

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 416 OF 2013

Vijay Ramchandra Pilankar
Age 52 years, Occupation Business
R/o. Kankavali (Madhaliwadi),
Taluka- Kankavali, District – Sindhudurg

...Appellant

Versus

1.Nagesh Dashrath Kalasekar,
Since deceased through legal heirs:-
A) Nanda Nagesh Kalsekar
Age about 78 years, Occ, Household

B)Ujjawala Nagesh Kalsekar
After marriage Siddhi Vinayak Rane,
Age about 36 years, Occupation Housewife

C)Vaishali Dilip Ghadi,
Age about 34 years, Occupation Housewife,
R/o. Halwal, Shivneri Apartment,
C/o. Dilip Ghadi, Tal.Kankavali,
District- Sindhudurg.

D)Nilam Nagesh Kalsekar,
Age about 29 years, Occ. Household.

E)Vaibhav Nagesh Kalsekar,
Age about 26 years,
Occupation Hotel Business,
R/o. Ujawala Lodge, Kankavli,
Bazarpeth, Tal.Kankavali,
District Sindhudurg Nos. A, B
and D R/o. Teli Aali, Tal. Kankavali,
District- Sindhudurg.

2. Shri Rajendra Dashrath Kalsekar,
Age about 50 years, Occ. Business

3. Shri Gurunath Dashrath Kalsekar,
Age about 47 years, Occupation Business

4. Satyawati Dashrath Kalsekar,
Age about 72 years, Occ. Household
Nos.2 to 4 all r/o. Kankavali Teli Ali,
Kankavali, Taluka- Kankavali,
District-Sindhudurg.

....Respondents

**WITH
SECOND APPEAL NO. 55 OF 2013
WITH
CIVIL APPLICATION NO. 161 OF 2013
IN
SECOND APPEAL NO. 55 OF 2013**

Vijay Ramchandra Pilankar
Age 54 years, Occupation Business
R/o. Kankavali (Madhaliwadi),
Taluka- Kankavali, District – Sindhudurg

...Appellant

Versus

1. Nagesh Dashrath Kalsekar,
Since deceased through legal heirs:-
A. Nanda Nagesh Kalsekar
Age about 54 years, Occ, Household

B. Vaibhav Nagesh Kalsekar,
Age about 26 years, Occupation Business

C. Nilam Nagesh Kalsekar,
Age about 27 years, Occ. Nil

D. Vaishali Nagesh Kalsekar,
After marriage Vaishali Dilip Ghadi,
Age about 29 years, Occupation Housewife

E.Ujjawala Nagesh Kalsekar,
After marriage Siddhi Vinayak Rane,
Age about 31 years, Occupation Housewife,
Nos. A to C r/o. Kankavali,
District Sindhudurg, No. D r/o. Halwal,
Brahmanwadi, Shivneri Apartment,
Tal. Kankavali, Dist. Sindhudurg.
No. E r/o. Katradeviwadi, Sangave,
Post Burambe, Tal. Rajapur,
District Ratnagiri.

2. Shri Rajendra Dashrath Kalsekar,
Age about 47 years, Occ. Business

3. Shri Gurunath Dashrath Kalsekar,
Age about 44 years, Occupation Business

4. Satyawati Dashrath Kalsekar,
Age about 56 years, Occ. Business
Nos. 2 to 4 all r/o. Kankavali
B.K.G. Road, Kankavali,
Taluka- Kankavali, Dist. Sindhudurg.

...Respondents

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Mr. S.A.Sawant for the Appellant.
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CORAM : MRS.MRIDULA BHATKAR, J.
RESERVED ON : 25TH APRIL, 2018
PRONOUNCED ON : 4TH MAY, 2018

JUDGMENT:

1. These Second Appeals are directed against the concurrent findings given by the First Appellate Court and the Trial Court.

