

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

SECOND APPEAL NO. 120 OF 2019
WITH
CIVIL APPLICATION NO. 3014 OF 2019
WITH
SECOND APPEAL NO. 121 OF 2019
WITH
CIVIL APPLICATION NO. 3015 OF 2019
WITH
SECOND APPEAL NO. 122 OF 2019
WITH
CIVIL APPLICATION NO. 3016 OF 2019

PAWAN POPATRAO KADU
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Appellant : Mr. V.D. Sapkal Senior Counsel
i/b. Mr. S.R. Sapkal
AGP for Respondents : Mr. P.V. Diggikar

CORAM : R.M. JOSHI, J.

Reserved on : 27th March, 2023

Pronounced on : 24th April, 2023

PER COURT :

1. By consent of both sides these appeals are decided finally at the stage of admission.

2. These appeals are filed under Section 100 of Code of Civil Procedure, challenging judgments and decree passed in RCA Nos. 361/2014, 359/2014, 363/2014, reversing the judgments and

decree passed in RCS Nos. 328/2010, 573/2010, 499/2010, respectively.

3. The appellant is original plaintiff in the aforesaid suits and since common question of law and facts are involved in these appeals, they are decided together.

4. The case of the parties which led to the filing of present appeals can be narrated in short as under :

In RCS No. 328/2010, plaintiff has filed suit with the contention that defendants invited tender for auction of the sand from river Pravara, in respect of lands bearing Gat nos. 32, 35 to 39, 40 to 43 and 45 for sand weighing 10,000 brass from spot no. 3. As per the terms of the tender, the sand was to be extracted up to 31st July, 2010. The plaintiff being the highest bidder, said tender was allotted to him and that he has paid all requisite charges and fees to the defendants. It is further case of the plaintiff that the removal of the sand was allowed from Gat numbers shown as spot nos. 2 and 3 without demarcation at site. According to him, it was obligation of the defendants to fix necessary markings. Plaintiff started digging spot no. 3 though it was unmarked, in the presence of the officers of the defendants. It is further claimed that these officers were visiting daily to the spot and record

was maintained in respect of quantity of sand extracted. It is alleged by the plaintiff that after the work of excavation commenced by him, some mischief mongers started demanding money from him and threatened him that they will file complaint against him. It is alleged that an action was initiated against him under Section 48 (7) of Maharashtra Land Revenue Code (for short “the Code”). It is claimed by the plaintiff that at no point of time, the officers of defendants who were present daily at the spot have ever raised objection about unauthorized extraction of sand by him. It is stated that defendants issued notice dated 19.04.2010, alleging that he has excavated 312 brass sand illegally from spot no. 3. The said notice was replied by the plaintiff. It is further alleged that the panchnama was prepared behind back of the plaintiff. Pursuant to the said notice, order came to be passed by Tahsildar dated 19.04.2010 and 23.04.2010, imposing penalty for excavation on 312 brass sand from spot no. 3.

5. Defendants opposed the contentions of plaintiff by filing written statement. It is alleged that the plaintiff has extracted more than ten thousand brass sand contrary to the tender. It is also alleged that the said removal was done from spot no. 3 even before delivery of the possession of spot no. 2 to the extent of 6026 brass sand. It is claimed that measurements taken by the officials of the defendants are

correct. According to these defendants, the permission for excavation of sand from spot no. 2 is cancelled after issuing notice dated 19.04.2010 and the plaintiff was restrained from further extraction of the sand. It is claimed that action of the defendants is taken under Section 48 of the Code, is justified.

6. Plaintiff examined himself (Exh.24). Whereas, defendants led evidence of Babasaheb Kamble, Circle Officer (Exh. 27). Learned Trial Court after considering the evidence on record passed judgment and decree dated 30.11.2011, whereby, the order of Tahsildar dated 19.04.2010 and 24.03.2010 vide outward no. 413/2010 was held to be not binding on the plaintiff. Suit was decreed in the said terms. The said order was carried in Appeal before District Court in RCA No. 361/2014, wherein, the judgment of the Trial Court was reversed and suit was dismissed.

