

(2020) 04 BOM CK 0016
In the Bombay High Court
Case No : Writ Petition No. 2928 Of 2015

Deodutta Gangadhar Marathe

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 21-04-2020

Acts Referred:

Indian Penal Code, 1860 — Section 34, 109, 120(B), 406, 409, 420, 465, 468, 471, 474

Prevention Of Corruption Act, 1988 — Section 13(1)(C)(D), 13(2)

Maharashtra Slum (Improvement, Removal And Development) Act, 1971 — Section 3K

Citation : (2020) 04 BOM CK 0016

Hon'ble Judges : B. P. Dharmadhikari, CJ, N. R. Borkar, J

Bench : Division Bench

Advocate : Manoj Mohite, Amey Deshpande, Gaurav Belsare, Gaurang Jhaveri, Vandana Bait, Harsh Nishar, Pradeep Gharat, K. V. Saste

Final Decision : Dismissed

Judgement

B. P. Dharmadhikari, CJ

1. The matter is yet not admitted and the petition was initially filed at Nagpur Bench as Writ Petition No.462/2015 and as per orders of Honâ??ble

the Chief Justice dated 24/6/2015 in Criminal Miscellaneous Application No.346/2015 in PIL No.23/2014 the matter has been transferred to Mumbai.

2. It appears that thereafter on 26/10/2015 Division Bench of this Court observed that if possible the Criminal Writ Petition shall be heard finally at the stage of admission.

3. Accordingly, we have heard Shri Mohite learned counsel for the petitioner and Mr, Gharat, learned Special Public Prosecutor for the State finally by

issuing Rule and making it returnable forthwith.

4. The prayer in the petition is to quash and set aside FIR dated 11/6/2015 registered as FIR No.35/2015 at ACB Police Station, Mumbai under section 120(B), 420, 406, 409, 465, 468, 471, 474, 109 read with 34 of IPC and section 13(1) (C) (D) read with 13(2) of the Prevention of Corruption Act.

5. It is not in dispute that present petitioner worked as Secretary (Works) PWD with the State Government and retired on 30/6/2006. He had reached age of 58 years on 31/12/2015 but was given 6 months extension.

6. The controversy arises out of development of a plot of Regional Transport Office at Andheri, Mumbai by private contractor by name M/s. Chamankar.

7. Plot CTS 825/1 and 825/2 at Village Ambivali Link Road, Andheri (W) was to be developed. There is slum located on two sides of this plot and slum dwellers there had formed two different co-operative societies. This co-operative Society had selected and appointed a private developer by name M/s. Chamankar for slum redevelopment as per scheme of slum development.

8. RTO Plot is 825/2 and it ad-measures 40,716 square meters. 8,153 square meters was occupied by slums while remaining 32,563 square meters was vacant. Adjacent plot No.825/1 ad-measuring 20570 square meters was of the State Government. 13043 square meters of it was encroached by slums, 6330 square meters was for widening Andheri link Road and balance 1197 square meters was lying vacant.

9. Plan for redevelopment of slum submitted by M/s. K. S. Chamankar Enterprises was received by Slum redevelopment Authority on 22/12/1998.

M/s. K. S. Chamankar, who was Architect applied for no objection to Principal Secretary Transport Department, Mantralaya, Mumbai. It was

rejected by RTO office on 12/1/2001. It was mentioned that RTO had received amount of Rs.4.43 crores already for construction work and on

24/11/2000 Home Department had issued orders to start plinth work. The rejection was communicated on 2/2/2001 and at that time Deputy

Commissioner RTO observed that if land of RTO is spared for slum development, RTO office will face shortage of space. It was also stated that

around RTO plot a stone wall was constructed and there was no encroachment inside the compound wall. As such slum situated outside compound

wall had no concern with plot and land of RTO. The Transport Commissioner on 14/3/2001 accordingly informed Principal Secretary Transport. Thus,

the rejection of proposal submitted by M/s. K. S. Chamankar was finalized.

