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

SECOND APPEAL NO.551 OF 2017

1. Vithal s/o Kashinath Kotalwar,
Age : 65 years, Occu. Agriculture,
2. Sachin s/o Vithal Kotalwar,
39 years, Occu. Service & Agri.,
Through Power of Attorney Appellant No.1

Both R/o Zari (Bk), Tq. Chakur,
Dist. Latur

..APPELLANTS
(Orig. Plaintiffs)

VERSUS

1. Baburao s/o Kashinath Kotalwar,
Age : 57 Yrs, Occu. Agriculture,
2. Balaji s/o Baburao Kotalwar,
Age : 32 years, Occu. Agriculture,
3. Govind s/o Baburao Kotalwar,
Age : 23 years, Occu. Agriculture,

All R/o Zari (Bk), Tq. Chakur,
Dist. Latur

..RESPONDENTS
(Orig. Defendants)

Mr P.P. Mandlik, Advocate for appellants;
Mr V.J. Dixit, Senior Advocate, instructed by Mr S.B. Madde, Advocate for respondents

CORAM : NITIN W. SAMBRE, J.

DATE : 26th September, 2017

ORAL ORDER:

Heard respective Counsel for some time.

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2. The appellants-plaintiffs filed Regular Civil Suit No.17 of 2003 for perpetual injunction and declaration of ownership, which came to be dismissed by the Trial Court vide judgment and decree dated 8th October, 2014, which further came to be confirmed by the lower appellate court in Regular Civil Appeal No.169 of 2014 vide judgment and decree dated 9th March, 2017.

3. It is the case of the present appellants-plaintiffs that the land in question was allotted to them being legal heirs of one Kashinath, who was blessed with three sons, namely, Tukaram, Vitthal and Baburao.

4. Respective ownership and the share is not in dispute. However, what is disputed is location of shares of each of them, which has prompted institution of the suit. It is not in dispute that of the total land held by the parties, land to the extent of 2 Hectares 70 R underwent acquisition from the share of the plaintiffs and defendants.

5. In the aforesaid background, while trying to make out a case for remand, Mr Mandlik, learned Counsel appearing on behalf of the appellants would urge that the Courts below have failed in their duty in felling to appoint Court Commissioner, so as to ascertain the factual position at the site, by passing an order under Order XXVI, Rule 9 of the Code of Civil Procedure.

6. So as to substantiate his contention, Mr Mandlik has relied upon the judgment of this Court in the matter of **Chandramani Marotrao Pantavne**

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vs. Shashikala Brijlal Bisen, reported in **2016 (5) Bom. C.R. 573**. In addition, he would urge that in view of the fact that the acquisition proceedings in relation to the land in question was undertaken, the map drawn and considered during acquisition and other relevant material should have been appreciated while recording the findings.

7. While opposing the claim on merits, Mr Dixit, learned Senior Counsel appearing on behalf of respondents, though upon instructions from the respondents consents for remand, however, submits that such remand should be with an exemplary costs and the Court should fix outer limit.

8. In the wake of above submissions, in my opinion, the appeal can be disposed of by consent, with following order :-

The impugned judgments and decrees rendered by the Courts below, are set aside, subject to appellants depositing costs of Rs.60,000/- before the Trial Court within a period of eight weeks from today, to which the respondents shall be entitled to.

If costs as aforesaid is not deposited, it be deemed that present second appeal is dismissed.

The matter stands remitted back to the Trial Court with a direction to decide the same afresh, in accordance with law, taking into consideration the observations made herein.

(4)

With consent of the parties, Taluka Inspector of Land Records, within whose jurisdiction the disputed property is located, is appointed as Court Commissioner, who shall measure the land in question and submit his report to the Trial Court, in any case by 30th November, 2017.

The entire costs of measurement shall be borne by the appellants-plaintiffs.

In the circumstances, it is expected of the Trial Court to decide the suit within a period of six months from the date of receipt of such report from the Taluka Inspector of Land Records, after giving due opportunity to the respective parties including that of adducing evidence.

Parties hereto undertake that they shall appear before the Trial Court on 9th October, 2017.

With above observations and directions, second appeal stands partly allowed.

In view of disposal of the appeal, pending Civil Applications do not survive and stand disposed of accordingly.

(NITIN W. SAMBRE, J.)

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