

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

SECOND APPEAL NO.440 OF 2019

(MADHAO RUPRAO GAWANDE & OTH....VS.. VIJAYKISHOR DEVIPRASAD DUBEY & OTH.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri N.R.Tekade, Advocate for Appellants.
Shri G.G.Mishra, Advocate for Respondent No.1.

CORAM : ANIL S. KILOR, J.
DATED : JANUARY 27, 2023.

1. Heard.
2. The present Second Appeal is arising out of the judgment and decree dated 29/07/2019 passed by District Judge-3, Akola in Regular Civil Appeal No.36 of 2016 arising out of the judgment and decree passed by the 3rd Joint Civil Judge Junior Division, Akola dated 07/01/2016, decreeing the suit for permanent injunction in favour of the plaintiff.
3. This Court vide order dated 19/11/2019 framed following Substantial Questions of Law :

“(i) Whether the First Appellate Court erred in non considering the application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 which resulted into miscarriage of justice?

ii) Whether both the Courts below erred in holding that the original plaintiff had easementary right over the disputed portion?”

4. As regards the first Substantial Question of Law, it is submitted by the learned counsel for the appellant that the application under Order 41 Rule 27 of the Code of Civil Procedure (CPC) was not decided by the lower appellate Court and the same is pending before the learned lower appellate Court. The learned counsel for the respondent is not disputing the said position.

5. In the circumstances, without going into the second Substantial Question of Law, I am of the opinion that the appellant succeeds on the first Substantial Question of Law in this appeal as the matter needs to be remanded back to the learned lower appellate Court with direction to decide the application under Order 41 Rule 27 of CPC pending with the learned lower appellate Court and filed in Regular Civil Appeal No.36 of 2016. Accordingly, I pass the following order:

- i) The Second Appeal is partly allowed.
- ii) The judgment and decree dated 29/07/2019 passed by District Judge-3, Akola in Regular Civil Appeal No. 36 of 2016 is hereby quashed and set aside.
- iii) The learned first Appellate Court is directed to decide the application filed by the appellant under Order 41 Rule 27 of CPC, according to law, after hearing both the parties.

- iv) Both the parties shall appear before the first Appellate Court on 22/02/2023 at 11:00 a.m.
- v) The learned first Appellate Court is directed to decide the application within a period of two months from the date of appearance of the parties and thereafter shall decide the appeal afresh within four months from the date of decision on the application under Order 41 Rule 27 of CPC.

The Second Appeal is **disposed of** accordingly.
No order as to costs.

JUDGE

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