10. According to prosecution in this backdrop the Private Secretary of the then Deputy Chief Minister Shri Chagan Bhujbal convened the meeting on

16/5/2001 for rehabilitation work in the chamber of Deputy Chief Minister on 21/5/2001.

11. As per prosecution case, it is thereafter when the accused persons including petitioner fabricated records and twisted facts to accept the proposal

submitted by M/s.Chamankar. It is therefore submission that in the process, offences as alleged supra have been committed. The FIR has been

registered on 11/6/2015 on the strength of complaint of ACB, Mumbai region.

12. In this backdrop, Advocate Mohite submits that all papers being relied upon constantly show opposition by the petitioner. He submits that despite

that opposition the responsible elected office bearer like the Deputy Chief Minister proceeded further and as such the petitioner cannot be blamed in

the matter.

13. He points out that clubbing of two plots and SRA project was objected to by the department initially but latter on that objection was given up and

petitioner is not concerned with that process. According to him, on 21/3/2002, State Government has issued a policy decision (GR) for development of

Government plots through private developers to bring uniformity. He submits that the surplus FSI of such plot can be made over to developer as TDR

and the developer can use it elsewhere as per law. These factors are to be examined by the Chief Engineer and recommendation has to be made.

Petitioner happened to be administrative head of PWD and he received the recommendation from the Chief Engineer.

14. On 25/10/2015, Chief Engineer who submitted a note for approval pointing out that the proposal was looked into by the office of the Chief

Architect. The proposal pointed out that the developer was to be permitted utilization of 21683.09 sq. mtrs. TDR on non slum plots and 4000 sq. mtrs.

non slum plot was to be made over to developer. Against that, developer was to make construction worth Rs.77.52 Crores free of cost for

Government. This construction included office of RTO worth Rs.10.52 Crores, other structures like test track parking required by RTO worth Rs. 5

Crores, Maharashtra Sadan at New Delhi worth Rs. 45 Crores and other constructions like Yashodhan etc worth Rs. 77 Crores.

15. The Chief Engineer had submitted a note with schedules and this proposal was also sent to Chief Architect. He submits that this proposal is in the

backdrop of objection mentioned supra. The objection raised on 14/10/2005 and the proposal was then sent by the Chief Engineer on 25/10/2005.

16. He submits that the basic objection and charge against the petitioner is about showing less FSI and thereby causing loss to Government. He

contends that the requirement of adding 35% extra FSI is on the strength of letter dated 10/5/2005 sent by the Chief Architect to Chief Engineer.

There no legal provision has been relied upon to substantiate practice followed in building line in Mumbai has been mentioned. The private sector

considers 35% over and above the carpet area for the purposes of sale. However, while charging stamp duty, only 25% extra FSI was being applied.

Learned counsel submits that this practice being followed in private sector cannot be used in the present matter as here the land was not to be

transferred to private developer and its title was to continue with the State Government/RTO.

17. On the basis of forwarding note sent by the office of the Chief Engineer, petitioner prepared his note and in it expressly pointed out that the project

as evolved was of such a nature that the FSI of plot 825/1 and 825/2 must be made over to SRA project developer. However, the possibility of

objection that it was done without calling tenders, could not have been overruled. This objection is reiterated by the petitioner in his note prepared for

the cabinet meeting and at the later stage, the petitioner also suggested foreclosing of entire proposal. In his note dated 18/1/2006, he has mentioned

valid objection raised by the Finance Department. He also points out that on 8/2/2006, Slum Rehabilitation Authority had indicated a need to give

suitable directions from the State Government (Urban Development Department) for development of non slum land by utilizing its FSI for any purpose

other than the purpose/reservation shown i.e. reservation for RTO.

18. Housing Department also pointed out infirmities in the proposal as M/s. Chamankar were not appointed as developer after inviting tenders. Section

3K of Maharashtra Slum (Improvement, Removal and Development) Act, 1971 was pointed out and the said authority explained that the State

Government could have issued directions to Slum Rehabilitation Authority. He then pointed out that 70% of the Slum residents had opted for M/s.

