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

**SECOND APPEAL NO.491 OF 2017
WITH
CIVIL APPLICATION NO.9529 OF 2017
IN
SECOND APPEAL NO.491 OF 2017**

1. Karbnhari s/o Ramchandra Thengde,
Age: 66 years, Occ: Agri.,
R/o. Palaswadi, Tq. Khultabad,
District Aurangabad.
2. Uttam s/o Ramchandra Thengde,
Age: 58 years, Occ: Agri.,
R/o. Palaswadi, Tq.Khultabad,
District Aurangabad. .APPELLANTS

VERSUS

1. Damodhar s/o Gangadhar Thengde,
Age: 64 years, Occ: Agri.,
R/o. Palaswadi, Tq.Khultabad,
District Aurangabad.
2. Uttam s/o Gangadhar Thengde,
Age: 60 years, Occ: Agri.,
R/o. Palaswadi, Tq.Khultabad,
District Aurangabad.
3. Kautik s/o Khanderao Aute,
Age: 48 years, Occ: Agri.,
R/o. Palaswadi, Tq.Khultabad,
District Aurangabad.
4. Gayabai w/o Khanderao Aute,
Age: 73 years, Occ: Agri.,
R/o. Palaswadi, Tq.Khultabad,
District Aurangabad.
5. Sahebrao s/o Khanderao Aute,

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Age: 50 years, Occ: Agri.,
R/o. Palaswadi, Tq.Khultabad,
District Aurangabad.

6. Mansab s/o Khanderao Aute,
Age: 48 years, Occ: Agri.,
R/o. Palaswadi, Tq.Khultabad,
District Aurangabad. ..RESPONDENTS

Mr M.G. Kolse Patil, Advocate for appellants;

CORAM : N.W. SAMBRE, J.

DATE : 19th JULY, 2017

ORAL ORDER :

The present appellants are defendant Nos. 5 and 6 in Regular Civil Suit No. 84 of 2012 for perpetual injunction. Respondent Nos. 1 and 2 — original plaintiffs prayed that the defendants shall restrain from disturbing their peaceful possession over the suit property, which was having Gat No. 469 admeasuring 29 Are situated at village Palaswadi, Taluka Khultabad, District Aurangabad.

2. Learned trial Court decreed the suit by judgment and order dated 10th April, 2014, whereby restraining defendants-appellants from disturbing possession of the plaintiffs over the suit property

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described in paragraph-1 of the plaint. An appeal being Regular Civil Appeal No.98 of 2014 came to be dismissed by judgment and order dated 21st December, 2016. As such, this second appeal.

3. Mr. Kolse Patil, learned Counsel for the appellants, while inviting attention of this Court to the provisions of Order 23 Rule 9 of the Code of Civil Procedure, would urge that the trial Court should have appointed Court Commissioner for the purpose of carrying out joint measurement of the land before decreeing the suit. So as to substantiate his contention, he has invited attention of this Court to the judgment delivered in ***Kashinath Chandhuji Shastri vs Haribhau Nathuji Bawanthade***, reported in ***2006 (Supp.) Bom.C.R. 1018***, particularly paragraphs-6, 8 and 9 thereof. According to him, the measurements which are relied upon by both the Courts below are brought on record by the plaintiffs and as such, are not required to be appreciated, particularly when it was not joint measurements.

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4. Perused the judgment of both the Courts below. The land old Survey No. 8 was given Gat No.469. The Cadestral Surveyor is examined as witness PW-2, who has deposed that he received application on 23rd January, 2008 in his office, where he was working as Surveyor. According to him, he issued notice to adjoining land owners and fixed date of measurement as 15th May, 2008. It is then brought on record in his cross examination by the present appellants that area of Gat No. 469 old Survey No. 8 was 3 Hectare and 27 Are, which was divided into six parts. Land Gat No.469 admeasuring 29 Are, Gat No.466 area 52 Are, Gat No.464 area 1 Hectare 13 Are, Gat No. 465 area 56 Are, Gat No.467 area 53 Are, Gat No.468 area 24 Are was taken into account as reflected in his cross examination.

5. It is then to be noted that present appellants subjected the said witness PW-2 to cross examination and nothing adverse could be brought on record so as to infer that the measurement carried out by PW-2 was incorrect. The appellants-defendant Nos. 5 and 6 were in such eventuality, if

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they were not in agreement with the measurement carried out by Cadestral Surveyor, which was brought on record by the plaintiffs along with suit, could have moved separate application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of Court Commissioner. The appellants have not taken such recourse to as referred to above and brought any incriminating material so as to dispute measurement carried out by PW-2.

6. As such, in my opinion, I hardly notice any error, which calls for interference in concurrent findings recorded by both the Courts below. The appeal lacks merit, fails and stands dismissed.

7. Consequently, civil application stands disposed of.

(N.W. SAMBRE, J.)