7. In RCS No. 753/2010, plaintiff has made similar averments about the invitation of tender in respect of extraction of sand from respective gat numbers and the tender being allotted to him as highest bidder. It is further claimed by the plaintiff that the possession of spot nos. 2 and 3, was handed over to him and that in accordance with the rules, he has removed sand therefrom. It is stated

that the action taken against him under Section 48 (7) of the Code is not valid. It is alleged that the panchnama of spot was drawn behind his back and without hearing him, the order in question was passed.

8. Written statement was filed by the defendants reiterating their contentions as raised in the written statement filed in RCS No. 328/2010. It is alleged that even before handing over of the possession of spot no. 2, plaintiff has extracted 6026 brass sand from the said store and, therefore, the action against him under the provisions of the Code is justified.

9. After framing of the issues plaintiff led his evidence at exhibit 22, whereas, defendants laid their evidence through Babasaheb Kamble, Circle Officer, at exhibit 27. Learned Trial Court decreed the suit which order came to be reversed in the first appeal.

10. In RCS No. 494/2010 plaintiff apart from reiterating the contents in other suits has challenged order of imposing penalty of Rs. 2500/- per brass for alleged illegal extraction of the sand. Order no. 86 of 2010 and 20.09.2010, is taken exception by claiming that the same is without hearing and contrary to the material on record and hence, is not binding on the plaintiff.

11. By filing written statement, defendants denied the contentions of the plaintiff and it is alleged that plaintiff has carried out unauthorized excavation of sand even before it was allotted to him. There is specific allegation that since the sand of 312 brass was found to be excavated unauthorizedly, the order of imposition of penalty against plaintiff is correct. In this suit also the plaintiff laid his evidence and defendants examined the Circle Officer. This suit came to be allowed and the said judgment and decree was reversed in RCA No. 328/2010.

12. Learned counsel for the plaintiff states that the Trial Court after rightly appreciating evidence on record had decreed the suit. However, the first appellate Court has committed serious error in appreciating the material evidence on record and in particular the admissions given by the witness of the defendants. He, however, candidly makes statement that there is no propriety in insisting upon the mandatory injunction of permitting him to extract further sand from spot nos. 2 and 3. By drawing attention of the Court to the oral as well as documentary evidence on record, it is argued that the entire record of removal of sand is admittedly maintained by the defendants and in absence of production of the same before the Court, the impugned orders of imposing penalty cannot sustain. In support of his

contentions, he placed reliance upon the judgment of Hon'ble Apex Court in case of *Gulab Ayubkhan Pathan Versus District Collector, Collectorate Office, Ahmednagar and another*, reported in **2019 (5) Mh.L.J.**

13. Learned AGP supported the impugned judgment and decree passed by the first appellant Court with submissions that the plaintiff in his cross-examination, has given admissions which goes to show that there is no error committed by the defendants in passing impugned orders, whereby, penalty was imposed upon the plaintiff. Following substantial question of law is framed :

Whether the first appellate Court has committed error in dismissing the suit by misconstruing and ignoring material evidence on record and without appreciating provision of Section 48 (7) of the Code ?

14. There is no dispute about the fact that there was tender invited for the excavation of sand in respect of gat nos. 32, 35 to 39, 40 to 43 and 45 situated at river Pravara, and that being the highest bidder, the said tender was issued in favour of plaintiff. Further, there is no denial that the necessary charges fees and payments towards the said contract are done by the plaintiff in favour of the defendants.

Section 48 of the Code, deals with title to mines and minerals which rests with government and State Government is empowered to assign to any person right in mineral. In view of issuance of tender to extract sand, it cannot be said that plaintiff has extracted sand without any lawful Authority. The point of dispute between the parties was with regard to the excavation of sand from spot no. 2 without handing over of the possession of the same to the plaintiff and extra / additional excavation of sand from spot no. 3 to the extent of 312 brass sand, for which penalty is imposed.

