(1992) 11 BOM CK 0053

Bombay High Court

Case No: Criminal Appeal No. 138 of 1986

Municipal Corporation of Gr. Bombay		APPELLANT
	Vs	
P.V. Sabestian alias Cherian and Another		RESPONDENT

Date of Decision: Nov. 23, 1992

Acts Referred:

- Bombay Municipal Corporation Act, 1888 - Section 344, 394, 471, 56, 68
- Criminal Procedure Code, 1973 (CrPC) - Section 378
- Evidence Act, 1872 - Section 3

Citation: (1993) 1 BomCR 717 : (1993) 95 BOMLR 88

Hon'ble Judges: M.F. Saldanha, J

Bench: Single Bench

Advocate: D.S. Rai, for the Appellant; D.G. Paranjape and B.R. Patil, Assistant Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

M.F. Saldanha, J.

1.Two points of some consequence arise for determination in this set of appeals which are summarised below :

(a) Whether the Deputy Municipal Commissioner is empowered to delegate the functions that are vested in the Commissioner under the provisions of section 68 of The Bombay Municipal Corporation Act and if so, what is the duration of the powers so delegated and whether they can be said to be circumscribed ward-wise?

(b) What should be the approach of the Court in cases where the prosecution alleged that an offence has been continued over considerable period of time ?

A few facts are essential :

As long back as in the year 1980, the B.M.C. through its legal adviser prosecuted the accused in a series of 11 cases on the allegation that he was running a lodging house on the terrace of a building by the name Kothari Mension at Walchand Hirachand Marg, Fort, Bombay. It was alleged that the accused did possess the requisite licence for running a lodging house in the same building which he was in fact doing, but that the Municipal Inspector when he carried out an inspection for the first time on April 5th, 1979, found that a certain part of the terrace had been enclosed and that there were as many as 25 beds kept at that place. It was found that the accused had virtually extended his lodging house also to the terrace and that he was using that area as a Lodging House without having obtained a separate licence in respect of the terrace and on this ground he was prosecuted for an offence punishable u/s 394 read with section 471 of the B.M.C. Act. I need to mention that inspections were carried out on 4-3-1980,15-3-1980,2-4-1980,27-5-1980,6-6-1980,14-6-1980,26-6-1980,14-7-1980,22-7-1980 and on 14-8-1980. The Inspector alleges that on each of these dates when he carried out the inspection he found that the premises on the terrace were still being used as a Lodging House. The prosecution charge is that the offence was a continuing one and that in this regard, since it had not concluded, that there was no bar of limitation when the complaints were filed before the learned Magistrate but that each inspection disclosed a fresh cause of action and therefore, was liable to punishment separately.

2. The learned trial Magistrate upheld the B.M.C.''s contention on the point of limitation with regard to the maintainability on the ground that the offence was a continuing one. However, on the other two aspects namely the question as to whether the evidence discloses conclusively that the offence had been committed and more importantly, the aspect of jurisdiction namely as to whether the Inspector was duly authorised in law to take the action which he had done, the learned Magistrate recorded findings in favour of the accused and acquitted him. The matter was thereafter carried in appeal and at the hearing of the appeal since it was disclosed that the requisite formalities u/s 313 Cr. P. C. had not been duly complied with, the case was remanded to the trial Court. After recording the statement of the accused, the trial proceeded once again and the learned Magistrate on this occasion acquitted the accused. He upheld the contention that the Inspector was not duly authorised as also that the evidence did not disclose an offence. The B.M.C. after obtaining leave from this Court, has preferred the present set of appeals principally on the ground that the point involved in this case required decision and secondly that it is essential to arrest the miscarriage of justice that has resulted.

