

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO.1170 OF 2003
with
CRIMINAL APPLICATION NO.4980 OF 2003**

Rajkmar Hiranand Devnani & anr.

... Petitioners

Vs.

The State of Maharashtra & anr.

... Respondents

Mr.M.S. Mohite with Sandeep R. Waghmare for the Petitioner No.2
Mr.S.P. Kadam for Intervener in APPLN/4980/2003
Ms.Veera Shinde, APP, for the Respondent – State
Mr.Rajkumar H. Devnani, Petitioner No.1 – present in person

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: JANUARY 17, 2019

ORAL JUDGEMENT:

1. In the present petition, the challenge is to the judgment and sentence dated 27.6.2003 passed by the learned Additional Sessions Judge in Criminal Revision Application No.65 of 2003 thereby confirming the order of conviction and sentence dated 26.12.2002 passed under section 53(7) of the MRTP Act by the learned Metropolitan Magistrate, 39th Court, Vile Parle, Mumbai in C.C. No.26/MRTP/2001. The issue involved in the present Writ Petition is very short. The complaint was filed by one D.B. Bhagat,

Junior Engineer, BMC at Khar Police station on 7.12.2000. The FIR was registered vide LAC No.49/2000 under section 53(7) of the MRTP Act for change of user of the residential premises into commercial premises and thus, the prosecution was launched against the accused under section 53(7) of the MRTP Act. The complainant officer of the BMC had visited flat No.4 of Ramdevi Cooperative Housing Society Ltd. i.e., the intervener society at Khar and on inspection, he found that the residential flat of all the accused persons was converted into office premises. The office furniture i.e., computer, chairs, tables, were found and no residential effects were found. As the entire area was occupied for the office purpose, notice was issued under section 53 of the MRTP Act on 8.11.1999 against both the accused. After completion of investigation, chargesheet was filed. The accused pleaded not guilty and they maintained the stand that the society has demanded exorbitant transfer fees i.e., 4% of the total market value of the flat. However, the applicants refused to pay the said amount and, therefore, out of vengeance, the society has got this prosecution initiated through BMC by giving false report to the BMC about the change of user. Five witnesses were examined by the prosecution including the residents of the society. The learned

Judge after considering the evidence of all the witnesses, convicted both the applicants under section 53(7) of the MRTP Act and sentenced them to suffer S.I. for one month with fine of Rs.5,000/- each and I/d to suffer S.I. for 30 days.

2. The applicants moved Revision application before the Sessions Court by filing Criminal Revision Application No.65 of 2003 and challenged the said order. However, the learned Sessions Judge had taken a view that the witness or the inspector did not observe any residential use in the flat. And no evidence of residence was found. The learned Judge confirmed that the flat was used only for commercial purpose and confirmed the conviction.

3. Though the matter was earlier called out twice and sufficient opportunity was given, none appears for the Respondent – Corporation.

4. The learned Counsel for the Intervener Society has submitted that his intervention is to be allowed because the society is the aggrieved party and is the complainant. The said application is opposed by the petitioners on the ground of locus of the society.

5. Mr.Kadam, appearing for the Society, has submitted that the society had complained to the Corporation about the change of user by the petitioners and, therefore, the Corporation has further taken action by sending its officer for inspection. Thus, the society is an aggrieved party and has locus to intervene in the matter. Learned Counsel appearing for the petitioner No.2 and the petitioner No.1 appearing in person have opposed the application.

6. The society is not the original complainant but a Junior Engineer of the Corporation is the original complainant. Moreover, the society cannot be said to be directly affected person because of the alleged commercial activity. On this count, I am not inclined to allow the intervention in this Writ Petition. Hence, the intervention application is dismissed.

7. On perusal of the record and the impugned orders, it is found that the appreciation of the evidence by the learned Metropolitan Magistrate and also the learned Sessions Judge is not as per law but both the learned Judges have jumped to the conclusion that absence of proper chain of circumstances showed that there is a change of user from the residence to commercial use. The witnesses have deposed that in the said flat, no utensils,

kitchenware, clothes and other household commodities were not found but only computer, tables and chair were found. The learned Judges therefore, drew inference that the said premises is not a residential one but used for commercial purpose. This appreciation is not correct because the absence of evidence of residence shall necessarily amount to commercial use of the said premises. A person may not be residing in a particular premises and may be using that premises for studying or just for resting so regular household articles may not be found in the said premises and, therefore, it cannot be a conversion of residential into commercial premises. The learned Judges of the Courts below have committed error in appreciating the evidence and drawing inference and, therefore, orders passed by the learned Judges of both the Courts below are required to be set aside. In view of the defence taken by the petitioners, it is made clear that the society cannot charge transfer fee exceeding Rs.25,000/-. However, in the present case, as per the petitioners' case, they were asked to pay 4% of the market value of the said premises, which is nearly Rs.1 lakh. Thus, the said demand was illegal. In view of this, for want of sufficient evidence of change of user, this complaint cannot sustain.

8. Hence, the judgment and order dated 27.6.2003 passed by the learned Additional Sessions Judge in Criminal Revision Application No.65 of 2003 as also the judgement and order passed by the learned Metropolitan Magistrate, 39th Court, Vile Parle, Mumbai in C.C. No.26/MRTP/2001 are set aside. The petitioners are acquitted. The fine amount of Rs.5,000/- each needs to be returned. However, at the request of the petitioners, the said fine amount be paid into the account of Manodhairya scheme which is under the control of Maharashtra State Legal Services Authority.

9. Writ Petition is disposed of accordingly.

(MRIDULA BHATKAR, J.)