

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

930 APPEAL FROM ORDER NO.29 OF 2020  
WITH  
CA/7896/2020 IN AO/29/2020

Abdul Gani Shah Mohammad  
**Since deceased through legal representatives -**

- 1     Shakila Begum Abdul Gani Qureshi,  
      Age 76 yrs., Occ. Household,  
      R/o Ragiv Gandhi Nagar, Osmanabad,  
      Tq. & Dist. Osmanabad.
- 2     Abdul Karim Abdul Gani Qureshi,  
      Age 48 yrs., Occ. Business,  
      R/o as above.
- 3     Abdul Hamid Abdul Gani Qureshi,  
      Age 47 yrs., Occ. Business,  
      As above.
- 4     Abdul Alim Abdul Gani Qureshi,  
      Age 44 yrs., Occ. Business,  
      R/o as above.
- 5     Abdul Samad Abdul Gani Qureshi,  
      Age 47 yrs., Occ. Business,  
      R/o as above.
- 6     Abdul Ahmed Abdul Gani Qureshi,  
      Age 35 yrs., Occ. Business,  
      R/o as above.

... Appellants

... **Versus** ...

- 1     Saraswati Babanrao Shelke,  
      Age 65 yrs., Occ. Household,

- 2 Virendra Babanrao Shelke,  
Age 50 yrs., Occ. Agri. & Business,  
  
Both are r/o Samata Nagar, Osmanabad,  
Tq. & Dist. Osmanabad.
- 3 The State of Maharashtra  
Through Collector, Osmanabad.
- 4 The Chief Officer,  
Municipal Council, Osmanabad.

... **Respondents**

...

Mr. J.R. Patil, Advocate for appellants

Mr. P.S. Chavan, Advocate for respondent Nos.1 and 2

Mr. N.T. Bhagat, AGP for respondent No.3

Mr. V.B. Deshmukh, Advocate for respondent No.4

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

**DATE : 04<sup>th</sup> FEBRUARY, 2021.**

**JUDGMENT :**

1 Present Appeal from Order has been filed under Order 43 Rule 1(u) of the Code of Civil Procedure, 1908 to challenge the order passed by learned District Judge-2, Osmanabad in Regular Civil Appeal No.8/2017 dated 17.08.2020, remanding the matter to the executing Court for giving an opportunity to the respondent Nos.1 and 2 herein and then to decide Exh.99 before the executing Court.

2           The facts giving rise to the appeal are that the present appellant is the Decree Holder, who has filed Execution Petition bearing R.D. No.26/2010 before learned Joint Civil Judge Senior Division, Osmanabad for getting the decree passed in Regular Civil Suit No.227/2000 executed. Present respondent Nos.1 and 2 raised objection under Section 47 read with Order 21 Rule 97 to 101 of the Code of Civil procedure by filing application Exh.99. It was contended by the objectors that objection petitioner No.1 Saraswatibai is the owner and possessor of plot No.221 (Southern) having an area of 165 square meters. The said plot was allotted to her husband by Samata Co-operative Housing Society, Osmanabad with Allotment Certificate No.451 dated 08.07.1977. After the death of her husband the plot has devolved on the petitioner No.1, who is the widow and petitioner No.2, who is the son. It is further contended that the petitioners are using the road located towards the Eastern side of the said plot uninterruptedly since last 40 years and in fact, the Decree Holder had admitted in the plaint para No.6 that towards the West side of the suit property there is property of Samata Colony. It is further stated that the petitioners are using the said road for the enjoyment of their property, and therefore, they are having easementary right by prescription over the said road. It is stated that the act of the plaintiff is illegal and further steps, which are being taken in response to the execution of the decree i.e. measurement by T.I.L.R., are also illegal. The decree is

silent, as to whether the plaintiff is claiming possession of the area. So many questions arise, which the plaintiff had failed to prove, however, since the right and interest of the petitioners are involved, they say that the decree is unexecutable and they are not bound by the said decree.

3           The said application Exh.99 was objected by the Decree Holder stating that the suit was in respect of plot No.1 in Sy.No.145/A, wherein the defendant-Municipal Council had made encroachment. The suit was decreed and the decree has achieved finality. The objectors are claiming certain rights in respect of Sy.Nos.142 and 144, which was not the suit property. Further, similar objection was raised at Exh.29 by another member of Samata Co-operative Housing Society, Osmanabad and it was rejected by the executing Court. Writ Petition No.6456 of 2014 was decided by this Court and it was stated that the executing Court to proceed with the execution within six months. In fact, the possession warrant was issued in 2013 itself. The institution of the suit, its decision and execution was within the knowledge of the objectors, but they did not lodge any objection at any earlier point of time.

4           After hearing submissions on both sides the learned Joint Civil Judge Senior Division, Osmanabad rejected the objection below Exh.99 along with stay petition Exh.100 on 20.01.2017.

5           The said order was challenged before District Court, Osmanabad by filing Regular Civil Appeal No.8/2017. It was decided by learned District Judge-2, Osmanabad on 17.08.2020. Learned Judge has set aside the order below Exh.99 and remanded the matter with direction to the executing Court that opportunity should be given to file the say to Exh.99 and give an opportunity to adduce evidence to all the parties and then decide the objection Exh.99 afresh as per law. This order is under challenge in this appeal from order.

