



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

CRIMINAL APPEAL NO.1313 OF 2007

The State of Maharashtra
(Through Santacruz Police Station) ...Appellant

Versus

Amit Surendra Mittal,
Age: 29 years, Occupation : Business,
R/o.: Santacruz (W), Mumbai ...Respondent

Mr. S. H. Yadav, APP for the Appellant.

Mr. S. C. Mangle for Respondent (Amicus Curiae)

CORAM : JITENDRA JAIN, J.

DATE : 15th SEPTEMBER, 2023.

P.C.

. The present appeal is filed by the State of Maharashtra (original complainant) under section 378 of the Code of Criminal Procedure, 1973 against the order dated 3rd February 2006 passed by the Learned Metropolitan Magistrate, 39th Court, Vile Parle, Mumbai acquitting Respondent (original accused) of the offence under section 53(1) of The Maharashtra Regional and Town Planning Act, 1966 ('MRTP Act').

2. Narrative of Events:

(i) On 27th May 2002, Shri. Sawant, Assistant Municipal Commissioner, H Ward, Bandra, Mumbai 400 050 visited

Room No.2, Geetika Co-operative Housing Society, S.V. Road, Santacruz (West), Mumbai 400 054 and found that garage no.2 was being used as a beauty parlour.

- (ii) On 10th June 2002, a notice under section 53(1) of the MRTP Act was issued by Shri. Sawant to the Respondent accused directing him to discontinue the use of garage as beauty parlour within one month from the date of notice. The said notice further stated that failure to comply with the same would result into prosecution.
- (iii) On 22nd July 2002, a second inspection report was submitted by Shri. Uttam Mulik, officer of the Municipal Corporation of Greater Mumbai ('MCGM') in which it was recorded that notice dated 10th June 2002 under section 53(1) was served on Respondent accused on 10th June 2002 and the Respondent accused has not stopped the garage from being used as a beauty parlour. There is an endorsement on the second inspection report dated 26th July 2002 to lodge a complaint in the police station.
- (iv) On 29th July 2002, a complaint against the Respondent accused under section 53 of the MRTP Act was made by Shri. Sawant to Santa Cruz Police Station alleging change of user from car parking garage no.2 to commercial activity of

beauty parlour without obtaining permission from the Municipal Commissioner as required under the MRTP Act. The said complaint further states that notice under section 53 was duly served on the Respondent accused on 10th June 2002 and the period of one month to discontinue the change of use expired on 11th July 2002. It further states that on second inspection dated 22nd July 2002, the Respondent accused had not complied with the notice by stopping the use of garage as beauty parlour and thereby committed an offence under section 53(7) of the MRTP Act and therefore requested the police to take cognizance of the said offence and deal with the accused according to law.

(v) On 10th December 2002, an FIR under section 154 of the Code of Criminal Procedure, 1973 was lodged in which it is stated that the offence has occurred from 27th May 2002 to 10th December 2002. The FIR records that information was received on 12th October 2002. The complaint as per the FIR is made by Shri. Mulik.

(vi) On 10th December 2002, a panchanama was drawn by the police with respect to the inspection of garage no.2 being used as a beauty parlour. The witnesses/panch to the said panchanama as noted therein are Shri. Narendra Gupta and

Shri. Bal Lakshman Pandey.

(vii) On 9th May 2003, Assistant Municipal Commissioner granted sanction under section 142 of the MRTP Act to prosecute the Respondent accused for committing offence under section 53(1) of the MRTP Act for taking cognizance by the competent Court.

(viii) Pursuant to above, chargesheet was filed on 10th February 2004 in the Court of Metropolitan Magistrate, 39th Court, Vile Parle, Mumbai and same was numbered as CC No. 17/PW/2004.

3. Proceedings before the Court of Metropolitan Magistrate:

(i) On 13th July 2004, the Magistrate explained the charge to the Respondent accused, the charge being use of car parking garage no.2 as beauty parlour and thereby committing offence under section 53(1) of the MRTP Act.

(ii) The accused Respondent understood the charge read over and explained by the Magistrate and pleaded not guilty to the charge.

(iii) The State led four witnesses as under:

- i.a. PW-1, Shri. Mulik, officer of MCGM.
- i.b. PW-2, Shri. Gupta, panch/witness as per the panchanama.
- i.c. PW-3, Shri. Khoje, sanctioning authority.
- i.d. PW-4, Shri. Gautam, investigating officer.

(iv) The above witnesses were cross-examined by the Advocate of the Respondent accused.

(v) On 19th January 2006, statement of the Respondent accused was recorded under section 313 of the Code of Criminal Procedure, 1973. The Respondent accused stated that the notice as per Exhibit P-4, that is notice under section 53(1) of the MRTP Act was not given to him. He also denied that the premises was owned by him. The Respondent accused stated that he has been falsely implicated in this case.

