



(This judgment is modified and uploaded vide speaking to the minutes order dated 11.02.2025.)

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10847 OF 2022

1. Vishal s/o Rajendra Tondchirkar
age 36 years, occ. Business
2. Rajendraprasad s/o Vidyaprasad Tiwari
age 60 years, occ. Pensioner
3. Ramesh s/o Devidasrao Chimegaonkar
age 62 years, occ. Agril,
4. Vrandavana s/o Abhay Patil
age 42 years, occ. Business
5. Bharat s/o Somnath Pastapure
age 64 years, occ. Business

All r/o Shivaji Graha Nirman Sahakari
Sanstha Ltd. Opp. Bus Stand
Udgir, Tq. Udgir, Dist. Latur

.. Petitioners

versus

1. Dnyanoba s/o Govindrao Chamle
age 85 years, occ. Agril
r/o c/o Shriram s/o Dnyanoba Chamle
Dam Road, Udgir, Tq. Udgir, Dist. Latur.
2. Shivaji Graha Nirman Sahakari Sanstha Ltd.
Opp. Bus Stand Udgir
Through its Liquidator.
3. Chandrakant s/o Narayanrao Mukkawar
age major, occ. Business

4. Suryakant s/o Narayanrao Mukkawar
age major, occ. Business
5. Sow. Sunanda w/o Chandrakant Mukkawar
age major, occ. Household
6. Vijaykumar /so Girjappa Shahir } (deleted as per
leave granted vide
order dt. 29.11.2022
7. Rajaram s/o Bhagwanrao Deshmukh
deceased through LRs.
- 7A) Gopal s/o Rajaram Deshmukh } (deleted as per leave
} granted vide order
- 7B) Sharad s/o Ambadas Deshmukh } dated 29.11.2022

Respondent Nos. 3 to 7 are residents of
Shivaji Graha Nirman Sahakari Sanstha Ltd.
Opp Bus Stand Udgir, Tq. Udgir
Dist. Latur.

8. Maruti s/o Dashrath Tandale
deceased through LRs.
- 8A) Nandkishor s/o Maruti Tandale
age 57 years, occ. Business
Presently residing at House No. 3-17-304
Rokdiya Hanuman Colony,
Near Hanuman Mandir,
Kranti Chowk, Aurangabad 431005.
9. Deputy Superintendent of Land Records
Udgir, Tq. Udgir, Dist.Latur.
10. The Chief Officer
Municipal Council, Ugdir
Dist. Latur.
11. Smt. Sheela w/o Rudradeo Jadhav
age 63 years, occ. Household
r/o Plot No. 24, Shivaji Graha Nirman

Sahakari Sanstha Ltd., Opp. Bus Stand
Udgir, Tq.Udgir, Dist. Latur 413517

12. Ramesh s/o Narsingrao Ekambe
(Deceased through LRs)

12(1) Sharda s/o Ramesh Ekambe
age major, Occ. Household

12(2) Sheetal w/o Deelip Biradar
age major, occ. Household

12(3) Ajit s/o Ramesh Ekambe
age major, occ. Business

12(4) Amit s/o Ramesh Ekambe
age major, occ. Business

Respondent Nos. 12(1) to 12(4) are residents
of Plot No. 25, Shivaji Gruh Nirman Sahakari
Sanstha Ltd., Opp. Bus Stand, Udgir
Tq. Udgir, Dist. Latur.

12A Smt. Pushpa w/o Satish Ekambe
age 59 years, occ. Household
r/o Plot No. 25, Shviaji Graha Nirman
Sahakari Sanstha Ltd. Opp. Bus Stand
Udgir, Tq. Udgir, Dist. Latur 413517.

.. Respondents

Mr. R. N. Dhorde, Senior Counsel instructed by Mr. K. P. Rodge,
Advocate for the Petitioners.

Mr. B. A. Shinde, AGP for the State.

Mr. A. V. Patil, Advocate for Respondent No. 1.

Mr. S. V. Natu, Advocate for Respondent No. 2.

Mr. B. N. Patil, Advocate for Respondent Nos. 3 to 5.

Mr. C. C. Deshpande, Advocate for Respondent No. 8A.

Mr. P. V. Barde, Advocate for Respondent No. 10.

Mr. J. R. Patil, Advocate for Respondent No. 11.

