
(1973) 02 BOM CK 0007
In the Bombay High Court

Abdul Karim Kasam Virani

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 13-02-1973

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 539B

Citation : (1974) CriLJ 514 : (1974) MhLj 34

Hon'ble Judges : Shah, J

Bench : Single Bench

Judgement

Shah, J.—This criminal revision application filed by the accused challenges the order dated December 14, 1972, passed by the learned Sessions Judge, Kolaba, confirming the order of the Judicial Magistrate, First Class, Panvel, granting the complainant's -application requesting the Court to visit and inspect the alleged construction work carried on by the accused.

2. The complainant is the Controller of Unauthorised Construction, City and Industrial Development Corporation of Maharashtra Limited, Thana. On October 25, 1972, he filed a private complaint with the Magistrate against the accused making the following allegations. The accused who is the owner and occupant of a plot of land bearing Survey No. 116/2 plus 5A in village Kalamboli, Taluka Panvel, undertook and carried out the unauthorised development of the said land without the permission of the competent authority. This unauthorised development was detected by the officers of the CIDCO in an incomplete state on December 22, 1971, and the accused was served with a notice dated April 12, 1972, requiring him to discontinue the unauthorised development. However, the accused continued the unauthorised development and completed the work of the building after the service of the notice. Thereafter, on August 29, 1972, the complainant issued a notice to the accused under the provisions of Sub-section (1) of Section 53 of the Maharashtra Regional and Town Planning Act, requiring him to demolish the said structure. However, the accused disregarded the requisition notice and failed to demolish the construction. Thereafter, the

complainant personally inspected the unauthorised construction on October 7, 1972, when it was noticed that the structure of the main building was? almost complete, although the wooden frames of windows were not fitted with glasses. The building was also not painted. It was found locked and was not. brought under use. He also found that there was no water connection or electric power installed. On these facts, it was alleged that the accused had committed an offence u/s 53(6)(a) read with Section 53 (7) of the Maharashtra Regional and Town Planning Act.

3. On the same day, the complainant also filed an application requesting the learned Magistrate to have local inspection of the construction in question. In this application, it was alleged that; the accused was taking a false plea that only internal repairs had been carried out which did not require permission under the Act and that he was falsely alleging that the building was already under use for which it was constructed. The complainant requested the Court to have local inspection of the construction work to verify the truth, as it would also reveal the condition in which the building then existed. It was further alleged in the application that the building was in the stage of finalisation and was neither occupied nor brought under use, and this could be verified by local inspection by the Court,

4. This application was opposed" by the accused. It was, inter alia, contended that the local inspection of the place would reduce the Court to the position of a witness. It was also contended that he did not dispute the fact of construction and, therefore, it was a matter of evidence and interpretation of law. He further submitted that the application was not tenable at that stage and it was open to the complainant to make a similar request after the evidence was over.

5. Relying on the provisions of Section 539-B of the Code of Criminal Procedure, the learned Magistrate granted the complainant's application. He rejected the contention of the accused that if the local inspection of the place was taken, he would be reduced to the position of a witness.

6. The accused challenged the said order of the learned Magistrate by preferring a revisional application before the learned Sessions Judge, Kolaba, who confirmed the order passed by the learned Magistrate and dismissed the revisional application.

7. Mr. Tipnis, the learned Counsel for the accused, contends that the order passed by the learned Magistrate is illegal and improper. Relying on the contents of the complainant's application he submits that the real purpose in making the application is to lead evidence in the form of inspection by the Court and prejudice the mind of the Court against the accused. He points out that the complainant wanted to show to the learned Magistrate that the case of the accused was false and that he was telling lies. He submits that it is only in exceptional circumstances that the Court or the Magistrate should order local inspection of a site and, in any event, it should not be undertaken at the very

initial stage before recording any evidence in the case. His submission is that the inspection of the place at such an early stage is likely to reduce the learned Magistrate to the position of a witness, as he is bound to be prejudiced by what he observes at the time of inspection.

8. This case involves the interpretation of the provisions of Section 539-B of the Code of Criminal Procedure. It provides:

539-B. (1) Any Judge or Magistrate may at ,any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in the opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost:

Provided that, in the case of a trial by jury, the Judge shall not act under this section unless such jury are also allowed a view u/s 293.

