

:: 1 ::

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

**APPEAL FROM ORDER NO.65 OF 2018 WITH
CIVIL APPLICATION NO.12150 OF 2018**

1. Jagannath s/o Santu Bhingardive
Age 40 years, Occu. Fitter,
R/o Pipeline Road, Savedi,
S.No.34, District Ahmednagar.
2. Gorakh s/o Santu Bhingardive,
Age 38 years, Occu. Fitter,
R/o A/p Newasa, Taluka Newasa
District Ahmednagar
3. Bharat s/o Santu Bhingardive,
Age 32 years, Occu.
R/o Pawan Nagar, Savedi,
District Ahmednagar
4. Bhagubai Santu Bhingardive,
Age 34 years, Occu. Household,
R/o A/p Newasa, Taluka Newasa,
District Ahmednagar.

**... APPELLANTS
(Orig. Plaintiffs)**

VERSUS

1. The Collector, Ahmednagar
District Ahmednagar
2. The Tahasildar, Tahsil Office,
Ganja Depot, Ahmednagar
3. Talathi Mauje Savedi,
Savedi, District Ahmednagar
4. Smt. Yashodabai Savleram Bhingardive,
Age 65 years, Occu. Household,
R/o Savedi, Behind Talathi Office,
Ahmednagar.

5. Uttam s/o Savleram Bhingardive,
Age 48 years, Occu. Business,
R/o Savedi, Behind Talathi Office,
Ahmednagar.
6. Sudam s/o Savleram Bhingardive,
Age 46 years, Occu. Business
R/o Savedi, Behind Talathi Office,
Ahmednagar.
7. Daulat s/o Savleram Bhingardive,
age 32 years, Occu. Business,
R/o Savedi, Behind Talathi Office,
Ahmednagar.
8. Shobha @ Swati Madhusudan Bansole,
Age major, Occu. Household,
R/o Savedi, Behind Talathi Office,
Ahmednagar.
9. Prema Vyankat Naidu,
Age major, Occu. Business,
R/o Chira Bazar, Mumbai
10. Sheela Ravindra Ubale,
Age major, Occu. Business,
R/o Savedi, Behind Talathi Office,
Ahmednagar
11. Jayashree Prakash Gaikwad,
Age major, Occu. Household
R/o Savedi, Behind Talathi Office,
Ahmednagar.
12. Dayabai Kisan Salve,
Since deceased, through L.Rs.
- 12-A) Baliram Kisan Salve,
Age 73 years, Occu. Nil,
R/o Rahuri, Taluka Rahuri,
District Ahmednagar
- 12-B) Manoj Baliram Salve,
Age 34 years, Occu. Agri.

:: 3 ::

R/o Jangum Galli, Pushkar Building,
Rahuri, Taluka Rahuri,
District Ahmednagar

12-C) Shantabai Murlidhar Rokade,
Age 70 years, Occu. Household,
R/o Nisha Park Apartment,
Behind Mamta Gas, Gulmohar Road,
Savedi, Ahmednagar

13. Leelabai Vishnu Bedekar,
Age major, Occu. Household,
R/o Behind Don Bosco School,
District Ahmednagar.

... **RESPONDENTS**
(Orig.Defendants)

.....

Shri S.S. Gangakhedkar, Advocate for appellants
Shri S.S. Dande, A.G.P. for respondents No.1 to 3
Mr. S.R. Wakale, Advocate holding for
Shri A.A. Phad, Advocate for respondents No.11, G.P.A. for
respondents No.5 and 8 to 10
Mr. S.R. Wakale, Advocate holding for
Shri T.J. Momin, Advocate for respondents No.12-A to 12-C

.....

WITH

APPEAL FROM ORDER NO.66 OF 2018 WITH
CIVIL APPLICATION NO.12157 OF 2018

1. Jagannath s/o Santu Bhingardive
Age 40 years, Occu. Fitter,
R/o Pipeline Road, Savedi,
S.No.34, District Ahmednagar.
2. Gorakh s/o Santu Bhingardive,
Age 38 years, Occu. Fitter,
R/o A/p Newasa, Taluka Newasa
District Ahmednagar
3. Bharat s/o Santu Bhingardive,
Age 32 years, Occu.
R/o Pawan Nagar, Savedi,
District Ahmednagar

:: 4 ::

4. Bhagubai Santu Bhingardive,
Age 34 years, Occu. Household,
R/o A/p Newasa, Taluka Newasa,
District Ahmednagar.

... **APPELLANTS**
(Orig. Plaintiffs)