Mr. V. S. Kadam, Advocate for Respondent Nos. 12, 12A, 12(1) to
12(4).

CORAM : R. M. JOSHI, J.

DATE : 29th JANUARY, 2025.

JUDGMENT :

1. By consent of both sides, heard finally at stage of admission.

2. This petition takes exception to the order passed below Exhibit 184-A dated 12.09.2022 in Regular Darkhast No. 3/1999 as well as order passed below Exhibit 140 dated 11.01.2019 of issuance of possession warrant for allotment of plot from open space.

3. For the purpose of appreciating contentions of rival parties, recording of facts in nutshell is necessary.

Respondent No. 2 is a cooperative housing society registered under the Maharashtra Cooperative Societies Act, having 42 members. There were 42 plots as per the approved lay out. Respondent No. 1 since did not submit his willingness, no plot was allotted to him and his membership came to be cancelled on 14.06.1968. Respondent No. 1 filed dispute before the Co-operative Court, Nanded bearing CCL No. 634/1990 for allotment of plot. It was the case of the society before the Cooperative Court that plot is

not available and that Respondent No. 1 is no more member of the society. The Cooperative Court passed judgment and award dated 20.12.1995 and a direction was issued to Respondent No. 2/society to allot plot, if any available, by removing encroachment. This order was not challenged by the society and has attained finality.

4. Respondent No. 1 thereafter filed execution proceeding being Regular Darkhast No. 3/1999 to get the award passed by the Cooperative Court executed from Civil Court. In the earlier round of litigation, it was held by the Civil Court that the award is not executable. Said order came to be challenged in Writ Petition No. 4611/2008 with the averment that an opportunity be given to Respondent No. 1 to point out identity of the plot which could be allotted to him. The said petition came to be allowed and the matter was relegated back to the Execution Court. It was the case of Respondent No. 1 that there is encroachment by certain members and because of which one plot has disappeared. The Court Commissioner came to be appointed to measure the land and it was found that there was encroachment by certain members and therefore plot was not available. Execution Court, therefore, passed order of issuance of possession warrant on 11.01.2019. Petitioners

filed Writ Petition bearing No. 6772/2019 taking exception to the said order dated 11.01.2019. Said petition came to be withdrawn with liberty to prosecute remedy before appropriate forum in accordance with law by order dated 16.03.2022. Petitioners, thereafter filed application vide Exhibit 184-A under Section 47, Order 21 Rule 99 and 101 of Civil Procedure Code in Regular Darkhast No. 3/1999 and raised objection for allotment of plot from open space to the decree holder. The Execution Court rejected the application hence this petition.

5. At this stage, it would be relevant to take note of application Exhibit 184-A filed before the Execution Court. Apart from the other contentions, it is specifically averred therein that while executing the award, no proper notices were issued to the members. In some cases, notices were issued to the members and hence they sought themselves to be joined as party to the execution proceeding. Apart from this, it is contended that since no plot is available and as plot from open space cannot be allotted, the award is not executable. Learned Execution Court rejected the application with cost.

6. Heard learned counsel appearing for Petitioners and respective Respondents.

7. Learned Senior Counsel appearing on behalf of Petitioners submits that the Petitioners are aggrieved by execution proceedings and likely to be affected by execution of the final order passed by the Cooperative Court in CCL No. 634/1990. He drew attention of the court to the fact that the dispute was filed against society represented by managing committee and other 5 persons. The dispute came to be dismissed against Opponent Nos. 1(a), 2(17), 2 to 16. The order was passed only against Opponent No. 1/society. It is his contention that thus, there is no order against the Petitioners or any other member of the society. It is his submission that once there is no order against the Petitioners or any other member of the society, question of execution of the same against them does not arise. It is his submission that Clause No. ii of operative order reads that the opponent/society shall take steps to remove the encroachment made by the members on open space and on the roads of the society and see that if any plot can be made available for allotment to the disputant and if so, approval from the competent authority be obtained if necessary. It is his submission that this

order cannot be construed as a licence given to the society to remove alleged encroachment without following due process of law. According to him, since order is passed by Cooperative Court without hearing Petitioners and in fact no order is passed against any member of society, question of same being executed against them does not arise. Thus, it is his submission that in any case, the Petitioners being the persons likely to be aggrieved by execution of the award, they are necessary parties to the execution proceeding and hence, Petition be allowed.

