



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
NAGPUR BENCH, AT NAGPUR.**

**Second Appeal No. 146 of 2001**

~~Ramdas s/o Shankarrao Gaikwad,  
Aged – Adult, Occu. – Business;  
R/o Collector Colony, Behind S.T. Stand,  
Akola.~~

Ramdas Shankarrao Gaikwad  
Since deceased through L.Rs.

L.Rs. of  
deceased  
appellant  
brought on  
record as per  
Court order  
dtd.  
23.11.2007

- (1) Sou Shobha w/o Baban Ingole,  
Aged about 45 years, Occupation  
Household, resident of Ordnance  
Factory, Itarsai (M.P)
- (2) Kailash s/o Ramdas Gaikwad,  
Aged about 42 years,  
r/o Collector Colony, behind  
S.T. Stand, Akola.
- (3) Sou. Pratibha w/o Ramesh Patil,  
Aged about 38 years, Occupation  
Household, R/o. Nimbora,  
Tq. Ravner, Distt. Jalgaon.
- (4) Vilas s/o Ramdas Gaikwad,  
Aged about 36 years,  
Occupation Business,  
r/o Behind S.T. Stand, Akola.
- (5) Vikas s/o. Ramdas Gaikwad,  
Aged about 34 years,  
Occupation Business,  
r/o Collector Colony, Behind  
S.T. Stand, Akola.
- (6) Vibha w/o Prag Raut,  
Aged 32 year, Occupation :  
Household, r/o Gore Apartment  
No. 2, Shastri Nagar, Akola.

**... Appellants**

- Versus -

Hanumanprasad s/o Ramjivan Goenka, [Dead]  
aged-Adult, Occu. Business,  
R/o Gandhi Road, Gandhi Chowk,  
Akola, Tah. and District -Akola.

Through L.Rs.

Amended as  
per Court's  
order dated  
05.06.2023

- (1) Ajaykumar s/o Hanumanprasad Goenka,  
Aged about 54 years,  
Occupation – Business.
  - (2) Sanjaykumar s/o Hanumanprasad Goenka,  
Aged about 53 years,  
Occupation – Business.
  - (3) Vijaykumar s/o Hanumanprasad Goenka,  
Aged about 51 years,  
Occupation – Legal Practitioner.
- (All 1 to 3 are R/o. Gandhi Chowk, Akola,  
Tah. and District - Akola).

... Respondents

with  
**Second Appeal No. 147 of 2001**

~~Ramdas s/o Shankarrao Gaikwad,  
Aged Adult, Occpn. Business;  
R/o Collector Colony, Behind S.T. Stand,  
Akola.~~

L.Rs. of  
deceased  
appellant  
brought on  
record as per  
Court order  
dated  
23.11.2007

- (1) Sou Shobha W/o Baban Ingole,  
Aged about 45 years, Occ.  
Household, R/o Ordnance  
Factory, Itarasi (M.P)
- (2) Kailash S/o. Ramdas Gaikwad,  
Aged about 42 years,  
R/o. Collector Colony, Behind  
S.T. Stand, Akola, District Akola.

- (3) Sou. Pratibha W/o. Ramesh Patil,  
Aged about 38 years, Occ.  
Household, R/o. Nimbora,  
Tq. Ravner, Distt. Jalgaon.
- (4) Vilas S/o Ramdas Gaikwad,  
Aged about 36 years,  
Occ. Business, R/o Collector  
Colony, Behind S.T. Stand, Akola.  
District Akola.
- (5) Vikas S/o. Ramdas Gaikwad,  
Aged about 34 years,  
Occu. Business, R/o Collector  
Colony, Behind S.T. Stand, Akola.  
District Akola.
- (6) Vibha W/o Parag Raut,  
Aged about 32 years, Occ.  
Household, R/o Gore Apartment  
No. 2, Shastri Nagar, Akola.  
District Akola.