3. Mr. Rai, learned Counsel appearing on behalf of the appellant has in the first instance contended that the findings of the trial Court on the issue that the complainant Guptas did not possess the requisite legal authority is erroneous. He

contends that the Officer has produced at page 42 of the record an authority in his favour dated 16th December, 1976 issued to him by the Deputy Commissioner Zone-I. It is the contention of Mr. Rai, that u/s 68 of the B.M.C. Act, the Commissioner is empowered to delegate the authority and that the present delegation is perfectly in order. Mr. Rai, submits that section 56 of the Act virtually equates the Deputy Muncipal Commissioner with the Commissioner and that the grievance canvassed before the lower Court to the effect that the Deputy Municipal Commissioner was not empowered in law to delegate the powers which the commissioner could do u/s 38 is purely academic but without any substance whatsoever. He has also dealt with the subsidiary challenges namely the point that Gupta at the time when the powers were delegated to him in December 1976 was admittedly posted to a different ward and secondly that the powers were delegated three years earlier and submitted before me that once the Inspector is invested with the powers by virtue of the Act of delegation that the authority given to him continues regardless of which part of the city he may be transferred to and that it continues until the powers are revoked and/or until he ceases to hold that office. He, therefore, contends that the learned Magistrate was clearly in error in having upheld these contentions.

4. Mr. Paranjape, the learned Counsel appearing on behalf of the respondent No.1 has in the first instance submitted that the Deputy Municipal Commissioner and the Commissioner are not Officers of co-ordinate jurisdiction and that section 68 specifically restricts the powers of delegation to the Commissioner and to nobody else. As a corollary to this, he contends that if the Commissioner delegates the powers to the Deputy Municipal Commissioner then that authority cannot sub-delegate the powers to any other Inspector and therefore, the act of delegation to the Inspector can be performed by no other authority other than the Commissioner himself. In support of his contention, he has drawn my attention to a decision of this Court reported in 1979 Cri Lj 5 in the case of The state of Maharashtra v. Shripati Jyoti Mane, wherein Kotwal, J., (as he then was) in dealing with an identical situation held that the authorisation issued by the Deputy Municipal Commissioner and not by the Commissioner was improper and invalid, because the prosecution had not led evidence in support of its contention that the Deputy Municipal Commissioner was invested with such authority. Mr. Paranjape contends that the present case is on all fours with the reported decision and that therefore, the learned Magistrate was perfectly justified in having upheld the contention that the Inspector did not possess the requisite authority. He further argues that there is an admission by the witness that even if he was legally authorised to carry out these acts while working in a different ward, that it is necessary for him to obtain specific authority once again after he is transferred to another ward before he can continue to exercise those powers. Mr. Paranjape therefore, submits that in the light of these admissions the position is quite unambiguous and that even assuming that Gupta was validly authorised when he

was holding his earlier position that once he was transferred to the A ward that the powers stood extinguished and that a fresh authorisation or delegation was essential.

5. Mr. Paranjape quotes the parallel of the powers which can be exercised even by judicial authorities such as Magistrates and points out to me that those powers are circumscribed to the local area wherein they are administratively permitted to function and if the powers are exercised outside that area that it is well settled law that they have acted without jurisdiction. As regards this last aspect of the matter, I need to correct the fallacy in the argument by pointing out that the delegation of powers or the investment of such powers is an authority would normally continue for as long as the person continues to hold that rank or post and exercises the functions attached to that post or until the powers are revoked. Mere movement from one administrative division to another will not extinguish those powers and it needs to be clarified that it is only for administrative convenience that jurisdiction is sometimes circumscribed, to a particular geographical area. If Gupta was duly authorised to exercise the powers of a Municipal Inspector, regardless of whatever erroneous admissions he might have given in the witness box, the correct position in law is that he could continue to exercise those powers as long as he functioned as an Inspector and the only difference would be that he would continue to exercise to them in the new area that he was posted to in substitution for the original area where he was earlier working.

6. The most important aspect of the matter is the question as to whether Gupta did possess the requisite legal authority. Kotwal, J., in the decision referred to supra has taken the view that the prosecution ought to have led necessary evidence to establish that the Inspector had the requisite powers. It is true that in that particular case no such evidence was led and in the absence of anything on record to justify how the authority could validly exercise that power, the learned Judge upheld the defence objection. What was however not pointed out to the learned Judge at that time was that it is permissible either by leading evidence or by pointing out requisite provisions of law to satisfy the Court that the delegation was valid and that it was in order. It is true that the better method would be by producing the requisite witnesses or the requisite documents but it is equally open to the prosecution to satisfy the Court that such delegation is permissible within the framework of the act and that it is valid and binding.