VERSUS

1. The Collector, Ahmednagar
District Ahmednagar
2. The Tahasildar, Tahsil Office,
Ganja Depot, Ahmednagar
3. Talathi Mauje Savedi,
Savedi, District Ahmednagar
4. Ashok s/o Sitaram Shelke,
Age 54 years, Occu. Service,
R/o Pipeline Road, Savedi,
S.No.34, District Ahmednagar.
5. Smt. Saraswati w/o Ashok Shelke,
Age 47 years, Occu. Household,
R/o Narayandoho, Taluka Nagar,
District Ahmednagar.
6. Smt. Kedabai Bhimrao Mundhe,
Age major, Occu. Household,
R/o Narayandoho, Taluka A'nagar,
District Ahmednagar.
7. Smt. Yashodabai Savleram Bhingardive,
Age 65 years, Occu. Household,
R/o Savedi, Behind Talathi Office,
Ahmednagar.
8. Uttam s/o Savleram Bhingardive,
Age 48 years, Occu. Business,
R/o Savedi, Behind Talathi Office,
Ahmednagar.
9. Sudam s/o Savleram Bhingardive,
Age 46 years, Occu. Business
R/o Savedi, Behind Talathi Office,

Ahmednagar.

10. Daulat s/o Savleram Bhingardive,
age 32 years, Occu. Business,
R/o Savedi, Behind Talathi Office,
Ahmednagar.
11. Shobha @ Swati Madhusudan Bansole,
Age major, Occu. Household,
R/o Savedi, Behind Talathi Office,
Ahmednagar.
12. Prema Vyankat Naidu,
Age major, Occu. Business,
R/o Chira Bazar, Mumbai
13. Sheela Ravindra Ubale,
Age major, Occu. Business,
R/o Savedi, Behind Talathi Office,
Ahmednagar
14. Jayashree Prakash Gaikwad,
Age major, Occu. Household
R/o Savedi, Behind Talathi Office,
Ahmednagar.
15. Dayabai Kisan Salve,
Since deceased, through L.Rs.
- 15-A) Baliram Kisan Salve,
Age 73 years, Occu. Nil,
R/o Jangam Galli,
In front of Hanuman Temple,
Rahuri, Taluka Rahuri,
District Ahmednagar
- 15-B) Manoj Baliram Salve,
Age 34 years, Occu. Agri.
R/o Jangum Galli, Pushkar Building,
Rahuri, Taluka Rahuri,
District Ahmednagar

**(Deleted as not party before Court below,
with liberty to file proper Civil Application)**

- 15-C) Shantabai Murlidhar Rokade,
Age 70 years, Occu. Household,
R/o Behind Mamta Gas, Gulmohar Road,
Savedi, Ahmednagar
16. Leelabai Vishnu Bedekar,
Age major, Occu. Household,
R/o Behind Don Bosco School,
District Ahmednagar.
17. Khan Noorjahan Mehboob Khan,
Age 65 years, Occu. Agri. & Household,
R/o Idgah Maidan, Zindigate,
Ahmednagar
18. Khan Majidkhan Mehboob Khan,
Age 45 years, Occu. Agri. & Business,
R/o Idgah Maidan, Zindi Gate,
Ahmednagar
19. Khan Sajidkhan Mehboob Khan,
Age 40 years, Occu. Agri. & Business,
R/o Idgah Maidan, Zindi Gate,
Ahmednagar
20. Khan Tabassum Sajid Khan,
Age 42 years, Occu. Agri. & Household,
R/o NIBM Kondwa, Pune Office,
Now at present Ahmednagar.
21. Shaikh Tahesin Shabid
Age 40 years, Occu. Agri. & Household,
R/o NIBM Kondwa, Pune Office,
Now at present Ahmednagar
22. Nasir Chhanubhai Shaikh
Age 74 years, Occu. Agri.,
R/o Gulshan Bungalow,
Burudgaon Road, Ahmednagar
23. Rubabbabai Nasir Shaikh,
Age 70 years, Occu. Agri.,
R/o Gulshan Bungalow,
Burudgaon Road, Ahmednagar

:: 7 ::

24. Rais Nasir Shaikh,
Age 43 years, Occu. Agri.,
R/o Gulshan Bungalow,
Burudgaon Road, Ahmednagar. ... **RESPONDENTS**
(Orig.Defendants)

.....

Shri R.R. Karpe, Advocate with
Shri S.S. Gangakhedkar, Advocate for appellants
Shri S.S. Dande, A.G.P. for respondents No.1 to 3
Mr. S.R. Wakale, Advocate for respondents No.4 to 6
Mr. S.R. Wakale, Advocate holding for
Shri A.A. Phad, Advocate for respondents No.11, G.P.A. for
respondents No.5 and 8 to 10
Mr. S.R. Wakale, Advocate holding for
Shri T.J. Momin, Advocate for respondents No.15-A & 15-B
Mr. S.P. Salgar, Advocate for respondents No.17 to 21

.....