15. At this stage, it would be relevant to refer to Section 48 (7) of the Code, which reads thus :

“48 – Government title to mines and minerals :

(7) Any person who without lawful authority extracts, removes, collects, replaces, picks up or disposes of any mineral from working or derelict mines, quarries, old dumps, fields, bandhas (whether on the plea of repairing or constructions of bund of the fields or any other plea), nallas, creeks, river-beds, or such other places wherever situate, the right to which vests in, and has not been assigned by the State Government, shall, without prejudice to any other mode of action that may be taken against him, be liable, on the order in writing of the Collector or any revenue officer not below the rank of Tahsildar

authorised by the collector in this behalf, to pay penalty of an amount upto five times the market value of the minerals so extracted, removed, collected, replaced, picked up or disposed of, as the case may be.”

16. This provision makes it clear that penalty can be imposed upon any person who has without lawful authority removed or extracted minerals of amount up to the extract of five times market value of minerals so extracted. Thus, for the purpose of imposition of penalty, it must be proved that :

- (i) extraction was without authority ;
- (ii) quantity so extracted ;
- (iii) reason and justification to impose penalty up to five times of market value of the minerals.

17. Perusal of evidence on record indicates that plaintiff has deposed about the extraction of sand in presence of the officers of defendants and record of the same being maintained by them. In this regard, cross-examination of Circle Officer confirms that at the time of excavation of the sand, a record is maintained about the sand removed from the spot. He admits that there is no record in the office to show that the plaintiff has extracted any additional sand than permit. He

further admits that there is no complaint made against the plaintiff about commission of theft of the sand from the said spots. He was unable to say as to the volume of sand removed by plaintiff. This witness states that the plaintiff was prevented from carrying out further extraction of sand due to the complaints received by Tahsildar against him. It is further revealed that before preventing plaintiff from further extraction, it was not ascertained that any additional extraction of sand was done by him from the spots allotted.

18. As far as the allegation of defendants that plaintiff excavated 6026 brass of sand from spot no. 2 without giving possession thereof by defendants to him is concern, witness of defendant, however, candidly admits that by letter dated 15.03.2010, spot no. 2 was given in possession of plaintiff for the removal of sand. Thus, there is documentary evidence coupled with admission of witness of plaintiff in this regard. Hence, stray statement of plaintiff is not sufficient to hold that spot no. 3 was not handed over to him. This witness also accepts the suggestion that there is no record with these defendants to show that who conducted the extraction and how the sand was transported therefrom.

19. Once defendants do not dispute the fact that plaintiff was

given right to excavate sand from spot nos. 2 and 3, unless, it is shown that the said excavation was contrary to the terms of agreement between the parties, no penalty could have been imposed on the plaintiff for the alleged additional or unauthorized extraction of the sand from spots allotted. When there is admission of the defendants that record is maintained about the excavation by the authorities by remaining present at the spot, the burden solely rests on the defendants to show that as to the volume of sand was extracted and that it was beyond agreement. Similarly, letter dated 15.03.1010, shows that spot no. 2 was duly handed over to the plaintiff to extract sand therefrom and hence, on this count too, the order of penalty cannot sustain.

20. Needless to say that levy of penalty is a serious matter and cannot be permitted unless the Authority adheres to required procedure and complies requisite conditions before imposition thereof. Here in this case defendant has failed to discharge burden upon it to prove that the extraction of sand was unauthorized. Further there is no proof as to the exact additional sand removed by plaintiff from the spots. Similarly, though there is power to impose penalty up to five times, there must be reason recorded for imposing maximum penalty. For this purpose number of factors would be relevant and one of them would be issuance of permit to the plaintiff to extract sand from the

spots. Plaintiff in this case is not a person who has committed theft of sand or has entered illegally in riverbed to remove sand. All these material aspects are not considered and the impugned order is passed mechanically.

21. The First Appellate Court has misconstrued the evidence on record to state that the possession of spot no. 2 was not given to the plaintiff and, therefore, the action imposition of penalty is held legal and proper. The said findings of the first appellate Court being contrary to the material admissions of witness of the defendant and documentary evidence on record, and also in ignorance of provision of Section 48 (7) of Code cannot sustain and the substantial question of law, therefore, is answered in affirmative.

22. In the result, appeals deserve to be allowed. The Judgments and decree passed by First Appellate Court are set and aside and judgments of Trial Court stands restored.

23. Pending Civil Applications stand disposed of.

[R.M. JOSHI, J.]