
(1995) 12 AHC CK 0064
In the Allahabad High Court
Case No : Criminal Appeal No 3035 of 1979

Executive Officer, Municipal Board, Nainital	APPELLANT
Vs	
Bankey Lal Sah & Ors.	RESPONDENT

Date of Decision : 19-12-1995

Acts Referred:

Uttar Pradesh Municipalities Act, 1916 — Section 178, 180(3), 185, 287, 314

Citation : (1995) 12 AHC CK 0064

Hon'ble Judges : C.A.Rahim, J

Final Decision : Allowed

Judgement

C. A. Rahim, J.—This appeal has been filed against the judgment and order passed by learned II Additional Sessions Judge, Nainital dated 4.8.1979 in Criminal Appeal No. 83 of 1979 acquitting the accused respondents from the charge under Section 185 of U.P. Municipalities Act, 1916.

2. The prosecution case is that a complaint was filed with the allegation that on 29.12.1979 when Sri G. D. Sharma and Sri. A. H. Siddiqui, Work Agent and Junior Engineer of the Municipal Board inspected the Ajka Hotel, Mall Road, Nainital and found that owners of the said hotel, namely, Bankey Lal, Bharat Bhushan and Navin Chandra, respondents before this Court, had constructed four R. C. C. pillars of 1" x 1" diameter and construction of a room 6"9" x 6"9" was going on in the lane behind the hotel building. According to the prosecution the said construction was unauthorized and illegal as not being sanctioned by the Board. On the same day the Executive Officer of the Board issued notice under Section 186 of the aforesaid Act to the respondents asking them to remove the construction within three days. But inspite of service of notice accused respondents, continued the construction work. On 22.1.1977 another notice under Section 186 of the aforesaid Act was issued but it was not complied with and hence petition complaint was filed in the court of Munsif Magistrate, Nainital on 11.3.1977.

3. Trial was held and the learned Munsif Magistrate after considering the

evidence and materials on record found all the accused respondents guilty of the offence punishable under Section 185 of the Act, convicted them and sentenced to pay a fine of Rs. 500/ each. He also found the accused respondents not guilty of the offence punishable under Section 307/186 of the Act and acquitted them on that count.

4. An appeal against the judgment and order was filed and it was heard by learned II Additional Sessions Judge, Nainital. By judgment and order dated 4.8.1979 the learned Judge allowed the appeal and set aside the conviction and sentence passed by the learned Munsif Magistrate alongwith an order to refund the fine if deposited. Against that order the Executive Officer Municipal Board, Nainital has preferred this appeal.

5. Learned counsel appearing for the appellant Municipal Board has submitted that the learned Sessions Judge erred in holding that the Executive Officer had no authority to lodge the complaint or to forward petition of complaint of the Municipal Engineer of the Board. Learned Judge held that the Executive Officer had no power or authority to forward the complaint to the Municipal Engineer. He also held that in schedule II of the Act offence under Section 186 has not been mentioned.

6. The approach of the learned Judge seems to be erroneous. According to Section 314 of U.P. Municipalities Act the court can take cognizance punishable under the Act only on the complaint or upon the information received from the Board or some person authorised by the Board by general or special order. Learned counsel for the appellant has drawn my attention to section 60 (i) (d) of the Act wherein it has been provided that an Executive Officer of the Board has the power to exercise some of the powers of the Board including the powers held by section or subsection specified in the first column of Schedule II. In first column of Schedule II Section 214 has been mentioned which speaks that the Executive Officer has the power to institute prosecution by making complaint and giving information and to authorise other persons to make such complaint and give such information.

7. Section 314 also provides that the court shall take cognizance of any of the offence punishable under the Act whereof a list is given in Schedule VIII. In Schedule VIII offence under Section 185 has been mentioned. So the learned Judge has wrongly mentioned Schedule II while explaining Section 314 of the Act. Accordingly, it appears that the Executive Officer or any person authorised by him (according to Schedule II) can file complaint for an offence under Section 185 of the Act. In the instant case it appears that by forwarding the complaint the Executive Officer has authorised the Engineer of the Municipal Board to lodge a complaint. So there is no illegality or irregularity for which the complaint can be dismissed.

8. The learned Sessions Judge has held that the case could not and should not be proceeded against the accused respondents as in pursuance of the resolution of

the Board an application for withdrawal of the complaint was filed on 11.4.1977 but later on the said application was withdrawn by the Executive Officer of the Board, who was officiating at that time. Learned counsel appearing for the accused respondents has submitted that since no resolution was passed to withdraw the application dated 11.4.1977 the Executive Officer had no power to file application on 23.4.1977.

9. In reply learned counsel for the appellant has submitted that no order was passed on the application dated 11.4.1977. On the application filed by Executive Officer (Officiating) on 23.4.1977 an order was passed by the learned Magistrate allowing the said application. He has submitted that since no revision was filed against that order, the point raised by the accused persons during appeal about two years after the said order was passed, cannot be heeded to as it is barred by limitation.

10. The contention of the learned Judge of the appellate court is that the Executive Officer (Officiating) cannot pass such order when no resolution was taken by the Board, cannot be sustained in view of the principle that when the Executive Officer has got the right to file a complaint without approval of the Board, he can take such other steps for continuation of the proceeding or for withdrawal of the case and in that premises no resolution of the Board is necessary. Learned counsel has submitted that the said resolution was taken by the Board in view of the fact whether the Board would proceed for the demolition of the construction or for continuation of the criminal prosecution. An illusion was created which is apparent from the application (dated 11.4.1977) itself. In this regard it may be stated that an officer officiating in a particular post has got full power to act as principal officer and it cannot be challenged on the ground that he had no power or authority to do a particular act and in that regard I hold that the decision of the learned lower appellate court is not on the right direction.

