

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

WRIT PETITION NO. 6302 OF 2021

Vishwanath D. Gaikwad

...Petitioner

vs.

Omkar D. Gaikwad

...Respondent

Mr.Rohan P Surve for Petitioner.

Mr.Atul P. Vanarse for Respondent.

CORAM : BHARATI DANGRE, J.

DATED : 5 OCTOBER 2021

P.C. :

1. The Petitioner is aggrieved by an order passed below Exhibit 89, rejecting the request to issue writ of summons to the Architect P.D. Kulkarni, who is likely to be examined for the feasibility of the partition being effected in the light of the report of the court commissioner which is already on record.

Perusal of the record of the writ petition would reveal that between the plaintiff and defendant, Special Civil Suit No.1022 of 2007 came to be contested, resulting into the suit being decreed in favour of the plaintiff on 6 February 2012 by the 3rd Joint Civil Judge, Senior Division, Pune. The defendant was directed to hand over possession of the suit property bearing 289 admeasuring 298.08 sq.mtr. at Narayan Peth, Pune and another property bearing No.288 admeasuring 246 sq.mtr. at Narayan Peth, Pune (excluding the properties acquired by the corporation) qua to the extent of half share of the plaintiff.

2. When the decree is put up for execution, various objections were raised, resulting into appointment of commissioner, who has submitted his report stating that the partition in the manner stated in the report dated 20 November 2014 is feasible and pertinent to note that the said report is submitted by the court commissioner, who is an architect. Thereafter, the court commissioner is examined and also cross-examined. The Petitioner rely upon a report of one Shri P.D. Kulkarni, Architect and Engineer, who contradicts the report of the commissioner about the feasibility of the partition being effected in the manner set out by the commissioner. In the wake of the said report of Shri P.D. Kulkarni, the application is moved by the Petitioner/the judgment debtor seeking issuance of witness summons to Shri P.D. Kulkarni.

3. The learned Judge passed an order on the said application and on consideration of the stage, at which the matter is pending before him, he recorded that the judgment debtor cannot examine witness in support of his contention relating to the report of the court commissioner, since at present, the admissibility of rejection of the report of the court commissioner is under consideration, as the report of the court commissioner is not yet accepted or rejected. The learned Judge, therefore, record that it is not permissible for judgment debtor to lead evidence at this stage and the parties shall argue on the acceptance of the report of the court commissioner first. It is in this background, the application by the Petitioner to issue witness summons to Mr.P.D. Kulkarni was rejected.

4. Considering the stagnation in the execution proceedings, I am of the firm opinion that the view taken by the Civil Judge, Senior Division cannot be considered to be an erroneous one particularly, when he record that the

commissioner has already been examined and cross-examined and admissibility of the report of the court commissioner is in issue and on the evidence, being tendered the parties would advance their arguments on the acceptance of the report of the court commissioner. The application of the judgment debtor, therefore, is premature at this stage and as the course that has been adopted by the learned Judge, he shall proceed to hear the parties on the acceptability of the report of the court commissioner in the light of the evidence which has come on record.

With this clarification, the impugned order is upheld and the writ petition is dismissed.

(SMT. BHARATI DANGRE, J.)