

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Writ Petition No. 1264 of 2018

PETITIONER : Ayubkha Mahammadkha, aged Major,
Occ. Agriculturist, Resident of Ladkheda,
Tah. Darwha, Dist. Yavatmal.

-Versus-

RESPONDENTS:

1. Rajdarkha Kifayatullakha, Aged Major,
Occ.: Agriculturist,
2. Afsarkha Kifayatullakha, Aged Major,
Occ. Agriculturist,
- 3a. Smt. Lelabai Vitthalrao Ddhe, Aged
Major, Occupation-Household,
- 3b. Vilas Vitthalrao Dudhe, Aged Major, Occ.
Agriculturist,
- 3c. Vinod Vitthalrao Dudhe, Aged Major,
Occ. Agriculturist,
- 3d. Shankar Vitthalrao Dudhe, Aged Major,
Occupation-Agriculturist,
RespondentNos.1 to 3d resident of
Ladkheda, Tah. Darwha, Dist. Yavatmal.
- 3e. Sau. Sunita Dnyaneshwar Nimkar, Aged
Major, Occupation-Household,
- 3f. Sau. Vanita Dnyaneshwar Nimkar, Aged
Major, Occupation-Household,
3(e) & 3(f) R/o. Baraipura, Darwha,
Tah.Darwha, District Yavatmal.

3g. Sau. Ranjana Dattatray Dhage, Aged Major, Occ. Household, Nos.3e to 3g resident of Near Shankar Theatre, Baraipura, Digras, Tah. Digras, Dist. Yavatmal.

3h. Sau.VandanaBabasaheb Dabhod, Aged Major, Occ. Household, Resident of Badner, Near Temple Road, Tah. Amravati, Dist. Amravati.

Mr. N.S.Bhattad, counsel for the Petitioner.
Mr. Anand Deshpande, counsel for
respondent Nos.1, 2, 3(g) to 3(h).

CORAM : ANIL S. KILOR, J.
DATED : 04.01.2023.

ORAL JUDGMENT

Heard.

2. **Rule.** Rule made returnable forthwith. The petition is heard finally with the consent of the learned counsel for the parties.

3. In this petition the challenge is raised to the common order below Exhibits-181 and 186 dated 10/10/2017, passed by the Joint Civil Judge, Senior Division, Darwaha in Regular Civil Suit No.158 of 1995, rejecting the application Exhibit-181 for

staying the suit till the land is measured and the application Exhibit-186 to produce documents, i.e. measurement map dated 17/05/2017.

4. The learned counsel for the petitioner submits that in view of the judgments of this Court in the case of **Vasant Tukaram Prabhu v. Xalinibai Borcar alias Shalinabai Borkar**, reported in 2014 (5) Mh.L.J. 382, **Vijay Shrawan Shende and others v. State of Maharashtra and others**, reported in 2009 (5) Mh.L.J. 279 and **Ramzan Sheikh Chand Sheikh v. Panjab Nathuji Gawande**, reported in 2014 (6) Mh.L.J. 97, the appointment of Commissioner is necessary, in case of dispute about the boundaries. He accordingly submits that the impugned order is contrary to the well settled principle of law.

5. On the other hand, Shri Anand Deshpande, learned counsel for the respondent Nos.1, 2 and 3(a) to 3 (h), supports the impugned order and it is pointed out that this is a third round of litigation for the same purpose and the petitioner is interested in delaying the decision in the suit. It is pointed out that the suit

is of the year 1995 and even after 28 years, there is no decision. Accordingly, he prays for dismissal of the present petition.

6. I have perused the impugned order and the documents filed along with the present petition. The record shows that earlier the petitioner had filed an application for appointment of Commissioner, which was rejected. Thereupon, he approached to this Court by filing Civil Revision Application No.153 of 1997, wherein this Court had passed the following order.

“The impugned order passed by the learned Judge rejecting the application filed by the applicant for appointment of Commissioner does not call for interference. However, it would be open to the applicant/plaintiff to examine witnesses for that purpose and also have measurement of the land in dispute by any other means. Revision application is rejected.”

7. Thereafter, the petitioner filed another application under Order XVI Rule 9 of the Code of Civil Procedure, which also came to be dismissed against which he approached this Court in Writ Petition No.1310 of 2016, which came to be dismissed.

However, in paragraph 7 of the said order, this Court had observed thus :

“7. Considering the facts on record, in my opinion, it would be open for the plaintiff to avail the opportunity granted by this Court while disposing Civil Revision Application No.153 of 1997. The petitioner would be at liberty to get the land measured privately and to examine the measurer to support his claim. If the petitioner is interested in availing the opportunity, steps shall be taken by him and concerned witness shall be examined within three months, failing which the trial Court shall proceed further with the civil suit.”

8. In view of the above referred paragraph 7, the petitioner applied for measurement on 04/10/2016, i.e. just before completion of three months and citing the said reason that measurement report is awaited, he filed an application Exhibit-181 to stay the suit. The said application was rightly rejected by the Trial Court, as taking the advantage of the liberty granted by this Court, the petitioner tried to stall the proceedings, which is pending from 1995. However, in view of the above referred paragraph 7 of the order dated 15/07/2016, and in view of the

judgments cited by the learned counsel for the petitioner, I am of the opinion that the application Exhibit-186 needs to be allowed, but subject to payment of costs, considering the conduct of the petitioner. In that view of the matter, I pass following order.

ORDER

- (1) The petition is partly allowed.
- (2) The impugned order passed below Exhibit-181 is confirmed.
- (3) The order below Exhibit-186 is hereby quashed and set aside and the petitioner is permitted to produce the document, i.e. measurement map dated 17/05/2017 on record.
- (4) The petitioner is permitted to examine the Measurer, if he so desired, within one month from today and if the Measurer is examined, on the same day, the respondent shall be given opportunity to cross-examine and thereupon, the Trial Court is directed to decide the matter within two months.
- (5) It is made clear that failure to examine the Measurer within one month from today, the permission granted by this

Court to examine the Measurer shall stand withdrawn and for any reason the time would not be extended.

- (6) The petitioner shall pay Rs.3,500/- to each respondent within one month from today.
- (7) Rule is made absolute in the above terms.

[ANIL S. KILOR, J.]