

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

WRIT PETITION NO.714/2018

1. Rajesh s/o Madhukar Kanhed,
Aged about 50 years,
Occu.: Business.

2. Madhukar Ratansa Kanhed,
Aged about 80 years,
Occ. Agriculturist,
Both R/o. Nandipeth, Washim,
Tq. & Dist. Washim.

..... PETITIONERS
(Ori. Plaintiffs)

// VERSUS //

1. Municipal Council, Washim,
through Chief Officer, Municipal Council,
Washim.

2. Satish Paraji Bidawe,
Aged about 50 years,
Occ. Service.

3. Prakash Paraji Bidawe,
Aged about 50 years,
Occ. Service,
2 & 3 R/o. Nandi Peth, Near Nagar
Parishad, Washim, Tq. And Dist. Washim.

.... RESPONDENTS
(Ori Defendant)

Mr. Zeeshan Haq, Advocate h/f Mr A. R. Deshpande, Advocate for
petitioners.

Mr. A. M. Ghare, Advocate for respondent no.1.

Mr. Onkar A. Ghare, Advocate for respondent nos.2 and 3.

CORAM : AVINASH G. GHAROTE, J.

DATED : 08/03/2021

ORAL JUDGMENT : (PER:- AVINASH G. GHAROTE, J.)

1] **Rule.** Rule made returnable forthwith.

2] Heard finally by consent of the learned counsel appearing for the parties.

3] Heard Mr. Zeeshan Haq, learned counsel for the petitioners. Mr. Ajay Ghare, learned counsel for the respondent no.1 and Mr. Onkar Ghare for respondent nos.2 and 3.

4] In a suit for removal of encroachment filed by the petitioners, an application for appointment of Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure for measurement of the encroachment, as indicated in prayer clause (A) of the plaint was made which came to be rejected by the impugned order.

5] Mr. Zeeshan Haq, learned counsel for the petitioners submits that the rejection is improper and the reason thereof, that the application is filed for collecting evidence through the medium of the Court is not borne out. He submits that in a case of encroachment, it is always necessary, for the encroachment as alleged, to be jointly measured by appointment of a Court Commissioner which would result in warding off unnecessary controversies and would entail a decision of the suit upon the factual position as revealed from the report.

6] Mr. Ajay Ghare, learned counsel for the respondent no.1 and Mr. Onkar Ghare, learned counsel for the respondent nos. 2 and 3 opposed the prayer, by inviting my attention to the plaint map at page 20, to indicate, that there is no dispute about the ownership of the properties of the respondent nos.2 and 3 and in any case, the relief as sought in prayer clause (B) of the plaint was not maintainable. He submits that the entire attempt is to collect evidence without discharging the burden placed upon the plaintiffs to prove the encroachment.

7] Having heard the learned counsel for the parties, I am of the considered opinion that in a case for removal of encroachment it would always be preferable for determination of the actual controversy, to have a Commissioner report, by appointing a Court Commissioner, to measure the alleged encroachment, which would set at rest the controversy in the suit. The application for appointment of Commissioner merely intends to ensure this position. The impugned order, is therefore, quashed and set aside and the application for appointment of Court Commissioner is accordingly allowed.

Rule is made absolute. No order as to costs.

JUDGE