

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

Second Appeal No. 223 of 2014

Ismail Musabhai Memon
Age 67 years,
Occupation : Business,
R/o Chara Galli Mohalla,
Nandurbar, District Nandurbar. **.. Appellant.**

Versus

Abdul Aziz Anvar Inamdar,
Age Major,
Occupation : Retired,
R/o Mojawar Mohalla, Nandurbar,
District Nandurbar. **.. Respondent.**

Shri. Prakashsing B. Patil, Advocate, for appellant.

Shri. S.A.P. Quadri, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

**Judgment reserved on : 21st September 2015
Judgment pronounced on : 30th September 2015.**

JUDGMENT :

1) The appeal is filed against the judgment and decree of Regular Civil Suit No.13 of 2004 which was pending in the Court of the Civil Judge, Senior Division, Nandurbar and also against the judgment and order of Regular Civil Appeal No.13 of 2007 which was pending in

the Court of the District Judge-1 Nandurbar. Relief of injunction is granted against the appellant to prevent the nuisance by the trial Court and the decision is confirmed by the first appellate Court. Both sides are heard.

2) The plaintiff and the co-sharer are owners of property bearing CTS No.2407/1-A situated at Nandurbar. It is contended by the plaintiff that the defendant is in possession of property bearing CTS No.2407/1-B situated adjacent to the property of the plaintiff and the defendant is illegally running a saw mill on property CTS No. 2407/1-B. It is the case of the plaintiff that the defendant is not having necessary licence to run the saw mill. It is contended that due to machinery of saw mill there is noise pollution and the machinery is causing vibrations also and it is also nuisance to the plaintiff. It is contended that the defendant is keeping his wood on the property of the plaintiff and it is also creating nuisance. It is the case of the plaintiff that he is residing in the building constructed on property CTS No.2407/1-A and due to vibrations caused by the machinery of the defendant danger is created to the building of the plaintiff. It is contended that

due to aforesaid vibrations and noise the plaintiff is suffering ill-health and he is not in a position to tolerate this nuisance as he has become old.

3) It is the case of the plaintiff that both properties bearing CTS Nos.2407/1-A and 2407/1-B are situated in residential zone of the local body and the defendant is running the saw mill illegally there. It is contended that the defendant has no right to run saw mill there and for nuisance also preventive relief needs to be given against the defendant to stop the nuisance.

4) The defendant contested the suit by filing written statement. He has contended that he is doing the business of saw mill on the property CTS No.2407/1-B since 1992 and right from beginning he is holding necessary licence of competent authority to do this business. It is contended that his machinery is not creating noise pollution and also the vibrations and no actionable wrong, nuisance as such is there. It is contended that due to delay caused in taking action, due to laches and acquiescence also the plaintiff is not entitled to get any relief.

5) On the basis of the aforesaid pleadings issues were framed. Both the sides gave evidence. Both the Courts below have held that it is a case of actionable nuisance. The Courts below have held that defendant has not obtained licence to run the saw mill on property CTS No.2407/1-B but the machinery is kept there and so he is running the business illegally.

6) Son of the plaintiff, residing in the building constructed on CTS No.2407/1-A, has given evidence on nuisance. His evidence is consistent with the aforesaid pleadings. Suggestions are given to the son of the plaintiff by the defendant that the plaintiff must have become accustomed with the noise now. It is suggested that as the plaintiff was working in a Railway workshop, he cannot say that noise is causing annoyance to him. In the evidence of the son of the plaintiff it is brought on record that there are many houses surrounding the saw mill on property CTS No.2407/1-B. It is suggested that in the vicinity there are saw mills and they are also causing nuisance but such suggestions are not admitted. The suggestions and the evidence of the defendant show that

it is not disputed that there is only one saw mill and that is of the defendant in that locality. Son of the plaintiff has specifically stated in the cross examination that his building is situated at a distance of 10 ft from the place where the machinery is being used by the defendant.

7) Son of the plaintiff has admitted in the cross examination that in the other residential localities like Bail Bazar there are two saw mills. However, this circumstance cannot be considered in a case like present one if the plaintiff is able to prove the case of actionable nuisance.

8) The defendant has examined himself to give evidence in rebuttal and he has examined two witnesses. His evidence shows that, he owns some space from both CTS Nos.2407/1-A and 2407/1-B. He has given evidence that his saw mill is situated on both these properties. He has given evidence that he had obtained licence to run the business on property CTS No.2407/1-A.

9) The evidence of the defendant shows that in the year 2005-2006 there was no licence with the defendant to run the business. Reasons for the same are being

discussed later on. The evidence on the record shows that the machinery of the defendant was being run on 10 HP motor. The defendant has admitted that there is no pacca construction to cover the area of machinery. Conditions of the licence show that the machinery needs to be inside of the pacca construction. It appears that there is only tin-shed of the defendant and it is also not in good condition. Photographs in that regard were produced in the trial Court. The evidence of the defendant shows that he does not know that he was expected to keep the machinery in pacca construction. It is surprising that the concerned department has not taken any action though the machinery is not installed in pacca construction. The evidence of the defendant and his witness Shaikh Muktar shows that there is only saw mill which is of the defendant in that locality. The evidence also shows that they admitted that on all the sides of the saw mill there are houses which are occupied.