Chamankar and SRA on 27/10/2004, had issued LOI accordingly to M/s. K.S. Chamankar Enterprises and RTO had also given no objection. The

developer Chamankar also had necessary licences and permissions for development and hence, it would not be appropriate to direct SRA to cancel

appointment of developer. If such direction was issued, developer could have approached the Court and got the stay.

19. Mr. Mohite has invited attention to submission of Mr. Devashish Chakravarti wherein Mr. Chakravarti has mentioned that on 29/3/2006 a meeting

was held at Vidhan Bhavan under the chairmanship of Mr. Chhagan Bhujbal, the then PWD Minister on this subject. It was attended by Chief

Secretary, Housing Department (transport), petitioner, Chief Engineer, Chief Architect and Superintending Engineer PWD. The business transacted in

the meeting is also pointed out by Mr. Chakravarti. The Secretary, PWD (present petitioner) pointed out that giving of work to M/s. K.S. Chamankar

Enterprises would not be legal. PWD Minister Mr. Bhujbal thereafter directed the petitioner to submit proposal favouring K.S. Chamankar Enterprises

as developer for submission to cabinet.

20. Learned counsel for the petitioner states that the petitioner retired in June, 2006 and final approval to the proposal was given on 28/8/2006 by

Cabinet Infrastructure Committee. Our attention is drawn to a note prepared by the Desk Officer which records that on 29/4/2006 PWD Minister had

discussion with Honâ??ble Chief Minister and Honâ??ble Chief Minister then directed the proposal to be placed before the Cabinet Infrastructure

Committee in the meeting scheduled on 3/5/2006. This subject was taken up in its meeting on 5/5/2006 and this is accepted by Mr. Vijaykumar

Agrawal, the then Principal Secretary, Planning Department, Mantralaya. Because of this direction, on 28/4/2006, petitioner had sent a letter to

Principal Secretary, Planning Department with requisite number of copies of the proposal for its placement in the Cabinet Infrastructure Committee

meeting then scheduled on 3/5/2006.

21. Contention is the State ought to have placed the proposal before the cabinet and not before the Cabinet Infrastructure Committee. However, the

then Honâ??ble Chief Minister and the Minister of PWD had desired that it should

be placed before the Cabinet Infrastructure Committee and accordingly it was so placed. Petitioner cannot be blamed again for this.

22. Mr. Mohite submits that the petitioner has duly performed his part of duty by pointing out the lacunae in the proposal but his objections were overlooked. According to him, in this situation, petitioner cannot be arraigned as accused and FIR to that extent needs to be quashed and set aside.

23. Learned Special PP submits that the petitioner himself has pointed out fact of not following proper procedure and also objected to allotting of balance FSI or balance land of RTO plot to private developer. He was therefore, aware of the requirements of law and then he proceeded to point out the steps to be taken and the need of permission of the Cabinet. He has also stated that because of peculiar situation, balance FSI of plot 825/1 and 825/2 needed to be given to private developer and hence, the work could be started only after approval of the Cabinet Infrastructure Committee and after tripartite agreement. The Special PP therefore, submits that the petitioner has waived his objections raised earlier and acquiesced in the breaches.

24. Our attention is invited to the location of plot no. 825/1 and 825/2 and sketch thereof. It is submitted that the sketch shows that all the portions of the said plot have direct access on public road and despite this petitioner, in order to justify allotment in favour of the private developer, made false submission that the part of the said plot was located away from the road. According to him this is so observed only to favour the private developer M/s.Chamankar.

25. Therefore, only the adverse effect, if proposal was not sanctioned also came to be wrongly projected. The proposal prepared for its placement before the cabinet is also relied upon for this purpose.

26. Learned Special PP also submits that as per clause 11 of the policy decision dated 21/3/2002, the private developer cannot be permitted to earn more than 20% of the cost of project as profit. This condition is also violated in the present matter.

