

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

CRIMINAL WRIT PETITION NO.2079 OF 2007

1. Satyanarayan Agarwal, &
2. Manohar Tukaram Jadhav.

.....Petitioners

Versus

1.The State of Maharashtra, &
2. Municipal Corporation of Greater Mumbai Respondents

Mr. Raja Thakare, Senior Advocate a/w. Siddharth Jagushte,
for the Petitioners.

Mr. Arfan Sait, APP for the Respondent No.1-State.

Mr. P.P. Chavan, Advocate for the Respondent No.2-MCGM.

CORAM : SARANG V. KOTWAL, J.

DATE : 12th OCTOBER, 2023

ORAL JUDGMENT:

1. The Petitioners have challenged the order dated 12.9.2006 passed by the Metropolitan Magistrate, 41st Court, Shindewadi, Dadar in C.C. No.70/PW/2004 rejecting the Petitioners' application for discharge under Section 239 of Cr.P.C. The Petitioners challenged that order in Criminal Revision Application No.83/2007 before the Court of Sessions, Greater Mumbai at Sewree. That Revision

Application was dismissed by the 5th Adhoc Additional Sessions Judge, Court of Sessions, Greater Mumbai at Sewree vide order dated 29.9.2007. Both these orders are under challenge in this Writ Petition.

2. Heard Mr. Raja Thakare, learned Senior Counsel for the Petitioners, Mr. Arfan Sait, learned APP for the Respondent No.1-State and Mr. P.P. Chavan, learned counsel for the Respondent No.2-MCGM.

3. The FIR was lodged at Colaba police station vide LAC No.373/2003 on 27.5.2003 under Section 52 read with Section 43 of the Maharashtra Regional & Town Planning Act, 1966 (hereinafter referred to as 'the M.R.T.P. Act') against both the Petitioners. The Petitioner No.1 was shown as the owner of Mukesh Mill which was situated at Colaba and the Petitioner No.2 was shown as the Superintendent looking after the estate.

4. The investigation was carried out and after obtaining sanction from the Assistant Commissioner of Mumbai Municipal Corporation, the charge-sheet was filed.

The Petitioners preferred an application for discharge under Section 239 of Cr.P.C. which was rejected and the Revision Application challenging that order was also dismissed.

5. Learned Senior Counsel for the Petitioners submitted that the charge-sheet itself shows that the structure in question was not a permanent structure. Some set for a film shooting was erected in the premises. The panchnama itself shows that there was a temporary set and it had nothing to do with the alteration of the building. He submitted that the ingredients of Section 52 of the M.R.T.P. Act are not fulfilled. There was no change of user as far as the building or the premises was concerned. He referred to the definition of 'development' under Section 2(7) of the M.R.T.P. Act. He submitted that there was no development of the building because of the acts alleged against the Petitioners.

6. He referred to proviso (viii) to Section 43 of the M.R.T.P. Act which provides that no permission was required for use of the land occasionally for some other purposes. There was no structural changes in the building and,

therefore, the offences are not made out.

7. Learned counsel appearing for the Respondents together submitted that the orders passed by both the Courts i.e. the Magistrate and the Sessions Court are correct. They have taken a proper view and, therefore, the offence is committed. It is necessary to see whether the structure was a permanent structure and, therefore, the Petitioners are required to face the trial. The evidence about the nature of structure can be established only during the trial.

8. I have considered these submissions. The FIR is lodged by Vijaykumar Sonar, who was working as a Junior Engineer with Mumbai Municipal Corporation. At the time of lodging of his FIR on 27.5.2003 he was working in 'A' Ward of the Mumbai Municipal Corporation. His nature of work included looking for unauthorized constructions and taking steps in that behalf. On 26.5.2003 he visited the Mukesh Mill Compound, Colaba, Mumbai. He observed that on the empty space in that compound, a film shooting was going on. The activities were going on for erecting the film set. According to the first informant said mill was dysfunctional and the

space was in use unauthorizedly for the film shooting. Therefore, he served a notice under Section 354-A of the Mumbai Municipal Corporation Act (for short, 'said Act') and then issued notice under Section 52 read with 43 of the M.R.T.P. Act. After that on 27.5.2003 he lodged the FIR with Colaba Police Station.

9. The investigation was carried out and the charge-sheet was filed. The charge-sheet contains a panchnama dated 27.5.2003. It is mentioned that there was an arch made out of plaster of paris and thermocol. It was having height of 15 feet and there were a few steps put up near that. There was some handcarts with vegetables kept nearby. There were articles for film shooting. Importantly it is clearly mentioned in the panchnama that the set was temporary and was used for a film shooting.