10) Madhav Namdev Gavali, Deputy Director of Social Forestry is examined by the defendant. His evidence shows that right from 1993 the business was

being done by the defendant and requisite licence was issued by the Forests Department for the business. His evidence, however, shows that due to some illegal activity, action was taken by Forests Department and the saw mill was sealed and closed. The evidence shows that licence was issued in respect of property CTS No.2407/1 and not specifically in respect of CTS No.2407/1-A or 1-B.

11) The property card of CTS No.2407/1-A is on record and it shows that the plaintiff is shown as one of the owners of this property. It appears that no record whatsoever was produced by the defendant in the trial Court to show that he had acquired ownership over portion of CTS No.2407/1. In second appeal, civil application is filed by the defendant and he has sought permission to produce some relevant record. In view of nature of the dispute this Court is considering that record. In 1990 the owner of CTS No.2407/1 had given no objection certificate to the concerned authority for issuing licence of saw mill in favour of the defendant. The first licence was for the period from 1-1-1993 to 31-12-1993 and it was in respect of CTS No.2407/1. The number of

this licence was 30/93 and it was for 42" vertical bend. In the year 1997, licence No.47/97 was issued for using the machinery and name of the saw mill was shown as "Apni Saw Mill, Nandurbar". In the first licence bearing No.47/97 property on which it was to be used was not described but subsequently in the year 2001 the property was described as 2407/1. Licence No.59/2004 was then issued and it was in existence till the year 2004. It appears that from that year the dispute started. Further, the Forests Department also took action against the defendant like starting confiscation proceeding in respect of the forest products in which the mill was sealed and criminal action was also taken. The record shows that the Sessions Court set aside the order of confiscation and the defendant got acquittal also.

12) In the second appeal, the record like copy of sale deed is produced to show that some portion of property CTS Nos.2407/1-A and 2407/1-B was purchased by defendant from its owner. Thus there is record of ownership with the defendant in respect of portion of CTS No.2407/1. Thus not much can be made out due to

the discrepancy like on the licence property number was mentioned as 2407/1. Further, in the year 1990 owner of this portion had given no objection in favour of the defendant and on that basis licence was issued to the defendant in the year 1993. This Court has no hesitation to hold that the discrepancy in mentioning the property number in the licence cannot be used against the defendant. Thus it needs to be ascertained as to whether the activity of the defendant amounts to actionable nuisance.

13) The nuisance of noise and vibrations detracts from enjoyment of right of property. Nuisance is such a tort that the injury caused by it cannot be specifically repaired and the extent of injury cannot be ascertained or estimated with accuracy. Such nuisance may be of many degrees and in many cases like the present the nuisance may not endanger the life or health and it may only cause annoyance, discomfort. It is settled law that in view of the rights of the owner of the property whenever there is discomfort such nuisance can become actionable. However, the plaintiff is required to show that discomfort

is of such degree that it would affect not only the plaintiff but any person irrespective of age, health or position in life. Thus, if the plaintiff is able to prove that his premises cannot be comfortably occupied due to nuisance created by the defendant, the plaintiff can get relief of injunction. Reliance is placed on reported cases :

- (i) **ILR 8 Bombay 35 (Land Mortgage Bank of India v Ahmedbhoy Habibbhoy)**
- (ii) **8 BLR 89 (Hari v. Vithal)**
- (iii) **ILR 40 Bombay 401 (Bai Bhicaiji v Perojshaw)**

14) The law discussed in the cases cited supra shows that the defence that the defendant is doing his business in proper manner, in accordance with the conditions of licence, cannot prevent the Court from granting relief of injunction if the plaintiff is able to prove that the act of the defendant amounts to actionable wrong, nuisance. Circumstance that the defendant is not complying with the conditions laid down in the licence can be used as additional circumstance against the defendant. When there is non-compliance of the conditions of licence and there is also actionable nuisance it is up to the Court to ascertain whether the nuisance

can be stopped by giving some directions to the defendant like to take corrective measures, to comply with the conditions of licence.

15) Whether a private nuisance of aforesaid nature is actionable or not can be judged by ordinary standards of persons residing in the neighbourhood. It is up to the Court to decide as to what type of nuisance can be tolerated in a particular case. If the noise or vibration of the machinery affects physical comfort of the plaintiff and his family members, the Court can grant relief provided that ordinary standards of person's life in such locality are satisfied.

16) In view of the aforesaid position of law the points for considering the matter like the present one can be as follows :-

(i) whether use of machinery for saw mill of the horse power (10 HP) used by the defendant is creating nuisance of noise and vibrations ?

(ii) whether the nuisance is actionable ?

(iii) whether use is in contravention of conditions of licence and whether by taking some corrective measures nuisance can be stopped and the defendant can be allowed to run the business ?

17) When there is contravention of conditions of licence it is also upto the authority to take steps. Surprisingly with regard to the aforesaid admission of the suggestion that there is no pacca construction, no action is taken by the authority. In such case also Court can step in and take action. All the aforesaid questions are questions of fact. In second appeal in view of its scope this Court is not expected to interfere in the findings given by the Courts below which are on question of facts. There is evidence of one witness of the same locality in support of the case of the plaintiff. Further, injunction is a discretionary relief as provided in section 38 of the Specific Relief Act and so the appellate Court much less this Court in second appeal is not expected to interfere in the order made by the Courts below. As the Courts below have given findings which are concurrent and they are also on the discretionary power, this Court holds that it is not possible to formulate substantial questions of law.

18) In the result, the appeal stands dismissed.

Sd/-
(T.V. NALAWADE, J.)

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