

(2019) 11 BOM CK 0080
In the Bombay High Court
Case No : Criminal Appeal No. 321 Of 2003

State Union Territory Of Dadra And Nagar Haveli	APPELLANT
Vs	
Kishan Navsu Dodia And Anr	RESPONDENT

Date of Decision : 26-11-2019

Acts Referred:

Indian Forest Act, 1927 — Section 3, 4, 6, 20, 23, 26, 26(1)(d), 26(1)(h)
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 11 BOM CK 0080

Hon'ble Judges : K.R. Shriram, J

Bench : Single Bench

Advocate : Trupti Khamkar, S.V. Marwadi, Anamika Malhotra

Final Decision : Dismissed

Judgement

1. This is an appeal filed by the State impugning an order and judgment dated 31st December 1999 passed by the Chief Judicial Magistrate acquitting the accused/respondent no.1 of charge levelled against him under Section 26 (1) (d) and (h) of the Indian Forest Act (the said Act).

2. Under Section 3 of the said Act, the State Government may constitute any forest land or waste land which is the property of Government, or over which the Government has proprietary rights, as reserved forest in the manner provided under the said Act. Section 4 of the said Act provides that whenever it has been decided to constitute any land a reserved forest, the State Government shall issue a notification in the Official Gazette declaring that it has been decided to constitute such land a reserved forest, specifying, as nearly as possible, the situation and limits of such land and appointing an officer to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits. Under Section 6 of the said Act, when a notification has been issued under Section 4, the said Officer, who is referred to as Forest Settlement Officer, shall publish in the local vernacular in every town and village in the neighborhood of the land

comprising therein a proclamation and invite any person who claims any right in the said land proposed to be notified as forest land to make a representation within a period not less than three months from the date of proclamation. Inquiries are later conducted and after following the procedure as prescribed under the said Act, a notification under Section 20 is issued in the Official Gazette specifying definitely, according to boundary-marks erected or otherwise, the limits of the forest which is to be reserved and declaring the same to be reserved from a date fixed by the notification. From the date so fixed such forest shall be deemed to be a reserved forest.

3. Under Section 23 of the said Act, no right of any description shall be acquired in or over a reserved forest except by succession or under a grant or contract in writing made by or on behalf of the Government or some person in whom such right was vested when the notification under Section 20 was issued.

4. Section 26 (1) (d) and (h) read as under :

"26 . Acts prohibited in such forests.- (I) Any person who -

.....

(d) trespasses or pastures cattle, or permits cattle to trespass;

(h) clears or breaks up any land for cultivation or any other purpose;

.....

Section 26 of the said Act, therefore, provides for acts prohibited in such forests and the respondent herein is accused of trespass under Section 26 (1) (d) and for clearing or breaking up land for constructing a house under Section 26 (1) (h). The offence complained of is that on or about 24th February 1997 at village Godbari accused encroached upon the reserved forest land bearing survey no.22 of village Godbari and used the said land for constructing a house and also constructed a house on the reserved forest land and thereby committed an offence punishable under Section 26 (1) (d) and (h) of the said Act.

5. The onus is on the prosecution to prove that accused trespassed or encroached upon the reserved forest land for constructing a house and also constructed house on the said reserved forest land by clearing or breaking up land. The statement of the accused under Section 313 of the Code of Criminal Procedure was recorded after the evidence was concluded and it is the case of accused that his house has been in the place since last 17 to 18 years. The statement under Section 313 of the Code of Criminal Procedure was recorded on 26th November 1999 and therefore, according to accused his house was there since 1981-1982. Accused has denied that he encroached in 1997 and constructed a house as alleged.

6. To prove their point, prosecution examined six witnesses. PW-1 and PW-2 are panch witnesses, whose panchnama is supposed to have been recorded on 24th February 1997 (Exhibit 18) to prove that there was a house constructed in the

reserved forest, boundaries being marked and measurements being taken and that the house was in Survey No.22. In the cross examination, PW-6, who had prepared the panchnama, admits that the panchnama does not indicate anywhere that it relates to a building in Survey No.22. The panch witnesses turned hostile. The panch witnesses have stated that they do not know anything about panchnama and they were only told to sign. They also say no measurement was taken in their presence and it is also not correct to say that after seeing the construction work they signed the panchnama. PW-1 says that the other panch was also not present with him. PW-2, though he admits that the panchnama bears his signature, states he does not know anything about the contents of the panchnama. He also states that no measurement was taken in his presence and only his signature was obtained in panchnama. Therefore, even the evidence of PW-6 has to be discarded.

PW-3 is a Surveyor in Forest Department. PW-3 states that he has taken measurement of the house but PW-3 states that there is a school building situated in Survey No.22, whereas the charge is that the accused bought the said land for constructing house and also constructed house. PW-3 does not mention anything about any house. He also states that he has not made any inquiries of the records about the said land.

PW-4 is a Forest Guard and he says he found on 24th February 1997 one house was constructed in Survey No.22 and he made panchnama of the said house. As noted earlier, the panchnama has to be discarded because of the evidence of PW-1 and PW-2, the panch (hostile) witnesses. In the cross examination, PW-4 says that the construction was completed on 24th February 1997 and there was no electricity in that house. At this point, I have to note that PW-6, who was "in-charge" around the forest, says that there was electricity in the house on 24th February 1997. Therefore, these two witnesses are contradicting each other. PW-4 also says he never made any inquiries about the ownership of the house.

PW-5 is the star witness, who is the Range Forest Officer (RFO), who has in his cross examination stated that the plot of land on which the encroachment was noted was given to one Dhakal Diwal Dodia for cultivation purposes and after publishing the gazette, the land was in possession of Dhakal Diwal Dodia. He also states that he has not taken any action on the house holder or plot holder for taking possession. According to him, the local panchayat people have not been co-operating.

7. None of the evidence indicates that the accused is the person who had trespassed or cleared up or broken up any land for construction of a house. One witness says there was a school in Survey No.22, whereas another witness says it was a house. The panch witnesses had denied the contents of panchnama or that they ever saw any measurement being taken or they were present together. The witnesses also have not produced any evidence to show that it was the accused who was guilty of the acts prohibited under Section 26 of the said Act by constructing a house in February 1997, i.e., accused (a) encroached/trespassed

in reserve forest land, (b) cleared and/or broke up land and (c) for constructing a house because accused has stated that he has been living in that house for 17 to 18 years. There is also no evidence to prove the age of the house.

8. In the circumstances, I cannot find any fault with the impugned judgment. In the State of Maharashtra V/s. Jahid Ali Bashir Ahmed 1998 Bom. C.R. (Cri.) 419 the Court, after observing that the incident being nearly 7 years old and the sentence which would be awarded to respondent even if he is convicted, held that no case for interference is made out. In this case, the incident is of 1997 and 22 years have passed since then.

9. The Apex Court in Chandrappa & Ors. V/s. State of Karnataka (2007) 4 SCC 415 in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under:

"42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

10. There is an acquittal and therefore, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to accused under the

fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, accused having secured acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. For acquitting accused, the Trial Court observed that the prosecution had failed to prove its case.

11. In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, cannot be interfered with. I cannot find any fault with the judgment of the Trial Court.

12. Appeal dismissed.