

(2024) 05 BOM CK 0025
In the Bombay High Court
Case No : Criminal Appeal No. 143 Of 2005

State Of Maharashtra

APPELLANT

Vs

Sunil Pandurang Jagtap

RESPONDENT

Date of Decision : 10-05-2024

Acts Referred:

Maharashtra Municipal Councils, Nagar Panchayats And Industrial Townships Act, 1965 — Section 189(8), 189(9)
Maharashtra Regional And Town Planning Act, 1966 — Section 23, 43, 44, 45, 46, 47, 49, 51, 52, 152, 152(3)

Citation : (2024) 05 BOM CK 0025

Hon'ble Judges : Abhay S. Waghware, J

Bench : Single Bench

Advocate : D. J. Patil, R. S. Shinde

Final Decision : Dismissed

Judgement

Abhay S. Waghware, J

1. State is questioning the correctness of the judgment and order passed by Sessions Judge, Dhule in Criminal Appeal No. 42 of 1995 arising out of R.C.C. No.419 of 1993.

FACTS GIVING RISE TO THE TRIAL ARE AS UNDER

2. Respondent Sunil undertook construction of building on Parola Road. Visit was made by Building Inspector of Municipality and he claims to have noticed unauthorized construction by making encroachment and reported it to Chief Officer. Therefore, notice was said to be issued under section 189(8) of The Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 directing to restore vacant land and remove encroachment within 15 days. In spite of notice, respondent did not comply and after obtaining sanction, Building Inspector lodged complaint for commission of offence under section 52 read with section 43 of Maharashtra Regional and Town Planning Act, 1966 (for

short, "MRTP Act").

After investigation, respondent was charge-sheeted and tried by learned Chief Judicial Magistrate, Dhule vide R.C.C. No. 419 of 1993. Matter was contested. Evidence of prosecution and defence of accused was appreciated and learned Chief Judicial Magistrate by its judgment and order dated 19.08.1995, convicted respondent for offence under section 52 of MRTP Act and sentenced him to suffer simple imprisonment for one year and to pay fine, in default to suffer simple imprisonment for six months.

3. Such judgment and order of conviction was questioned by respondent by filing appeal before Sessions Court, Dhule bearing Criminal Appeal No. 42 of 1995. After hearing both sides, learned Appellate Court vide judgment and order dated 20.09.2003 allowed the appeal of respondent and setting aside the conviction and sentence.

Hence, instant appeal by State.

SUBMISSIONS

On behalf of Appellant – State :

4. Learned APP questioned the correctness of judgment of Appellate Court pointing out that, prosecution was launched for commission of offence under section 52 of MRTP Act. That, there was apparent encroachment and unauthorized construction. That, during field visit, Building Inspector verified the encroachment. Chief Officer on getting convinced, issued notice under Municipalities Act, calling upon respondent to remove the encroachment within stipulated period. However, he failed and therefore, prosecution was launched, wherein ample evidence was adduced before Chief Judicial Magistrate. According to learned APP, learned trial court appreciated the evidence as well as law and rightly convicted respondent. That, there was correct appreciation of both evidence as well as legal position. That, there was no reason to interfere. However, according to him, Appellate Court erred in interfering and allowing the appeal. Therefore, he prays to re-appreciate the evidence and to restore the judgment and order passed by learned Chief Judicial Magistrate by setting aside judgment and order passed by the Appellate Court.

On behalf of Respondent :

5. Supporting the judgment of Appellate Court, learned counsel for respondent pointed out that, apparently prosecution launched itself was illegal. That, there was no proper service of notice. That, notice dated 16.03.1992 is shown to be issued under section 189(8) of Municipalities Act 1965, which is a code in itself and in said act itself, by virtue of section 189(9) mechanism to deal with contingency of non-obedience with regard to issue under section 189(8) is already provided.

6. He further pointed out that, on the date of complaint, there was no sanction.

Post facto sanction is impermissible. That, for invoking section 52 of MRTP Act, distinct procedure is contemplated. According to him, learned Appellate Court rightly held that prosecution had failed to establish its case beyond reasonable doubt. That, moreover, prosecution evidence itself suggested that, there was no encroachment or illegal activity. Respondent being wrongly charged, he prays to confirm the Appellate Court's Judgment and uphold it by dismissing the appeal.

