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

WRIT PETITION NO. 11557 OF 2014

Mrs. Kusum Dattatray Ganthade. ... Petitioner.

V/s.

Mr. Namdev Bapu Hattikar, since deceased
through his L.Rs.
Geetabai Namdev Hattikar and Ors. ... Respondents.

Mr. S.R.Ganbavale for the Petitioner.
Mr. S.M. Katkar for Respondents 1-B and 1-C.
Mr. V.S. Talkute for Respondent 2.
Mr. P.D. Dalvi for Respondent 3-B, 3-C, 4-B, 4-C and 5.

CORAM : N.M. Jamdar, J.

25 August, 2016.

Oral Order :-

By this Petition the Petitioner challenges the order passed by the learned Civil Judge, Junior Division, Ichalkaranji dated 22 November 2014 by which the learned Civil Judge has directed a measurement of the land to be carried out.

2. The Petitioner is a decree holder. The Petitioner filed a suit bearing No. 287 of 1984 for removal of obstruction by the

Respondents. The suit was decreed on 6 July 1998. Appeal was filed by the Respondents which was dismissed on 30 July 1998. The Darkhast proceeding were filed by the Petitioner for execution of the decree. The Respondents raised an objection to the execution decree. The objection was over-ruled and the decree was put in execution. On 22 April 2013, the Petitioner filed a pursis stating that the Petitioner has received possession as per the decree and the Darkhast proceedings be closed. Thereafter, an application was moved by the Respondents – Judgment Debtors making a grievance that the Petitioner has, while executing the decree, obtained possession of the excess land than specified in the decree. This application came up for consideration before the learned Civil Judge whereupon the learned Civil Judge, by the impugned order has directed an appointment of Commissioner to carry out measurement.

3. Heard the learned Counsel for the parties.

4. The learned Counsel for the Petitioner submitted that once the decree is satisfied, there is no question of further proceedings in Darkhast and therefore, the application filed by the Respondents was not maintainable. He relied upon Clause 359 of Civil Manual framed by this Court. He submitted that an objection was raised to the execution of the decree which was over-ruled and

successive applications raising objections to the executability of the decree cannot be raised and it can only be raised once. He relied upon the decision in the case of *R.P.A. Valliammal v/s. R. Palanichami Nadar and Ors.* reported in (1997) 19 SCC 209. The learned Counsel for the Respondents relying on the decisions of the Apex Court in the case of *Desh Bandhu Gupta v/s. N.L. Anand & Rajinder Singh* reported in (1994) 1 SCC 131 and the Gauhati High Court in the case of *Babul Ali v/s. Smt. Khirada Dutta and Ors.* reported in (1993) AIR Gauhati 56, the learned Civil Judge of Gauhati High Court submitted that such issues will have to be gone into by the executing court in view of Section 47 of the Act and all that the learned Civil Judge has done is to direct measurement.

5. The Respondents have not raised any objections to the executability of the decree but it is their grievance that when the decree is executed by the Petitioner, the Petitioner has taken possession of the excess land. Therefore, the decisions cited by the learned Counsel for the Petitioner of the Apex Court will have no application as there is no successive objection regarding executability of the decree. Merely because the Petitioner has placed on record that he is satisfied with the execution of the decree does not mean that the decree stands satisfied in law. It will be satisfied only when it is correctly executed. Once the Respondents had made a grievance that the Petitioner has taken excess land while executing the decree,

the issue had to be considered under Section 47 and Order 21 of the Code of Civil Procedure. Once the Code itself provides for a remedy, the same cannot be defeated by relying on a provisions of the Civil Manual. In the decision of the learned Single Judge of the Gauhati High Court, in identical circumstances, has observed that when such a grievance is made, it is the duty of the Court to find out the truth in order to further the justice. It is under this duty that the learned Civil Judge has directed an appointment of Commissioner to measure the land.

6. While considering the Petition moved and invoking the power of superintendence of this Court, resultant prejudice to the parties will have to be considered. If the Petitioner is right in his contentions that the Petitioner has not taken land in excess of the decree, he will succeed but if it is found otherwise, then by accepting the contentions of the Petitioner, substantial prejudice will be caused to the Respondents. As regard the delay, the Petitioner himself has filed this Petition and has stalled the execution of decree by seeking interim order which is in operation for last two years. In the circumstances, no case is made out for interference in writ jurisdiction. The Writ Petition is accordingly rejected.

(N.M. Jamdar, J.)