27. Our attention is drawn to the chart showing margin of profit to the contractor to be 26.40%. It is pointed out that this chart is about development of RTO plot at Andheri and construction of residential quarters for officers and employees of RTO. This chart was not accepted as the profit margin

was seen more than it is permitted by the GR dated 21/3/2002. Petitioner therefore, submitted another chart which reveal the margin of profit at 14.47%. Contention is this profit margin has been worked out by adding price escalation and therefore, does not represent the correct picture as on date on which previous financial statement chart was prepared. This chart aggravates the offence.

28. Our attention is drawn to statement of Mr. Sakharam Bhagwan Namsekar, Secretary, PWD and answers given by him to show that the lacunae pointed out above or irregularities have been brought on record by him. This witness has also stated that the price of testing track and other construction worked out has been added as Rs. 5 Crores though the developer was given 7522 sq. mtrs. of land free of cost. This witness has stated that if the cost of testing track would not have been added again, the State Government could have obtained additional construction to that extent.

29. Learned Special PP submits that the FSI in balance would have also been auctioned so as to augment the Government revenue. Why these steps were not considered is itself a doubtful circumstance and as such this court should refrain from interfering at this stage. Our attention is invited to the objection taken by the Finance Department on 18/1/2006 and also to the remark by the petitioner, thereafter for submitting that the petitioner was aware of these fatal lacunae and still avoided to take recourse to auction. It is submitted that though there are no provision for clubbing of the development of the RTO property with the slum project, the accused persons together conspired and caused loss to the Government.

30. M/s. Chamankar were not registered contractor or contractor in Class I(a) to undertake works in excess of Rs. 25 Crores. The appointment of Chamankar privately by the Cooperative Societies was stretched to development of RTO plot and by artificial exercise, arbitrarily work of construction of Maharashtra Sadan or other works like work of 'Yashodhan' were added to it.

31. Learned Special PP has compared two financial statements prepared by the petitioner in an attempt to show how the profit margin is sought to be reduced from 26.40% to 14.47%.

32. Counsel for the petitioner in brief reply, explained two calculations in which petitioner attempted to explain how the profit margin works out to

14.47% only. The fact that cost of Maharashtra Sadan escalated to Rs.50 Crores is also pressed into service for this purpose. It is submitted that the

Developer had added the cost of test track and parking for RTO Andheri in his proposal dated 4/10/2005 itself. The total cost of works to be

constructed for Government free of cost was Rs. 75.52 Crores.

33. The permission given by RTO on 26/5/2003 to Chief Executive Officer of Slum Rehabilitation Authority for re-development of slums on CTS No.

825(p) and for clubbing of slum and non slum portion therefor is also relied upon. In this grant, as per clause (5), the Developer had to construct the

office building, staff quarters, compound wall, test track etc. as 7522 sq. mtrs of RTO plot was to be allowed for slum rehabilitation. It is submitted

that letter of intent issued on 27/10/2004 did not refer to test track. This letter sanctions FSI of 1.948 to M/s. K.S. Chamankar Enterprises

(Developer). The obligation to provide access free of cost and to mention that access in lay out plan was also cast on the developer as the land was

land-locked. Learned counsel for the petitioner states that on 4/10/2005, M/s. K.S. Chamankar Enterprises pointed out that it would raise total

construction worth Rs.75.52 Crores if the balance FSI of 26,747 and 4000 sq. mtrs of the adjoining plot was transferred to it. In this letter, they have

mentioned the cost of the test track at Rs. 5 Crores.

34. Counsel for the petitioner submits that all these facts are admitted and hence, the objection that the petitioner with dishonest intention projected the

RTO property to be the land-locked or located on interior side, is misconceived. It is further submitted that there is no requirement in law that the

developer who finances the project should also be registered as the contractor.

35. Nahalchand Laloochand Private Society Limited: (2010) 9 SCC 536 is relied upon to show that the builder cannot charge for parking and other

similar common facilities. While concluding his arguments, petitioner submits that on 10/6/2015, petitioner has submitted reply explaining why 35% of

the so called additional FSI was not added. This reply has been conveniently lost sight of.