CORAM : R. G. AVACHAT, J.

DATE : 14th DECEMBER, 2021

J U D G M E N T :

Both these appeals are being decided by this common judgment and order since they are interconnected. The challenge in Appeal No.65/2018 is to the judgment and order dated 15/6/2018, passed by District Judge-11, Ahmednagar in Regular Civil Appeal No.674/2012. While challenge in Appeal from Order No.66/2018 is to the judgment and order passed by the very Court in Regular Civil Appeal No.248/2007. Although the orders impugned in both these appeals arise from two different appeals, those appeals had arisen out of judgment and decree dated 8/3/2004 passed in Regular Civil Suit, being Suit No.54/2002. Under

the orders impugned in these appeals, the judgment and decree dated 18/3/2004 in Regular Civil Suit No.54/2002 has been set aside, remanding the suit back to the trial Court to decide it afresh.

2. The appellants in both these Appeals from Orders are the original plaintiffs in Regular Civil Suit No.54/2002.

3. The facts necessary to decide the present appeals are as follows :

4. The plaintiffs filed the suit (No.54/2002) for partition and separate possession of the land in Survey No.38 (Old No.34) particularly described in the plaint, against respondent No.6 to 16 herein (defendants). The suit came to be decreed, declaring the right, title and interest of the plaintiffs and the defendants (respondents No.6 to 11 herein). The original defendant No.12 filed the appeal, Regular Civil Appeal No.674/2012, claiming to have not been given due opportunity to contest the suit. It was the case of the appellants herein (plaintiffs in the suit) that the original defendant No.12 had given up her right, title and interest in the suit land. The trial Court accepted the said contention.

5. Whereas Regular Civil Appeal No.248/2007 was

filed by respondent No.1 to 3 herein, contending that, they have not been made parties to the said suit. The respondent No.18 to 25 in Regular Civil Appeal No.248/2007 also came with a case to have not been made parties to the said suit. The contention of the appellants and these respondents in Regular Civil Appeal No.248/2007 was that, they have purchased the land in Survey No.38, under various sale deeds and no land has remained with the plaintiffs and other defendants to inherit the same.

6. The appellate Court accepted the contention of the appellants in both the appeals and remanded the suit back to the trial Court to decide the same after giving the appellants and other parties to the suit an opportunity of hearing. Both these appeals have, therefore, been preferred by the original plaintiffs, taking exception to the orders remanding the suit back to the trial Court.

7. Shri S.S. Gangakhedkar, learned counsel for the appellants in Appeal from Order No.65/2018 would submit that, the defendant No.12 had filed her written statement. She was given an opportunity to lead evidence and cross-examine the witnesses. According to him, the plaintiffs may admit the defendant No.12 to have a share in the suit land.

The appellate Court, for that purpose, ought not to have remanded the suit back to the trial Court. The original defendant No.12 could have been given her share in the suit land in appeal itself.

8. Shri R.R. Karpe, learned counsel for the appellants in Appeal from Order No.66/2018 would submit that, the respondents No.1 to 3 did not have any right, title or interest in the suit land. There were two suits, Regular Civil Suit No.325/1981 and Regular Civil Suit No.341/1981 for relief of injunction and mandatory injunction in respect of the land in Survey No.38. Both the suits have been dismissed. The decree passed in both the suits has attained finality. As such, the respondents No.1 to 3 could not be heard to claim to have a share in the suit land. The learned counsel would further submit that, the issue of title was very much involved in those two suits. Since for the relief of mandatory injunction, title of the plaintiff to the suit property was the matter directly and substantially in issue. The claim raised in those suits has been negatived. According to learned counsel, the objections raised to the execution of the decree in Regular Civil Suit No.54/2002 could have been decided by the Executing Court itself. No civil suit or appeal could, therefore, have been

entertained. The learned counsel relied on the provisions of Order XXI Rule 97 and Rule 101 of the Code of Civil Procedure. Following authorities have also been placed into service on the question of res judicata, circumstances under which remand of the suit to the trial Court is warranted, etc. Learned counsel relied on the following authorities :-

- (1) Sarwan Kumar & anr. Vs. Madanl Lal Aggarwal
AIR 2003 SC 1475
- (2) J. Balaji Singh Vs. Diwakar Cole & ors.
(2017) 14 SCC 207

9. After going through the orders impugned in these appeals, this Court found it not necessary to call upon learned counsel for the respondents to respond to the submissions made by the learned counsel for the appellants herein. This Court found the judgment and order in Regular Civil Appeal No.248/2007 to have been well reasoned, warranting no interference therewith.

