

(2013) 04 DEL CK 0438
In the Delhi High Court
Case No : Criminal Appeal 695 of 1999

D.D.A.

APPELLANT

Vs

Rajiv Khurana

RESPONDENT

Date of Decision : 25-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Delhi Development Act, 1957 — Section 14, 29(2), 49, 49(1)

Citation : (2013) 5 AD 29 : (2013) 202 DLT 274 : (2013) 136 DRJ 469

Hon'ble Judges : R.V. Easwar, J

Bench : Single Bench

Advocate : Rajesh Mahajan with Mr. Agnihotri, for the Appellant; Rajesh Gupta, for the Respondent

Final Decision : Dismissed

Judgement

R.V. Easwar, J.—By the present appeal, the appellant challenges the judgment of the Metropolitan Magistrate passed on 01.03.1999 acquitting the respondent of the offence charged u/s 29(2) of the Delhi Development Act, 1957, hereinafter referred to as the "DD Act". The facts are these. On 01.03.1995, the surveyor of DDA, Shri D.D. Tyagi inspected premises bearing No. A-7, Kirti Nagar, Delhi and found that a furniture showroom under the name and style of M/s. Khurana Furniture was functioning in the ground floor in an area of about 2500 sq. yds. The premises fell in Development Zone No. G-2 of the Master Plan for Delhi and, therefore, could have been used only for residential purposes. There was thus a violation u/s 14 of the DD Act, which was punishable u/s 29(2) of the said Act. However, before launching prosecution for the violation, sanction for the prosecution had to be obtained as required by section 49 of the DD Act. The sanction was accordingly obtained and a complaint was filed in the court. In support of the complaint, two witnesses were examined by the complainant. The statement of the accused was also recorded u/s 313 of the Cr.P.C. He, however, did not lead any witness in his defence.

2. A preliminary point which was raised before the Magistrate was to the effect that the prosecution was bad on account of the fact that there was no valid sanction for the same u/s 49 of the DD Act since the sanctioning authority had not applied its mind to the facts and circumstances placed before it. This point appealed to the Magistrate. According to him the complaint was filed against the respondent in his capacity as proprietor of M/s. Khurana Furniture on the ground that he was found using the premises for commercial purposes ever since 19.05.1979 when M/s. Khurana Furniture, which was a partnership firm at that time, was convicted by the Metropolitan Magistrate for running a furniture showroom in violation of the Master Plan. The Metropolitan Magistrate in the impugned judgment has also noted that the sanction for the prosecution was granted on the basis of the inspection report dated 01.03.1995, that it was totally silent about the previous conviction of the firm on 19.05.1979 and that it was also silent about the continuing nature of the offence from that date. In these circumstances he held that the complaint cannot go beyond the sanction, but has to conform to it. After noticing the provisions of section 49 and a few authorities on the question of the requirements of a valid sanction for prosecution, he held that the complete facts about the earlier conviction and the continuous misuse of the premises were not placed before the sanctioning authority and, therefore, the complaint, in as much as it proceeds on the basis that the accused is liable to be convicted and fined under the later part of the section 29(2) of the DD Act was invalid and incompetent. He accordingly quashed the complaint and acquitted the respondent of the offence.

3. It is the correctness of the aforesaid order that is called in question before me by the Delhi Development Authority. Section 29(2) of the DD Act is in the following terms:-

29. Penalties.-

(1)...

(2) Any person who uses any land or building in contravention of the provisions of section 14 or in contravention of any terms and conditions prescribed by regulations under the proviso to that section shall be punishable with fine which may extend to five thousand rupees and in the case of a continuing offence, with further fine which may extend to two hundred and fifty rupees for every day during which such offence continues after conviction for the first commission of the offence.

4. Section 49(1) of the DD Act reads as under:-

49. Sanction of prosecution.-

(1) No prosecution for any offence punishable under this Act other than an offence referred to in sub-section (2) shall be instituted except with the previous sanction of the Authority or as the case may be, the local authority concerned or any officer authorised by the Authority or such local authority in this behalf.