... Appellants

- Versus -

Hanumanprasad s/o Ramjivan Goenka,  
Age : adult, Occpn : Business,  
R/o. Gandhi Road, Gandhi Chowk,  
Akola, Tq. & Distt. Akola.

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Aged about 51 years,  
Occupation – Legal Practitioner.  
(All 1 to 3 are R/o. Gandhi Chowk, Akola,  
Tah. and District - Akola).

... Respondents

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Mr. Ved R. Deshpande with Mr. Kunal Pande, Advocates for the appellants  
Mr. M. G. Sarada, Advocate for the respondents  
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**CORAM : ANIL L. PANSARE, J.**

**Date of reserving judgment : 27-02-2024**

**Date of pronouncing judgment : 29-02-2024**

**JUDGMENT**

These two appeals have been admitted on following substantial questions of law.

(1) Whether, the Judgment and decree passed by both the lower Courts are required to be quashed in view of the order dated 28.1.03 bearing No. L.N.A./39/ Akola/ 01 / 2002-2003 passed by Collector, Akola and order passed Municipal Corporation Akola, bearing No. 14/59/03-04, dated 9.7.2003, regularising the construction in possession of appellant, particularly when, the entire suit based on allegation that the construction of the appellant is without sanctioned ?

(2) Whether, in view of orders dated 28.1.2003, passed by Collector, Akola, and order dated 9.6.2003, passed by Municipal Corporation, Akola, this Hon'ble Court will have to exercise its power under Order 41 Rule 23 (A) of Civil Procedure Code ?

(3) Without prejudice to submission made herein above, it is submitted whether the learned lower appellate Court exceeded its

jurisdiction in directing the appellant to remove the entire construction made by the appellant, particularly when, the grievance lodged by the plaintiff/respondent that 4 ft. distance between the southern wall of the plaintiff/respondent land proposed construction is not maintained ?

2. The appeals have been filed in the year 2001. The substantial questions, however, have been formulated on the basis of the order dated 28-1-2003 passed by the Collector, Akola. By the said order, the Collector has regularized the encroachment made by the original appellant, who is now represented by his legal representatives.

3. I have gone through the said order. The order indicates that the appellant had made a request to allot 145 Sq. Ft. land in Plot No. 6/1 for expansion of shop. The order further indicates that land admeasuring 105 Sq. Ft. in Plot No. 6/1 was handed over to the appellant in the year 1980-81. The appellant sought additional adjoining land. The reports of Assistant Director, Town Planning, Nagar Parishad, Akola, T.I.L.R., Akola was sought. The Municipal Council, Akola has recommended to allot additional land. The Assistant Director, Town Planning, Akola has submitted his report stating therein that the land demanded is situated on the road and, therefore, refused to recommend to allot additional land. The Nazul Tahsildar has inspected

the spot and found that the appellant has made a *pakka* construction and, in addition, has encroached upon adjacent land admeasuring 134 Sq. Ft. by making *pakka* construction. The Tahsildar has then stated that the land demanded is situated in service lane. Despite this, the Tahsildar has given a report that there is no possibility of the adjoining plot owners undergoing difficulty to ingress and egress from the road. This remark is made on the ground that there is no opening of the adjoining houses towards the service lane. The order of Collector then refers to a letter dated 30-5-2001 of Revenue Minister, who has recommended to allot the land. The Commissioner, Amravati has vide letter dated 17-8-2001, taking into account the letter of Revenue Minister, has forwarded to the Government a letter recommending allotment of land. Accordingly the Collector has noted that the appellant has encroached upon the land admeasuring 134 Sq. Ft. on Plot No. 6/1 for commercial use and has then referred to letter dated 6-8-2002 issued by the State Government to regularize the encroachment.