11. Learned counsel has submitted that the learned Sessions Judge has held that when this is a case of first offence imposition of fine of Rs. 500/ each was beyond the jurisdiction and it should not have exceeded to Rs. 1000/ in all. The learned Sessions Judge has misread the provisions of law. Section 185 has clearly indicate:

".....shall be liable upon conviction to a fine which may extend to one thousand rupees but which in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court shall not be less than two hundred fifty rupees.

Nowhere it has been stated that there is bar in imposition of fine of Rs. 500/ each. Rather it has been mentioned that to impose fine less than Rs. 250/ the Magistrate has to assign reason. There is no ambiguity in it and I find that by imposing Rs. 500/ each, the learned Magistrate has committed no wrong.

12. The learned Judge has held that notice under Section 287 of the Act was necessary to make an entry into the premises of the accused persons by the staff

of the Municipal Board and since it was not done the said inspection was illegal. Learned counsel for the appellant has submitted that the said notice is required only when question of entering into the premises of the accused persons is necessary. Section 287 speaks thus:

"The President, Executive Officer and if authorised in this behalf by resolution, any other member, Officer or servant of the Board may enter into or upon a building or land with or without assistants or workmen, in order to make an inspection or survey or to execute a work which a board is authorised by this Act, or by Rules or byelaws to make or execute or which it is necessary for a Board, for any of the purpose or in pursuance of any of the provisions of this Act or Rules or byelaws....."

13. Learned counsel for the appellant has submitted that since it was not necessary for the inspecting officer to enter into the premises of an illegal construction so made on the lane behind the said area, no notice was required to be issued. Learned counsel for the respondent has submitted that the said lane is a private lane, as a portion of the building as Alka Hotel, is existing beyond the said lane. The claim on behalf of the respondent is that the said lane is a private lane is a question of fact and the same cannot be allowed for the first time at this stage when an appeal was preferred and disposed of by the lower court. Moreover, it is the case of the respondent that they submitted an application with a plan which was not considered by the Board, is sufficient to prove the admission of the respondent with regard to the encroachment of the public lane and unauthorised construction thereon. It appears that this point was not raised at the trial or the learned lower appellate court and for the first time it has been raised before this Court. While admitting the position the learned counsel for the respondent has fairly conceded that if it is a public lane no notice under section 287 of the Act is necessary. In view of the admission of the respondent and also in view of the fact that the said fact was not raised in the lower courts being a question of fact it is not permissible to raise that point before this Court when an appeal against the acquittal is being heard. In this respect I find that the learned Sessions Judge has erred in deciding the said point in favour of the accusedrespondents.

14. The next point that has been urged by the learned counsel is that the learned Judge has also erred in deciding that when a civil suit is pending and an order of injunction has been issued the learned Magistrate should have considered that aspect of the matter and decided accordingly. Learned counsel has submitted that the said civil suit was filed by Sri Harish Lal Sah against Sri Bankey Lal Sah and others in respect of a dispute arose in between the parties where the Municipal Board was not a party to the suit. Learned counsel has further submitted that the suit has got no connection with regard to the illegal construction made by the accusedrespondents encroaching upon the land situated behind the said hotel. The learned Judge has not discussed how the suit in between the two brothers can restrain the Municipal Board to proceed against

an illegal construction. I do not find any relevancy in the matter and I hold that if the learned Magistrate did not consider that aspect of the matter the judgment passed by him cannot be brushed aside on that score.

15. The last point that has been raised by the learned counsel for the appellant is that the postfacto application for sanction cannot have any impact on the offence already committed by the accusedrespondents. It has been submitted that the learned Judge has erred in deciding that submission of plan by the accused respondents after the commission of the offence does not entitled them to earn the right conferred by Section 180(3) of the Act which provides that the Board shall be deemed to have sanctioned the proposed work when they did not respond to such application within 45 days.

16. It appears that the inspection was held on 29.12.76 when four R.C.C. pillars were constructed and further construction of a room was going on. Notice was issued but the accusedrespondents continued the construction work and did not comply with the order of the municipal authority. The learned lower appellate court has indicated that by letter dated 24.1.1977 four copies of the plan were submitted for sanction and a reminder to that effect was sent on 22.2.1977 and 25.2.1977. So it is clear that the said application for sanction was filed about one month after the said inspection and if the Board did not consider the said prayer, benefit of Section 180(3) of the Act is not available to the accusedrespondents. It presupposes a notice under Section 178 of the Act which speaks that before beginning to erect a new building or part of a new building a person shall give a notice of his intention to the Board. So the application dated 24.1.1977 cannot be regarded as a notice under Section 178 of the Act and hence benefit of Section 180 (3) of the Act is not available to the accusedrespondents.

17. No other point has been raised in this appeal by either side and I find that on all points the learned Judge has erred and has taken a different approach which is not permissible according to law and accordingly I find that on those points the judgment and order of the learned II Additional Sessions Judge should be set aside.

18. The appeal is, therefore, allowed. The judgment and order dated 4.8.1979 passed by the learned II Addl. Sessions Judge, Nainital in Criminal Appeal No. 83 of 1979 is hereby set aside. The conviction and sentence passed by the learned Munsif Magistrate is affirmed. If the fine imposed by the learned Magistrate has not been deposited it should be deposited within one month from this date. Interim orders, if any, passed in connection with this appeal is vacated.

Appeal allowed