7. Mr. Rai, has drawn my attention to section 56(b) of the B.M.C. Act whereby the functions of the Deputy Municipal Commissioner have been set out. Sub-clause (2) of section 56(b) in no uncertain terms equates the position of the two officials in this regard to the extent that by virtue of a deeming provision it has been clarified that the acts so performed by the Deputy Municipal Commissioner shall be deemed to be performed by the commissioner himself. Reading section 56(b) with section 68, therefore, these can be no ambiguity left, and to my mind, the Deputy Municipal

Commissioner Kamdar who was delegated the powers at the relevant time to Gupta was fully authorised to do so. The objections in this regard therefore to my mind do not survive. The mere fact that the prosecution did not lead any further evidence for the purpose of establishing that Kamdar was acting under the powers vested in him u/s 56 of the B.M.C. Act would not make any appreciable difference. I need to add here that the this is an issue of some consequence and that it was essential for this Court to have corrected erroneous position in law that had emerged. Quite apart from the 11 appeals that are the subject matter of this group, it is common knowledge that all sorts of technicalities are pleaded and wrongly upheld in prosecutions that are launched by the Bombay Municipal Corporation as a result of which the breaches of the provisions of the Act invariably go unpunished. The whole purpose of having placed these provisions on the statute book is virtually put into cold storage and in this view of the matter it is of immense public importance that the miscarriage of justice be rectified.

8. As regards the evidence of Gupta Mr. Paranjape had a two fold submission to advance. In the first instance he contended that Gupta even assuming that he was lawfully authorised, is the sole witness produced by the prosecution. Gupta has admitted that there were complaints with regard to the alleged offences attributed to the accused and Mr. Paranjape submits that in these circumstances, it was essential that Gupta should have contacted the persons who had complained and should have brought them as witness in support of his contention, that a lodging house was being run on the terrance. He contends that in the absence of any corroborative evidence such as even the statement from any of the persons who were occupying the beds in question or for that matter from any of the colleagues of Gupta, that the Court ought not to record a conviction on the basis of the uncorroborated testimony of Gupta. In this regard Mr. Paranjape has pointed out to me that the owner of the building would undoubtedly not be inclined to side with any occupant or tenant who is committing offences and that he was the best regard to the position that evidence was easily available and that it was not produced, that the Court ought not to accept the uncorroborated version of Gupta.

9. The second limb of the argument is that if one tests the evidence of Gupta very carefully that one will find that there are a large number of infirmities in his evidence. Mr. Paranjape has drawn my attention to the fact that the notings of Gupta in his Field Book have been questioned by the defence and that some of the details like the timing of the visit or the fact that the different details appear under the same serial number of the fact that on occasion there was a wide gap between the visits coupled with other infirmities such as Gupta''s admissions that he did not contact the complainant, the lodgers etc., and that he did not also look for evidence in support of the fact that the persons alleged to be staying on the terrace were not staying there free of charge or that they were merely permitted as a matter of courtesy to use the place and that the accused was in fact running a full fledged lodging house are all blemishes in his evidence.

10. I do not dispute the fact that Gupta''s evidence could have been better or for that matter that he could have obtained supportive evidence from other quarters. In the present instance, it has came on record that Gupta himself had recently been transferred to this ward from another ward, there is not even a suggestion against him that he was a corrupt official or that he was out to falsely implicate the accused and harass him. Under these circumstances, there is little reason why the substratum of Gupta''s evidence which is to the effect that he had visited the premises on as many as 11 occasions and that on all these occasions he found the terrace being used as a Lodging house should not be accepted. We find some corroboration to his evidence from the noting in his field book and it would be too much to allege that the Inspector would fabricate these notings merely in order to support the prosecution. It is the function of the Inspector to carry out such inspections. He states on oath that he had done so and he has told the Court the result of the inspections and in these circumstances merely because there are minor infirmities with regard to a few inconsequential details, I do not see any reason why his evidence and be discarded. On the question of need in law to examine further witnesses in support, whereas it is undoubtedly a general rule of caution to look for support to the evidence of a lone witness, it is equally not a legal requirement, if the evidence of a single witness is good enough, there is nothing in law which prevents a court from basing a conviction on such evidence. In the present instance one should note that the offence is of a very minor nature and under these circumstances to insist on the degree of proof that one would look for in grave offences such as murder trials and that those requirements should be equated with the present case is an incorrect demand. I have no hesitation in holding on a careful scrutiny that Gupta''s evidence which indicates that he did inspect the terrace on the dates mentioned by him and when he found as many as 25 beds there, that he was justified in his conclusion that the accused was running a lodging house at that spot is acceptable. We find some support even from the replies of the accused who has sought to give a rather ingenious explanation in his statement u/s 313 and in his replies to the B.M.C., wherein he states that certain young men from Kerala who are either visiting or working in Bombay had joined together and that they were using the premises and that all that they asked the accused to do was to assist them in the user of the same for which they made some token payment to him but that there was no full-fledged lodging house being run there. To my mind, the character of the user is what is important and if even the arrangement of the aforesaid type was going on it would come within the definition of running a lodging house. It is however difficult for me to accept the position that 25 persons who are using the terrace were doing so under these circumstances. To my mind, the offence with which the accused is charged must be held to hove been established. The learned Magistrate was in error in having recorded the acquittal.

