

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

SECOND APPEAL NO.873 OF 2016

1. Sadashiv s/o. Patilbuwa Dhande,
age : 66 years, Occ. Agri.,
r/o. Dhande Galli, Beed,
Tq. and Dist. Beed
2. Vijay s/o. Patilbuwa Dhande,
age : 51 years, Occ. Agri.,
r/o. Dhande Galli, Beed,
Tq. and Dist. Beed

Vs.

1. Sau. Kusumbai w/o. Shrimantrao
Tandale, Age : Major,
Occ. Household,
r/o. Adarsh Nagar,
Beed
2. Shekhar alias Pappu s/o.
Pralhad Dhande,
Age : Major, Occ. Agri.,
r/o. Palwanchowk, Beed,
3. Pradeep s/o. Pralhad Dhande,
Age : Major, Occ. Agri.
r/o. Palwanchowk, Beed,

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Mr.Ameya N. Sabnis, Advocate for appellants

Mr.S.S.Thombre, Advocate for respondent no.1

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CORAM : SANGITRAO S. PATIL, J.
DATE : JULY 18, 2017

ORAL ORDER :

Heard the learned Counsel for the parties.

2. The appellants have challenged the judgment and decree dated 04.04.2016 passed in R.C.A. No.2 of 2014 by the learned District Judge-5, Beed, confirming the judgment and decree dated 03.12.2013 passed in R.C.S. No.246 of 2012 by the learned Joint Civil Judge, Junior Division, Beed, granting perpetual injunction against the appellants and respondent nos.2 and 3, restraining them from disturbing possession of respondent no.1 over the suit land.

3. The learned Counsel for the appellants submits that the lands of the parties have not been measured and demarcated. There is dispute regarding the boundaries of their lands. In the absence of the measurement and demarcation of the

lands of the parties, the trial Court as well as the first appellate Court should not have granted relief of perpetual injunction. He submits that the trial Court as well as the first appellate Court should have got the lands of the parties measured and demarcated. In support of this contention, he relied on the judgment in the case of **Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade, 2004(2) Mh.L.J. 722**, wherein this Court in Second Appeal, in the similar circumstances, set aside the judgment and decree passed by the trial Court as well as the first appellate Court and remanded the suit to the trial Court with a direction to get appointed the Court Commissioner to take joint measurement of the disputed lands and decide the suit afresh in accordance with law.

4. The learned Counsel for the appellants, therefore, submits that the impugned judgment and decree may be set aside and the suit may be

remanded for trial afresh, after getting the lands of the parties measured by appointing the Court Commissioner. He submits that the appellants are ready to move the trial Court for appointment of the Court Commissioner to get the lands measured.

5. The learned Counsel for respondent no.1 opposed the claim for remand of the suit, however, nothing has been stated on behalf of respondent no.1 as to what harm the respondent would suffer, in case the suit is remanded with a direction to get the disputed lands measured through the Court Commissioner and then decide it according to law.

6. In view of the judgment cited by the learned Counsel for the appellants, I am of the opinion that in the absence of measurement of the disputed lands, the trial Court as well as the first appellate Court should not have decided the controversy between the parties. In the absence of the measurement of the disputed land, there is no point in considering the controversy between the

parties. For just decision of the suit. It was immensely necessary to get the lands measured through the Officer concerned of the Office of Land Records. In my view, in order to decide the controversy between the parties finally and effectually and to meet the ends of justice, it will be necessary to set aside the judgment and decree passed by the trial Court as well as that of the first appellate Court and remand the suit with a direction to get the Court Commissioner appointed to take joint measurement of the lands of the parties.

7. The appellants shall move the trial Court for appointment of the Court Commissioner. After receiving the report of the Court Commissioner, the trial Court shall decide the suit afresh according to law.

8. With these directions, the appeal is allowed. The impugned judgment and decree are set aside. The suit is remanded to the trial Court

for disposal according to law. All the contentions are kept open. The parties shall remain present before the trial Court on 14.08.2017 positively. No costs.

[SANGITRAO S. PATIL, J.]

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