
(2015) 09 BOM CK 0027

In the Bombay High Court

Case No : Criminal Application Nos. 6173, 6175 and 6176 of 2013

Bharti Airtel Limited

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 22-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 142, 154, 4(2), 482

Maharashtra Regional and Town Planning Act, 1966 — Section 142, 43, 44, 45, 45 [5]

Citation : (2016) 1 BomCR(Cri) 477

Hon'ble Judges : S.S. Shinde, J;A.I.S. Cheema, J

Bench : Division Bench

Advocate : Sachin S. Deshmukh, for the Appellant; V.D. Godbharle, APP,
Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.S. Shinde, J—Rule. Rule made returnable forthwith, and heard finally with the consent of the parties.

2. The above mentioned three Criminal Applications i.e. Criminal Application Nos. 6173/2013, 6175/2013 and 6176/2013 are filed, praying therein for quashing FIR No. 27/2013, FIR No. 06/2013 and FIR No. 13/2013, registered on 7th April, 2013, with the Dhule City Police Station, Dhule and Devpur Police Station, Dhule, by the Respondent No. 2 under Section 52 and 53 of the Maharashtra Region & Town Planning Act, 1966, respectively.

In brief the facts disclosed in the Memo of Application, leading for filing the said Criminal Applications, are as under:

3. It is the case of the Applicant that, the Government of India, pursuant to the new Telecom Policy, decided to allow Private Operators to provide basic and cellular telecommunication and paging services in India, which would put the country in the global telecommunication map. On 13th August, 2000, the Government of India opened the infrastructure services sector [related to

telecommunication/cellular communication] to the Private parties and opened registration for Infrastructure Provider Category I [IP-1] and Infrastructure Provider Category II [IP-II]. In the month of November, 2008, the Applicant was formed. The entire shareholding of the applicant is held by the group Companies of Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited. Applicant was granted the Registration Certificate for Infrastructure Provider [Category - IP I] by the Department of Telecommunications, Government of India, for providing infrastructure required for providing telecommunication services. Pursuant to such registration, the management of the sites, inter alia, set up by the said Bharti Airtel Limited [including the said site] has been entrusted to the Applicant.

4. It is the further case of the Applicant that, in the Year 2011, the Dhule Municipal Corporation resolved to levy an amount of Rs. 1 lac per site set up in the Dhule Municipal Corporation area. The Applicant challenged the said Resolution of the Dhule Municipal Corporation before the Bombay High Court, Bench at Aurangabad, by way of filing a Writ Petition No. 3722/2011. In the Year 2012, despite the restraining orders of the High Court, the Dhule Municipal Corporation, sealed some of the sites of the Applicant.

5. It is the further case of the Applicant that, Writ Petition No. 3722/2011 filed by the Applicant, came to be disposed off by common order. According to the Applicant, by the said common order, the action of Dhule Municipal Corporation to impose levy was set aside by the Bombay High Court, Bench at Aurangabad.

6. It is the further case of the Applicant that, on 1st January, 2013, fresh applications were submitted by the Applicants to the Dhule Municipal Corporation in respect of sites of the Applicants in Dhule City. The said Applications are pending. On 6th April, 2013, the Respondent No. 3 lodged the FIR with the Respondent No. 2, stating therein that, the said site has been set up unauthorizedly in Dhule City. Hence Applications.

7. The learned counsel appearing for the Applicants submits that, the Applicants or its employees or Directors have not committed any offence as alleged inasmuch as the site in question was set up after requisite application, and after expiry of period contemplated in Section 45 [5] of MRTP Act. The Applicant has also submitted fresh Application in respect of the said site to the Dhule Municipal Corporation. It is submitted that, the Respondent No. 1 is threatening to arrest employees / Directors of the Applicants. It is submitted that, pending fresh application filed by the applicant, the respondent No. 2 could not and ought not to have filed any complaint, and respondent No. 1 cannot proceed with the investigation of the impugned FIR or can take any action thereunder against the Applicants. It is submitted that, for want of necessary sanction in the light of mandate of Section 142 of MRTP Act, since every prosecution under the said Act, necessarily has to be proceed by sanction. The investigation based on afore-mentioned FIR cannot be proceed further. It is submitted that, allowing the criminal proceeding to continue against the Applicant would tantamount to a

gross abuse of process of law.

