

(1992) 03 GUJ CK 0034
In the Gujarat High Court
Case No : Criminal Appeal No. 1146 of 1983

The State of Gujarat	Vs	APPELLANT
Nathabhai Manjibhai		RESPONDENT

Date of Decision : 11-03-1992

Acts Referred:

Bombay General Clauses Act, 1904 — Section 19
Bombay Provincial Municipal Corporations Act, 1949 — Section 254, 260, 264, 267, 268
Criminal Procedure Code, 1973 (CrPC) — Section 378
Gujarat Town Planning and Urban Development Act, 1976 — Section 27, 35

Citation : (1993) CriLJ 228

Hon'ble Judges : J.N. Bhatt, J

Bench : Single Bench

Advocate : S.T. Mehta, Addl. P.P, for the Appellant; S.P. Masurkar, for P.M. Thakker, for the Respondent

Final Decision : Dismissed

Judgement

J.N. Bhatt, J.—The appellant, State of Gujarat, has assailed the acquittal order passed by the learned Judicial Magistrate, First Class

(Municipal) Rajkot, in Criminal Case No. 374 of 1983 on 30-8-1983 by invoking the provisions of Section 378 of the Code of Criminal

Procedure 1973 (Code for short hereinafter).

2. In order to appreciate the merits of the present case and the challenge against it a resume of necessary relevant facts may be, briefly, narrated at

this stage. The respondent Nathabhai Manjibhai is the original accused in the aforesaid criminal case who was charged for the offence punishable

u/s 399 of the Bombay Provincial Municipal Corporation Act, 1949 (BPMC Act for short) as well as for the offence punishable u/s 35 of the

Gujarat Town Planning Act, 1976 (GTP Act for short) in the Court of learned J.M.F.C. (Municipal) Rajkot, in Criminal Case No. 374 of 1983.

3. In that the prosecution has alleged that the complainant one Shri K. N. Gadhia, Overseer, Rajkot Municipal Corporation visited the place of

accused at Kotharia Road on 6th January, 1983 in his capacity as an overseer for checking and in course of that enquiry, it was found by him that

the accused had constructed a house on the ground floor by removing the old house. He also noticed that the accused had constructed shops and

further construction work was in progress. The complainant found the accused present on the site when he visited and so also the construction

work going on there.

4. It is the prosecution case that the accused raised construction without obtaining the requisite permission from the Corporation. Therefore, notice

u/s 260 of the BPMC Act was issued and served to the accused. Thereafter, an injunction order restraining him from carrying on further

construction was also issued by the Corporation by resorting to the provisions of Section 267 of the BPMC Act. It is the prosecution version that

in spite of these actions against the accused, he did not stop the construction work. Therefore, it is alleged that the accused has committed an

offence u/s 254 of the BPMC Act and also u/s 27 of the GTP Act. The case of the prosecution is that the accused has completed the construction.

Consequently, the Corporation instituted a Criminal complaint being criminal case No. 374 of 1983, in the Court of learned J.M.F.C. (Municipal)

Rajkot for the offence punishable u/s 399 of the BPMC Act and u/s 35 of the GTP Act.

5. On appreciation of the evidence on record the learned trial Magistrate was pleased to acquit the accused from the said charges against him by

passing an acquittal order on 30-8-1983. Hence, this appeal by the State u/s 378 of the Code challenging the legality and validity of the acquittal

order passed by the trial Magistrate.

6. The complaint is filed by the original complainant Mr. B. P. Gadhia, who was the Overseer at the relevant point of time. He filed the complaint

under the provisions of Section 399 of the BPMC Act and also under the provisions of Section 35 of the GTP Act. A question which would be

required to be examined is that as to whether the complainant was competent to

file complaint under both the Acts.

7. It is contended on behalf of the respondent original accused that the complainant was not competent to file complaint under both the Acts. This

contention is seriously opposed by the learned Additional Public Prosecutor, Mr. Mehta. The accused was served with a notice u/s 260 of the

BPMC Act for raising construction without permission. Notice u/s 260 is produced at Exh. 20 and it is dated 20-1-1983. An injunction order was

also issued by the Rajkot Municipal Corporation directing the accused not to proceed with the construction work. The injunction order was issued

u/s 267 of the BPMC Act which is produced at Ext. 19.

8. Permission for construction is required to be obtained under the provisions of Section 264 of the BPMC Act. The accused started construction

work demolishing the old house without permission as contemplated under the provisions of Section 254 of the Act. Therefore, notice u/s 268 of

the BPMC Act was served to the accused. Section 260 of the BPMC Act provides proceedings to be taken in respect of building or work

commenced contrary to rules or bye-laws. Despite the notice and injunction order by the Corporation, the accused did not stop the construction.

Not only that, virtually, completed the construction. Therefore, a complaint was filed by the Overseer Mr. K. N. Gadhia of Rajkot Municipal

Corporation in the Court of JMFC (Municipal) at Rajkot on 4-6-1983. Summons was issued. The accused appeared and resisted the complaint

contending that he was innocent and he had not committed any offence.

9. The order appointing the complainant Mr. Gadhia as Overseer is produced at Exh. 15. It is dated 11-4-1979. Thus, there is no dispute about

the fact that the complainant was working as Overseer in Town Development Branch of Rajkot Municipal Corporation at the relevant point of

time. Office order of delegation of powers by the Commissioner of Rajkot Municipal Corporation exercising his power u/s 269(1) of the BPMC

Act is produced at Exh. 16. It provides in item No. 6 that Overseer of the Corporation is delegated the power to prosecute for offence under the

provisions of the BPMC Act and Rules. Section 481(1)(a) prescribes the provision in respect of institution, withdrawal etc. in Civil and Criminal

action and obtaining legal advice. Thus, the Municipal Commissioner has delegated his power u/s 481(1)(a) of the BPMC Act for instituting

prosecution for offence under the provisions of the Act and Rules. However, in item No. 5 in column No. 3 while passing the order, the

Commissioner has placed an embargo that the complainant shall obtain administrative consent as to whether a case is fit for prosecution from the

respective head of the Department. There is no dispute about the fact that the Municipal Commissioner of the Corporation is empowered to

delegate his powers under the Act with conditions and qualifications as he deemed appropriate.

