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M.K. Vasuraj Vs. Delhi Development Authority and ors.

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Court : Delhi

Decided On : May-18-1971

Reported in : ILR1971Delhi21

Judge : Hardayal Hardy and; V.S. Deshpande, JJ.

Acts : [Delhi Development Act, 1957](#) - Sections 49(1); [Constitution of India](#) - Article 226

Appeal No. : Civil Writ Appeal No. 728 of 1970

Appellant : M.K. Vasuraj

Respondent : Delhi Development Authority and ors.

Advocate for Pet/Ap. : J. Ramamurthy,; Bindra Thakur and; Keshav Dayal, Advs

Judgement :

V.S. Deshpande, J.

(1) With a view to regulate development and use of land and buildings in Delhi a civic survey of Delhi was carried out and a Master Plan was promulgated by the Delhi Development Authority (hereinafter called the Authority) under section 7 of the [Delhi Development Act, 1957](#) (hereinafter called the Act). The Master Plan, which came into force on 1-9-1962, defined the various zones into which Delhi was divided for the purposes of development and indicated the manner in which

the land in each zone was proposed to be used and the stages by which any such development shall be carried out. The Master Plan divided Delhi into various zones such as residential, commercial, industrial etc. The premises situated in each such use zone are to be used only for those purposes and not for other purposes. The premises of the petitioners are situated in residential use zones. They began to be used for commercial purposes after the coming into force of the Master Plan. The dates from which the residential premises began to be used for commercial purposes or were allowed to be so used by the petitioners .in this and the three connected writ petitions (namely, Civil Writs 225, 226 and 424 of 1969) are alleged to be on 1-10-1968, 19-9-1964, 1-8-1965 and June 1965 respectively in that order. Section 14 of the Act which prohibits such user contrary to the plan is as follows :-

'USE of land and buildings in contravention of plans.- After the coming into operation of any of the plans in a zone no person shall use or permit to be used any land or building in that zone otherwise than in conformity with such plan: Provided that it shall be lawful to continue to use upon such terms and conditions as may be prescribed by regulations made in this behalf any land or building for the purpose and to the extent for and to which it is being used upon the date on which such plan comes into force.'

Section 29(2) of the Act which makes such user an offence punishable with a fine is as follows :-

'29.Penalties.- (2) Any person who uses any land or building in contravention of the provisions of section 14 or in contravention of any terms and conditions prescribed by regulations under the proviso to that section shall be punishable with fine which may extend to five thousand rupees and in the case of a continuing offence, with further fine which may extend to two hundred and fifty rupees for every day during which such offence continues after conviction for the first commission of the offence.'

Section 49(1) which requires previous sanction to the institution of a prosecution for the said offence is as follows :-

'SANCTION of prosecution.-(1) No prosecution for any offence punishable under this Act other than an offence referred to in sub-section (2) shall be instituted except with the previous sanction of the Authority or, as the case may be, the local authority concerned or any officer authorised by the Authority or such local authority in this behalf.'

The Authority by a resolution authorised its Secretary to grant sanction and to launch prosecutions against persons for using premises contrary to the Master Plan. The Secretary of the Authority accordingly granted sanction and instituted criminal proceedings against the petitioners. These proceedings are pending in criminal courts. In these writ petitions, the petitioners have challenged the legality of the prosecutions instituted against them on various grounds each of which has been replied to by the Authority. Some of them are as follows:-

(1) It is contended that no prosecution could be filed before the zonal plans in respect of the zones in which the premises are situated come into force. But the reply is that section 14 of the Act applies 'after the coming into operation of any of the plans'. therefore, as the Master Plan has come into operation and the user is contrary to the Master Plan, the prosecutions are legal even though no zonal plans have yet been framed for these zones. (2) It cannot be known from the Master Plan whether the premises are situated in a residential use zone and, therefore, the petitioners have committed no offence if the premises are used for commercial purposes. The reply is that the premises are in fact situated in residential use zones and that this is clear from a perusal of the Master Plan and the maps attached to it. (3) There is no clear distinction between a residential and a commercial user and, therefore, the user by the petitioners cannot be said to be commercial. The reply is that the user by each of the petitioners or by their tenants is clearly commercial. (4) Unguided and arbitrary power is vested in the Authority to declare use zones as residential, commercial etc. This contention may be answered by pointing out that an elaborate procedure has to be followed (by the Authority which is multi-member) in the preparation of the Master Plan such as a civic survey, submission of the plan to the Central Government for approval, its publication inviting objections from the public, consideration of these objections, suggestions and representations and its final approval by the Government before it

