



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

APPEAL FROM ORDER NO. 64 OF 2022

Kisan Sitaram Jadhav
Sine deceased through His L.Rs.
Parwati Kishan Jadhav and others .. Appellants

Versus

Arjun Rangnath Jadhav .. Respondent

Mrs. M. A. Kulkarni, Advocate for the Appellants.
Shri P. S. Dikle, Advocate for the Respondent.

CORAM : SHAILESH P. BRAHME, J.
DATE : 12TH DECEMBER, 2025.

FINAL ORDER :

. Heard both sides finally.

2. Appellants – original defendants have challenged order of remand passed in R.C.A. No. 302 of 2013. It was arising out of decree of dismissal of R.C.S. No. 307 of 2010 filed by the respondent – plaintiff for declaration and injunction.

3. The substantial question of law is as under :

Whether the first appellate Court is right in remanding the matter for decision afresh after recording that the plaintiff has in fact come out with a new case in the appeal ?

4. Learned counsel Mrs. Kulkarni for the appellants would submit that altogether new case is made out by the respondent before the lower Appellate Court which was neither pleaded in the plaint, nor those were facts in issue before the Trial Court. She would submit that the respondents suppressed material facts and his suit was dismissed. He should have disclosed the location of the tank in the plaint. It is submitted that remand of the matter for fresh trial should not have been resorted to and the Appellate Court itself should have exercised the powers under Order XLI Rule 25 of the Code of Civil Procedure (for the sake of brevity and convenience hereinafter referred as to the "C.P.C.") It is submitted that order of remand is mechanical and unwarranted. It is further submitted that the map and the Commissioner report which was shown to the lower Appellate Court was from R.C.S. No. 48 of 2012.

5. Per contra, learned counsel for the respondent submits that it has come in the evidence that land was acquired from gut No. 14 for percolation tank. He would submit that the location of the percolation tank, measurement of gut No. 14 and 15 are relevant consideration for deciding the controversy. He would further submit that father of the defendants Sitaram received the compensation and the award showing acquisition of 36R from gut No. 15 is factually incorrect. He wants to rely on public document in respect of acquisition of the land. The letter dated 03.08.2018 addressed by the Circle Officer to the Tahsildar discloses that in fact the land was acquired from gut No. 14 for

the percolation tank.

6. I have considered rival submissions of the parties. The respondent has come up with a case that he is owner of land gut No. 15 to the extent of 60R. Appellants are owners of land gut No. 14, which is adjoining one. They encroached on 31R land.

7. The suit is contested by the appellants disclosing that originally it was survey No. 9. After consolidation scheme it was disintegrated into gut Nos. 14 and 15. Gut No. 14 is measuring 1H 20R and gut No. 15 is measuring 1H 19R. It is pleaded that 36R of land was acquired for the tank, which is shown in gut No. 14.

8. The award dated 27.02.1979 at Exhibit 45 discloses that 36R from gut No. 15 was acquired and the tank was shown to be in gut No. 15. The compensation was paid to Sitaram Dasu Jadhav for acquisition of 36R land. If the land of gut No. 15 was acquired, the appellants are unable to explain as to how compensation was paid to their father. It should have been paid to the respondent – plaintiff. The cross examination of the defendants' witness Vishwanath shows that percolation tank is adjacent to gut No. 14. He further admitted that in rainy season land of gut No. 14 submerges in the water of the tank.

9. The map drawn by the Court Commissioner in collateral proceedings discloses percolation tank in gut No. 14. Pertinently,

in between percolation tank and gut No. 15, there exists gut No. 14. Both gut numbers emerged from Sy. No. 09 and entries in the acquisition record appears to be incorrect.

10. The exact location of gut No. 14 and 15 and their area needs to be ascertained. The location of the percolation tank is also relevant. The pleadings and the evidence on record of both sides are ambiguous. The letter addressed by the Circle Officer on 03.08.2018 discloses that acquisition of 36R from gut No. 14, but wrongly recorded to be from gut No. 15, albeit, the letter was not on record. In this backdrop, the fact finding process is required to be undertaken.

11. Just because new case is made out by the respondent in lower Appellate Court cannot be a ground to over look the actual position of the subject matter. Appellants – defendants have also not made the factual position clear. It is necessary to take recourse to Order XXVI Rule 9 of the C. P. C. It's a dispute pertaining to encroachment on the adjoining land. No prejudice would be caused to the appellants if the trial court undertakes the exercise of ascertaining the truth afresh.

12. The lower Appellate Court has assigned adequate reasons for remand. The respondent is armed with the relevant material, which was not before the Courts below to throw light on the location of the land. I find that impugned order is not mechanical. In the given facts and circumstances, the Appellate

Court is justified in resorting to Rule 23A instead of Rule 25 of Order XLI of the C. P. C. My attention is adverted to the judgment of the Supreme Court in the matter of Shivkumar and others Vs. Sharanabasappa and others reported in *(2020) 11 SCC 277*. I have gone through the law laid down by the Supreme Court in para Nos. 25.1 to 25.4 of the judgment. By following the principles I have come to the conclusion that there is no error of jurisdiction committed by the Appellate Court.

13. The substantial question of law needs to be answered in favour of the respondent to uphold the impugned order. Appeal from order is dismissed.

[SHAILESH P. BRAHME J.]

bsb/Dec. 25