10. The panchnama itself shows that it was a temporary shed and it had nothing to do with the structural changes in the building standing in the compound. In this context, Sections 43 & 52 of the M.R.T.P. Act are important, which read thus :

“43. Restrictions on development of land

After the date on which the declaration of intention to prepare a Development plan for any area is published in the Official Gazette or after the date on which a notification specifying any undeveloped area as a notified area, or any area designated as a site for a new town, is published in the Official Gazette, no person shall institute or change the use of any land or carry out any development of land without the permission in writing of the Planning Authority :

Provided that, no such permission shall be necessary—

(i) for carrying out works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance thereof [except in case of heritage building or heritage precinct;]

(ii) the carrying out of works in compliance with any order or direction made by any authority under any law for the time being in force ;

(iii) the carrying out of works by any authority in exercise of its powers under any law for the time being in force :

(iv) for the carrying out by the Central or the State Government or any local authority of any works—

(a) required for the maintenance or improvement of a highway, road or public street, being works carried out on land within the boundaries of such highway, road or public street ;

(b) for the purpose of inspecting, repairing or renewing any drains, sewers, mains, pipes, cable, telephone or other apparatus including the

breaking open of any street or other land for that purpose ;

(v) for the excavation (including wells) made in the ordinary course of agricultural operation ;

(vi) for the construction of a road intended to give access to land solely for agricultural purposes ;

(vii) for normal use of land which has been used temporarily for other purposes;

(viii) in case of land, normally used for one purpose and occasionally used for any other purpose, for the use of land for that other purpose on occasions;

(ix) for use, for any purpose incidental to the use of a building for human habitation of any other building or land attached to such building.”

“52. Penalty for unauthorised development or for use otherwise than in conformity with Development Plan

(1) Any person who, whether at his own instance or at the instance of any other person commences, undertakes or carries out development or institutes, or changes the use of any land—

(a) without permission required under this Act ; or

(b) which is not in accordance with any permission granted or in contravention of any condition subject to which such permission has been granted ;

(c) after the permission for development has been duly revoked ;or

(d) in contravention of any permission which has been duly modified,

shall, on conviction, be punished with imprisonment for a term which shall not be less than one month but which may extend to three years and with fine which

shall not be less than two thousand rupees but which may extend to five thousand rupees, and in the case of a continuing offence with a further daily fine which may extend to two hundred rupees for every day during which the offence continues after conviction for the first commission of the offence.

(2) Any person who continues to use or allows the use of any land or building in contravention of the provisions of a Development plan without being allowed to do so under section 45 or 47, or where the continuance of such use has been allowed under the section continues such use after the period for which the use has been allowed or without complying with the terms and conditions under which the continuance of such use is allowed, shall on conviction be punished with fine which may extend to five thousand rupees; and in the case of a continuing offence, with a further fine which may extend to one hundred rupees for every day during which such offence continues after conviction for the first commission of the offence.”

11. Section 2(7) of the M.R.T.P. Act defines ‘development’, which reads thus :

“2. Definitions.

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(7) “development” with its grammatical variations means the carrying out of buildings, engineering, mining or other operations in or over or under, land or the making of any material change, in any building or land or in the use of any building or land or any material or structural

change in any heritage building or its precinct and includes demolition of any existing building structure or erection or part of such building, structure of erection; and reclamation, redevelopment and lay-out and sub-division of any land; and “ to develop” shall be construed accordingly;”

12. From the panchnama, it is quite clear that it cannot be said that any work was carried out in respect of the buildings or over the land or for making any material change in that building or that land or for change in the use of any building or land. None of the building standing in the compound was even touched by the film set. The temporary film set was raised in the vacant space and it was strictly of a temporary nature. Therefore, it definitely will not mean that there was any development of the land or of the building in said compound. Those activities also cannot be said to be change in the use of any land. In that context, the proviso (viii) mentioned under Section 43 of the M.R.T.P. Act is rightly relied on by learned Senior Counsel for the Petitioners. It is mentioned that no permission is necessary in case of lands, normally used for one purpose and

occasionally used for any other purpose, for the use of land for that other purpose on occasions. This proviso clearly covers the present case.