On a plain reading of this section, it would appear that the Judge or the Magistrate has power to visit and inspect the place at any stage of any inquiry, trial or other proceeding. The wording of the section is very wide and it does not limit the powers of the Judge or the Magistrate to visit and inspect a place only after the evidence is recorded and not before. However, these powers can be exercised and local inspection made only if the Judge or the Magistrate is of the opinion that the same is necessary for the purpose of properly appreciating the evidence given at such inquiry or trial. The purpose of local inspection is no doubt limited by the wording of the section, but discretion is given to the Judge or the Magistrate to visit and inspect the site at any stage of the inquiry or trial. It obviously depends on the facts and circumstances of each case whether the Judge or the Magistrate should exercise his discretion to visit and inspect the place at a particular stage. He may do so before, during the course of or after the completion of the recording of the evidence, depending on the facts and circumstances of the case. There is no justification for taking the view that the powers conferred u/s 539-B should be exercised only in exceptional circumstances or only after the evidence is recorded by the Court. To put such an interpretation on the section would be to introduce words which are not found in the section itself. The section does not say that the powers can be exercised only in exceptional circumstances or after the evidence is recorded. Far from suggesting such an interpretation, the wording of the section tends to indicate to the contrary. If the Legislature intended to so limit the powers of the Judge or the Magistrate, it would not have used the expression "at any stage of any inquiry, trial or other proceeding" in the section. The only condition to be fulfilled before undertaking such a visit is that the Court must be of the opinion that it is

necessary to view the place for the purpose of properly appreciating the evidence given at the inquiry or trial. It is possible to imagine several types of cases where the Court might think it proper to visit and inspect the place even before the witnesses are examined. For instance, in a murder trial, there may be an occasion when the Judge might feel the necessity of viewing the place of occurrence and its surroundings to enable him to understand the evidence of the eye-witnesses. The Judge need not in such cases wait till all the evidence is recorded by him. On the other hand, it would be easier for him to appreciate and understand the evidence given by the prosecution witnesses if he first visits and inspects the scene of offence. Same discretion can be exercised by the Judge or the Magistrate in a case where the nature of construction of a building is a relevant point for consideration. In the instant case, the allegation is that the building has been recently constructed by the accused, and in some respects it is still incomplete. The prosecution witnesses would give evidence in support of this contention. The said evidence may go into minute details regarding the nature as well as the present state of the construction of the building. There will be so many aspects of the factual position of the construction on which the prosecution may lead evidence. Such evidence may also involve expert evidence of an architect or an engineer. The learned Magistrate recording the evidence may not be in a position to properly understand and appreciate what the witnesses would depose to before him in the matter of the construction of the building. In order to properly appreciate the evidence of such witnesses, it is highly desirable that the learned Magistrate should himself visit and inspect the structure. If he does so before the evidence is actually recorded, it would be easy for him to properly appreciate the evidence given by the witnesses.

9. Mr. Tipnis's contention that the Magistrate would be prejudiced by the inspection of the place before he records the evidence in the case has no merit. If this argument is to be accepted the provisions of Section 539-B would be rendered nugatory because the same argument could be advanced even if the place is inspected after the evidence is recorded. If the Judge or the Magistrate chooses to have local inspection after the evidence is recorded, it would equally be urged that he is likely to be prejudiced by what he has seen at the time of inspection. There is no ground to assume that the Court would be prejudiced against the accused by the inspection that may be made by it before the evidence is recorded. It is also not possible to accept the contention that the Court would be reduced to the position of a witness by the inspection of the place. The section clearly permits local inspection by the Judge or the Magistrate although the purpose thereof must be to enable him to properly appreciate the evidence given before him. Moreover, it is clear from the section itself that certain safeguards have been provided by the Legislature to avoid any controversy regarding the actual observation made by the Judge or the Magistrate at the time of local inspection. The section provides that the inspection should be made after due notice to the parties and the Judge or the Magistrate must record a memorandum of the relevant facts observed at such

inspection without unnecessary delay. The section also requires that such memorandum shall form part of the record of the case and copies thereof shall be furnished to the parties if they so desire.

10. Mr. Tipnis strongly relies on the observations of the Vindhya Pradesh Judicial Commissioner's Court in *Dwarika Prasad v. Ram Nath Modi* AIR 1951 Vind Pra 1. In that case, the Magistrate had discharged the accused on the ground that the prima facie evidence did not make out the offence under the sections mentioned in the complaint. The complainant challenged this order of discharge by a revisional application. The Judicial Commissioner's Court took the view that the Magistrate was wrong in discharging the accused simply because he found that the case made out against the accused was not the one defined in the sections mentioned in the complaint but something else. It was held that the responsibility for the application of a particular section of the Penal Code or any special law rested on the Magistrate and not on the party. On this ground the order of discharge passed by the learned Magistrate was set aside and he was directed to hold a further inquiry to find out whether a prima facie case had been made out, or there was ground for presuming that prima facie the accused had committed an offence. While so deciding the case, the Court made certain observations with regard to the interpretation of Section 539-B which are not being relied on by Mr. Tipnis. The relevant observations in paragraphs 10 and 11 of the judgment are as under:

(10) There is one more point also. The learned Magistrate has held local inspection u/s 539-B. This section is so widely framed as to justify a local inspection at any stage, before framing charge, or as for that matter even before recording the evidence. The only purpose of local inspection being to properly appreciate the evidence given at the trial it is only reasonable that the local inspection should, as a rule, come after all the evidence is recorded. The obscurity, if any, in the earlier stages of the hearing may clear as more evidence is recorded, so the Court should not be hasty unless there are some very exceptional grounds. As more evidence is recorded there may be fresh aspects of the problem, which a local inspection may help in proper appreciation. Obviously, it is neither proper nor practicable for the Court to be holding repeated local inspections at every stage of the case. Thus, unless in the exceptional circumstances, no local inspection should be made till after all the evidence is recorded.

