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

WRIT PETITION NO.12793 OF 2023

Bhagirathi Shankar Chavan (Since
Deceased)

Through Legal Representatives
Haridas Shankar Chavan & Ors

... Petitioners

V/s.

Kusum Dattatray Ganthade & Ors.

... Respondents

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Mr. Dilip Bodake, for petitioner.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 18, 2023

P.C.:

1. By this writ petition, under Article 227 of the Constitution of India, the judgment debtor is challenging order dated 16 June 2023 passed by the 2nd Joint Civil Judge, Junior Division, Ichalkaranji, District Kolhapur in Regular Darkhast Application No.129 of 1998 rejecting applications below Exhibits 325, 327 and 334.

2. It appears that as a result of decree passed in Regular Civil Suit No.287 of 1984 dated 6 July 1998 which has attained finality, the decree holder filed Regular Darkhast No.129 of 1998. The decree is for delivery of possession of encroached portion. The

decree is passed in relation to property described in paragraph 1 of the plaint. Paragraph 1 of the plaint gives boundaries in relation to which decree was passed. It is, therefore, duty of Executing Court to execute the decree delivering possession of property described in paragraph 1 of the plaint; however, it appears that in execution, the judgment debtor filed an application for appointment of Court Commissioner which came to be allowed and this Court confirmed the order of appointment of Court Commissioner.

3. In furtherance of such appointment of Court Commissioner under Order 26, Rule 9 of the Code of Civil Procedure, 1908, the Court Commissioner carried out inspection and submitted its report.

4. The judgment debtor has, therefore, filed an application below Exhibit 334 for framing issue in relation to prove the Court Commissioner's report.

5. According to petitioner, unless Court Commissioner is examine, the Court Commissioner's report cannot be read in Execution Petition.

6. By way of reply below Exhibit 325 and 327, objection is raised regarding admissibility of Court Commissioner's report without its proof.

7. The Trial Court rejected the application holding that the objection is not tenable.

8. Learned Advocate for the petitioner submitted that the

decree holder has taken possession of 400 sq. ft. which is excess of decree passed in suit. It is, therefore, necessary that the Court Commissioner should be examined.

9. In my opinion, the issue involved is squarely covered in the case of **Rahul S Shah Versus Jinendra Kumar Gandhi & Ors.**, reported in 2021 AIR (Civil) 539. The Apex Court in paragraph 42 (11) has held as under:

“11. The Court should allow taking of evidence during the executing proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.”

10. Reading of clause 11 makes it clear that leading oral evidence to prove question of fact in execution can be permitted only in exceptional and rare cases. Such resort can be made only if expeditious method in the form of appointment of Court Commissioner is not sufficient to decide question of fact as Court Commissioner has already submitted his report, there is no question of application of Order 26, Rule 10 of Code of Civil Procedure, 1908 in execution.

11. Section 141 of the Code of Civil Procedure, 1908 is applicable to the Execution Petition as far as possible, therefore, what is contemplated is substantial compliance of Section 141 of the Code of Civil Procedure, 1908 which have been substantially complied with by the Executing Court. Therefore, re-trial of issues

involved in Execution Petition is not permissible. Hence, in my opinion, the Trial Court has not committed error of jurisdiction calling of interference under Article 227 of the Constitution of India.

12. The writ petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)