10. In this context, it will be interesting to note that the complainant Overseer Mr. Gadhia has not obtained legal consent or permission from the

Head of the Department for filing the Criminal prosecution against the accused. The prosecution has relied on a sanction or permission produced at

Ext. 17. It is undated. It is signed by one Town Development Officer of Rajkot Municipal Corporation (TDO for short hereinafter). There is no

dispute about the fact that the TDO is not the head of the department of Town Planning Branch in which the complainant Mr. Gadhia was working

as an Overseer at the relevant point of time. Thus, it is apparent that the condition with which the powers are delegated to the complainant for filing

criminal prosecution against the accused is not fulfilled. There is also no dispute about the fact that TDO who has granted permission for

prosecution is one Himatlal Shankarlal Acharya who is examined at Ext. 27 in the trial Court. He has categorically admitted under cross-

examination in paragraph 8 at Ext. 27 that he was as such working as an Overseer at the relevant point of time and he had signed the sanction or

consent for filing prosecution against the accused which is produced at Ext. 17 as an in-charge TDO. The In-charge TDO cannot be said to be

designated as a regular TDO who could exercise the delegated statutory powers. He cannot be said to be the Head of the Department. The

competent person to grant sanction or to consent for prosecution was Head of the Department of Town Planning Branch of Corporation. Mr.

Acharya was not designated or regularly appointed TDO and he was not authorised to grant permission or to sanction the prosecution. He was

also not the Head of the Department.

11. A person who is temporarily performing certain duties of statutory post cannot perform statutory functions for granting permission or according

consent for prosecution in view of the provisions of the BPMC Act and order of delegation of power produced at Exh. 16; In the present case,

Mr. Acharya was working as an in-charge TDO at the relevant point of time. He was not duly appointed. He was not designated as regular TDO.

Granting of permission or according a consent for prosecution is, undoubtedly, a part of the statutory duties. Such a duty cannot be performed by

a person temporarily holding charge of that office. A person temporarily holding charge of the office of TDO cannot, under the law, sanction the

complaint or authorise officer to file complaint. The In-charge TDO cannot, therefore, be allowed to discharge the statutory function as provided

under the delegated powers in an order at Exh. 18 at item No. 6. Statutory function can be discharged only by the duly designated officer.

Therefore, on all counts, the TDO was not competent and legally authorised person to sanction the prosecution or to accord sanction for filing the

prosecution against the accused. The contention that the provision of Section 19 of the Bombay General Clauses Act, 1904 can be pressed into

service cannot be accepted. In the opinion of this Court provisions incorporated in S. 19 of the Bombay General Clauses Act would not come to

the rescue of prosecution whose ship is sinking. It cannot be, also, operated as an S.O. 6. Having examined the underlying purport of Section 19,

this Court is of the opinion that this section cannot be resorted to by the prosecution for proving that in-charge TDO was also competent to

sanction prosecution. On a true and correct application and interpretation of the said section, in the light of the case of the underlying object, there

should be no hesitation in finding that the statutory duty is to be performed by duly appointed designated officer of a certain rank and a not by his

subordinate even if, such subordinate is temporarily doing or engaging in the function and duties of the office of Superior. Mr. Acharya was as such

an Overseer at the relevant point of time and he was temporarily holding the office of TDO who was an in-charge TDO permitted Overseer Mr.

Gadhia to launch prosecution against the accused for the alleged offences. Provisions of Section 19 of Bombay General Clause Act, as such, does

not, and could not have the effect of making and appointing or substituting the subordinate in place of a superior irrespective of tenor of the

language employed in the said provision. In short, there was no valid and legal consent or permission to launch the prosecution against the accused.

With the result the complaint launched by Mr. Gadhia against the accused was not legal and valid on this Court itself.

12. The learned Addl. Public Prosecutor Mr. Mehta next contended that the permission to file complaint against the accused was required in view

of the order of delegation of powers and the relevant provisions of the BPMC Act and therefore, the complaint under the provisions of GTP Act

cannot be said to be improper or invalid. This contention prima facie, may appear to be sound but not sustainable when one gets into the reality of

the facts and the relevant provisions of the law. Mr. Mehta has not been able to point out from the records of the present case as to under what

authority and under what provision the complainant Mr. Gadhia was competent to file criminal complaint for the alleged offence u/s 27 read with

Section 35 of the GTP Act. So the prosecution has failed to prove that the complainant was authorised or competent to file criminal complaint

under GTP Act. Not only that, attention of the Court is pointedly invited to the testimony of complainant Mr. K. N. Gadhia produced at Exh. 14.

In para 38 of his testimony at Exh. 14 it is unequivocally admitted that he was not competent and authorised to file prosecution for the alleged

offence under the Gujarat Town Planning and Urban Development Act, 1976. What more is required. In the circumstances the said contention

raised by the learned Addl. Public Prosecutor, Mr. Mehta must fail as it is meritless.

13. In the facts and circumstances narrated hereinbefore and the relevant legal settings there is no hesitation in holding that the present appeal is

devoid of any merits and therefore, deserves to be dismissed. In the result, the appeal is dismissed and the acquittal order passed by the learned

trial Magistrate is confirmed.