

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

WRIT PETITION NO. 1312 OF 2019

Kalpana Ramesh Jamdhare and ors. ...Petitioners
vs.
Gopal Ambo Pitambare and anr. ...Respondents.

Mr. R.M. Haridas i/by Mr. Amol P. Mhatre for the Petitioners.
Mr. Girish Pariyani i/by A & G Legal Associates LLP for Respondent Nos. 1 and 2.

CORAM : REVATI MOHITE DERE, J.
DATE : 03rd February, 2020

PC:

1. Heard learned counsel for the parties.
2. By this petition the petitioners have impugned the order dated 17.11.2018 passed by the learned Civil Judge, J.D., Bhiwandi below Exh.41 in Regular Darkhast No.92 of 2012 by which the learned Judge was pleased to reject the petitioners (Judgment Debtors) application for appointment of T.I.L.R. as Court Commissioner, for fixing the boundaries of suit land and for deciding whether there is an additional structure.
3. Perused the papers including the impugned order. The respondents are the original plaintiffs and the petitioners, (original defendants). According to the respondents (plaintiffs), the petitioners had encroached on the suit property in 2003 by erecting a katcha shed over the suit property. Pursuant thereto, the petitioners filed a suit, being R.C.S.No.

912/2003 in the Court of learned Civil Judge, J.D., Bhiwandi as against the petitioners (Defendants) for removal of the encroachment and possession of the suit property. The Trial Court by its Judgment and Decree dated 20.3.2012 decreed the said suit in favour of the respondents-plaintiffs. Being aggrieved by the said Judgment and decree dated 20.3.2012, the petitioner preferred an appeal in the District Court, Thane being Civil Appeal No. 149 of 2012. The learned District Judge was pleased to dismiss the said appeal by its Judgment and Order dated 6.3.2014. Being aggrieved by the said order, the petitioners filed a second appeal in this Court, being Second Appeal No.380 of 2014. The said second appeal was dismissed by this Court on 23.2.2017 and as such, the Judgment and decree passed by the Trial Court, directing the petitioners to handover the possession of the suit property to the respondents stood confirmed.

4. After dismissal of the second appeal, the respondents (original plaintiffs) filed Regular Darkhast (i.e. Regular Darkhast No.92 of 2012) for execution of the decree passed in their favour. In the darkhast proceeding, the petitioners (Judgment Debtors) filed an application and sought appointment of a TILR as Court Commissioner. According to the petitioners, the decree holder i.e. respondents had filed an application for issuance of possession warrant and for handing over the vacant possession by removing the entire structure admeasuring 19x27ft. and 20x20ft. from the suit land i.e. Survey No.3, Hissa No.2-Part situated at Borivali (Kukse), Taluka Bhiwandi, District Thane. The application filed by the decree holder-respondents was

resisted by the petitioners. According to the petitioners, the respondents were seeking removal of additional structure admeasuring 19x27ft. which is not over the suit land and hence, the petitioners filed an application and sought appointment of a TILR as Court Commissioner. By rejecting the said application (Exh.41) the Executing Court observed that the petitioners had not shown that the additional structure admeasuring 19x27ft. was not over the suit land. It appears that the additional structure admeasuring 19x27ft. touches the existing structure of 20 x20ft. and is one structure, even as per the Bailiff's report. It is pertinent to note that, for the first time, the petitioners had taken the said stand in the execution proceeding that apart from 20x20ft., there was an additional structure admeasuring 19x27ft. A perusal of the order passed by this Court dated 23.2.2017 in Second Appeal which is at Page 47 of this petition does not show that this grievance was raised in the Second Appeal. By filing the said application i.e. seeking appointment of TILR, the only object appears is to be, is to delay the removal of the encroachment. No infirmity can be found in the impugned order dated 17.11.2018.

5. Accordingly, the petition is dismissed.

REVATI MOHITE DERE, J.