

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

CRIMINAL WRIT PETITION NO. 3864 OF 2021

Asha Mukund Hemani

.... Petitioner

versus

The State of Maharashtra & Ors.

.... Respondents

.....

- Mr. Ashok Kumar Dubey a/w Anil Kumar Pandey i/b. SAVJ.
Law Solutions, Advocate for Petitioner.
- Mr. M. G. Patil, APP for the State/Respondent.
- Smt. Madhuri More, Advocate for MCGM (Respondent Nos.2 to 5).

CORAM : SARANG V. KOTWAL, J.
DATE : 16th JUNE, 2023

P.C. :

1. Rule.
2. Rule is made returnable forthwith with consent of the parties.
3. The Petitioner has challenged the order dated 16/09/2019 passed by the Court of Metropolitan Magistrate, 55th Court, Vile Parle, Mumbai, in CC No.5505237/SS/2019 u/s 381A r/w 471 of Mumbai Municipal Corporation Act, 1888 (for short 'MMC Act').

4. Heard Mr. Ashok Kumar Dubey, learned counsel for the Petitioner, Smt. Madhuri More, learned counsel for Corporation and Mr. M. G. Patil, learned APP for the State.
5. The complaint was filed by the Assistant Law Officer of Mumbai Municipal Corporation. The allegations are that the Petitioners are the members of the respective societies which are located on plot of land near Punjab National Bank, Mathuradas Road, Kandivali (W), Mumbai. The allegations in the complaint are that the inspection was carried out by one Rajendra Sunil Sankhe working in that ward who was delegated those powers by the Deputy Municipal Commissioner u/s 68 of the Mumbai Municipal Act. He carried out the inspection of the Petitioner's flat and he found that the Petitioner had kept unauthorized single LDPE water storage tank holding water on the bathroom and the WC loft and was in non-mosquito proof condition and hence was likely to breed mosquitoes.

6. According to the complaint, thus, the Petitioner had committed offence punishable u/s 381A r/w 471 of the MMC Act. This complaint was filed on 16/09/2019. On that very day learned Magistrate issued process u/s 381A r/w 471 of MMC Act. The said process is under challenge. Learned counsel for the Petitioner submitted that the order itself shows total non-application of mind on the part of the learned trial Magistrate. The complaint is filed in a most casual manner. It was actually filed to cause harassment to the Petitioners which is clear from the affidavit-in-reply filed by the Respondents.
7. Learned counsel for the Respondents submitted that the offence is clearly made out and the learned Magistrate has passed the correct order after applying his mind.
8. I have considered these submissions. The affidavit-in-reply filed by the Respondents mentions in paragraph No.4 that the Municipal Corporation had received a complaint from one Sandip V. Tanna of Shree Sai Consultant regarding the

unauthorized bore well in the society and loft tanks installed in many flats in the said society.

9. The affidavit-in-reply itself shows that the inspection was carried out and subsequent prosecution is launched at the behest of the said person. Learned counsel for the Petitioners submitted that the two societies have a dispute going on with the said builder and there are other suits pending in the City Civil Court at Dindoshi, between the society and the builder for conveyance. The present prosecution is a result of this dispute and hence it is a malafide prosecution.

10. Having considered the nature of the allegations and the affidavit-in-reply, I am of the opinion that there is considerable force in the submission that it is a malafide prosecution. The affidavit-in-reply itself mentions that the entire process was initiated after the builder had given his complaint to the Municipal Corporation. Vague allegations are made that unauthorized storage tank was kept and it was in non-mosquito

proof condition and hence was likely to breed mosquitoes therein. In this connection sections 381A and 381-B of the MMC Act are important. Section 471 is the Penal Section of the said Act. Sections 381A and 381-B of the MMC Act read thus:

“381A – Permission for new well, etc.

(1) No new well, tank, pond, cistern or fountain shall be dug constructed without the previous permission in writing of the Commissioner.

(2) If any such work is begun or completed without such permission the Commissioner may either -

(a) by written notice require the owner or other person who has done such work to fill up or demolish such work in such manner as the Commissioner shall prescribe, or

(b) grant written permission to retain such work, but such permission shall not exempt such owner from proceedings for contravening the provisions of sub-section (1).

381B – Prohibition of mosquito breeding in collection of water on any land.

No person shall, on any land owned by him or in his possession, -

- (a) have, keep or maintain any collection of standing or flowing water in which mosquitoes breed or are likely to breed, or
 - (b) cause, permit or suffer water on such land to form a collection in which mosquitoes breed or are likely to breed,
- unless such collection has been so treated as effectively to prevent such breeding.”

11. The process is issued u/s 381A of the MMC Act. Therefore, at this stage, the prosecution is not pending for the offence u/s 381B which provides for apprehension of mosquito breeding due to collection of water. In any case, learned counsel for Petitioners make a statement that the Petitioners shall take precaution to safeguard from breeding of the mosquitos. The corporation is at liberty to inspect their flats for the said purpose to verify regarding safety precautions taken by the flat owners, so that there are steps taken to prevent mosquito breeding. That part of the complaint is not the subject matter of issuance of process order.

12. The only question which remains for consideration is about violation of section 381A of the said Act. It is not the allegation that the Petitioner is drawing water unauthorizedly and storing it in water tank. There are no allegations that these storage tanks in the flats, singularly or collectively are causing any damage to the stability of the structure. The allegations are quite vague and the objection from the complaint appears to be that the Petitioner is storing water in a tank. Section 381A provides that no tank shall be dug or constructed without previous permission in writing of the Commissioner. In this case, there are no allegations that any tank was 'constructed' or that there was digging of the land for the purpose of construction of any tank. There is nothing to show that the permission is required to keep a small storage tank in a flat for temporarily storing water, particularly when it is a well known fact that many times there is water shortage.

13. Clause (a) of sub-section (2) of section 381A of the MMC Act makes the position clear. The words used therein are

‘to fill up’ or ‘demolish’. These words are in relation to ‘digging’ and ‘constructing’. Therefore, this section is applicable only when there is digging or ‘construction’ of tanks. The allegations in the present complaint do not attract this provision.

14. Thus, the present prosecution is nothing but harassment to the flat owners. None of the ingredient of section 381A of the MMC Act is satisfied, justifying continuation of the prosecution. The penal statutes are required to be strictly construed. Hence the prosecution deserves to be quashed.

15. Hence, the following order :

ORDER

- (i) Rule is made absolute in terms of prayer clause
- (b) which reads as under :

“(b) After perusing the record and proceedings of the Ld. Metropolitan Magistrate 55th Court, in respect of the Complaint

No.5505237/SS/2019 for the offences punishable under section 381A r/w 471 of MMC the process issued on 16/09/2019 be quashed and set aside.”

(ii) Writ Petition is disposed of.

(SARANG V. KOTWAL, J.)