(2011) 02 BOM CK 0155

Bombay High Court

Case No: Criminal Writ Petition No. 3544 of 2010

Mahesh Shivram Puthran		APPELLANT
	Vs	
The Commissioner of Police, Senior Police Inspector, Director General of Police and State of Maharashtra		RESPONDENT

Date of Decision: Feb. 17, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226
- Criminal Procedure Code, 1973 (CrPC) - Section 142, 154, 173(2), 4, 4(2)
- Maharashtra Regional and Town Planning Act, 1966 - Section 43, 44, 45, 47, 52

Citation: (2011) 113 BOMLR 1158

Hon'ble Judges: A.R. Joshi, J; A.M. Khanwilkar, J

Bench: Division Bench

Advocate: Dnyaneshwar Deshmukh, for the Appellant; Nitin Pradhan, for Amicus Curiae and H.J. Dedhia, Assistant Public Prosecutor for the State, for the Respondent

Final Decision: Allowed

Judgement

A.M. Khanwilkar, J.
Rule. Rule made returnable forthwith, by consent.

2. This Writ Petition under Article 226 of the Constitution of India takes exception to the F.I.R. registered by the police officer on his own, bearing F.I.R. No. II 73/2010, dated 30th November, 2010, against the Petitioner for offence punishable under Sections 43 and 52 of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as "the Act" or "the Act of 1966").

3. According to the Petitioner, the police officer has had no authority to register F.I.R. u/s 154 of the Code of Criminal Procedure (hereinafter referred to as "the Code") in relation to the stated offence, much less on his own.

4. We have heard the learned Counsel for the Petitioner, the learned A.P.P. as well as Mr. Nitin Pradhan, the learned amicus curiae.

5. Briefly stated, it is not in dispute that the F.I.R., as registered against the Petitioner, merely refers to offences under Sections 43 and 52 of the Act. No other offence has been applied. The principal question is whether the police officer can register the F.I.R. suo motu in connection with the offence punishable under the provisions of the Act of 1966.

6. It cannot be disputed that the Act of 1966 is a special enactment, enacted by the State Legislature. The Act is intended to make provisions for planning the development and use of land in regions established for that purpose and for the constitution of Regional Planning Boards therefor; to make better provisions for the preparation of Development Plans with a view to ensuring that Town Planning Schemes are made in a proper manner and their execution is made effective; to provide for the creation of new towns by means of Development Authorities; to make provisions for the compulsory acquisition of land required for public purposes in respect of the plans; and for purposes connected thereto.

7. Section 43 of the Act stipulates restriction 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 fore a new town. It mandates that 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. Section 52, which is also part of Chapter IV of the Act deals with the control or development and use of the land included in Development Plans. It also provides for penalty for unauthorized development or use or otherwise in conformity with the Development Plan. It mandates that no person shall himself or whether at his own expenses or at the instance of any other person commence, undertake or carry out development, or institute or change the use of any land without following the specified procedure. In case of contravention of stipulation provided in Section 52, the person can be prosecuted, and, upon conviction, shall 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 case of a continuing offence, with a further daily fine which may be extended to two hundred rupees for every day during which the offence continues after conviction for the first commission of the offence. Sub-section (2) of Section 52 envisages that any person who continues to use or allows use of any land or building in contravention of the provisions of a Development Plan without being allowed to do so u/s 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, 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 be extended to one hundred rupees for every day during which such offence continues after conviction for the first commission of the offence.

8. Section 53 of the Act provides for power to require removal of unauthorised development. In terms of this provision, the Planning Authority may, in the first place, issue notice to the owner requiring him within specified period not being less than one month from the date of service of notice to take such steps as may be mentioned in the notice in relation to contravention referred to in Section 52 of the Act. On receipt of such notice, the person (noticee) is expected to remedy the contraventions within specified time. Indeed, by virtue of Sub-section (3) of Section 53, the noticee can apply for permission u/s 44 for retention on the land or any building or work for the continuance of any use of the land, to which the notice relates; and, pending the final determination or withdrawal of the application, the mere notice itself shall not affect the retention of buildings or works or the continuance of such use. In case permission as sought by the noticee is granted, the notice issued u/s 53(1) shall stand withdrawn as with respect to such buildings or works or such part of the land, as the case may be, for which permission is granted for the retention thereof, and, thereupon, the owner or the noticee is required to take steps as specified in the notice. In case of refusal of permission in whole or in part, the noticee is required to remove the objectionable or unauthorised development forthwith. The failure to remove the unauthorised development would not only entail in removal of such unauthorised development or use by the Planning Authority, but also expose the owner (noticee) to prosecution, as provided u/s 53(6) of the Act. Sub-sections (6) and (7) of Section 53, which are relevant for our purpose, read thus:
53(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 other person also who uses the land or causes or permits the land to be used in contravention of the notice; and

(b) where the notice requires the demolition or alteration of any building or works or carrying out of any building or other operations, itself cause the restoration of the land to its condition before the development took place and secure compliance with the conditions of the permission or with the permission as modified by taking such steps as the Planning Authority may consider necessary including demolition or alteration of any building or works or carrying out of any building or other

operations; and recover the amount of any expenses incurred by it in this behalf from the owner as arrears of land revenue.

(7) Any person prosecuted under Clause (a) of Sub-section (6) 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 such offence continues after conviction for the first commission of the offence.

9. From the scheme of the provisions of the Act, it is obvious that the prosecution for offences punishable under the Act of 1966 is instituted and pursued by the Planning Authority. This position is reinforced by Section 142 of the Act, which reads thus:

Sanction of prosecution.-No prosecution for any offence punishable under this Act or rules made thereunder shall be instituted or no prosecution instituted shall be withdrawn, except with the previous sanction of the Regional Board, Planning Authority, or as the case may be, a Development Authority or any officer authorised by such Board or Authority in this behalf.

