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

WRIT PETITION NO.15732 OF 2023

Kallawa W/o Ganapati Berad Alias Naik
(Deceased)

Through Legal Heirs

... Petitioners

V/s.

Annappa Ranba Naik (Since Deceased)

Through Legal Heirs & Ors

... Respondents

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Mr. S. S. Redekar, for Petitioners.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 18, 2023

P.C.:

1. The petitioner is original plaintiff who filed Regular Civil Suit No.30 of 1980 against the defendants for recovery of possession on the ground of encroachment.
2. The Trial Court by the judgment and decree dated 29 August 1986 dismissed the suit. The Appellate Court confirmed the decree.
3. This Court in second appeal on 29 January 1998 confirmed the findings against respondent Nos.1, 3 and 4; however, only to the extent of respondent No.2 remanded the appeal back to the Trial Court for appointment of Court Commissioner.

4. In furtherance of appointment of Court Commissioner as per order passed by this Court in second appeal, the Court Commissioner submitted his report.

5. According to the petitioner, the Court Commissioner's report indicates encroachment over the suit property by respondent Nos.1, 3 and 4. Therefore, he filed an application under Section 113 read with Order 46, Rule 1 of the Code of Civil Procedure, 1908 for referring the issue to this Court. The Trial Court rejected the application; hence, present writ petition.

6. Reading of Section 113 read with Order 46, Rule 1 of the Code of Civil Procedure, 1908 makes it clear that, such power can be exercised by the Court only when in the opinion of the Court, if the suit or proceedings involved in question of law which needs to be decided by the High Court.

7. In the facts of the case, this Court while entertaining Second Appeal No.8 of 1998 confirmed the decree of dismissal of the suit as against defendant Nos.1, 3 and 4. The order passed by this Court restricts such remand only to the extent of alleged encroachment of defendant No.2. Therefore, the Trial Court shall have power only to ascertain whether defendant No.2 encroached over the plaintiff's land. Whether defendant Nos.1, 3 and 4 had encroached over the suit property is an issue which has attained finality by virtue of judgment of this Court in Second Appeal No.8 of 1998. Once, such the issue against defendant Nos.1, 3 and 4 attained finality, in the facts of the case, the Trial Court has rightly rejected the application under Section 113 read with Order 46,

Rule 1 of the Code of Civil Procedure, 1908. There is no legal infirmity in the order.

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

(AMIT BORKAR, J.)