8. Learned counsel for Respondent No. 10 has raised exception to the maintainability of the Petition on the ground that alternate remedy is available for the Petitioners to file appeal against the impugned orders as provided by provisions of Section 47, Order 21 Rules 101 and 103 of Code of Civil Procedure.

9. Learned counsel for Respondent No. 1 vehemently opposed the petition firstly on the ground that the Petitioners had challenged the order passed below Exhibit 140 before this Court by filing Writ Petition No. 6772/2019. This petition was subsequently withdrawn and as such the second petition on the same subject is not

maintainable. On merit of the petition, he drew attention of the Court to the order passed by this Court dated 11.01.2023 in the instant petition, wherein this Court had directed the Municipal Council to submit a report in respect of extent of encroachment by other plot owners in the sanctioned lay out so also in the compulsory open space which is required to be maintained. It is his submission that pursuant to the said order, the Municipal Council has submitted its report indicating encroachment done by the Petitioners and other members of the society. It is his submission that in view of said order passed by this Court, it is open for the Municipal Council to take action against the encroachers and that decree can be executed. To support his submission, he placed reliance on judgment of Hon'ble Supreme Court in case of **Shalini Shyam Shetty and anr. vs. Rajendra Shankar Patil**, 2010 AIR (SCW) 6387.

10. At the outset, it needs to be recorded that there is no order/decreed against the Petitioners or any other member of the respondent No. 2/ cooperative housing society. In fact, the dispute is dismissed against other Respondents therein. There is no finding recorded by the Cooperative Court that any encroachment including extent thereof being done by the members of the society. Even

otherwise, no such finding could have been recorded in absence of all the members being made as party to the dispute. Thus, it can be said that the award in question is not binding on Petitioners or any other member of the society.

11. In the light of this, question arises as to whether it was permissible even for this Court also to direct the Municipal Council to ascertain the alleged encroachment and to take action on behalf of such report filed by the Municipal Council. With utmost respect to the said order, such course of action cannot be permitted to be adopted and hence a candid answer to such question would be in negative. The reason therefor is that whenever there is any encroachment alleged against any person, he is entitled to be heard and defend the said allegation. Though the Municipal Council being the planning authority or even the cooperative society may be permitted to take action for removal of encroachment, but the same cannot be done in this manner i.e. without giving an opportunity to the persons against whom the encroachment is alleged and to direct removal of encroachment on the basis of report without testing its correctness and without extending any opportunity to aggrieved party to disprove the allegation. The principle of *audi alteram*

partem cannot be given go by. Any order in violation of principles of natural justice, would render it nullity. Thus, this Court finds no reason to accept contention of learned counsel for Respondent No. 2/society that on the basis of report submitted by the Municipal Council to this Court, it should be permitted to remove alleged encroachment found as per the said report. Permitting such course of action will deny fair opportunity to the Petitioners and other Respondents against whom allegation of encroachment is made and the same would certainly lead to miscarriage of justice. There can never be any justification of encroachment made by any person but its removal must be done as per law. This Court cannot become a party to perpetrate illegality and in no circumstances any order can be passed in violation of principles of natural justice.

12. Though it may be open for the Municipal Council as well as Respondent No. 2/society to take action against encroachment, the same has to be done in accordance with law and not on the basis of some report submitted by the Municipal Council. Hence, it is specifically observed that though this Petition is allowed, the same would not preclude the Municipal Council or Respondent No.

2/society to take action against the alleged encroachers in accordance with law.

13. As far as issue of maintainability of petition raised by one Respondent is concerned, since non providing of opportunity of hearing to the petitioners in execution proceeding in the facts of the case would lead to miscarriage of justice, without going into technical objection to maintainability, the same is entertained.

14. Suffice it to say that Petitioners are the persons who are likely to be affected by execution of order passed by Cooperative Court and hence in consonance with basic principle of law, they are required to be heard in the matter. As a result of this, petition deserves to be allowed partly. Impugned order dated 12.09.2022 passed below Exhibit 184-A is set aside. Application Exhibit 184-A is allowed to the extent of permitting Petitioners to join as party to the execution proceeding. Further orders be passed after giving an opportunity of hearing to the Petitioners.

15. Execution Court is directed to expedite the execution proceedings and in any case, to complete the same within a period of a year."

**(R. M. JOSHI)
Judge**

dyb