8. It is further submitted that, in the light of undertaking to this Court in Contempt Petition No. 544/2012, the applications for erecting mobile towers were to be presented with the Dhule Municipal Corporation in the light of Judgment of Bombay High Court in Writ Petition No. 48/2011 i.e. GTL Infra. Accordingly, on 01.01.2013, the applications were presented in Appendix A as per the byelaws of the Corporation. On 16.01.2013, the applications were rejected, directing to submit the application as per Sections 44, 45, 58, 59 of MRTP Act.

9. It is further submitted that, on 09.04.2013, the application as per Rule 601 of the Corporation was tendered and amount of Rs. 200/- has been accepted by issuing receipt to that effect. However, same is not processed. On 12.04.2013, notices were served upon the applicant under the provisions of Sections 52 and 53 of MRTP Act, directing removal of towers. On 25.04.2013, since the applications seeking permission under Section 44 of MRTP Act was not processed, however, the notices served, therefore, the applicants approached by way of filing Writ Petition No. 3583/2013 to the High Court, seeking quashment of the said notices with further direction to decide the application filed by the applicant, wherein High Court issued notices and directed to maintain the status quo as such the issue is pending consideration. In the midst of aforesaid development, the Corporation has filed the impugned FIR under the provisions of Section 43, 52 and 53 of MRTP Act.

10. It is further submitted that, in the light of the verdict of the Bombay High Court in Writ Petition No. 3544/2010 rendered by the Division Bench, and further followed by the another Division Bench in Criminal Application No. 247/2013, the issue raised in the present Petition is no longer res integra. It is submitted that, Section 44 of MRTP Act provides making an application followed by grant or refusal of permission as per Section 45, and subsequent Appeal as per Section 47, departure with the scheme provided in the Act and having recourse to Section 52 of the said Act, thereby initiating prosecution, is unsustainable. Therefore, the learned counsel appearing for the Applicants submits that, the Petition deserves to be allowed.

11. On the other hand, the learned counsel appearing for the Respondent No. 2 submits that, in the case of Mahesh Shivram Puthran [supra], the Bombay High Court at Principal Seat, in the facts of that case taken a view that, the Maharashtra Regional and Town Planning Act, 1966, is a special enactment, provides mechanism for institution of prosecution against the noticee / owner. In the scheme of things, registration of FIR by the Police Officer under Section 154 of the Code in relation to offence punishable under the provisions of the said Act cannot be countenanced. More so, the local Police Officer, on his own, even if he notices any unauthorized development or use, cannot proceed to register the FIR under Section 154 of the Code. He has no authority to do so, especially in the face of mandate of Section 142 of the Code that, no prosecution for any offence

punishable under the said Act or Rules made thereunder shall be instituted, except with the previous sanction of the specified authority. He further submits that, in the facts of that case before launching prosecution no previous sanction of the specified authority was obtained, and therefore, it was held that, registering FIR without previous sanction from the specified authority cannot be countenanced, and therefore, the FIR was quashed in the facts of that case. However, in the present case, the respondent No. 2 after obtaining prior sanction of the specified authority, has lodged FIR.

12. It is further submitted that, in the case of Bharti Airtel Limited [supra], in the facts of that case, the Court held that, the allegations in the FIR which was subject matter of the said Petition, point towards commission of an offence under Section 52 of the Maharashtra Regional & Town Planning Act, 1966. Beyond the said provision, no other enactment was invoked so as to enable the Police to register the FIR and commence investigation in pursuance thereof, and therefore, in the said background, the Court relying upon earlier Judgment in the case of Mahesh Shivram Puthran [supra] held that, since point is covered by the Judgment of the Division Bench in the case of Mahesh Shivram Puthran [supra], the Application was allowed. However, in the present case, the respondent No. 2 has taken sanction to launch the prosecution and thereafter only FIR is registered, therefore, the Judgments in the case of Mahesh Shivram Puthran [supra] and in the case of Bharti Airtel Limited [supra] are not applicable in the facts of the present case. Therefore, he submits that, in the present case, after obtaining prior sanction FIR is registered, and therefore, applications deserve to be rejected.

13. We have given careful consideration to the submissions of the learned counsel appearing for the Applicants, the learned APP appearing for the Respondent - State, and the learned counsel appearing for the Respondent No. 2. We have carefully perused the averments in the Applications, annexures thereto and the Judgments cited across the bar by the learned counsel appearing for the Applicants. The present Applications are filed invoking provisions of Section 482 of Criminal Procedure Code. While considering the prayer for quashing the FIR, this Court has to keep in view that, power under Section 482 of Criminal Procedure Code has to be used sparingly in rare cases, and also keeping in view the exposition of the Hon'ble Supreme Court in the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, AIR 1992 SC 604 : (1992) CriLJ 527 : (1990) 4 JT 650 : (1990) 2 SCALE 1066 : (1992) 1 SCC 335 Supp : (1990) 3 SCR 259 Supp .