The complaint filed before the Metropolitan Magistrate refers to the conviction order of 19.05.1979 for contravention of the Master Plan; in the second paragraph it also refers to the inspection report dated 01.03.1995 and to the fact that "the said accused has/had not stopped the misuse even after the first conviction of the offence and the offence was continuing up to the date of detection of the misuse i.e. on 01.03.1995". In paragraph 3 of the complaint it is alleged that the accused is liable to be convicted and fined to the extent of Rs. 250/- per day till the stoppage of the non-conforming use. It also states in para 4 that the sanction of the sanctioning authority to initiate proceedings has been obtained. From the averments made in the complaint it is clear that the appellant is relying on the second part of the section 29(2) and regards the offence as a continuing offence in which case, in addition to the maximum fine of Rs. 5,000/-, a further fine which may extend to Rs. 250/- for each day during which the offence continues after conviction for the first commission of the offence can be levied. The contention of the appellant is that CW-1 Shri D.D. Tyagi, who carried out the inspection on 01.03.1995 has deposed in categorical terms that in addition to sending the file containing his report and plans, the documents regarding the previous conviction of M/s. Khurana Furniture were also sent to the sanctioning authority for the purpose of obtaining the requisite sanction for the prosecution. The contention is that this categorical statement has not been proved wrong or false in the course of the cross-examination and, therefore, it must be taken that the sanctioning authority, while according sanction for the prosecution did take into account or apply its mind to the earlier conviction before according sanction. It has also been contended that even if the sanctioning authority is assumed, for the sake of argument, not to have considered or applied its mind to the earlier conviction, the sanction cannot be struck down as invalid, because section 29(2) of the DD Act consists of two distinct and severable violations or offences and the sanction can be upheld in so far as it relates to the violation noticed on 01.03.1995 and, therefore, the Metropolitan Magistrate ought to have examined the question as to how much fine can be imposed on the respondent, subject to a maximum of Rs. 5,000/-. My attention was drawn to the judgment of the Division Bench of this Court in the case of Oriental Bank of Commerce vs. Delhi Development Authority and Anr., decided on 16.07.1982 and reported in Oriental Bank of Commerce Vs. Delhi Development Authority and Another, .

5. On the other hand the counsel for the respondent, relying on the judgment of a Single Judge of this Court in The State (Delhi Administration) Vs. Vasdev and Another contends that where there is no evidence in the sanction order to suggest that the sanctioning authority, at the time of granting sanction, was aware of the facts constituting the offence or applied its mind to all the relevant material or documents brought on record, the sanction cannot be held to be a valid sanction. According to him, the complaint refers to the past conviction and the present violation by the respondent herein and has attempted to make out a case of a continued offence and, therefore, it was incumbent upon the

sanctioning authority to apply its mind to those facts and bring out clearly and demonstrably that he did in fact apply his mind to those facts and did consider the offence to be a continuing offence so as to attract the later part of section 29(2) of the DD Act. However, according to the counsel for the respondent, there is nothing in the sanction order dated 06.03.1995 to show any application of mind to the relevant facts and, therefore, the Metropolitan Magistrate was right in quashing the complaint for invalid sanction. My attention has also been drawn to the cross-examination of Shri D.D. Tyagi (CW-1) in the course of which he has stated that at the time of the previous conviction, M/s. Khurana Furniture had a different constitution and was a partnership firm, whereas the present accused was not a partner of that firm and that the present accused was the sole proprietor of M/s. Khurana Furniture, which fact was got verified from the sales tax department. On the basis of this, it is argued by the counsel for the respondent that it is a very material fact as to who suffered the first conviction and if the conviction order discloses that the present accused was not a partner in M/s. Khurana Furniture when that firm was convicted on 19.05.1979, the sanctioning authority could not have come to the conclusion that there was a continuing offence for the simple reason that he was not a partner in M/s. Khurana Furniture on that date.