10. It is to be stated at the very outset that, the appellants herein appear to have not raised before the appellate Court any point as to the decree in Regular Civil Suit No.325/1981 and Regular Civil Suit No.341/1981 having

been attained finality and objection, if any, raised by the respondents No.1 to 3 to the execution of the decree should have been decided by the Executing Court and not by a separate suit. The appeal preferred by the respondents No.1 to 3 is of the year 2007. It came to be decided in 2018. Order XXI Rule 97 of the Code of Civil Procedure postulates an application by the decree holder for removal of objection to the delivery of possession.

11. Admittedly, the appellants in Regular Civil Appeal No.248/2007 were not parties to the suit (Regular Civil Suit No.54/2002). Feeling aggrieved by the judgment and decree passed in the said suit, they preferred the said appeal. It appears that, all the defendants in the suit had admitted the claim of the plaintiffs therein (appellants herein). The appellants in Regular Civil Appeal No.248/2007 and the appellate Court as well had, therefore, every reason to observe it to be a collusive suit. The appellants in Regular Civil Appeal No.248/2007 came with a case that no land in Survey No.38 remained with the parties to the suit since the entire land had been sold under various sale deeds by the predecessors-in-title of the plaintiffs and defendants. Registered sale deeds were placed on record of the appellate

Court, which prima facie found substance in the contention of the appellants therein. The appellate Court also found that, in a suit instituted in the year 2002, the 7/12 extract of the suit land pertaining to the year 1979, was produced along with the plaint. No revenue record in respect of the suit land on the date of the suit was produced. Even if a small portion of the land in Survey No.38 is assumed to have remained with the original owners, its identification ought to have been proved before the trial Court. The appellants in Regular Civil Appeal No.248/2007 ought to have, therefore, been made parties to the suit. The appellate Court also held that, the map drawn by the District Inspector of Land Records was not a document of title. It ought to have been proved during trial of the suit. It has also observed that, while a decree was sent to execution, the Taluka Inspector of Land Records found it difficult to identify the suit land. The revenue record and the record maintained by the TILR's office was mismatched.

12. This Court is in agreement with the observations made by the first appellate Court. It is true that, the suit was of the year 2002. The first appellate Court can hear and decide the appeal on its own merits and if required, record the evidence before itself and decide the appeal without

remanding the suit back to the trial Court. Here, however, is a case that the appellants in Regular Civil Appeal No.248/2007 appear to have consciously not been made parties to the suit. These appellants and other respondents came with a case to have purchased the entire land Survey No.38. Registered sale deeds were placed on record of the first appellate Court. On facts, the first appellate Court found it to be a collusive suit between the parties thereto, except the defendant No.12. For the suit of 2002, a revenue record standing in the name of the appellants (plaintiffs) of the year 1979 was filed along with the plaint. Had the revenue record as of the date of the suit was filed, the trial Court could have found the appellants in Regular Civil Appeal No.248/2007 to be parties necessary to decide the matter in issue. Whether the judgment and decree in Regular Civil Suit No.325/1981 and Regular Civil Suit No.341/1981 would operate as res judicata is necessarily a question of fact. For decision thereof, the issue ought to have been raised in the suit. Who are sought to be estopped by the principle of res judicata should have been parties to the suit. The first appellate Court, only on the basis of judgment and decree in the said suit, would not be called upon to give a finding on an issue of res judicata. The issues raised by the appellants in Regular Civil

Appeal No.248/2007 go to the very root of the matter. Those issues need to be decided by the fact finding Court of the first instance. The appellate Court, on appreciation of the entire controversy in the matter, has rightly remanded the suit back to the trial Court.

13. Although the submissions made by the learned counsel for the appellants in Appeal No.65/2018 may be acceptable, the same cannot be done in piecemeal since the challenge in both the appeals was to one and the same judgment and decree passed in Regular Civil Suit No.54/2002. Since the order remanding the suit back to the trial Court is being maintained in Appeal from Order No.66/2018, the Appeal from Order No.65/2018 meets with the same fate.

14. In the result, both the appeals fail. The appeals are, therefore, dismissed.

15. On the request of learned counsel for the appellants, ad-interim order to continue for next five weeks.

16. Record and proceedings be sent back to the trial

:: 16 ::

Court immediately.

17. In view of disposal of the Appeals, pending Civil Applications are disposed of.

**(R. G. AVACHAT)
JUDGE**

fmp/-