

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE SIDE JURISDICTION  
WRIT PETITION NO. 1263 OF 2015**

Ahmed S/o Mohammed Haji (Deceased) through ]

1A. Zubeda w/o Ahmed & Ors. ] Petitioners

Vs.

Shamsuddin Shikh Hussain (since deceased) ]

through Lrs.

Zohra w/o Shamshuddin (since deceased) ]

1b. Mushtaq s/o Shaikh Shamsuddin & Ors. ] Respondents

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Mr. M.B.W Khan, for the petitioner.

Mr. Anilkumar K. Patil, for respondents.

Mr. Mustak S. Shaikh, Respondent No.1(b) present in the Court.

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

**DATE : 26TH APRIL, 2018.**

**P.C.**

Heard Mr. M.B.W Khan, learned Counsel for the petitioners and Mr. Patil, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as “decree holders” have challenged the judgment and order dated 19th August, 2009 passed by the learned Ad-hoc District Judge-1, Malegaon in Civil Appeal No.43 of 2007. By that order, the learned District Judge partly allowed the Appeal preferred by original respondent No.1 and set aside possession warrant issued on 13th March, 2002

and directed original respondent No.1 to hand over possession of 10'x12' feet area from southern side out of 50'x35' feet land. The learned District Judge further directed the Executing Court to issue possession warrant if the decree holders apply within one month from the date of the order.

3. Mr. Khan has invited my attention to the order dated 7th January, 2002 passed by the learned Judge, Junior Division, Malegaon in Regular Darkhast No.3 of 1991 and in particular paragraphs 8, 9 and 10 thereof. In paragraph 8, the learned trial Judge, after considering the version of the witness of the petitioners/decreed holders observed that judgment debtor is in occupation of area admeasuring 50'x35' which is more than the area of the suit premises namely 10'x12' out of Survey No.22. The judgment debtor has made encroachment by the sides of the suit premises, particularly towards north and east of the suit premises.

4. In paragraph 9, the learned trial Judge observed that as per the version of the judgment debtor and decree holder, it has come on record that more than area of the suit premises, the judgment debtor is in occupation of area admeasuring 50'x35'. In paragraph 10, the learned trial Judge observed that in view of the testimony of decree holder and judgment debtor, it can be inferred that judgment debtor is in possession of area admeasuring 50'x35'.

5. In the order dated 18th April, 2018, reference was made to the order dated 25th September, 1992 passed by this Court (Coram: M.G. Chaudhari, J.) in Writ Petition No.3895 of 1992 as also order dated 19th August, 2009 passed by the learned District Judge in Civil Appeal No.43 of 2002. In paragraph 6, it was noted that the respondent is willing to surrender area of 10'x12' feet of his choice out of the area of 50'x35' feet. Mr. Patil reiterates the said statement and states that the respondent is ready to

surrender area of 10'x12' feet of his choice out of the area of 50'x35' feet, portion from the southern side.

6. Mr. Patil states that respondent No.1(b) Mustak S. Shaikh is present in the Court. Learned Counsel for the parties have tendered lay out plan showing location of the area of 10'x15' proposed to be surrendered by the respondents to the petitioner. The said lay out plan is taken on record and marked 'X' for identification. This lay out plan shall form part of this order.

7. Mr. Khan submitted that the judgment debtor is found in possession of 50'x35' feet area. He, therefore, submits that without prejudice to the rights and contentions of the petitioner herein to adopt appropriate proceedings for recovery of possession of the encroached area by the respondents, the petitioners are ready and willing to accept area of 10'x12' as shown in the lay out plan.

8. In view thereof, Petition is disposed of by passing the following order;

[1] The respondents shall hand over possession of 10'x12' as shown in the lay out plan at Exhibit 'X' from the Southern portion within three weeks from today.

[2] The petitioners are at liberty to adopt appropriate proceedings for recovery of possession of encroached portion from the respondents.

[3] If such proceedings are filed, all contentions of the respondents in that proceedings are expressly kept open.

Order accordingly.

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