6           Heard learned Advocate Mr. J.R. Patil for appellants, learned Advocate Mr. P.S. Chavan for respondent Nos.1 and 2, learned AGP Mr. N.T. Bhagat for respondent No.3 and learned Advocate Mr. V.B. Deshmukh for respondent No.4.

7           It has been vehemently submitted on behalf of the appellants that the learned District Judge-2, Osmanabad erred in remanding the matter. He failed to see that by order below Exh.1 in Regular Civil Appeal No.8/2017 learned Principal District Judge, Osmanabad had passed an order on 17.10.2019 that the said appeal, which was then pending on the file of learned Principal District Judge, was transferred to the file of learned District Judge-2, Osmanabad for its disposal along with Civil Miscellaneous Application No.4/2017, Civil Misc. Appln. No.5/2017 and Regular Civil

Appeal No.7/2017. Out of that Civil Misc. Appln. No.4/2017 has been rejected. Therefore, Regular Civil Appeal No.7/2017 and Civil Misc. Appln. No.5/2017 are still pending on the file of District Judge-2, Osmanabad and without considering the pendency of those matters, which are arising out of the same Judgment and Decree and without considering the order passed by the learned Principal District Judge, Osmanabad on 17.10.2019, he has decided Regular Civil Appeal No.8/2017 only. Further, the learned Judge failed to see that a similar objection was raised by another member of the said society below Exh.29 and it was rejected. It was specifically observed that the execution petition is in respect of plot No.1 situated in Sy.No.145/A. The objectors were claiming certain rights in respect of Sy.No.142 and 144, which was not the subject-matter of the suit and the decree. Unless the objectors would have shown some rights there was no necessity even to remand the matter further. Therefore, the order of remand is unsustainable. He prayed for setting aside the said order.

8            Learned Advocate appearing for respondent Nos.1 and 2 submitted that opportunity was not given to the objectors to lead evidence, when in fact, the objections, those are raised under Order 21 Rule 97 to 101 of the Code of Civil Procedure, are required to be dealt with as a suit and proper procedure was not adopted. The learned District Judge-2,

Osmanabad was of the view that when principles of natural justice have not been adhered to, the objectors should get an opportunity. There was no illegality in the said order. Merely because another member had raised objection, that does not mean that his right and the rights of the present objectors are same.

9           At the outset, perusal of the order passed below Exh.1 by learned Principal District Judge, Osmanabad on 17.10.2019 in Regular Civil Appeal No.8/2017 (same appeal, which is decided by learned District Judge-2, Osmanabad on 17.08.2020) would make it clear that the respondents therein had filed a pursis below Exh.24 and prayed for consolidating four matters viz. the same appeal, Civil Misc. Appln. No.4/2017, Civil Misc. Appln. No.5/2017 and Regular Civil Appeal No.7/2017. Out of that only Regular Civil Appeal No.8/2017 was then pending before the learned Principal District Judge, Osmanabad and other three matters were on the file of District Judge-2, Osmanabad. Therefore, the learned Principal District Judge, Osmanabad, by observing that as the dispute between the parties pertains to the same property, it is just and proper to place all the matters before one and the same Court, in order to avoid conflict of verdicts and inconvenience to the parties; Regular Civil Appeal No.8/2017 was withdrawn from the file of learned Principal District Judge, Osmanabad and was transferred to the file of District

Judge-2, Osmanabad. When clear order was passed, yet, ignoring the same the learned District Judge-2, Osmanabad appears to have decided only Regular Civil Appeal No.8/2017, and therefore, on this ground alone the said Judgment and Decree passed in Regular Civil Appeal No.8/2017 of remanding the matter deserves to be set aside. The learned District Judge-2, Osmanabad ought to have heard all the parties in respect of the four matters at one and the same time, however, it has been submitted that Civil Misc. Appln. No.4/2017 has been rejected. Therefore, the other remaining three matters ought to have been disposed of at one and the same time. The matter, therefore, now by setting aside the impugned order, the learned District Judge-2, Osmanabad deserves to be directed to hear the remaining three matters and dispose of them at one and the same time, by observing the natural justice, which he has canvassed for the appellant before him.

10           As this Court is of the opinion that the impugned Judgment deserves to be set aside on the aforesaid ground and issuing further directions to the learned District Judge-2, Osmanabad; this Court restrains itself from making any kind of comments on the merits of the case, as to whether the objection is maintainable or not maintainable or since the matter pertaining to another member was already decided, the same view ought to have been taken by learned District Judge-2, Osmanabad etc. All the points

are then kept open for the parties to be raised before the learned District Judge-2, Osmanabad. With these observations following order is passed.

**ORDER**

1           Appeal from Order No.29 of 2020 is hereby partly allowed.

2           The Judgment and order passed in Regular Civil Appeal No.8/2017 by learned District Judge-2, Osmanabad on 17.08.2020 is hereby set aside.

3           The matter is restored on the file of learned District Judge-2, Osmanabad with direction that he should dispose of the said appeal with Regular Civil Appeal No.7/2017, Civil Miscellaneous Application No.5/2017, at the same time, as per the provisions of law.

4           Parties to appear before learned District Judge-2, Osmanabad on 22.02.2021.

5           Civil Application No.7896 of 2020 stands disposed of, in view of disposal of the Appeal from Order.

**( Smt. Vibha Kankanwadi, J. )**