6. I am of the view that there is a good deal of force in the contentions of the counsel for the respondent. I consider it to be the correct principle to be applied in such cases that even though the sanction order was in a cyclostyled form, it can be considered valid if application of mind and consideration of the materials on record can be easily discerned from the sanction order itself. The mere fact that the sanction order was in cyclostyled form is no ground to invalidate the same as has been held by the Supreme Court in Shivaji Atmaji Sawant Vs. State of Maharashtra and Others, . This judgment has been applied by Justice Mukta Gupta of this Court in the case of DDA vs. M/s. Gautam Hospital and Anr., (Crl. A. No. 134/1999 decided on 11.01.2011). From the judgment of the learned Judge, I find that after referring to the judgment of the Supreme Court, it has been observed that each case has to be looked into on its particular facts and that in that case the sanction order was found to contain individual details to which the sanctioning authority had duly applied its mind. Further, he had appeared in the witness box and had stated about the documents considered by him while granting sanction. The same situation does not obtain in the present case. The sanction order does not refer to the previous conviction on 19.05.1979, which was necessary if the complaint under the later part of section 29(2) of the DD Act could be lodged. The complaint was filed on the footing that there was a previous conviction in which M/s. Khurana Furniture was sentenced to pay a fine of Rs. 2,000/- by a conviction order passed on 19.05.1979 and a further violation was noticed in the course of the inspection carried out on 01.03.1995 and, therefore, the accused was liable to be convicted and fined to the extent of Rs. 250/- per day till the non-conforming user was stopped. The sanction order however does not disclose any application of mind on the part of the sanctioning

authority to these facts, as rightly pointed out by the Metropolitan Magistrate in the impugned order. This is further verified by the deposition of Shri D.D. Tyagi, Surveyor of DDA, who admitted during the cross-examination that M/s. Khurana Furniture had a different constitution and was a partnership firm at the time of the earlier conviction and that the present accused was not a partner of the firm. A perusal of the conviction dated 19.05.1979 passed by the Metropolitan Magistrate, which was before the sanctioning authority as per the deposition of Shri D.D. Tyagi, shows that there were two partners of M/s. Khurana Furniture- (1) Banwari Lal Khurana and (2) Anil Kumar. The present accused was not a partner. If, as Tyagi had deposed, the earlier conviction order was before the sanctioning authority, the fact that the present accused was not a partner in M/s. Khurana Furniture and was not a person who was convicted could not have escaped its notice. If that is so, the sanctioning authority could not have reasonably or rationally come to the conclusion that the present accused was guilty of a continuing offence or violation within the meaning of section 29(2) of the DD Act. Thus it appears to me to be a case of non-application of mind to the facts and the material which were undoubtedly placed before the sanctioning authority and to which he ought to have applied his mind before according sanction for the prosecution. I make it clear that I am not resting my order on the ground that the sanction order is in a cyclostyled form; as already pointed out, the Supreme Court and the learned Single Judge of this Court have held that merely because a cyclostyled proforma is filled it does not lead to the inference that there is no application of mind at the time of grant of sanction and that each case has to be looked into on its particular facts. On the facts of the present case, it is clear that the material which was before the sanctioning authority had not been duly taken note of and the impact of the earlier conviction order has not been assessed at all by the sanctioning authority before according sanction.

7. It remains for me to consider the argument of the appellant that the Metropolitan Magistrate ought to have examined whether there was any violation of the nature prescribed in the first part of Section 29(2) i.e. a first violation or contravention which was discovered on 1.3.1995. This contention, I am afraid, cannot be given effect to because that is not the complaint filed by the appellant. As already pointed out, the violation sought to be made out in the complaint is that there was a continuing offence which falls under the later part of Section 29(2) of the DDA Act. There is no specific allegation in the complaint that the violation is a first-time violation falling within the first part of the above mentioned section attracting a maximum fine of Rs. 5,000/-. In the absence of specific complaint to this effect, it was not within the competence of the Magistrate to examine whether such a complaint/violation was established. The argument of the appellant is accordingly rejected. For the above reasons, I am in agreement with the order passed by the Metropolitan Magistrate on 01.03.1999 holding that there was no valid sanction for the prosecution of the accused in the present case. I accordingly uphold his order and dismiss the appeal.