

Bombay High Court

Unmesh Diwakar Raote vs The Municipal Corporation Of ... on 13 July, 2018

Bench: A.M. Badar

(901)REVNNo.4532009(J)2

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

REVISION APPLICATION NO.453 OF 2009
WITH
CRIMINAL APPLICATION NO.320 OF 2018
IN
REVISION APPLICATION NO.453 OF 2009
WITH
CRIMINAL APPLICATION NO.394 OF 2009
IN
REVISION APPLICATION NO.453 OF 2009

Unmesh Diwakar Raote,
Age 35 years, Occu. - Business,
Dyansagar Building, R.B.S.K.
Bole Road, Dadar(West), Mumbai.
At present Petitioner/accused
is in Arthor Road Jail.

... Petitioner/Applicant

V/s.

1. The Municipal Corporation
of Greater Mumbai,
C.S.T., Mumbai.

2 The State of Maharashtra
At the instance of Shivaji Park
Police Station, District - Mumbai. ...

Respondents

.....

Mr.Ganesh Bhujbal, Advocate for the Petitioners.

Mr.R.A.Malandkar, Advocate for the Respondent No.1.

Mr.S.V.Gavand, APP for the Respondent No.2/State.

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CORAM : A.M.BADAR J.

DATED : 13th JULY 2018.

ORAL JUDGMENT :

1 This revision petition came up for hearing the

application for stay to the conviction preferred by the revision petitioner/accused. Considering the long pendency of the revision petition and short point involved therein, the parties urged for final disposal of the revision petition itself. Hence, the revision petition is taken up for final hearing.

2 By this revision petition, the petitioner/original accused is challenging the Judgment and Order dated 21/07/2009 passed by the learned Additional Sessions Judge, Mumbai in Criminal Appeal No.279 of 2008 thereby dismissing his appeal challenging the Judgment and Order dated 11/04/2008 passed by the learned Metropolitan Magistrate, 41st Court, Shindewadi, Dadar, Mumbai in Criminal Case No.87/PW/2005 by which he came to be convicted of the offence punishable under Section 21 read with Section 8 of the Maharashtra (Urban Areas) Protection and Preservation of Trees Act, 1975 (hereinafter referred to as 'Trees Act' for the sake of brevity) and is sentenced to suffer simple imprisonment for twenty days apart from directing him to pay fine of Rs.2,000/- and in default to undergo further simple imprisonment for twenty days.

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3 Briefly stated the facts of the prosecution case are thus :

(a) First Informant Dattatrya Pai was serving as Horticulture Assistant with the Municipal Corporation of Greater Mumbai (hereinafter referred to as 'Municipal Corporation' for the sake of brevity). On 19/07/2005, First Informant Dattatrya Pai (P.W.No.1) received complaint in respect of unauthorized cutting of trees at Purandare Wadi, Gokhale Road, Mumbai signed by residents of that area including P.W.No.3 Amita Gala. He visited the spot of the incident on 23/07/2005 and found that the earth is excavated from the spot and four to five trees were not standing there. P.W.No.1 Dattatrya Pai, First Informant then went to Police Station, Shivaji Park, Mumbai and submitted

letter dated 13/08/2005 (Exhibit 5) signed by the Assistant Commissioner, Municipal Corporation, Mumbai and addressed to the said Police Station. Thereafter, on 25/08/2005, the spot came to be inspected again by police in presence of P.W.No.2 Anant Thool by Investigating Officer P.W.No.4 Jaganath Patil, P.S.I., Shivaji Park Police Station. On 17/09/2005 report came to be registered on the basis of statement of P.W.No.1 Dattatrya Pai, First Informant. Accordingly, LAC/17/2005 came to be registered for the offence punishable under Section 21 read with Section 8 of the Trees Act. As the alleged offence was non-cognizable in Gaikwad RD 3/19 (901)REVNN0.4532009(J)2 nature, the Investigating Officer sought permission of the learned Metropolitan Magistrate under Section 155 of the Criminal Procedure Code for investigating the same. On getting permission, the investigation came to be conducted and the revision petitioner came to be charge-sheeted with all averments that he caused falling of trees at Purandare Wadi, Gokhale Road, Mumbai.

(b) The learned trial Court framed charge for the offence punishable under Section 21 read with Section 8 of the Trees Act. However, the charge as framed is not for causing the cutting of the trees, but the same is for cutting the trees without obtaining prior permission from the concerned Officer.

(c) The revision petitioner/original accused pleaded not guilty and claimed trial.

(d) In support of this case, the prosecution has examined in all four witnesses. P.W.No.1 Dattatrya Pai is the First Informant. Panch witness Anant Thool is examined as P.W.No.2. The spot panchanama dated 25/08/2005 is at Exhibit 8. One of the complainant namely Amita Gala is examined as P.W.No.3. She proved various complaints made by her and also relied on photographs and CDs. Investigating Officer, Jaganath Patil, PSI is examined as P.W.No.4.