2. The appellant is the plaintiff, who had filed a Regular Civil Suit No. 56 of 2001 against the respondents/ defendants for mandatory and perpetual injunction and also for damages. It is the case of the plaintiff that since 1988, he is a tenant of the suit property on a monthly rent of Rs. 250/-. The plaintiff had constructed the wooden shop over the suit plot and initially, he was having a business of laundry. Thereafter, he shifted to the business of Pepsi Cola and sale tea. The father of the defendants had executed an Agreement of Tenancy dated 16th March, 1989 with the plaintiff for a period of ten years. However, on 8th April 1999, in the absence of the plaintiff, the defendants have demolished the wooden shop and hence, the plaintiff had filed the suit against the defendants. The defendants appeared and contested the claim. They have filed written statement wherein the fact of tenancy was denied, but it was mentioned that the plaintiff had illegally constructed the wooden shop and the Tehsildar, Kankavali ordered the demolition of the wooden shop and it was demolished accordingly. It was contended that for the act of Government Agency, the defendants cannot be held responsible. Both the parties tendered documentary as well as oral evidence. The Trial Court partly decreed the suit and the relief of mandatory injunction was refused, but the defendants were directed to pay an

amount of Rs. 25,000/- towards damages. The said order was challenged by the plaintiff in a Regular Civil Appeal No. 106 of 2006. Against the said order, the defendants had also filed a Regular Civil Appeal No. 100 of 2006. The defendants had challenged the order of granting damages of Rs. 25,000/- and the plaintiff had challenged the order of rejection of mandatory injunction and, therefore, there are two Appeals. Both the Appeals were heard and decided together by a common judgment and order dated 31st July, 2012 passed by the learned Principal District Judge, Sindhudurg, Oros. The First Appellate Court allowed the Regular Civil Appeal No. 100 of 2016 filed by the defendants, cancelled the order of damages and dismissed the Regular Civil Appeal No. 106 of 2006 filed by the plaintiff. Hence, these Second Appeals.

3. Though served twice, none present for the respondents. Hence, the Appeals are heard ex-parte.

4. By order dated 23rd September 2015, my predecessor had recorded that no one appeared on behalf of the respondents though served and directed to keep these Appeals for final hearing as per earlier order, as the notice for final hearing was already issued.

5. The learned Counsel for the appellant has submitted that both the Trial Court and the First Appellate Court have failed to appreciate the evidence on record and law in respect of the landlord and the tenant. He has further submitted that the appellant has relied on written agreement i.e., Agreement of Tenancy, dated 16th March, 1989, which was executed by Shri Dashrath Krishna Kalsekar i.e., the father of the defendants with the plaintiff. The open plot of '15' X '10' ft. was handed over in possession of the plaintiff for which an amount of Rs. 15,000/- towards deposit was paid. The terms were agreed for a period of ten years, which were signed by the father of the defendants- Shri Dashrat Kalsekar and the plaintiff -Vijay Ramchandra Pilankar. He has argued that the appellant was legally put in possession of the suit plot and was doing his business. He has further submitted that the Trial Court as well as the First Appellate Court have failed to appreciate the evidence of the plaintiff and the witnesses so also the fact that the defendants have entered the shop of the plaintiff on 8th April, 1999 and with the help of gas cutter, they cut the tin shed and threw all the goods and articles of the plaintiff. He has further submitted that the plaintiff was in possession of the suit plot i.e., suit shop, since 1988 and the

defendants should not dispose the plaintiff illegally from the suit shop in such manner. The Government has issued a licence to the suit shop under the Food and Drugs Act. He has relied on a letter dated 25th January, 2005 written by the Office of the Tehsildar to Shri Vijay Ramchandra Pilankar informing that the Tehsildar did not take action for removal of the suit stall i.e., wooden shop, pursuant to the notice dated 6th March, 1999.

6. Both the Courts have committed error of law by ignoring the principles of law while considering illegal dispossession of the appellant and thereby refusing mandatory injunction.

7. Heard submissions. Perused the documents which are pointed out by the learned Counsel for the appellant. It is admitted that the appellant/ plaintiff was in possession of the suit shop before he was dispossessed from the suit shop. The respondents/defendants have admitted in the evidence that the father of the respondents has inducted the plaintiff in the suit premises i.e., open plot of '15' X '10' sq.ft. by Agreement of Tenancy dated 16th March, 1989. The said Agreement of Tenancy is at Exhibit 44. The plaintiff has examined witnesses and all PW Nos. 1 to 3 have confirmed the execution of

the said Agreement. The defendants have denied in the affidavit that the plaintiff was a tenant or licensee by virtue of such written agreement. It is a factual position that the suit stall of the plaintiff was standing on a private land and the respondents have claimed the ownership of that land. In the cross examination of defendant no.2- Rajendra D. Kalsekar, he has stated that the plaintiff has constructed a tin stall admeasuring '15' X '10" sq.ft. and in that he was running a laundry business, Pepsi Cola and sale of tea business. However, he has denied that the plaintiff was inducted by his father as a tenant.