4. The Collector has taken aid of Section 50 of the Maharashtra Land Revenue Code, 1966 (hereinafter referred to as 'Code of 1966') and Rule 43 of the Maharashtra Land Revenue (Disposal of Government Lands) Rules, 1971 (hereinafter referred to as 'Rules of

1971'). The Collector has taken note of the fact that the encroached land has market value of Rs. 1,61,872/-. He has then added penalty of Rs. 4,04,680/-. He has added the charges for non-agricultural use and regularized the encroachment admeasuring 134 Sq.Ft. by directing the appellant to deposit the aforesaid amount.

5. This order, to my mind, is a classic example as to what extent, the litigant like the appellant go to protect the construction which he knew to be encroachment; rather which has been declared encroachment by the first appellate Court directing the appellant to remove the said encroachment.

6. I am shocked to note the conduct of Mr. Anupkumar, the then Collector, Akola, who has failed to adhere to the oath he has taken while occupying the prestigious administrative seat. He has conveniently ignored the report of Town Planning, Akola as also the Nazul Tahsildar which clearly disclosed that the land demanded by the appellant is situated on a road.

7. The following map, which has been filed by respondent - plaintiff will not only depict the encroachment but will also show the gross misconduct committed by the Collector to favour a person who has no respect for law.





Portion marked ABCD is a building owned by the respondent-plaintiff. Portion HIJK is old construction of the appellant-defendant. Portion LMNO is the new construction (encroachment) carried out by the appellant – defendant. Plot No. 6 is the Government Road. As could be seen, the encroachment is made facing Tahsil Road and has completely blocked the access to Government Road i.e. Plot No. 6. As such, Plot No. 6 i.e. road is not sub-divided into Plot 6/1 and 6/2. At least the sub-division is not reflected in map, Exhibit 50. The sketch map reproduced above, appears to have been prepared on the basis of revenue map, Exhibit 50. The sub-division finds place only in the order passed by the Collector, Akola as also in revenue entries. There is, however, no authenticate document indicating sub-division of Plot No. 6.

8. The Collector has referred to Section 50 of the Code of 1966. It provides for removal of encroachments and, therefore, there arises no question of regularizing the encroachment in terms of Section 50. Learned counsel for appellants contends that the provision is incorrectly noted. The power to regularize the encroachment is provided under Section 51 of the Code of 1966 which reads thus :

**51. Regularisation of encroachments**

*Nothing in Section 50 shall prevent the Collector, if the person making the encroachment so desires, to charge the said person a sum not exceeding [five times or such times as may be prescribed, whichever is higher, of] the value of the land so encroached upon and to fix an assessment not exceeding [five times or such times as may be prescribed, whichever is higher, of] the ordinary annual land revenue thereon and to grant the land to the encroacher on such terms and conditions as the Collector may impose subject to rules made in this behalf; and then to cause the said land to be entered in land records in the name of the said person:*

***Provided that,** no land shall be granted as aforesaid, unless the Collector gives public notice of his intention so to do in such manner as he considers fit, and considers any objections or suggestions which may be received by him before granting the land as aforesaid. The expenses incurred in giving such public notice shall be paid by the person making the encroachment; and on his failure to do so on demand within a reasonable time, shall be recovered from him as an arrear of land revenue.*

9. Bare perusal of Section 51 indicates that the Collector may regularize the encroachment subject to rules made in this behalf. Proviso to Section 51 states that such encroachment cannot be regularized unless the public notice to that effect is given and objections or suggestions received in response are considered. The expenses of the public notice are to be incurred by the person making encroachment.

10. In the present case and as could be seen from the order dated 28-1-2003 passed by the Collector, the public notice was not given and, therefore, the public including the respondents had no opportunity to file their objections or suggestions. The order, therefore, suffers from non compliance of Section 51 of the Code of 1966.

11. The Collector has then referred to Rule 43 of the Rules of 1971. It provides that subject to proviso to Section 51, the Collector may grant the land encroached upon to the encroacher either in occupancy rights under Section 20 read with Section 31 or in leasehold rights under Section 38 on the conditions enumerated in Rule 43. Rule 43 commences with the statement “subject to proviso to Section 51”. Thus, compliance of Section 51 is of utmost importance, which admittedly has been not done.