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(e) The defence of the revision petitioner was that of total denial.

(f) After hearing the parties, the learned trial Court by the impugned Judgment and Order dated 11/04/2018 passed in Criminal Case No.87/PW/2005 was pleased to convict the revision petitioner/accused for the offence punishable under Section 21 read with Section 8 of the Trees Act and sentenced him as indicated in opening paragraph of this Judgment.

(g) Dissatisfied with the said Judgment, the revision petitioner/accused preferred the appeal which came to be registered as Criminal Appeal No.279 of 2008. Same was also dismissed by the learned Additional Sessions Judge, Mumbai on 21/07/2009 and that is how the Judgment and Order of conviction of the revision petitioner/accused recorded by the learned trial Court came to be confirmed. The Appellate Court in paragraph 24 of the impugned Judgment and Order has given reason for confirming the Judgment of the learned trial Court. The appellate Court relied on photographs filed on record and also believed version of P.W.No.3 Amita Gala for recording the conviction. It is observed by the appellate Court that the learned trial Court has seen all photographs and, as such, evidence of the alleged eye-witness P.W.No.3 Amita Gala cannot be doubted. It is worthwhile to mention here that the learned trial Court has also, in paragraph 18 of Gaikwad RD 5/19 (901)REVNN0.4532009(J)2 its Judgment, principally relied on photographs taken by

P.W.No.3 Amita Gala for recording conviction. It is observed that photographs as well as complaint filed by P.W.No.3 Amita Gala constitutes sufficient evidence to show that the revision petitioner directed the labourers to cut and remove trees. It is thus clear that both Courts below principally recorded conviction against the revision petitioner/accused on the basis of documentary evidence in the form of photographs taken from the mobile phone by P.W.No.3 Amita Gala and downloaded in the compact disk.

4 I heard Shri.Bhujbal, the learned Counsel appearing for the revision petitioner. He argued that the impugned Judgment and Order of conviction and resultant sentence is perverse and contrary to law. Inadmissible evidence is considered for convicting the revision petitioner/accused. Perversity is reflected from acceptance of evidence of P.W.No.3 Amita Gala, who is an interested witness whose aim was to secure conviction of the revision petitioner/original accused because of redevelopment work carried out at the site.

5 As against this, the learned Additional Public Prosecutor vehemently argued that testimony of P.W.No.3 Amita Gala is sufficient to base conviction and the impugned Judgment and Order is not suffering from any perversity or error of law. The Gaikwad RD 6/19 (901)REVNN0.4532009(J)2 learned Additional Public Prosecutor drew my attention to the evidence of P.W.No.1 Dattatrya Pai and submitted that this First Informant acted on the basis of complaint received by him and evidence of P.W.No.2 Anant Thool is corroborating the prosecution case. Evidence of removal of trees is reflected from the spot panchanama.

6 I also heard the learned Advocate appearing for the respondent No.1/Municipal Corporation.

7 I have carefully considered the rival submissions and also perused the entire Record and Proceedings.

8 The revision petitioner/accused has invoked revisional jurisdiction of this court to assail conviction and sentence recorded against him by both courts below. It is well settled that normally revisional jurisdiction is to be exercised only in exceptional cases where there is glaring defect in procedure and where there is manifest error on point of law which has consequently resulted in miscarriage of justice. The evidence cannot be re-appreciated or re-appraised and finding of fact can be upset only if it is perverse or if it suffers from error of law. Sufficiency of evidence cannot be a ground to set aside the finding of fact recorded by the court. If on the basis of evidence on record no reasonable man could come to the conclusion arrived at by the courts below, the revisional Gaikwad RD 7/19 (901)REVNN0.4532009(J)2 court can interfere with the impugned judgment and order. Keeping in mind this limited extent of jurisdiction of this court in the case in hand, let us ascertain whether the impugned judgments and orders of the courts below suffer from perversity or error of law.

9 Perusal of evidence of P.W.No.1 Dattatrya Pai, who is the First Informant in the instant case, shows that he acted upon the complaint received by him in respect of unauthorized cutting of trees from the residents of area. In his entire evidence, P.W.No.1 Dattatrya Pai has not deposed as to who was the person against whom such complaint for unauthorized falling of trees was made. This

witness has proved letter dated 13/08/2005 sent by the Municipal Corporation to the Senior Inspector of Police, Shivaji Park Police Station. Perusal of this letter at Exhibit 5 shows that though it is averred therein that the Municipal Corporation came to know from local residents that a Builder has removed the trees, name of that builder is conspicuously missing in this letter. Though P.W.No.1 Dattatrya Pai, First Informant in his deposition has stated that he knows the accused person, before the Court, this witness has not stated that it was the revision petitioner/original accused, who had caused removal of the trees from Purandre Wadi area of Mumbai. The charge framed against the revision petitioner/accused was to the effect that he himself cut the trees and this witness has not even whispered that the petitioner had cut the trees.