comes into force. Modifications of the plan also can be made in an appropriate way. All this shows that the multi-member Authority has to act with a great deal of consideration, with the approval of the Government and after taking into account the popular opinion. It cannot, therefore, act arbitrarily. (5) The Master Plan restricts the right of the petitioners to hold property or to practice business, trade or profession guaranteed by Article 19(1)(f) and (g) of the Constitution. The reply would be that such restrictions are reasonable in the interest of general public so that the development of Delhi proceeds in accordance with the plan and not haphazardly.

All the above and the other objections can be urged by the petitioners in the criminal courts in defending themselves in the prosecutions launched against them. Some of these objections necessitate an enquiry into facts. For instance, it is to be found out by a scrutiny of the Master Plan and the maps and perhaps by evidence whether the particular premises are situated in a residential use zone or not. But the petitioners have raised one preliminary objection which has to be considered as it raises a pure question of the construction of section 49(1) of the Act going to the jurisdiction of the criminal courts. The objection is that under section 49(1), sanction to prosecute the petitioners could be given only by the local authority, namely, the the New Delhi Municipal Committee or the Delhi Municipal Corporation. as the case may be, and that it could not be given by the Authority. This contention is based on the distinction made by section 12 of the Act between two types of areas in Delhi, namely. (1) development areas and (2) other areas. As the premises of the petitioners are situated in other areas, it is contended that the local authority concerned and not the Authority which is competent to launch prosecution against the petitioners. Reliance is also placed on the following observations of a Division Bench of this Court in *New Delhi Municipal Committee v. Inder Narain and others* (L.P.A. 141 of 1970 decided on 30th November 1970) (i) to which one of us (Deshpande J.) was a party :- 'SUB-SECTION(2) of section 49 deals with one particular offence and we are not concerned with that. In respect of all the other offences within its local limits regarding nondevelopment ' area punishable under the Act, sanction for the prosecution, according to sub-section (1) of section 49, has to be accorded by the appellant Committee. Power has also been vested by section 34 of the Act in the appellant Committee to compound

such offences either before or after the institution of the proceedings.'

(2) In our view this contention is supported neither by the provisions of the Act nor by the decision of this Court referred to above. For, the Act makes a clear distinction between (1) development and (2) user of the land and buildings in Delhi. Section 2(d) defines 'development' as 'the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in any building or land and includes redevelopment'. It is clear, therefore, that mere user of a building situated in residential use zone for commercial purposes is not development at all. On the other hand, it is only a simple user of the particular premises. Section 12 of the Act authorises the Authority itself to undertake the development of land only in an area which is declared to be a development area. It cannot do so in other areas. therefore, in these other areas the sanction for development has to be given by the local authority concerned under section 12(3)(ii) 'in accordance with the provisions made by or under the law governing such authority', that is to say, under the Punjab Municipal Act, 1911, by the New Delhi Municipal Committee and under the Delhi Municipal Corporation Act, 1957, by the Municipal Corporation of Delhi. Under section 12(4) no development shall be undertaken or carried out except in accordance with the plans after the coming into operation of any of the plans, namely, the Master Plan and/or the zonal plans, in any area.

(3) There are, therefore, two distinct prohibitions (apart from others with which we are not concerned) enacted by section 12(4) and by section 14 of the Act. The former prohibits development contrary to the plans, i.e., either the Master Plan or the zonal plan or both. The latter prohibits user of land and buildings contrary to the Master Plan or the zonal plan or both. Section 29(1) of the Act penalizes development contrary to the plan while section 29(2) penalizes user contrary to the plan. Sanction to prosecute in respect of both these offences, namely, those punishable under section 29(1) and those punishable under section 29(2) is, however, dealt with only in section 49(1). It is for this reason that both the Authority and the local authority concerned are mentioned as the sanctioning authorities in section 49(1). This does not mean, however, that in respect of one and the same offence both these authorities are competent to give the sanction, to prosecute.

