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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.13138 OF 2021

TULSHIRAM DADARAO SAPATE
VERSUS
SHRIRANG SHAHAJI PAWAR

...
Mr A. S. Deshpande, Advocate for petitioner

CORAM : SMT. BHARATI DANGRE, J.

DATE : 16th February, 2022

PER COURT:

1. Heard the learned Counsel for the petitioner, who has failed to make out a case for any indulgence.

The facts in brief would reveal that the petitioner is the original plaintiff who filed Regular Civil Suit No.134/2021 seeking a relief of perpetual injunction against the defendant, which is premised upon a pleading that the defendant, on the basis of collusive measurement report, prepared by the concerned authority, is attempting to remove and disturb the Shiv-Rasta and encroached upon the field of the plaintiff.

2. When the pleadings in the plaint instituted by the plaintiff are perused, in paragraph No.3, it is specifically avert that the

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defendant, behind the back of the plaintiff, has got measured his land and claiming his excess land in the plaintiff's suit land by taking disadvantage of the alleged collusive measurement. The plaintiff has also pleaded that, he raised an objection about the alleged false measurement and even filed an objection before the Tahsildar Latur and his application is pending.

3. On the defendant being issued with summons, he has filed written statement and in paragraph 10, the defendant has been raising objection that the Revenue Authorities regarding encroachment by the plaintiff over the Peth-Chandeshwar Shiv-Rasta, which lie between the land of the defendant and the land of the plaintiff and he has pointed out to the Revenue Authorities in the year 2010 and it is the plaintiff, who has encroached upon Shiv-Rasta and is cultivating his crops on the said road. It is also pleaded by the defendant that pursuant to the complaint of the defendant, the Revenue Authorities have conducted an enquiry through the Mandal Adhikari and the Talathi of the village Peth and the plaintiff and the defendant had as per the directions of the Revenue Authorities measured the respective land through the T.I.L.R. Latur and in the measurement, it is revealed that the

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plaintiff has encroached Shiv-Rasta between the land of the plaintiff and the defendant.

4. In the wake of the pleadings in the plaint, being traversed by the defendant by specifically filing written statement, it is upon the plaintiff to make his case good by adducing evidence.

Instead, he moved an application purportedly under Order XXVI Rule 9 of the Code of Civil Procedure, seeking appointment of the Surveyor/Court Commissioner to carry out joint measurement of the suit land of the plaintiff and the land under the Shiv-Rasta towards the western side of the defendant's land and fix the boundaries.

This application came to be rejected under the impugned order on 23/09/2021 by the learned 6th Joint Civil Judge Senior Division, Latur, and the detail order is based on a clear position of law to the effect that the provision of appointment of the Court Commissioner cannot be invoked so as to collect evidence for the parties and if the plaintiff has filed suit for perpetual injunction, he must establish his case, particularly in the wake of the written statement filed by the defendant, he should justify his relief in the plaint.

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5. In the wake of the above, the impugned order has rightly rejected the claim of the petitioner for appointment of Court Commissioner and since no legal infirmity is noticed in the impugned order, the same is upheld. Writ Petition is dismissed.

(SMT. BHARATI DANGRE, J.)

sjk