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10 P.W.No.1 Dattatrya Pai, First Informant has lodged

report which is at Exhibit 6 on 17/09/2005 itself. This FIR lodged by P.W.No.1 Dattatrya Pai, First Informant is to the effect that during spot inspection it was revealed to him that few trees from Purandre Wadi are cut. He has categorically stated that he has confirmed that the builder had cut the trees without permission. However, even in the report lodged by P.W.No.1 Dattatrya Pai, First Informant, he has not named the Builder and furthermore, the same is registered against unnamed Builder. The revision petitioner/accused is not named in the Report as the Builder who has cut the trees. The report was lodged after due deliberation and after visiting the spot twice. Still it is against unnamed Builder. There is no evidence on record to show that the petitioner is the Builder. Thus, evidence of P.W.No.1 Dattatrya Pai, Horticulture Assistant at the most shows that trees from Purandre Wadi were found cut.

11 The next witness examined by the prosecution is Anant Thool. Though examined as a panch witness, this witness is signatory to the complaints made to the various Authorities. He is resident of the Purandre Chawl, which was allegedly being redeveloped. His evidence shows that he is an eye-witness to the incident of cutting of trees. In chief-examination, this witness has categorically stated that five to six trees were cut. In cross- examination, he has stated that two to three persons were cutting Gaikwad RD 9/19 (901)REVNNo.4532009(J)2 the trees. Being the resident at Purandre Chawl, which appears to have been owned by the father of the revision petitioner/accused along with another person named Sathe, this witness was knowing the revision petitioner/accused. However, in his entire deposition though this witness has stated that five to six trees from the Purandare Wadi were cut, has not named the revision petitioner/accused as the person, who caused falling of those trees or a person, who cut those trees. If really the revision petitioner/accused has actually caused the falling of trees from Purandare Wadi, Gokhale Road, Mumbai, then this resident of that Chawl could have very well named the revision petitioner/accused person behind the act of falling of trees.

12 P.W.No.2 Anant Thool proved spot panchanama (Exhibit P8). Perusal of the spot panchanama does not show any recital that the trees cut from the spot were at the instance of the revision petitioner/accused.

13 The next witness examined by the prosecution and claimed to be the star witness is P.W.No.3 Amita Gala. She is one of the signatory to the complaint made to the Municipal Corporation. She was tenant of Room No.3 and her husband was tenant of Room No.2 in the Purandare Wadi. Chawl No.3. Prior to that her father-in-law and mother-in-law were tenants of those rooms. She and her husband were paying rent of those two rooms Gaikwad RD 10/19 (901)REVNNo.4532009(J)2 of Sidharath Enterprises owned by the father of the revision petitioner/accused as well as his partner Sathe. Evidence of this witness further shows that she along with others lodged several complaints to Authorities such as MHADA and Municipal Corporation principally against development of the subject property by alleging that without their consent, the structure is being demolished without following the legal process. It is averred in those complaints that plans are not approved by the Government Department and despite that work of redevelopment is being done. Those complaints are at Exhibit Nos.P11, P12, P13, P15, P16 and P18. Incidentally, the fact of uprooting the trees is also narrated in some of those complaints. However, none of these complaints, made to the several Authorities by P.W.No.3 Amita Gala and others, are naming the revision petitioner/accused as the person who has uprooted the trees at Purandre Wadi, Gokhale Road, Mumbai. It is alleged in some complaints that the landlord wants to redevelop the property without following the Rules of MHADA and is clearing the ground by uprooting the trees. It has not come on record that revision petitioner/accused is the landlord of the complainant. His name is not mentioned in any of the complaint as a person causing uprooting of the trees. Evidence of P.W.No.3 Amita Gala shows that she is having hostile relations with the revision petitioner/accused. On 07/07/2005, she had filed report of non-cognizable offence against the revision petitioner/accused at Shivaji Park Police Station. This report is at Gaikwad RD 11/19 (901)REVNNo.4532009(J)2 Exhibit 10. This material is sufficient to demonstrate that P.W.No.3 Amita Gala is an interested witness and her evidence ought to have been scrutinized carefully by the Courts below. This witness has stated that the revision petitioner/accused through his workers removed trees from the premises of Purandre Wadi and therefore, P.W.No.2 Anant Thool told the revision petitioner/accused not to remove those trees. This version of interested witness P.W.No.3 Amita Gala is not corroborated by P.W.No.2 Anant Thool. P.W.No.3 Amita Gala further deposed that on 16/07/2005, the revision petitioner/accused along with two workers, one Manager and one Architect came and told the workers to remove trees and accordingly, he was also present there from 22/07/2005 to 24/07/2005. This witness deposed that she took photographs of cutting of trees in three mobile phones and then prepared CD containing 102 photographs. The CD, according to the version of this witness, is prepared by Gemini Photo Studio by downloading the photographs from the mobile phones.

