

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 41 OF 2016

- 1] Jaikumar Khubchand Mangwani,
Age : 35 years, Occu. : Contractor,
R/o House No. 1019, Mamta Colony,
Near Water Tank Parbhani.
- 2] Sau. Rajshree Rajiv Chaudhari,
Age : Major, Occu. : Contractor,
R/o as above. ...Petitioners

Versus

- 1] The State of Maharashtra,
Through Nava Mondha Police Station,
Parbhani.
- 2] Ashok Vaijnath Swami,
Age : 46 years, Occu. : Service,
R/o House No. 1019, Mamta Colony,
Near Water Tank Parbhani.
- 3] The Municipal Corporation Parbhani,
Through its Commissioner. ...Respondents

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Mr. A. H. Kasliwal, Advocate for Petitioners.

Mr. M. M. Nerlikar, A. P. P. for Respondent No. 1-
State.

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**CORAM : T. V. NALWADE &
SMT. VIBHA KANKANWADI, JJ.**
DATE : 30-11-2018.

JUDGMENT : (Per Smt. Vibha Kankanwadi, J.)

01. Present writ petition has been filed by original accused persons invoking the powers of this Court under Article 226 of Constitution of India and under Section 482 of Criminal Procedure Code for quashing and setting aside the F. I. R. vide C. R. No. 3200 of 2015 registered with Nava Mondha Police Station, Parbhani under Section 52 of Maharashtra Regional and Town Planning Act, 1966.

02. The F. I. R. has been lodged by respondent No. 2 who is the Sanitary Inspector working with Parbhani Municipal Corporation. He has contended that the present petitioners i.e. accused persons have made construction / development on plot No. 92, House No. 1090, survey No. 277/1/92, plot No. 92, Mamta Colony, near water tank Parbhani. Notice under Section 53(1) of M. R. T. P Act was issued to them on 8.4.2015 wherein it was specifically stated that the report has been received by the then Sanitary Inspector Mehraj Ahmed that the construction that has been carried out is beyond the permission or in contravention of the permission granted for construction.

03. It has been contended by the applicants that one Harichandra Munjaji Gurav made complaint to respondent No.

3 i.e. the Municipal Corporation alleging that the additional construction and / or illegal construction has been carried out by the petitioners and it should be demolished. A threat was given in the said complaint application that if the demolition is not done then he would sit for fast unto death. It is stated that the petitioner No. 1 is having dispute with said Gurav. Said Gurav had given cheque of Rs. 1,00,000/-. However, it was dishonoured and therefore, the petitioner No. 1 had lodged complaint under Section 138 of the Negotiable Instruments Act before the Court. In order to give a counter blast, he filed complaint application with Municipal Corporation. The second respondent in collusion with him contended that there is violation of the construction permission given to the petitioners. Show-cause notice was issued on 8.4.2015, which was duly replied by them. Details of the alleged violation of the construction permission was not at all given in the notice. In the reply itself the petitioners had made request to regularize the additional construction by imposing fine. The Govt. of Maharashtra has also announced policy decision to regularize such constructions by accepting premium. It is stated that the decision is pending in respect of draft plan of the proposed action. Under such circumstance, the action

taken against the petitioners deserves to be suspended. It is stated that before submitting the draft plan to the State Govt. for increase in the F. S. I. the position was altogether different. If the F. S. I. is increased due to the acceptance, the additional construction would be permitted and it would be within the four corners of law. The third respondent ought to have considered the explanation tendered by the petitioners regarding the construction and thereafter, the unauthorized construction could have been regularized. Such powers are with the Municipal Corporation. It is stated that the F. I. R. is based on the complaint application which was made with ulterior motive. They have therefore, prayed for quashment of the said F. I. R.

04. Heard learned Advocate for Mr. A. H. Kasliwal, for Petitioners and Mr. M. M. Nerlikar, learned A. P. P. for Respondent No. 1-State.

05. The learned Advocate appearing for the petitioners submitted that one Harichand Gurav had made the complaint application against the construction of the petitioners based upon the same. It appears that the property was inspected and some report was submitted. On the basis of said report notice dated 8.4.2015 was issued.

Perusal of the said notice would show that how much construction is in contravention of the permission has not been mentioned and details of the said are not given. Therefore, the said notice is non-est in the eye of law. However,, the said notice was replied by the petitioners. A detail reply was given with a request that if at all it is found that there is some irregular construction, it should be regularized. When notice i.e. required to be given under Section 53(1) of M. R. T. P. Act is illegal, no action could have been taken under Section 52 of the said Act. The learned Advocate for the petitioner drew our attention to the Govt. Resolution dated 9.7.2018 wherein it has been stated that the Govt. has taken a policy decision to regularize the unauthorized construction which had come up prior to 31.12.2015. Based upon the said Govt. Resolution a proclamation was issued inviting the applications for regularization in respect of the constructions made prior to 31.12.2015. In response to the same the petitioners had made application for regularization of their work. The said proposal is still pending with the Corporation. Under such circumstance, it would be futile exercise to ask the petitioners to face the trial.

06. Per contra, the learned A. P. P. submitted that

when the construction was done, the part of it was unauthorized and therefore, within the powers, respondent No. 3 had taken action under Section 53 of the M. R. T. P. Act. If at all there is any dispute regarding the notice, the petitioners have civil remedy open to them. However, as regards action under Section 52 of the M. R. T. P. Act is concerned, it provides for penalty for unauthorized development or for use otherwise than in conformity with the development plan. When now the petitioners have prayed for regularization of their work, it pre-supposes that their work was unauthorized.

07. Whether the action is taken on the basis of a complaint filed by a person or not is immaterial when notice under Section 53(1) of M. R. T. P. Act is issued. The procedure laid down is that though the complaint application might have been given, the concerned authority i.e. Corporation is supposed to pay visit and assess as to whether the construction that has been made is as per the development plan or not. The petitioners themselves have produced on record one more complaint dated 23.11.2015 given by one Dr. Sandeep Rindhe in respect of construction of the petitioners. That means not only Harichand Gurav was aggrieved by the same, but, Dr. Rindhe is also aggrieved by the same. The F. I. R. clearly shows that

the construction site was visited by the then Sanitary Inspector and he had submitted report to respondent No. 3. Thereafter, the notice was issued dated 8.4.2015. Whether it is a complete, proper and sustainable in the eye law or not can not be gone into by Criminal Court and further it can be stated that issuance of notice under Section 53(1) of M. R. T. P. Act is not pre-requisite for taking action under Section 52 of M. R. T. P. Act. Here, in this case, the notice was given and it was replied. It appears that alongwith the said reply the petitioners did not forward the sanctioned map. Thereafter, again it appears that a notice was issued on 7.12.2015 to the petitioners wherein particulars are given that the construction is not as per the by-laws and the requisite set backs have not been left. Another aspect is also required to be considered is that when now the applicants have filed an application for regularization, they accept that there is some unauthorized work done by them.

08. Perusal of the Govt. Resolution dated 9.7.2018 would show that though a policy decision was taken to regularize the construction unauthorizedly made prior to 31.12.2015, yet, the said resolution does not make a specific mention that Govt. has taken a policy decision to take back the prosecutions which have already been

launched under Section 52 of the M. R. T. P. Act. Therefore, the petitioners can not be given any advantage of the Govt. Resolution. When there is prima facie case made out, the discretionary powers under Article 226 of Constitution of India or under Section 482 of Cr. P. C. can not be exercised.

09. Hence, following order;

ORDER

Writ Petition is dismissed.

[SMT. VIBHA KANKANWADI]

JUDGE

[T. V. NALWADE]

JUDGE

Dahibhate/-