

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6328 OF 2022

VILAS HARIBHAU SANGEWAR
VERSUS
DHARMAPAL SOPANRAO SALVE AND ANOTHER

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Advocate for Petitioner : Mr. Milind M. Patil (Beedkar)

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CORAM : MANGESH S. PATIL, J.

DATED : 22 JUNE 2022

PER COURT :

Heard learned advocate Mr. Milind Patil for the petitioner.

2. The petitioner is the original plaintiff who has filed the suit with the only prayer for demarcation of property bearing plot no. 155, out of survey nos. 626 & 627, Ward No.13(A) of Parbhani.

3. By the application (Exh.12) submitted under Order XXVI Rule 9 of the Code of Civil Procedure, he prayed for appointment of the court commissioner to carry out measurement. By the order under challenge, the trial court has rejected the application.

4. Learned advocate Mr. Patil for the petitioner would submit that such a suit is maintainable as laid down in the matter of *E. Achuthan Nair Vs. P. Narayanan Nair and Anr.*; AIR 1987 Supreme Court 2137. He further

submits that it has been specifically averred in the plaint as to how in spite of having made an attempt to get the property measured through the office of the survey department, for some reason or the other, the office is not co-operating him. Even the municipal corporation has refused to grant him building permission in view of the objection being raised by the respondent-defendant.

5. He submits that faced with the situation, there is no other remedy for the petitioner to file a suit seeking demarcation of his plot. In these peculiar circumstances, and innocuous request was made to the trial court to appoint the court commissioner for carrying out the measurement, but that has been illegally turned down.

6. I have perused the impugned order and the papers and considered the submissions.

7. Admittedly, the suit is still awaiting trial. The petitioner has not stepped into the witness box. Though, apparently, he is entitled to file a suit for demarcation as laid down in the matter of *E. Achuthan Nair (supra)*, it would be imperative for him first to make out the grounds which would entitle him to claim the relief. He has pleaded that in the year 2008, he had submitted an application to the office of District Superintendent of Land Records for carrying out measurement, but nothing was done and even the municipal corporation has refused the building permission. However, the fact

remains that since 2008, no further attempts have apparently been taken by the petitioner, at least there is no averment in the plaint to that effect with giving details or particulars.

8. The suit has been filed in the year 2019, after a lapse of 11 years of such attempt made in the year 2008 had failed, he has merely averred that the office of the survey department is not cooperating him. But then he will have to make out this ground before seeking assistance of the court in having the relief even before the suit is decided. Carrying out the measurement at this stage would tantamount to decreeing the suit itself. It is like putting a cart before horse.

9. This court in the matter of *Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade; 2004 (2) Mh.L.J. 722* and subsequent many decisions have consistently laid down that the parties seeking appointment of the court commissioner has to first step into the witness box, make out the grounds and then seek appointment of a court commissioner to carry out the measurement.

10. In the light of above, there is no error or illegality in the order passed by the trial court. The petition is dismissed.

11. However, it is made clear that the petitioner shall be entitled to renew the request at an appropriate stage.

(MANGESH S. PATIL, J.)