36. K.Kuppusamy and Anothervs. State of T.N. and Ors.:(1998) 8 SCC 469 is also relied upon to urge that the practice pointed out by the Chief

Architect cannot override the legal provisions in MOFA or other similar laws or the law looked into in (2010) 9 SCC 536 (supra).

37. In the light of these arguments, we find that at this stage when recording of evidence is yet to commence we are required to look into the material

on record as true. The period for which investigation has been undertaken and offence has taken place is stated to be from the year 2001 till 11/6/2015

when information was received in police station. In FIR the sections invoked are section 13(1) (c)(d) and section 13(2) of the Prevention of Corruption

Act and sections 120-B, 420, 406, 409, 465, 468, 471, 474 and 109 & a/w 34 of IPC. In the meanwhile Special Case No.10/2016 has also been

registered and pending with Special Court, ACB, Mumbai. It therefore follows that the disputed question cannot be looked into at this stage and

explanation or effort made in defence to blame others cannot be normally countenanced. We cannot forget that along with IPC offence under sections

420, 406, 409, 465, 468, 471, 474, 109, section 120-B of IPC as also section 34 thereof has been added.

38. Learned Special PP has submitted that the subject matter pertained to jurisdiction of Cabinet and could not have been placed before Cabinet

Infrastructure Committee. The petitioners have invited our attention to proceedings of meeting conducted under the chairmanship of Deputy Chief

Minister directing the proposal to be placed before the Cabinet Infrastructure Committee. There is dispute between parties about genuineness of this

document. At this stage we need not go into said aspect. The proceedings which contain such directions are forming part of charge-sheet. Even if we

presume that said note or direction exists, it is not sufficient to ignore role of bureaucracy in democracy. The responsible officers could have

emphatically placed on record the negative opinion. Their omission to do so does not enable us to exonerate them. Failure of the petitioner to do so

does not enable us to exonerate him at this stage.

39. Second important aspect is the breach of duty to explore maximum possible benefit for State Government. RTO had pointed out that slum

redevelopment work had no bearing on work within RTO plot or government property. In this situation, whether the auction as suggested could have

resulted in more benefit is the question. Developer had sought transfer of government property. Profit which that property would have earned

therefore was very much material. The Chief Architect himself pointed out the need to compute 35% or 25% of additional FSI for calculating the

value of property to be given to the developer. This aspect has not been explained by the petitioner. His defence is therefore not relevant atleast at this stage.

40. The negligence as civil wrong and dishonest intention are two different facets which may be attracted in present matter. When prima facie the violation of provisions of law are seen, this distinction cannot be used to quash the prosecution.

41. We cannot forget that the uniform policy dated 21/3/2002 stipulates that builder like M/s. Chamankar cannot have earned more than 20% profit.

Financial statement submitted by the petitioner reveals 26.40% profit. When this was objected to, in revised financial statement, this profit has been

brought down to 14.47%. If additional FSI used by M/s. Chamankar is applied in revised chart, the profit margin will exceed 20%.

42. While reducing profit margin, price escalation for developer has been looked into. The cost of Maharashtra Sadan has been increased from 45

cores to 50 crores. Similarly cost of play track, parking etc to be constructed by developer for RTO has also been added. We do not wish to comment

more on this disputed aspect. Because of price escalation, builder/ developer would have passed on the same to his customers and his profit margin

cannot therefore be brought down only by pointing out escalation in cost of construction. The calculation which revealed 26.40 % as profit margin

could have been corrected only by pointing out that at that stage and on that date, there was some mathematical or factual error. There is no such

effort made by the petitioner.

43. We therefore find learned Special PP right in submitting that there is enough material on record for trial to go on and the special case or the FIR

cannot be quashed by accepting the unsubstantiated defence.

44. We add that our observations above are only for the purpose of finding out whether a case for intervention is made out in extraordinary jurisdiction

or not.

45. With above observations and keeping all contentions of the petitioner open for its appreciation at appropriate stage by trial Court, we dismiss the

present matter. Rule is discharged. No costs.