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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 148 OF 2015

M/s.Siddhi Vinayak Construction Co. ... Petitioner

Vs.

Somnath Madhav Joshi and another ... Respondents

Mr.Sanskar Marathe, Advocate for Petitioner.

Mr.Prashant D.Patil, Advocate for Respondent No.1.

CORAM : R. G. KETKAR, J.

DATE : 16th JUNE, 2015

P.C. :

. Heard Mr.Sanskar Marathe, learned Counsel for the petitioner and Mr.Prashant D.Patil, learned Counsel for the respondent No.1 at length.

2. By this petition under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the original defendant No.2 has challenged the judgment and order dated 14/10/2013 passed by the learned 3rd Joint Civil Judge, Junior Division, Pune below Exhibit 1 in Regular Darkhast No. 32 of 2005. By that order, the learned trial Judge held that decree is executable and ordered Execution Petition to proceed.

3. In support of this petition, Mr.Marathe strenuously submitted that the suit instituted by respondent No.1 was decreed on 28/07/1997. Respondent No.1 has filed Regular Darkhast No. 32 of

2005 for execution of the decree. However, the decree has become infructuous or is not executable. He invited my attention to the sanctioned plan dated 08/06/2007 wherein no windows are shown on the eastern wall of that building. He also invited my attention to clauses 2 & 3 of the operative part of the trial Court's order dated 28/07/1997. He submitted that respondent No.1 had demolished the earlier structure and constructed new building and on the eastern side of the wall of newly constructed building, there are no windows. He also submitted that well is also not in existence. He submitted that the learned trial Judge, however, over ruled these objections by observing that no evidence is led by defendant No.2 to show that there has been permanent change as contemplated by Section 43 of the Indian Easements Act, 1882 in dominant heritage. Though the copies of sanctioned plan are produced on record, the same are not proved by leading evidence. Consequently, it is not proved that no windows are kept to the new building from eastern side. It was further observed that right of way also does not extinguish unless it is shown that for continuous period of 20 years, it is not used.

4. On the other hand, Mr.Patil submitted that the trial Court decreed the suit on 28/07/1997. Aggrieved by that decision, defendant No.2 preferred appeal which was also dismissed by the District Court. He further submitted that the statement of the petitioner that well is sealed is also not correct and is in existence. In

other words, decree has not become infractuous or in-executable.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The learned trial Judge has over ruled the objections that decree has become in-executable or infractuous mainly on the ground that no evidence is led by the petitioner in support of its case. Merely because the assertions are made in the application that does not take place of the proof of the matter in issue. It is for the parties to lead evidence and substantiate their case. In the present case, the petitioner did not lead any evidence in support of its contentions. I do find that the learned trial Judge has committed any error in passing the impugned order. Reserving the liberty to the parties to lead evidence in Darkhast Proceedings, Petition fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)