12. That apart in the case of *Madhukar Sampatrao Patil and ors. Vs. State of Maharashtra and ors. [2019(5) Mh.L.J. 652]*, this Court in a public interest litigation, while dealing with unauthorized construction on public utility lands, has formulated the following amongst other question for consideration.

*“(1) Whether there can be regularization of encroachments on the land admeasuring 54,437.19 square meters meant for public utility (school, hospital, Sanskrutik Bhavan,*

*Buddha Vihar, etc.), open spaces (playground and garden) and public roads in the layout of the Society ?*

(2) .....

(3) .....

The Court has observed thus :

*“23. We have already noticed the stand of the State Government taken on the basis of the Government Resolutions dated 4-4-2002, 7-9-2006, 7-10-2006 and 18-9-2010 issued by the Revenue and Forest Department, and the Circular dated 30-6-2010 issued by the Urban Development Department of the State Government. We have gone through all these Government Resolutions and Circular. The stand is emphatic in the affidavit dated 18-1-2011 that there cannot be encroachments on public utility, open spaces and public roads in the layout, and if such encroachment takes place, the obligation is created upon the competent authorities to undertake the drive of demolition. We do not find that any scope is left to regularize the encroachments made on such lands.”*

13. Thus, the Court has in clear terms held that there cannot be encroachments on public roads in the layout and that there is no scope to regularize the encroachments made on such lands. Rather, the Court has held that if such encroachments take place, the obligation is created upon the competent authorities to undertake the drive of demolition. In the present case, the competent authority i.e. Collector, Akola has, instead of demolishing the construction, regularized the same that too by ignoring the report of Town Planning, Akola and Tahsildar, Akola.

14. The order, being contrary to the provision of the Code of 1966 and the Rules of 1971 and judgment of this Court, is *non est* in the eyes of law and cannot be acted upon. The orders passed by both the Courts below cannot be quashed on the basis of such order nor is there any question of remanding the matter back to the Courts below in terms of Order 41 Rule 23-A of the Civil Procedure Code, 1908. The first two substantial questions of law are answered accordingly.

15. So far as third substantial question of law is concerned, the respondent – plaintiff has sought the relief of permanent injunction restraining appellant and persons acting on behalf of him from making any construction on the suit property and to direct him to remove the construction made on the suit site. The trial Court has directed the appellant to demolish the entire construction within three weeks. The findings of the trial Court was challenged by both i.e. appellant and the respondent being Regular Civil Appeal Nos. 16/1999 and 92/1999 respectively. The appeal filed by the appellant was dismissed and that of respondent was allowed. Regular Civil Suit No. 273/1998 was partly allowed by the trial Court has been decreed by the first appellate Court. The appellant was not only restrained from making construction on Plot No. 6/2 admeasuring 105 Sq.Ft. but was also directed to remove the entire construction made on Plot No. 6/2.

16. The first appellate Court noted that because of construction, the respondent's southern side door has been closed. The door opens towards the lane where encroachment is made. The Court noted that the Court Commissioner visited the plot and filed inspection report stating therein that the construction work is under progress in the land admeasuring 242 Sq. Ft. It appears that the appellant did not enter the witness box. The Court noted that appellant has not produced any document showing sanction to construction on the land admeasuring, at least 105 Sq. Ft. Thus, the appellant failed to lead evidence to substantiate allotment of land to the extent of 105 Sq.Ft., much less, the additional land encroached by the appellant, which has been regularized by the Collector. The first appellate Court noted that the respondent – plaintiff's case is that the appellant – defendant has made illegal construction without obtaining sanction from the concerned authorities. The first appellate Court noted that though the appellant – defendant is in possession of Plot No. 6/2 admeasuring 105 Sq. Ft., the document placed on record only indicates that the said land was allotted to him on certain conditions. However, the appellant failed to prove that the permanent construction made by him was in accordance with rules. The Court noted that not only the appellant failed to prove legitimate construction on the area admeasuring 105 Sq.Ft. but also the construction admeasuring 225 Sq.Ft. Accordingly the

Court noted that the construction being in violation of municipal rules and the respondent having proved that it resulted into invasion of right to life, air, privacy or causing material injury to the neighbours including the respondent, there accrued cause to file civil suit to challenge the invasion of his rights.

