

<u>Common ORDER BELOW EXH. 35 and 47 IN</u>
<u>RD No.500001 /2012</u>

1. Both the applications filed by decree holder for appointment of Shri More as commissioner for removal of construction over suit property shown in the map attached to the decree.
2. Heard Mr. A. A. Desai Ld. Adv. for decree holder.
3. When called repeatedly neither judgment debtors nor their advocate present. Hence, proceeded without argument.
4. It is contention of decree holder that, he has filed present application for execution of the decree passed in Regular Civil Suit No.100/84. However, the first appeal as well as the second appeal are dismissed. Therefore, he prayed for possession of the constructed portion by appointing court commissioner. He has suggested a name of Shri More engineer for the same. He is ready to pay his fees.
5. On the other hand, application is opposed on the ground that, the decree holder didn't filed present application within the period of limitation of 12 years. However, record shows that, previously same Darkhast was pending. However, it was

dismissed for want of steps. Thereafter, decree holder filed present Darkhast. Therefore, it cannot be said that, the present Darkhast is not filed within the period of limitation.

6. Moreover, the application is opposed on one more ground that, the suit property belongs to one Nathibhai Navalbhai Gandhi. It is devolve by succession on Ukraj Marwadi. Therefore, JD no. 3 had instituted RCS No. 45/2001. In order to declare that, the decree passed in RCS No. 100/84 is not binding on him. Against the decree in RCS No. 45/2001 he filed first appeal which is pending. However, record shows that, the said application is also dismissed.

7. Moreover, it is objection of the JD that, the area of city survey no. 3396 as per record is 1.07sq.mtr. However, DH is trying to recover more area than the same. However, the adjacent survey nos. 3395 and 3397 are adjacent to survey no. 3396. However, the predecessor in title of the JD has instituted suit regarding city survey no. 3395 in which temporary injunction was granted against the DH. Therefore, the present Darkhast cannot be executed. However, it is necessary to mention that, RCS No. 98/2000 is regarding city survey no. 3395. Hence, he has no concern with the present Darkhast. Moreover, city survey no. 396 belongs to one Nathibhai Porwal. Therefore, possession cannot be handed over to DH. However, it is necessary to mention that, there is no property in dispute that is survey no. 396. Hence there

is no merit in the said objection.

8. Moreover, as per the city survey record the boundaries of the city survey no. 3396 are yet to be fixed. Therefore, it is necessary to appoint city survey commissioner for the same. However, the map attached to the decree shows that, the measurement is already carried out as per the city survey record.

9. Moreover, the appeal is pending. However, decree holder has filed the copy of appeal pending in the Hon'ble High Court. On perusal of the same it appears that, the same is dismissed on admission stage. Hence, no substance in the same.

10. In view of the application at exh. 47 a notice was issued to Shri. More asking him whether he is ready for working as court commissioner. In pursuance of the said notice he is filed pursis showing his readiness for the same. Therefore, he has appointed as court commissioner for removal of the constructed portion shown by Yellow as well as Red colour. But, it's boundaries are shown in the map by Marathi letters अ, ब, क, ड attached to the decree and hand over its possession to the decree holder. DH is directed to pay the fees of the court commissioner as demanded by him.

Islampur

(J.G.Wagh)

Date : 18.12.2024

Judicial Magistrate First Class.

Islampur.