13. As mentioned earlier, there was no permanent change on any part of Mukesh Mill because of the activities mentioned in the FIR. The notice under Section 354-A of the said Act, referred to in the FIR, also refers to erection of any building or execution of the work described in Section 342 of the said Act. The activities described in the FIR do not fall within the meaning of any of the additions, alterations or repairs referred under section 342 of the said Act. Sections 342 & 354-A of the said Act read thus :

“342. Notice to be given to the Commissioner of intention to make additions etc., to, or change of user of, a building.

Every person who shall intend—

- (a) to make any addition to a building or change of existing user. or
- (b) to make any alteration or repairs to a building involving the removal, alteration or re-erection of any part of the building except tenantable repairs:

Provided that, no lowering of plinth, foundation or floor in a building shall be permitted.

Explanation.—"Tenantable repairs" in

this section shall mean only,—

- (i) providing guniting to the structural members or walls;
- (ii) plastering, painting, pointing;
- (iii) changing floor tiles;
- (iv) repairing W.C., bath or washing places;
- (v) repairing or replacing drainage pipes, taps, manholes and other fittings;
- (vi) repairing or replacing sanitary water plumbing, or electrical fittings; and
- (vii) replacement of roof with the same material but, shall not include,—
 - (a) change in horizontal and vertical existing dimensions of the structure;
 - (b) replacement or removal of any structural members of load bearing walls;
 - (c) lowering of plinth, foundations or floors;
 - (d) addition or extension of mezzanine floor or loft; and
 - (e) flattening of roof or repairing roof with different material.

(c) **

(cc) to make any alteration in a building involving—

- (i) the sub-division of any room in such building so as to convert the same into two or more separate rooms,
- (ii) the conversion of any passage or space in such building into a room or rooms, or
- (d) to remove or reconstruct any portion of a building abutting on a street which stands within the regular line of such street,

shall give to the Commissioner, in a form obtained for this purpose under section 344, notice of his said intention, specifying the position of the building in which such work is to be executed, the nature and extent of the intended work, the particular part or parts, if any, of such work which is or are intended to be used for human habitation and the name of the person whom he intends to employ to supervise its execution.”

“354A. Power of Commissioner to stop erection of building or work commenced or carried on unlawfully

(1) If the Commissioner is satisfied that the erection of any building or the execution of any such work as is described in section 342 has been unlawfully commenced or is being unlawfully carried on upon any premises, the Commissioner may, by written notice, require the person erecting such building or executing such work to stop such erection or work forthwith.

(2) If the erection of the building or execution of the work is not stopped as required by the Commissioner, or permission approved by the competent authority in favour of the erection of the building or execution of the work is not produced within twenty-four hours from the service of notice referred to in sub-section (1), the Commissioner may, without further notice, remove or pull down the building or work and the expenses thereof shall be paid by the said person or owner of the building or work. The Commissioner may also direct that any person directing or carrying out such erection or work

shall be removed by any police officer from the place where the building is being erected or the work is being executed.

(3) In addition to the action that the Commissioner may take under sub-section (2), he may, without further notice, cause to be removed any materials, machinery, equipments, devices or articles used in the process of erection of the building or execution of such work.

(4) If the expenses incurred by the Commissioner under sub-section (2) and (3) are not paid within one month from the date of demand, such sum as remains unpaid shall be treated, as arrears of property tax and the procedure prescribed under this Act for recovery of arrears of property tax shall, mutatis mutandis, apply to the recovery of such unpaid sum.”

14. Therefore, considering the panchnama included in the charge-sheet, the activities alleged against the Petitioners will not fall in any of these Sections and, therefore, the entire prosecution is misconceived. Neither learned Magistrate nor the Additional Sessions Judge has considered those issues in the background of these provisions and, therefore, both these orders are liable to be set aside. Hence, the following order :

:: O R D E R ::

- i. The order dated 12.9.2006 passed by the Metropolitan Magistrate, 41st Court, Shindewadi, Dadar in C.C. No.70/PW/2004 is set aside. The order dated 29.9.2007 passed by the 6th Adhoc Additional Sessions Judge, Court of Sessions, Greater Mumbai at Sewree in Criminal Revision Application No.83/2007 is also set aside.
- ii. The Petitioners are discharged from the said proceedings being C.C. No.70/PW/2004 pending before the Metropolitan Magistrate, 41st Court, Shindewadi, Dadar, Mumbai.
- iii. Rule is made absolute in the aforesaid terms.
- iv. The Petition is disposed of accordingly.

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by
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(SARANG V. KOTWAL, J.)