

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

935 WRIT PETITION NO.2620 OF 2017

ABDUL HAMEED SHAIKH AHMED
VERSUS
ABDUL MAJID SHAIKH AHMED DIED LRS SAFIYA ABDUL MAJEED
SHAIKH AND OTHERS

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Mrs. A.N. Ansari, Advocate for the Petitioner.
Mr. S.B. Pulkundwar, AGP for Respondents-State.
Mr. A.R. Sayed, Advocate for respondent Nos.1(A) to 1(F)
Mr. A.I. Deshmukh, Advocate for respondent nos.5 and 6-A,
6-B, 6-C and 6-E.
Mr.S.S. Patil, Advocate for Respondent Nos. 7 and 8A.

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**CORAM : SANDEEP V. MARNE, J.
DATED : 01st DECEMBER, 2022.**

PER COURT:-

1. By this petition, the petitioner challenges the order dated 20th December, 2016 passed by the Civil Judge, Junior Division, Jalgaon in Civil Miscellaneous Application No.110/2010. Earlier petitioner's application apparently seeking reopening the closed Darkhast was rejected by the Executing Court on 29th January, 2015, that order was subject matter of challenge before this Court in Writ Petition no.6298/2015. This Court passed the following order on 23rd September, 2016 :-

"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. Dehmukh, 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.”

2. Thus, the order dated 29th January, 2015 rejecting Civil M.A. No.110/2010 was set aside and Civil M.A. No.110/2010 was restored by this Court. True, it is that there appears to be typographical error in the order of this Court when this Court has directed the parties to appear before “the District Court”, where in fact the application which came to be restored was pending before the Executing Court. Be that as it may. All the parties are correctly understood the order and appeared before the Executing Court. The parties on both the sides made detail submissions. The auction purchasers and their successors in title also made detail submissions about the rights acquired by them in the suit property and as to why the application filed by the petitioner would not be maintainable. Therefore, the auction purchasers or their successors in title cannot be permitted to take benefit of that typographical error.

3. In an application made by the petitioner, the District

Court on 1st February, 1988 set aside the auction sale and finality was given to that order. The petitioner contends that when the auction sale itself was set aside, the property ought to have been restored in the name of the petitioner until valid auction sale was conducted afresh.

4. Parties are at dispute about the maintainability of the application filed by the petitioner, especially in view of the subsequent rights created over the property under execution.

5. Perusal of the order passed by the executing Court on 20th December, 2016 would indicate that none of the contentions have been dealt with in any manner. The executing Court has proceeded to reject the application only on the ground that there is no provision to reopen the closed Darkhast. In my view, the executing Court was expected to decide the application on merits (including all the technical issues including maintainability of the application etc) in view of the order of this Court dated 23rd September, 2016 passed in Writ Petition No.6298/2015 and not to dismiss it only on the ground that a closed Darkhast cannot be reopened.

6. The order dated 20th December, 2016 is thus unsustainable.

7. Accordingly, the petition is allowed. The order dated 20th December, 2016 passed by the executing Court is set aside and Civil M.A. No.110/2010 is restored with directions to the executing Court to hear all the parties and pass the

order in Civil M.A. No.110/2010 on merits.

8. All the contentions raised by Mr. Deshmukh, Mr. Patil and Mr. Sayed, learned counsel for the respective respondents are expressly kept open and no opinion is expressed on the same.

9. The executing Court shall decide the matter on its own merits without being influenced by the observations made in the present order.

10. The executing Court is requested to decide the matter as expeditiously as possible, preferably within a period of six months from today.

11. The petition is disposed of accordingly.

(SANDEEP V. MARNE)
JUDGE

sga/-