1A. Smt. Kalawati Kantilal Shah
Age:60 years, Occu. Household
R/o. Hira Bhawan, Khara Kunwa,
Behind Kirana Chawdi, Aurangabad.
- 1B. Sachin Kantilal Shah
Age:28 years, Occu.
R/o. Hira Bhawan, Khara Kunwa,
Behind Kirana Chawdi, Aurangabad.
- 1C. Sunita Dinesh Wani
Age:32 years, Occu: Household
R/o. Opp. Shirpur Merchants
Co-operative Bank, Joshi Galli,
Shirpur, Dist. Dhule.
- 1D. Anita Arvindkumar Shroff
Age: Major, Occu. Household,
R/o.Marwadi Galli, Gandhi Ganj,
Swastik Dal mill, Nijamabad,
Dist. Nijamabad (A.P.).
2. The State of Maharashtra
Through Secretary,
Cooperative Department,
Mantralaya, Mumbai-32.
3. The Registrar,
Cooperative Societies,
Aurangabad.

(2)

4. The City and Industrial Development Corporation Ltd. Aurangabad.

5. Aurangabad Municipal Corporation
Through it's Commissioner,
Aurangabad.

...Respondents

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Mr. Subodh P. Shah, Advocate for Appellant

Mrs. Surekha Mahajan, Advocate for Respondent No.1-A, 1-B, 2 & 3

Mr. P.R.Katneshwarkar h/f Mr.N.T. Tribhuvan, Advocate for
Respondent Nos. 1-C & 1-D

Mr.A.S. Bajaj, Advocate for Respondent No.4

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**CORAM : T.V. NALAWADE &
SUNIL K. KOTWAL, JJ.**

DATED : 23rd April, 2018.

JUDGEMENT: (Per T.V. Nalawade, J.)

1. The appeal is filed by respondent No.5 of Writ Petition No.3822/2006, which was pending before the learned Single Judge of this Court. The learned Single Judge has made the order in favour of respondent No.1 (now deceased Kantilal Dwarkadas Shah) and by allowing the petition, the learned Single Judge has directed the executing Court to reconsider the applications filed by decree holder at Exhibit-84, 92 and 95 and see that the decree is executed for full satisfaction. Both the sides are heard.

2. Respondent No.1-Kantilal D. Shah was a member of petitioner a Co-operative Housing Society. His membership was terminated and so has challenged the said order in Cooperative Court. Cooperative Court gave decree in favour of respondent no.1-Kantilal D. Shah and the direction was given to society to

allot a plot to respondent No.1-Kantilal D. Shah. This decision has become final. Execution proceeding came to be filed on the basis of this award of Cooperative Court.

3. In execution proceeding, it was submitted by the appellant-society that almost all the plots of the society were already allotted to different members except plot No.27 and plot No.41. It was submitted that plot no.27 was originally allotted to one Shri. Yeramwar, but his membership was also terminated and so that plot was available for allotment. The decree holder-Shah gave an option of plot no.41. Accordingly, the bailiff prepared a record of handing over of possession of plot no.41 to Shah.

4. Subsequently, Shah realized that it was not possible for him to get plot no.41 due to many reasons. There was D.P. of M.S.E.B. over the plot, Cidco was claiming that plot no.41 was created by making encroachment on property of Cidco, which was to the extent of 20x30 meters (600 sq.ft.) and further the space ought to be kept as open space by the society as per development plan. Due to this circumstance, the decree holder filed application before executing Court for making new orders, but the executing Court held that there was a full satisfaction of the decree, award and the application came to be rejected. In Writ Petition No.3822/2006 reliefs were claimed of direction to the society to allot other plot ad-measuring 3000 square feet to the petitioner and other reliefs. Alternate relief was also claimed

that, plot no.27 be allotted to the decree holder. The learned Single Judge of this Court decided the petition in favour of decree holder and directed the executing Court to execute the decree by presuming that it was not possible to allot plot no.41 to the decree holder. This Court has set aside the orders made by executing Court on applications at Exhibits 84, 92 and 95.

5. The appellant has made the following contentions:

(i) That, the learned Single Judge had no jurisdiction to decide Writ Petition No.3822/2006 in view of the nature of relief which were claimed in the petition.

(ii) When, the decree holder had accepted plot no.41 for satisfaction of decree, the acceptance needs to be treated as full satisfaction of the decree, even if to some extent the decree was not satisfied. There was a power to executing Court to hold that the decree was appropriately adjusted.

(iii) There was nothing with decree holder to show that Cidco had contended that there was an encroachment made on the property of Cidco for preparing plot no.41.

