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

WRIT PETITION NO.1104 OF 2015

Martha Sudhir Hanbarhatty and others. ..Petitioners

-Versus-

Vilas Rasiklal Shah. ..Respondent

.....

Mr.Santosh G. Chapalgaonkar, Advocate for the Petitioners.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 11th February, 2015

Per Court:

1 The Petitioners are aggrieved by the orders dated 31.08.2012 and 25.04.2014 passed below Exhibits-17 and 37 in Regular Darkhast No.4/2010.

2 The Petitioners are the Decree Holders who have succeeded in RCS No.160/2005 vide decree dated 23.07.2009.

3 The relevant portion of the operative part of the decree dated 23.07.2009 is as under:-

- “1. *The suit is decreed with costs.*
2. *The defendant is hereby directed to remove the compound wall constructed by him which is on the western side of the suit property i.e. plot No.7 within*

- two months from the date of this order.*
3. *Further the defendant is directed to construct the compound wall on the western side of the suit premises in such a manner which will not obstruct the natural flow of rain water and proper disposal of drain water in the suit property.*
 4. *Decree be drawn up accordingly.”*

4 The Petitioners preferred RD No.4/2010 seeking execution of the said decree. Application Exhibit-17 was filed for appointment of a Court Commissioner to demolish 10 feet wall in the light of the Judgment Debtor having already removed 37 feet wall in the north-south direction.

5 The grievance of the Petitioners is that the order of the Trial Court especially clause (2), as reproduced above, needs to be complied with to its fullest extent. By Exhibit-17, the Petitioners/ Decree Holders prayed for appointment of a Court Commissioner who could supervise the demolition of 10 feet wall which has still remained to be demolished.

6 The Trial Court, after considering the submissions of the rival sides and material on record, rejected application Exhibit-17 on 31.08.2012.

7 The Petitioners do not dispute that the said order dated 31.08.2012 was not challenged and same has been challenged in this

Petition after passage of about 26 months.

8 The Petitioners moved another application Exhibit-37 invoking the jurisdiction of the Executing Court under Section 152 r/w Section 47, Order 7 Rule 3 and Order 20 Rule 3 of the Code of Civil Procedure. It was stated that the Court Commissioner appointed by the order below Exhibit-11, has demolished only the western side wall and has not demolished the northern and southern wall which is on the western side. The Trial Court by the impugned order dated 25.04.2014 has concluded that Exhibit-37 cannot be entertained under Section 152 as well as other provisions invoked since the issue set out in Exhibit-37 has already been dealt with by the Court while deciding application Exhibit-17.

9 Having considered the submissions of the learned counsel appearing for the Petitioners and having gone through the petition paper book, it is not in dispute that by making an appropriate application, the Petitioners can lead evidence in order to establish their claim in the Regular Darkhast. If that be so, upon commencement of the recording of evidence, the Petitioners can surely bring such evidence on record to conclude that the directions given in the Decree dated 23.07.2009 have not been fully complied with. Naturally, if the Executing Court is

convinced of this aspect, it would pass necessary and consequential order to ensure that the Decree is fully satisfied.

10 In the event, the Petitioners make an application for leading evidence to establish that the Decree has not been fully complied with, the Executing Court shall decide such an application in accordance with law and on it's own merits after considering the submissions of the parties and without being influenced by it's observations in the impugned order.

11 With the above observations, this Writ Petition is disposed of without causing any interference in the impugned order. No order as to costs.

(RAVINDRA V. GHUGE, J.)