17. The appellant though pleaded that land admeasuring 105 Sq.Ft. was allotted to him by the competent authority, he has not placed on record any document in support. As such, the order passed by the Collector, Akola also indicates that land admeasuring 105 Sq.Ft. was allotted to the appellant but has not mentioned as to how such land, which is part of the public road, can be allotted. Most importantly, the appellant has neither filed any document in support of his case nor did he enter witness box. As such, Exhibit 53, the property card indicates that Plot No. 6/2 admeasuring 105 Sq.Ft. was allotted to the appellant. However, this being revenue entry can only be used for fiscal purpose. This revenue entry is not document of title. The appellant ought to have placed on record letter of allotment. The appellant has further not placed on record any document showing permission granted to him to construct the disputed structure. As noted earlier, the sub-division of Plot No. 6 i.e. road is not reflected in the revenue map, Exhibit 50, nor

has appellant filed any document in support of sub-division of Plot No. 6. In fact there can never be sub-division of a road.

18. In the circumstances, the findings recorded by the first appellate Court that appellant failed to prove that permanent structure made by him was in accordance with the rules, appears to be in tune with the provisions of law. I do not find any substance in the contention of the appellant that the first appellate Court has exceeded its jurisdiction in directing the appellant to remove the entire construction made by the appellant. The third substantial question of law is answered accordingly.

19. Thus what transpires is that there is no evidence to show that the construction made by the appellant was authorized, rather the respondent, by leading evidence, has established that the appellant has encroached upon the public road. The encroachment has been spelt out in the order dated 28-1-2003 passed by the Collector, Akola. This order has been obtained by the appellant pending second appeal and continued with the possession over the encroached premises for more than 25 years. He has taken benefits out of such encroachment by using the same for commercial use.



20. The High Courts and the Supreme Court has time and again came down heavily upon the menace of encroachments. The persons like appellant, however, do not bother to adhere to the provisions of law or the judgments passed by this Court and the Hon'ble Supreme Court.

21. The litigants like appellant encroach upon the lands and despite findings of the Courts below, continue to maintain encroachment by filing second appeal and enjoying interim relief for decades. In that sense, the appellant has abused the process of law. One of the remedies which I feel could be effective to curb the menace of encroachment is to impose heavy costs upon such persons, which may prove deterrent for the persons like the appellant.

22. In the circumstances, considering the span of 25 years of continuous encroachment and further considering the fact that appellant has encroached upon 225 Sq.Ft. of the land and has used the same for commercial purpose, he must have earned at least Rs. 10,000/- per year, totalling Rs. 2,50,000/- for 25 years. Accordingly exemplary costs of Rs. 2,50,000/- is imposed upon the appellant for abusing process of law.

23. The encroachment has been made on Government Land. The Government, therefore, would normally be credited with the cost. However, in the present case, the Collector, Akola representing Government, is responsible for regularization of the encroachment on public road, the municipal council has also not acted in accordance with the rules. The sufferer of the encroachment is the respondent whose right to life, air, privacy etc. has been infringed for all these years. He continued to fight litigation for more than 25 years. This long battle for right to life will entitle him for the costs. Hence, the costs be paid to the respondent.

24. The appeals are accordingly dismissed with costs of Rs. 2,50,000/-. The appellants shall deposit the costs with the Court within a period of eight weeks from today. The costs be thereafter paid to the respondents.

25. The Registry shall send the copy of judgment to the appointing authority of Mr. Anupkumar, the then Collector of Akola for information and necessary action.

**(Anil L. Pansare, J.)**

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