6. The submissions made show that it is not disputed by the society that plot no.41 was shown as open space in development plan. Thus, no construction activity is allowed on this plot and this portion is kept for the enjoyment of all and even society cannot transfer this plot to a person like respondent No.1-Shah. Due to this circumstance, it can be said that the executing Court was misled. This happened only due to the conduct of

society and not due to the willingness expressed by the decree holder. The contention of the society made in this proceeding that the society is ready to keep plot no.27 as the open plot in place of plot no.41 cannot be accepted. Such dispute cannot be considered as a part of the present matter. It will be different matter and it will be upto the proper authority to take decision on it. It can be said that all the persons are entitled to enjoy the open space, not only respondent No.1-Shah. In view of this circumstance, and as the development plan was approved long back, this contention of the society cannot be accepted.

7. The other contention of the society that the learned Single Judge had no jurisdiction has no force. The petition was filed under Article 226 and 227 of the Constitution of India. There was mention of orders made by executing Court on aforesaid applications filed in execution proceeding. It can be said that due to misconception, the relief of different nature like direction to allot other plot was claimed. However, when there was order made on few Exhibits showing that executing Court had treated that the decree was fully satisfied, unless that decision of the executing Court was set aside, further orders were not possible. Due to this, the learned Single Judge has moulded the relief and direction is given to the executing Court to decide those applications afresh, by presuming that the decree is not fully satisfied.

8. The petition was filed under Article 226 and 227 of the Constitution of India and initially, the petition was placed before the Division Bench of this Court. By an order dated 08.06.2009, due to submissions made by the learned counsel for petitioner Mr. S.P. Shah, the Court directed to place the matter before Single Judge. It is already observed that the matter involved consideration of various orders made by executing Court. Those orders could have been challenged in this Court by invoking the power of this Court under Article 227 of the Constitution of India. Such proceeding lies before Single Judge of this Court as per High Court, Appellate Side Rules. Thus, the order made by Division Bench giving direction to keep the matter before Single Judge was proper. In any case, on merits there is no force in this submission. On this point, the learned counsel for appellant placed reliance on some observations made by this Court in case as reported **2005(3) Mh.L.J. 933 - (Ramchandra Raghu Naik Vs. The State of Maharashtra)** and **1986 (4) SCC 436 - (Pandurang & Others Vs. The State of Maharashtra)**. The facts of those reported cases were different. Relevant facts of the present matter are already quoted. The observations made in those cases cannot help the appellant in the present matter and it cannot be said in the present matter that the learned Single Judge had no jurisdiction to decide Writ Petition No.3822/2006.

9. The contention that the executing Court has rightly held that the decree is fully satisfied, is not acceptable. Admittedly, plot no.41 was reserved as open space by developing authority and so there was no right to the society to make allotment of plot no.41 in favour of any member including present decree holder. Thus, the decree holder could not have accepted this plot and society could not have been transferred any right or interest in the said plot in favour of the decree holder. This aspect was not brought to the notice of executing Court, when the option given to decree holder by the society was accepted by the decree holder. There is no satisfaction of the decree, as nothing was transferred or allotted in favour of the decree holder. Such acceptance cannot be called as adjustment for satisfaction of the decree.

10. The learned counsel for society submitted that many facts were concealed from the Court by decree holder. It is submitted that during pendency of the litigation, decree holder executed an agreement in favour of third party in respect of plot no.41 and third party was placed in possession. The learned counsel submitted that third party has filed suit in respect of the said property and in that suit there is an undertaking from decree holder that decree holder will not create any third party interest. The learned counsel submitted that due to such suit and undertaking, the re-transfer of plot no.41 to society is not possible. For the reasons already given, this proposition is not at

all acceptable. As nothing is transferred or allotted to decree holder, he was not in a position to give any right or interest in plot no.41 to the said third party. Thus order, if any, made by Civil Court will be subject to the orders which can be made in execution proceeding. The execution proceeding is still pending in view of the aforesaid observations.

11. The learned counsel for petitioner placed reliance on observations made in some reported cases *which are as under :-*

(i) (2010) 2 SCC 114 - (Dilip Singh Vs. State of U.P.)

(ii) (2010) 4 SCC 504 - (P.K. Singh Vs. S.N. Kanungo)

(iii) AIR 1968 SC 1087 - (Moti Lal Banker Vs. Mahraj Kumar Mahemood Hasan)

(iv) 2005 (3) Mh.L.J. 933 - (Ramchandra Raghu Naik Vs. The State of Maharashtra)

12. The propositions made in those cases are of no help to the appellant for the reasons already given. The learned Single Judge has given direction to executing Court to consider every aspect of the matter before making further orders for execution of the decree. This Court sees no reason to interfere in the order made by the learned Single Judge. In the result, the Appeal stands dismissed.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE