

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

WRIT PETITION NO.4337 OF 2021

Dilip Rameshrao Choudhari,
Age – 52 years, Occ. - Farming,
R/o Deurwadi (Lad),
Tal. Darwha, Dist. Yavatmal. **PETITIONER**

...V E R S U S...

1. Narayan Krushnarao Sawade,
Age – 60 years, Occ. - Farming.
2. Mayur Narayan Sawade,
Age – 32 years, Occ. Farming.
3. Harshad Narayan Sawade,
Age – 28 years, Occ. Farming.

All R/o Deurwadi (Lad),
Tal. Darwha, Dist. Yavatmal. **RESPONDENTS**

Mr. D. U. Thakare, Advocate for Petitioner.
Mr. S. M. Vaishnav, Advocate for Respondents.

CORAM: **ROHIT B. DEO, J.**
DATE: **1st FEBRUARY, 2022.**

ORAL JUDGMENT:

Heard Mr. D. U. Thakare, the learned counsel for the petitioner and Mr. S. M. Vaishnav, the learned counsel for the respondents.

2. The petitioner is the plaintiff who instituted Regular Civil Suit 39/2017 seeking relief of permanent and mandatory injunction.

3. The substratum of the plaint is that the plaintiff is the owner of plot 303 and pursuant to permission obtained from the Gram Panchayat he fenced the said plot. The plaintiff alleges that the defendants who are the owners of adjoining plots 286 and 287 have started construction without obtaining the permission of the Gram Panchayat and without leaving the requisite margins. The plaintiff alleges that towards plot 303, the defendants have made a provision for a door. It is further alleged that the defendants are attempting to disturb the possession of the plaintiff. On such allegations, the plaintiff has sought a permanent injunction restraining the defendants from disturbing his possession qua plot 303 and a mandatory injunction directing the removal of the door.

4. The plaintiff has filed an affidavit in lieu of oral examination-in-chief. Before the plaintiff could be cross-examined, the plaintiff preferred an application seeking appointment of Court Commissioner to measure plot 303 owned by the plaintiff and

plots 286 and 287 owned by the defendants. This application is rejected by the learned trial Judge vide order dated 24.09.2019, which is impugned herein.

5. The trial Judge has reasoned that Court Commissioner cannot be appointed to collect evidence. The trial court has noted that it is not the pleading that there is any encroachment committed by the defendants.

6. In my considered view, there is no error in the view taken by the learned trial Judge. Pertinently, the suit is not for recovery of possession or removal of encroachment. The suit is for injunction simpliciter. The case of the plaintiff is that he is the owner of plot 303 and that the possession of the plaintiff is being disturbed. However, it is not even the case of the plaintiff that there is any encroachment committed as such. In this view of the matter, at least at this stage, it would not be necessary to appoint a Court Commissioner. After the parties adduce the evidence, if the trial Judge feels that Commissioner should be appointed to throw light on the evidence adduced by the parties, it shall always be open for the learned trial Judge to invoke the provisions of Order XXVI Rule 9 of the Civil Procedure Code. Subject to the aforesaid

observations, the petition is dismissed.

JUDGE

NSN