7. Consequently the gist of prosecution case in trial court was that, accused unauthorizedly erected illegal construction over land belonging to Municipal Council. In spite of being called upon by way of legal notice to remove the encroachment, he failed and therefore, after sanction, he was prosecuted for commission of offence under section 52 of MRTP Act.

8. In support of above case, prosecuted seems to have adduced evidence of PW1 Pandharinath complainant, a Building Inspector; PW2 Jafar Ahmad, Peon officiating in Municipality, who has served notice to accused; PW3 Dilip, Private Contractor; PW4 Chagan Wagh, Contractor engaged by accused; PW5 one Ramesh Mawasi, Chief Officer; PW6 Ramnath, the then Chief Officer;

9. Learned Chief Judicial Magistrate, who conducted trial, and who appreciated above evidence, discussed the evidence of PW1 Pandharinath, Building Inspector on the point of visit, noticing encroaching, reporting it to the Chief Officer and issuing notice (Exh.15) to stop and remove illegal construction. Learned trial court also appreciated the evidence of PW6 Ramnath, Chief Officer and held that, both these witnesses are lending support to each other regarding unauthorized construction, issuance of legal notice and in spite of it, accused failed to comply and remove illegal construction and hence the action.

10. Relying on the evidence of PW3 Dilip, PW4 Chagan and PW5 Ramesh, learned trial court reached to a finding that their testimonies have remained unshaken and consequently held the charges proved. Learned trial court has also discussed and analyzed evidence of PW1 Pandharinath and held sanction to be valid.

As Appellate Court overturned the judgment of learned Chief Judicial Magistrate, State has come up by way of instant appeal.

11. Section 52 of MRTP Act deals with Penalty for unauthorized development or for use otherwise than in conformity with Development plan. It reads thus:

"52. Penalty for unauthorized 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, 1[be punished with imprisonment for a term 2[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 that 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 3[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.”

12. Here, section 52 provides for penalty for unauthorised development or for use otherwise therein conformity with development. It is noticed that in trial Court development plan has not been placed on record to demonstrate that there was construction, which was not in conformity with the said map. Secondly, section 152 of MRTP Act provides powers to the Planning Authority or Development Authority for the purpose of invoking provisions under sections 25, 43 to 46, 49, 51 to 53 of MRTP Act (i.e. including section 52 of MRTP Act) and other sections for revocation or modification or permission to carryout development.

We are concerned herewith sections 51 and 52 of MRTP Act, which deals with powers of Planning Authority to revoke and modify orders as are necessary. Section 152(3) empowers Chief Officer of the Municipal Council to exercise powers. Here, admittedly there is no complaint at the behest of PW6 Chief Officer, who is in fact authorized by the statute to lodge complaint. Rather here complaint is on behalf of a Building Inspector (PW1 Pandharinath).

13. It is also noticed that, prior sanction is necessary before launching prosecution under section 52 of MRTP Act. Sanction accorded vide Exh.32 is of 03.04.1993. However, complaint at the instance of PW1 Pandharinath is already of 18.06.1992 vide Exh.20. Resultantly, such material shows that, prior to seeking sanction, complaint has been already lodged and that to be not by Chief Officer, but at the hands of Building Inspector. This is not permissible.

14. The Act also provides for issuance of notice prior to proposed action. Here, on re-appreciation of PW1 Pandharinath, it is noticed that, and he too has admitted that, service is effected on respondent on 16.09.1992, whereas

complaint is of 18.06.1992.

Above material shows that there is no prior notice as is required.

15. On re-appreciating of the evidence, it is also emerging that, Exh.14 shows that, respondent has succeeded in getting permission for minor construction way back on 12.09.1991 itself. Prosecution could not establish that construction was carried out beyond said permission or in contravention as there are no distinct documents including development plan. Further, above all, alleged construction is in the name of Dilip Umrao Jagtap and not present respondent Sunil Pandurang Jagtap. Therefore, on such count also prosecution case cannot stand.

16. To sum up, firstly, there is no complaint by Chief Officer to whom statute empowers to file complaint, rather it is by Building Inspector. Secondly, prior to mandatory notice, complaint is shown to be lodged. In trial Court, prosecuting authority could not demonstrate that, alleged construction was at the instance of particularly respondent and it was in contravention to any development plan.

17. For all above reasons, learned appellate court seems to have correctly re-appreciated the available evidence and has rightly intervened to set aside the trial court's order. No case being made on merit, appeal is required to be dismissed. Hence, the following order :-

ORDER

The Criminal Appeal stands dismissed