4. **Judgment of the Metropolitan Magistrate:**

(i) On 3rd February 2006, the Metropolitan Magistrate delivered a judgment acquitting the accused under section 248 of the Code of Criminal Procedure, 1973 punishable under section 53(1) of the MRTP Act and cancelled the bond and surety.

(ii) Briefly the reasons as per the Magistrate's order are that

Shri. Sawant, original Complainant was not examined by the State. The inspection report dated 12th June 2002 is not on record. Notice under section 53(1) is not proved to have been served. PW-1 Shri. Mulik failed to locate the garage on the plan. The Complainant has not proved that the accused is the owner of the premises or is occupying the premises and the statement of the panch/witness that the inspection was not done in their presence.

5. The present appeal is, therefore, filed challenging the above reasoning and findings of the Metropolitan Magistrate and prayed for reversal of the judgment dated 3rd February 2006.

6. Heard Shri. S.H. Yadav for the Appellant and Shri. S. C. Mangle as amicus curiae for the Respondent and with their assistance have perused the original records of the lower Court which were called for and also which formed part of the appeal paper book. The Appellant prayed for reversal of the acquittal by relying on grounds of appeal and the amicus supported the impugned order of the Magistrate.

Analysis and Conclusion:

7. It is important to note the relevant provisions of the MRTP Act for adjudication of the present appeal, which are as

follows:-

“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 carried 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 subject 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.

53. Power to require removal of unauthorised development:-

- (1) *Where development of land has been carried out as indicated in sub-section (1) of section 52, the Planning Authority may, subject to the provisions of this section, [***] serve on the owner a notice requiring him, within such period, being not less than one month, as may be specified, therein after the service of the notice, to take such steps as may be, specified in the notice.*
- (a) *in case specified in clause (a) and (c) of sub-section (1) of section 52, to restore the land to its condition existing before the said development took place,*
 - (b) *in case specified in clause (b) or (d) of sub-section (1) of section 52, to secure compliance with the conditions or*

with the permission as modified:

Provided that, where the notice requires the discontinuance of any use of land, the Planning Authority shall serve a notice on the occupier also.

(6) *If within the period specified in the notice or within the same period after the disposal of the application under sub-section (4), the notice or so much of it as stand is not complied with, the planning Authority may-*

(a) *prosecute the owner for not complying with the notice; and where the notice requires the discontinuance of any use of land any be used in contravention of the notice;"*

8. In my view, the present appeal would require to be dismissed for more than one reason which is analysed by me hereinafter.

9. It is settled position that in criminal proceedings commission of the offence has to be proved beyond reasonable doubt and if there are any doubts then the benefit of doubt has to be given in favour of the accused. It is also settled position that procedural compliance has to be strictly followed by the State and if there is any defect in the same then the accused cannot be held guilty for the alleged offence. Keeping in mind these settled positions, I now propose to deal with the reasoning given by the Metropolitan Magistrate based on the evidence led by the Appellant before the lower Court.

10. Section 52 of the MRTP Act provides for penalty for unauthorised development or for **use** otherwise than in

conformity with the development plan without permission required under the said Act or which is not in accordance with any permission granted or in contravention of any condition subject to which such permission has been granted, development after the permission has been revoked or in contravention of any permission which has been duly modified. If any such violation is committed then the person is liable to conviction with imprisonment and fine.

11. **Analysis of Sections 53(1) and 53(6):-** Section 53(1) of the MRTP Act as it stood prior to 15th April 2017 provided for service of notice on the owner requiring him to restore the land to its condition existing prior to the development under consideration or to secure compliance with the condition or with the permission as modified. The proviso to Section 53(1) states that where the notice requires the discontinuance of any use of land, the planning authority shall serve a notice on the occupier also. The notice under Section 53(1) of the Act should give the owner/occupier atleast one month for restoration of the land or for compliance of the condition. Section 53(6) provides that if within a period specified in the notice, if there is a non-compliance with the same then the planning authority may prosecute the owner for complying with the notice and where the notice requires the discontinuance of any use of land then the planning

authority may prosecute any other person also who uses the land in contravention of the notice. Therefore, on a conjoint writing of Section 53(1) and 53(6) of the MRTP Act, the service of notice on the owner or the occupier is sine qua non before the prosecution is launched. In my view, if there is no service of notice as required under Section 53(1), then the planning authority would not be justified in launching the prosecution.

