

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.10186 OF 2014

Dattatray Shankar Mestry
Since deceased through Legal Heirs Nos.2 & 3
Chandramohan Shankar Mestry and or : **Petitioners**
versus
Ambernath Krishna Mestry and ors. : **Respondents.**

Mr. P B Shah i/by Mr. Kayval P Shah for the Petitioners.
Mr. Santosh Shetty for the Respondent No.1.

CORAM : R. M. SAVANT, J.
DATE : 23rd December 2014.

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 30/4/2014 passed by the learned Civil Judge, Junior Division, Rajapur by which order the Application Exhibit 13 filed by the Respondents herein came to be allowed and the T.I.L.R. Rajapur was directed to carry out the commission work in terms of the directions issued in clause (2) of the impugned order.

2 The Respondents herein have a decree in their favour passed on 1/1/1985. The said decree is in the following terms :-

“The suit of Plaintiff is decreed with costs.

It is hereby declared that the Plaintiff is the owner of the suit lands at Ser.Nos.1 to 3, 5 and 6.

The Defendant Nos.1 to 4 to remove the encroachment from 3 gunthas of land from land Sur. No.96 Hissa No.1 and do give the possession of that area to the Plaintiff. The said area of 3 gunthas is being shown in the map Exh.61.

The Defendant Nos.1 to 4 do remove the gadaga erected by them and if they failed to do so the Plaintiff is at liberty to get removed said gadaga through the process of Court.

The Defendant Nos.1 to 4 are permanently restrained from interfering in suit lands Ser.No.1 to 3, 5 and 6.

The Defendant Nos.1 to 4 do pay the damages of Rs.975/- to the Plaintiff.

The map drawn by the Court Commissioner Exh.61 be treated as part of the decree.”

3 The Respondents herein it seems had filed Regular Darkhast No.5 of 1993 for execution of the said decree, and it seems that the decree came to be executed and the said Regular Darkhast came to be disposed of.

4 On the ground that the Judgment Debtors i.e. the Petitioners herein have once against encroached upon the decretal property, that the instant Regular Darkhast No.6 of 2013 came to be filed. The allegation is that the Judgment Debtors have carried out construction beyond the structure which was not the part of the decree by putting up laterite stone wall and have also put up construction. It is not necessary to dilate further on the said aspect as the Decree Holders filed the instant Application for appointment of Court

Commissioner to ascertain the extent of encroachment if any carried out by the Judgment Debtors.

5 The learned counsel for the Petitioners sought to raise an issue as regards maintainability of the fresh Execution Application as also the appointment of Court Commissioner.

6 In my view, the contention as regards the maintainability of the fresh Execution Application can be raised at the appropriate stage by the Petitioners before the Executing Court, however, the appointment of Court Commissioner cannot be faulted with having regard to the allegation of the Decree Holders that after the decree was executed, the judgment Debtors have encroached upon the suit property. In that view of the matter, no case for interference in the writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]