(11) Even that should be resorted to very sparingly the Court taking special precautions to prevent itself becoming a witness unconsciously. On some occasions it is practically impossible for the Court to make a local inspection, and not to import new materials collected by it. The moment the Court collects new material, it becomes a witness, and as it cannot cross-examine itself, it cannot try the case.

It would appear from these observations that, the powers to have local inspection at any stage even before the evidence is recorded are not disputed.

However, the view taken is that no local inspection should be made till after all the evidence is recorded except in exceptional circumstances. With respect, it is not possible to agree with these observations. As indicated earlier, the powers u/s 539-B are wide and can be exercised at any stage of the inquiry or trial. It all depends on the facts and circumstances of each case as to whether the Judge or the Magistrate should visit and inspect any particular place. In some cases, it may even be desirable for the Judge or the Magistrate trying the case to undertake local inspection in the early stages of the trial. So long as the object and the purpose of the local inspection, viz., to properly appreciate and understand the evidence, is not lost sight of by the Judge or the Magistrate, local inspection cannot be objected to merely because it is taken before recording the evidence. As stated earlier, even the said decision relied on by Mr. Tipnis recognises the power of the Judge or the Magistrate to visit and inspect the place before recording any evidence.

11. In this connection, a reference may be made to the observations of the Patna High Court in the case of *Raghunandan Prasad v. Ramadhin Singh* AIR 1918 Pat 656 : 19 Cri LJ 6, to the effect that the law allows a trying Magistrate to make local inspection for the purpose of understanding the evidence and it does not limit the power of making such inspection to a period subsequent to the commencement of the hearing of witnesses; all that is required is that the inspection should be limited to actual observation and should not include the taking of depositions. It is fairly well-settled that local inspection made by the Judge or the Magistrate cannot take the place of evidence. However, the Judge or the Magistrate can use the inspection not only for understanding the evidence but also for testing the veracity of the witnesses deposing before him as regards the features of the locality.

12. Mr. Jethmalani, the learned Counsel for the complainant, tried to contend that it is desirable that the Judge or the Magistrate should invariably make it a point to view the place and that such a view is, in law, part of evidence. He has drawn my attention to the observations of the Judicial Committee of the Privy Council in *Karamat v. The Queen* (1956) AC 256, to the effect that a "view" is part of the evidence and it is in substitution for or supplemental to plans, photographs and the like. That decision was based on the provisions of Section 44 of the Criminal Law (Procedure) Ordinance of British Guiana which inter alia provide that if the Judge considers it to be in the interest of justice, he may direct that the jury have a view of any place, person or thing connected with the case upon the terms and conditions which seem to him proper. It is also provided that the practice and procedure in criminal trials, including the practice and procedure relating to juries, should conform as nearly as possible to that which obtains in England. The said observations of the Judicial Committee of the Privy Council cannot apply here in view of the clear wording of Section 539-B of the Code of Criminal Procedure. It is, therefore, not possible to accept the submission of Mr. Jethmalani that a "view" by the Judge should be treated as part of evidence.

13. In this connection, a reference may be made to the decision of the Supreme Court in *Pritam Singh and Another Vs. The State of Punjab*, . The relevant observations would be found at p. 423 and they are as follows:

The learned Additional Sessions Judge...recorded his impression accordingly. This type of evidence was very strongly criticised by the learned Counsel for the appellants as real evidence which was not justified at all by the provisions of Section 539-B, Criminal P. C. or otherwise and it was urged that it was a matter which prejudiced the defence of the accused.

The learned Additional Sessions Judge was certainly not entitled to allow his view or observations to take the place of evidence because such view or observations of his could not be tested by cross-examination and the accused would certainly not be in a position to furnish any explanation in regard to the same.

It would, therefore, appear that the view by the Judge or the Magistrate cannot be allowed to take the place of evidence in view of the express provisions of Section 539-B. It is, therefore, not possible to give a larger scope to the powers of the Court under this section by treating the view by it as part of evidence. It can only be used for the limited purpose indicated above.

14. I do not think that the learned Magistrate has exceeded his powers in ordering the local inspection in this case. The learned Sessions Judge was, therefore, right in rejecting the revision application.

15. In the result, this revision application is rejected. Rule discharged.