

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5825 OF 2015**

Sou.Bharati Shivaji Jadhav and
Anr.

Petitioners

Vs

1.Sou.Indumati Shivaji Pawar,
2.Smt. Shantabai Hindurao
Suryavanshi (deceased).

.. Respondents

Mr.Sagar Joshi , Advocate for Petitioners.
Mr. Ajay A. Joshi, Advocate for Respondent no.1.

CORAM : R.G.KETKAR,J.
DATE : 28/07/2015

PC:

1. Heard Mr. Sagar Joshi, learned counsel for the petitioners and Mr. Ajay Joshi, learned counsel for respondent no.1 at length.
2. By this Petition under Article 227 of the Constitution of India, original defendants have challenged the Judgment and order dated 9.12.2014 passed by the learned Jt. Civil Judge, Jr. Dn., Pandharpur below Exhibit 114 in Regular Darkhast No.19 of 2010. By that order, the learned trial Judge rejected the application filed by the petitioners, hereinafter referred to as 'judgment debtors', seeking permission to lead evidence in support of application Exhibit-26 filed on 13.8.2012.
3. In support of this Petition, Mr.Sagar Joshi strenuously contended that judgment debtors filed application Exhibit 26 on 13.8.2012, inter alia, contending that the Darkhast is not instituted by the decree holder; that Suraj s/o Shivaji Jadhav is

cultivating the suit land for more than 3 years as licensee of judgment debtors. He is not party to the proceedings and, therefore, Darkhast cannot be proceeded against him. Even warrant of possession cannot be issued against him. He further submitted that in the suit property there is residential house, pipeline, stable etc which are not forming part of the decree. In view thereof, the decree is not executable. He submitted that in order to substantiate the assertions made in Exhibit 26 it is absolutely necessary to permit judgment debtors to lead evidence. It is precisely that purpose the application Exhibit 44 was filed on 18.11.2014. By the impugned order the learned trial Judge rejected the application, thereby precluding the judgment debtors from substantiating their case by leading evidence. He, therefore, submitted that the impugned order deserves to be quashed and set aside.

4. On the other hand, Mr. Ajay Joshi supported the impugned order. He submitted that respondent no.1 had instituted Regular Civil Suit No.349 of 1997 against judgment debtors. That suit was decreed and the decree was confirmed by the Apex Court. He submitted that objections raised in application at Exhibit 26 are raised with a view to delaying Darkhast proceedings. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

5. I have considered the rival submissions made by the

learned counsel appearing for the parties. I have also perused the material on record and in particular application dated 13.8.2012 Exhibit 26 and application dated 18.11.2014 Exhibit 114. Mr. Sagar Joshi submitted that regular Darkhast is filed by power of attorney of decree holder without filing original power of attorney on record. As the original power of attorney was not filed, the darkhast proceedings are illegal and cannot be proceeded further. On the other hand, Mr. Ajay Joshi submitted that the darkhast is instituted by the decree holder-respondent no.1 herein, through her power of attorney, viz. Her husband Shivaji Pawar. In fact, he was examined as decree holder's witness at Exh.40 in the trial Court. I, therefore do not find any merit in this submission. In view thereof, I do not find that it is necessary for judgment debtors to lead evidence in that regard. The said question cannot be allowed to be opened in darkhast proceedings. If at all judgment debtors had any objection about not filing original power of attorney they should have raised objection at the time of decree holder examining her husband as her power of attorney. In view thereof, it is not necessary to lead evidence in that regard.

6. Mr. Sagar Joshi submitted that son of the decree holder Suraj is cultivating the suit land for more than 3 years as a licensee of the judgment debtors. Suraj is not a party to the proceedings and consequently the darkhast cannot proceed

against him. Even warrant of possession cannot be issued against him. Perusal of paragraph 5 of the application itself prima facie shows that he is claiming through judgment debtors and is not claiming any independent interest. It is therefore not necessary to permit the applicant to lead any evidence in that regard.

7. Finally, judgment debtors want to lead evidence for establishing that decree is not executable. In paragraph 8 of the application Exhibit 26, it is asserted that in the suit land there is residential house, pipeline, stable, among other things, which are not covered by the decree. Decree is only in respect of open land. In my opinion, it is not necessary to lead evidence on this point as judgment debtors can take away the constructed portion of the suit land and can give vacant possession to the decree holder. For all these reasons, I do not find that the learned trial Judge has committed any error in rejecting the application Exhibit 114. In my opinion, this is clearly an attempt on the part of judgment debtors to delay the execution proceedings. As noted earlier, the decree obtained by respondent no.1 is confirmed by the Apex Court. It is, therefore, necessary for the executing court to proceed with the darkhast and dispose it of at the earliest. Petition fails and the same is dismissed. Order accordingly.

(R.G.KETKAR, J.)