14. Upon perusal of the allegations in the FIR, the offence under Section 52 and 53 of the MRTP Act, 1966, has been clearly disclosed. The provisions of Section 52 of the MRTP Act, 1966, reads thus:

52. Penalty for unauthorised development or for use otherwise than in conformity with Development plan -

(1) Any person who, whether at his own instance or at the instance of any other person commences, undertakes or carries out development or institutes, or changes the use of any land -

(a) without permission required under this Act; or

(b) which is not in accordance with any permission granted or in contravention of any condition subject to which such permission has been granted;

(c) after the permission for development has been duly revoked; or

(d) in contravention of any permission which has been duly modified, shall, on conviction, [be punished with imprisonment for a term [which shall not be less than one month but which may extend to three years and with fine which shall not be less than two thousand rupees but which may extend to five thousand rupees, and in the case of a continuing offence with a further daily fine which may extend to two hundred rupees] for every day during which the offence continues after conviction for the first commission of the offence.

(2) Any person who continues to use or allows the use of any land or building in contravention of the provisions of a Development Plan without being allowed to do so under section 45 or 47, or where the continuance of such use has been allowed under the section continues such use after the period for which the use has been allowed or without complying with the terms and conditions under which the continuance of such use is allowed, shall, on conviction be punished [with fine which may extend to five thousand rupees]; and in the case of a continuing offence, with a further fine which may extend to one hundred rupees for every day during which such offence continues after conviction for the first commission of the offence.

It is the submission of the learned counsel appearing for the Applicants that, in view of the law laid down by the Bombay High Court in the case of Mahesh Shivram Puthran [supra] and in the case of Bharti Airtel Limited [supra], no prosecution could have been launched without prior permission of the Regional Board, Planning Authority or Development Authority or any other Officer authorized for such power and authority in this behalf. In the present case, FIR is lodged with previous sanction of the specified Authority as contemplated under the provisions of Section 142 of the said Act. In the case of Mahesh Shivram Puthran [supra], the Division Bench of the Bombay High Court at Principal Seat, after considering factual scenario in the said Petition in para 16, reached to the conclusion that, the FIR as registered by the Police Officer against the petitioner, is without authority of law both on the ground that he could not have registered such FIR on his own, and, in any case, the FIR is registered without prior sanction of the specified Authority. Admittedly, in the present case, as already observed, after obtaining prior sanction of the Specified Authority, the FIR is registered.

15. So far next contention of the learned counsel appearing for the applicants

that, the alleged offence under Section 52 and 53 is non-cognizable, is concerned, in the case of Mahesh Shivram Puthran [supra], in para 14 it is held thus:

14. Reverting back to the question whether the offences under Sections 43 and 52 of the Act are cognizable or non-cognizable, since the Act of 1966 does not make express provision in that behalf, by virtue of Section 4(2) of the Code, reference can be made to the scheme provided in the Code in that behalf. For that, we may refer to Part II of Schedule I of the Code, which provides for classification of offences against other laws. The same reads thus:-

As the maximum punishment provided in terms of Section 52 of the Act, which has been applied to the case on hand, being up to three years, at best, the second category of cases specified in Part II of Schedule I would be attracted. It would necessarily follow that the offence under Section 52 of the Act is a cognizable and non-bailable offence.

[emphasis supplied]

16. Therefore, it follows from the para 14 of the Judgment in the case of Mahesh Shivram Puthran [supra] that, offence under Section 52 of the said Act is cognizable and non-bailable. Therefore, the FIR under Section 154 of Criminal Procedure Code has rightly been registered.

17. So far the defences raised by the Applicants in the Application are concerned, at appropriate stage those defences can be considered, but not at the stage of considering prayer for quashing the FIR. Once the FIR is lodged, the investigation is an exclusive domain of the Investigating Officer, as long as investigation is in accordance with the law, and the Courts are not supposed to interfere in such investigation. It is only when the Investigating Officer departs from the legal provisions, the Courts are permitted to interfere in such investigation. No prejudices can be caused to the Applicants to make themselves available for investigation.

18. In our opinion, no case is made out for quashing the FIR, therefore, the Applications deserve to be rejected. Accordingly, applications stands rejected. Rule discharged.

19. However, we make it clear that, dismissal of these Applications should not be construed as an impediment for availing appropriate remedy as available in law, in the event of filing of charge sheet by the Investigating Officer.