14 Cross-examination of this witness shows that she as well as her husband had visited the revision petitioner/accused in the matter of redevelopment of the property. She admitted that her husband is involved in the case of theft of electricity at the tenanted premises. She further admitted that she has received notice under Section 354A to stop unauthorized construction by the Municipal Corporation. This witness further accepted the fact Gaikwad RD 12/19 (901)REVNNo.4532009(J)2 that her husband asked permission from father of the revision petitioner/accused to carry out the

construction. These facts show the hostile attitude of this witness towards revision petitioner/accused. Therefore, her interested version can be accepted only if the same is corroborated by some other material on record.

15 As stated in foregoing paragraphs, neither P.W.No.1 Dattatrya Pai, First Informant nor P.W.No.2 Anant Thool, resident of Purandre Chawl, have named revision petitioner/accused as a person, who caused removal of the trees from the premises of that chawl. The material used for corroborating the version of this interested witness is in the form of photographs printed by downloading them from her mobile phone. As per version of P.W.No.3 Amita Gala, she had photographed the incident of chopping of the trees on her cellphone and has got the compact disc prepared by downloading those photographs. This witness has referred the photographs and the compact disc during the course of her chief-examination. Undoubtedly, the compact disc and photographs constitute documentary evidence. At this juncture, it needs to mention that the prosecution has not taken care to prove the photographs as well as compact disc by adhering to the provisions of law. No certificate as required under Section 65B of the Indian Evidence Act, 1872 was produced by the prosecution for proving compact disc and the photographs taken from the mobile phone of P.W.No.3 Amita Gala. It is apposite to quote law laid down by the Honourable Apex Court on this aspect Gaikwad RD 13/19 (901)REVNN0.4532009(J)2 in the matter of Anvar P.V. v. P.K.Basheer & Ors 1. Paragraph Nos.14 to 18 as well as 20 and 22 of this Judgments need reproduction and they read thus :

"14 Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

1 (2014) 10 Supreme Court Cases 473.

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(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

15 Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

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16 It is further clarified that the person need only to

state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead

to travesty of justice.

17 Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A- opinion of examiner of electronic evidence.

18 The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

20 Proof of electronic record is a special provision introduced by the IT Act amending various provisions Gaikwad RD 16/19 (901)REVNN0.4532009(J)2 under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Section 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Section 63 and 65 has to yield.

22 The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Section 59 and 65A dealing with the admissibility of electronic record. Section 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Section 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (*supra*), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

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16 In view of what has been stated by the Honourable

Apex Court in this regard, the photographs and compact disc which remained to be proved by the prosecution comprises of clearly inadmissible evidence. Proof of this electronic record is not permitted by oral evidence unless and until requirements of Section 65B of the Indian Evidence Act

is complied with. These photographs and compact discs produced on record as such cannot be read in evidence to infer guilt of the revision petitioner/accused in the crime in question. However, this inadmissible evidence is relied by the Courts below for convicting the revision petitioner/accused of the alleged offence.

17 In this view of the matter, it needs to be held that the impugned Judgment and Order suffers from perversity as well as error on the point of law in admitting inadmissible evidence on record and in relying the same for basing conviction against the revision petitioner/accused. It cannot be said that, therefore, the prosecution has proved the guilt of the revision petitioner/accused beyond all reasonable doubts. The approach adopted by Courts below is certainly perverse and suffers from error of law. The revision petition, therefore, needs to be allowed with a the following Order :

ORDER

(i) The Revision Petition is allowed.

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(ii) The impugned Judgment and Order passed by the learned Additional Session Judge, Mumbai on 21/07/2009 in Criminal Appeal No.279 of 2008 confirming the Judgment and Order of the learned Metropolitan Magistrate, 41 st Court, Shindewadi Dadar, Mumbai in CC/87/PW/2005 convicting the revision petitioner/original accused of the offence punishable under Section 21 read with Section 8 of the Maharashtra (Urban Areas) Protection and Preservation of Trees Act, 1975 and sentencing him accordingly is quashed and set aside.

(iii) The revision petitioner/accused is acquitted of the offence punishable under Section 21 read with Section 8 of the Maharashtra (Urban Areas) Protection and Preservation of Trees Act, 1975

(iv) His bail bonds shall stand cancelled.

(v) Fine amount, if any, paid by revision petitioner/accused be refunded to him.

(vi) The Revision Petition is disposed of accordingly.

(vii) In view of disposal of revision petition, all pending applications stands disposed of.

(A.M.BADAR J.)

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