12. **Service of mandatory notice** :- Shri. Sawant has stated that notice under section 53 was served on the accused Respondent on 10th June 2002 and one-month period expired on 11th July 2002, but the accused, as per the second inspection report dated 22nd July 2002, did not discontinue the use of the premises as beauty parlour. The accused in his statement dated 19th January 2006 has denied the notice having been served on him. The Appellant complainant has not led the evidence of Shri. Sawant to prove that the notice under section 53(1) was served on the accused. The service of notice under section 53 of one month is a sine qua non before prosecution is launched under sub-section (6). In the evidence of PW-1 Shri. Mulik, he has stated that the notice is signed by Shri. Sawant. PW-1 also stated that the notice for change of use was given to the accused, but who gave it and how it was given have not been proved, and if Shri. Sawant

has served the notice then PW-1 Shri. Mulik cannot give any evidence on this issue since he would not have any personal knowledge of the service. It is also important to note that the notice under section 53(1) dated 10th June 2002 giving one month's time to the accused to discontinue the unauthorised use bears signatures, but the Appellant complainant has not proved as to whose signature the said notice bears. There is a date of 10th June 2002 below the signature and the time is also recorded, but the Appellant complainant has failed to put any question to the Respondent/accused on this count to prove the service of notice on the accused. Therefore, in the absence of proof of service, the Respondent accused cannot be held guilty of the offence under section 53(1) of the MRTP Act.

13. **Ownership or Any person:** Prosecution under section 53(6) of the MRTP Act can be launched against owner or "any person" where the notice requires discontinuance of any use of land. The phrase "any person" used in section 53(6) should be read in the context of proviso to section 53(1) and if so read the phrase "any person" used in section 53(6) would mean the "occupier". Section 2(17) of the MRTP Act defines "occupier" to include a tenant, an owner in occupation of, or otherwise using the land, a rent-free tenant in any land, and any person in lawful

possession of any land who is liable to the owner compensation for the use and occupation of the land. The Appellant/complainant has not proved that the Respondent/accused is owner or occupier as required by section 53(6) of the Act. The phrase "any person" would mean a person who is using the premises for purpose other than for the purpose shown on the sanction plan. In the instant appeal, the prosecution has not proved as to how the accused is in-charge of the garage which is used as a beauty parlour. Mere presence of the Respondent accused at the premises would not make him liable for prosecution under section 53(6) unless the prosecution proves that the beauty parlour was run by the Respondent accused either as an owner of the premises or as an occupier or in any other capacity. In this connection it is important to note that the Respondent accused on 4th July 2005 had made an application to file the registration certificate under the Bombay Shops and Establishments Act, 1948 and assessment certificate issued by the Municipal Corporation of garage no.2 and no.3. It is noted on the application that the same was objected by the Appellant complainant. However, there is a noting in the Roznama that the said application was allowed. I, however, fail to understand as to why the Appellant complainant did not cross-examine the accused on these documents which were relevant for adjudicating nor was the same referred by the Learned

Magistrate. The registration certificate under the Bombay Shops and Establishments Act, 1948 appears to have been issued originally to Shri. Surendra Kumar Mittal but thereafter there are notings in red colour bearing the name Shri. Amit Mittal and the place being used as a parlour. It is also important to note that the assessment certificate dated 15th January 1997 which was taken on record shows that the garage was assessed as a shop and the said certificate bore the name of Shri. Surendra Mittal. In my view, the lower authority ought to have considered these important documents which would have thrown light in deciding the complaint. Having not done so, the Magistrate has erred in not considering these important documents which would have shown that the Corporation has approved the use of garage as a shop and at the same time the certificate under the Bombay Shops and Establishments Act, 1948 would have thrown light that the accused is running the business of parlour from garage no.2. However, I leave my views on these documents at this stage without any further adjudication.

14. **Identification of Garage:** It is important to note that PW-1 has produced the original sanction plan of the building but failed to locate the garage on the said plan. Therefore, the Appellant complainant has failed to prove its case in the proceedings before the lower court.

15. **Panchnama:** On 10th December 2002, a panchanama was drawn by the police in the presence of two witnesses, Shri. Narendra Gupta and Shri. Bal Pandey. Shri. Gupta in his examination in chief stated that the police had asked him to sign the panchanama but he was not aware about the contents of it. He also stated that the panchanama was not drawn in his presence nor was it read over and he had put his signature at the behest of the police. The second witness, Mr. Pandey was not examined at all. Hence the authenticity of the panchanama itself is in doubt. Therefore, even on this ground the present appeal is required to be dismissed.

16. First Information Report (FIR) dated 10th December 2002 was marked as Exhibit P-3. In the said FIR the date of receiving information at the police station is shown as 12th October 2002. The Appellant complainant has not produced before the Magistrate the document dated 12th October 2002 on the basis of which the FIR is sought to be lodged. This also indicates that the Appellant complainant has approached the present complaint in a very casual manner.

17. **Conclusion:** In view of the above analysis and reasoning, the present Appeal No.1313 of 2007 filed by the Appellant/original complainant against the Respondent/original

accused is required to be dismissed. Bond, if any, furnished by the Respondent/accused stands cancelled and is to be returned.

[JITENDRA JAIN, J.]