8. My attention is drawn to the document of the Regular Civil Suit No. 14 of 1999, which was produced before the Trial Court and the First Appellate Court. The said document is at Exhibit 89. The plaintiff and one Balkrishna Povadan, who was having an adjacent stall on the land of the defendants, have filed Regular Civil Suit No. 14 of 1999 challenging the notices dated 21st November, 1997 and 6th March, 1999 issued by the Office of Tehsildar. It is pointed out that the said suit was partly decreed on 31st March, 2011 and it was declared that the notices dated 21st November, 1997 and 6th March, 1999 issued by the Office of Tehsildar, Kankavali were illegal. The

Civil Court further directed the defendants not to demolish the suit stalls without following due process of law. The said order was challenged in the First Appeal, which was dismissed on 31st July, 2012. Thus, it appears that the Tehsildar was directed not to demolish the suit stalls without following due process of law.

9. My attention is drawn to a letter dated 25th January 2005, which is at Exhibit 63, written by the Tehsildar giving reply to the letter dated 4th January, 2005 about illegal demolition on 8th April, 1999. The Tehsildar informed that the Office of the Tehsildar has not carried out the demolition of the suit stall.

10. The Trial Court has committed error in drawing an inference that when the notices were sent by the Office of the Tehsildar in respect of unauthorized construction on agriculture land, it was the demolition by the Tehsildar in due process of law. It was argued by the learned Counsel for the appellant that the respondents have used muscle power and removed the suit stall forcibly. It was not removed by the proper Government Authority. The letter of the Tehsildar was produced before the Trial Court and then, it was accepted. The Trial Court without discussing the said letter in proper perception

discussed the truthfulness of Exhibit 44 in detail. It is a fact that the appellant was having a stall on the land owned by the respondents so also there were other adjacent stalls of other persons, then it can be easily concluded that initially, the appellant was having a suit stall with the permission of the respondents' father. Once the appellant has produced evidence in respect of demolition, which is not done by proper Authority, then considering the interest of the respondents in the suit land, the contention of the appellant that the suit stall was demolished forcibly without following due process of law should have been accepted by the First Appellate Court. The Trial Court has accepted that the suit stall was forcibly demolished and, therefore, awarded damages of Rs. 25,000/-, however, the Trial Court did not grant mandatory injunction. It was rejected mainly on the ground that the suit land was agriculture land and the suit structure standing thereon was unauthorized, as the notice was issued by the Tehsildar for removal of those stalls. The appellant challenged that notice in the suit. The said suit was decreed in favour of the appellant and the said notice was cancelled. It was made clear that the Authority may be Corporation or Tehsildar or any Government Authority having jurisdictional power can issue notice in respect of unauthorized structure, which cannot be tolerated and it should remove the

unauthorized structure. However, high handed action of the demolition of discarding the due process of law is illegal in the eyes of law and once that illegal action is observed, then the mandatory relief can be granted in favour of the appellant. This mandatory order is not to be treated as any bar for the Corporation or any other authority to take action if this structure is found unauthorized as per the policy and rules. Hence, I pass following order:

ORDER

- i) Both the Second Appeals are allowed.
- ii) The judgment and order dated 31st July, 2012 passed by the learned Principal District Judge, Sindhudurg at Oros in Regular Civil Appeal No. 106 of 2016 and the judgment and decree dated 16th March, 2006 passed by the learned Joint Civil Judge, Junior Division in Regular Civil Suit No. 56 of 2001 on the point of refusing mandatory injunction are hereby set aside.
- iii) However, the judgment and decree dated 16th March, 2006 passed by the learned Joint Civil Judge, Junior Division in Regular Civil Suit No. 56 of 2001 on the point of damages of Rs. 25,000/- is hereby confirmed.
- iv) The respondents to construct/install the suit stall i.e.,

wooden shop, on the suit land of '15' X '10" ft. and if it is not done by the respondents within a period of two months from the date of the order, if not done so, then the appellant may construct/install the suit stall on their own. However, it is subject to the objection and the legal action taken by the Municipal Corporation/ Tehsildar.

11. In view of disposal of the Second Appeal No.55 of 2013, Civil Application does not survive and the same is accordingly disposed of.

(MRIDULA BHATKAR, J.)