(Emphasis supplied)

The language of this provision leaves no manner of doubt that the pre-condition for even "institution of prosecution", is with the previous sanction of the specified Authority. As aforesaid, on noticing unauthorised development or use, it is the Planning Authority who has to first issue notice u/s 53(1) of the Act to enable the noticee (owner) to remedy the objectionable unauthorised development or use; and it is only upon failure to do so within the specified time, and, in absence of permission granted u/s 44 for retention on the land of any building or works or for the continuance of any use of the land, to which the notice relates, the Planning Authority may proceed to prosecute the noticee/owner by virtue of Section 53(6) of the Act. The prosecution, however, can be instituted only after previous sanction of the Regional Board or Planning Authority or, as the case may be, a Development Authority or any officer authorised by such Board or authority in that behalf.

10. A priori, the Act, being a special enactment, provides mechanism for institution of prosecution against the noticee/owner. In the scheme of things, registration of F.I.R. by the police officer u/s 154 of the Code in relation to offence punishable under the provisions of the said Act cannot be countenanced. More so, the local police officer, on his own, even if he notices any unauthorised development or use, cannot proceed to register the F.I.R. u/s 154 of the Code. He has no authority to do so, especially in the face of mandate of Section 142 of the Code that no prosecution for any offence punishable under the said Act or Rules made thereunder shall be instituted, except with the previous sanction of the specified authority.

11. The incidental question that needs to be addressed is whether the offence on account of contravention of Sections 43 and 52 of the Act would be a cognizable or non-cognizable offence. In that, if the said offences are non-cognizable, the question of registering F.I.R. u/s 154 of the Code would not arise at all. For, F.I.R. u/s 154 of the Code can be registered only in relation to cognizable offences, on the basis of which, the local police can proceed with the investigation and file report in the concerned Court u/s 173(2) of the Code.

12. The Act, by itself, does not provide whether the said offence is cognizable or bailable. For that, we have to refer to Section 4 of the Criminal Procedure Code. The same reads thus:

4. Trial of offences under the Indian Penal Code and other laws.--

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

(Emphasis supplied)

Sub-section (1) refers to offences under the Indian Penal Code. This provision has no application to the case on hand. However, Sub-section (2) refers to all offences under any other law which would include the offences punishable under the said Act of 1966. In other words, offences under the provisions of the Act of 1966 can be investigated, enquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. We have already alluded to the provisions of the Act of 1966, which provide for mechanism to institute prosecution for offences punishable under the said Act and Rules made thereunder. Accordingly, the said provisions would prevail, being special enactment.

13. Besides, it may be useful to refer to Section 5 of the Code, which reads thus:

Saving.--Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

(Emphasis supplied)

14. Revering back to the question whether the offences under Sections 43 and 52 of the Act are cognizable or non-cognizable, since the Act of 1966 does not make

express provision in that behalf, by virtue of Section 4(2) of the Code, reference can be made to the scheme provided in the Code in that behalf. For that, we may refer to Part II of Schedule I of the Code, which provides for classification of offences against other laws. The same reads thus:

II. CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS

(Emphasis supplied)

As the maximum punishment provided in terms of Section 52 of the Act, which has been applied to the case on hand, being up to three years, at best, the second category of cases specified in Part II of Schedule I would be attracted. It would necessarily follow that the offence u/s 52 of the Act is a cognizable and non-bailable offence.

15. However, as found earlier, u/s 142 of the Act, even for institution of prosecution, prior sanction of prosecution is required to be obtained from the concerned authority. Thus understood, even if the offence is treated as a cognizable and non-bailable offence, in view of the scheme of Section 142, read with the scheme of Sections 53 and 53(6), in particular, there is no manner of doubt that such prosecution could be instituted only by the authorised officer upon taking prior sanction of the specified Authority. By no stretch of imagination, the police officer could have registered the F.I.R. on his own having noticed some illegality in the construction allegedly done by the Petitioner in breach of the Development Plan. At best, he could have informed the concerned authority to proceed in the matter in respect of such unauthorised construction in accordance with law, who, in turn, would be required to issue notice u/s 53(1) of the Act to the owner / occupier, in the first instance, and give opportunity to them to remedy the objectionable unauthorised development or use otherwise than in conformity with the Development Plan, which may include option to the noticee to make application for permission u/s 44 for retention on the land or any building or works for the continuance of any use of the land, to which the notice relates, as provided by Section 53(3) of the Act. Depending on the outcome thereof, the noticee may be required to remove the unauthorised development or use; and, in the event the noticee fails to rectify the same within the specified time, the Planning Authority itself can initiate process for removing the same. Besides, the specified Authority may accord sanction for institution of prosecution against the noticee in relation to such unauthorised development or use otherwise than in conformity with Development Plan, only whence the prosecution can proceed against the noticee. Going by the scheme of the provisions of the said Act of 1966, suo motu registration of F.I.R. by the local police for offences punishable under the provisions of the said Act is not contemplated at all.

16. For the aforesaid reasons, we have no hesitation in taking the view that the F.I.R., as registered by the police officer against the Petitioner, is without authority

of law both on the ground that he could not have registered such F.I.R. on his own; and, in any case, the F.I.R. is registered without prior sanction of the specified Authority.

17. In that view of the matter, the petition ought to succeed, and the F.I.R. in question is quashed and set aside. We make it clear that quashing of F.I.R. does not result in condoning the unauthorised development by the Petitioner. It will be open to the appropriate Authority under the Act of 1966 to proceed against the Petitioner in that behalf in accordance with law.

18. The Court expresses a word of gratitude for the able assistance given by the learned amicus curiae.