11. This brings me to the last point that has been canvassed by the two learned Counsel. Mr. Rai, submitted that even though this offence may be relatively of a

minor nature, that this Court ought not to refuse to exercise its powers for the purpose of setting aside the acquittal on the ground that the consequences are very far reaching. He submits that flouting of the provisions of the B.M.C. Act is being done on a large scale and that the B.M.C. is instituting prosecutions virtually by the thousand whenever and wherever such breaches are detected and that all sorts of technical pleas are canvassed and the accused prefer to litigate and get out of the charge rather than to comply with the law. He, therefore, submits that as a matter of principle, this Court must take a serious view of the situation and must rectify the damage that is being done. On the other hand Mr. Paranjape has pointed out that the law with regard to interference in cases of acquittal is now very well crystallised. He submits that where an accused has been acquitted it will first have to be demonstrated that merely because another view is possible on the material before the trial Court that the Appeal Court should not interfere unless it is shown that the judgment in question has resulted in a gross miscarriage of justice and that it would be in the category of a legally perverse judgment. I do not dispute that this is the well settled position in law and Mr. paranjape has relied on duly one of the several judgments which enunciates this principle. In Tota Singh and Another Vs. State of Punjab, the Supreme Court had occasion to reiterate this proposition and to hold that if the view taken by the trial Court is a plausible one, that merely because a better view is possible on the re-examination of the material that it is no ground on which an order of acquittal can be interferred with. Even applying all these tests, to my mind, the view taken by the trial Court in this case is not a plausible view the reasons indicated demonstrate that it is a view that is erroneous both on facts and in law. The Word "perverse" is a strong word but it will have to include that category of cases where the trial Court has gone wrong both on facts and in law and in which it is very much in the public interest that a rectification is necessary. In these circumstances to my mind. Applying the very principles canvassed by Mr. Paranjape this set of appeals is a fit instance in which interference by this Court is called for.

12. Finally the issue arises as to what view this Court or the trial Court for that matter ought to take when it is confronted with the situation, where repeated and consistent breaches are established. To my mind, the Court cannot condone such a situation or take an uniform view in respect of the subsequent offences as it would take in the case of the first offence. Mr. Paranjape has urged the point that virtually 13 years have passed and that under these circumstances even if a breach is held to be established that the minimum fine of Rs. 500/- should be imposed as far as the first offence is concerned. This submission is accepted. If the law is to be meaningfully applied however in respect of the subsequent offences, enhancement of the fine is essential. For this purpose, therefore, to my mind, in the second case the fine will be enhanced by a sum of Rs. 50/- and this formula will continue in respect of each subsequent offences, progressively increasing in quantum.

13. The appeal accordingly succeeds. The order of acquittal is set aside. The respondent No.1 stands convicted of the offence punishable u/s 394 read with

section 471 of the B.M.C. Act and it is directed that he should pay a fine in the sum of Rs. 500/- in default rigorous imprisonment for one month. The appellant is granted time of four weeks to deposit the fine amount in the trial Court if he so desires.

Appeal allowed accordingly.

(The Registrar shall forward a copy of this Judgment to the Chief Law officer, Bombay Muncipal Corporation with instructions that copies thereof be made available to all the learned Magistrates hearing Muncipal cases as also to The Bombay Muncipal Corporation''s law Officers.)