Throughout the scheme of the Act, the spheres of operation of the Authority and the local authority are kept distinct. We have already shown above that section 12 gives the power of development in a development area to the Authority and the power to sanction development in other areas to the local authority. The framing of the Master Plan and taking steps to bring it into force is the exclusive function of the Authority. The division of Delhi into various use zones is brought about only by the Master Plan and, therefore, by the Authority. The local authority has nothing to do with it. The implementation of the Master Plan in respect of the user of land and buildings would also therefore be the function of the Authority. The Authority has been given wide powers under sections 28, 37, 38, 40-A and 52. On the other hand, the power of the local authority is restricted to the sanction to development in the non-development areas and matters connected with such development in sections 12, 29(1), 30(1)(ii), 31(1)(ii), 34(1)(ii) and 53A. The reason is that the [Delhi Development Act, 1957](#) is primarily implemented by the Authority, the only exception being development in the non-development area which is left to the discretion of the local authority. The local authority can act under the provisions of the Punjab Municipal Act, 1911, and the Delhi Municipal Corporation Act, 1957. It is to be noted that these statutes also do not give any power to the local authorities in Delhi to promulgate and enforce the Master Plan. This is done by the Authority alone under the Act. Under section 6, the objects of the Authority shall be to promote and secure the development of Delhi according to plan and to do everything necessary or expedient for purposes of such development and for purposes incidental thereto. The Master Plan is made by the Authority to carry out this object and the enforcement of the provisions regarding the use zones is thus incidental to the development of Delhi. While the development means the original work of construction etc. according to plan, the user is to continue the state of affairs after the development is completed. Because the sanction to development in a non-development area is being given by the local authority, it is the local authority which is concerned to see that the development is according to the sanction. therefore, it is the local authority which takes notice of the breaches of sanction and gives sanction to prosecution under section 49(1) in respect of offences punishable under section 29(1). On the same analogy, the use zones in the Master Plan are laid down by the Authority who alone is, therefore, concerned

in enforcing the user of the premises according to the Master Plan, It would be reasonable to conclude, therefore that it is the Authority alone who would be concerned in 3-685HCD/71 taking note of offences punishable under section. 29(2) as being contraventions of section 14 and, therefore, it is the Authority and not the local authority which would give sanction for the institution of proceedings in respect of offences under section 29(2) as provided for by section 49(1). We, therefore, find that the sanction to prosecute under section 49(1) for offences punishable under section 29(2) is to be given by the Authority and not by the local authority.

(4) In New- Delhi Municipal Committee v. Inder Narain referred to above, the offence was punishable under section 29(1) and, therefore, was compounded by the local authority. No question of user of the premises contrary to section. 14 arose in that case. No offence under section 29(2) was committed in that case. The sanction to prosecute could, therefore, be given only by the local authority and not by the Authority. The words 'in respect of all the other offences' used in the observation made in that decision cited above. therefore, meant ail the offences under section 29(1) consisting of development contrary to the sanction given by the local authority. The word 'all' was not intended to include offences punishable under section 29(2) for the prosecution for which sanction could be given only by the Authority.

(5) The respondents have also raised a preliminary objection. They say that all the contentions raised by the petitioners, other than the preliminary question of law relating to the construction of sections 29(2) and 49(1) of the Act decided by us above, are such that the proper forum for their consideration is the criminal court. We see great force in this objection. Professedly, the petitioners have come to this Court under Article 226 of the Constitution for a judicial review of the administrative action which consisted in the institution of prosecutions against the petitioners. But it is a misconception to think that judicial review is confined to writ petitions filed under Article 226. On the other hand, judicial review is basically of two kinds. The first kind of judicial review which is claimed by Prof. Nathan Isaacs in an Article on 'Judicial Review of Administrative Findings' in 30 Yale Law Journal 781 at 785-786 to be 'true review' is made (a) where the administrative body

applies to a court for enforcement of its action and (b) where a statute provides for an appeal to a court against the action of an administrative authority. This judicial review is called the 'true review' because it is the widest judicial review available to a person. When an administrative authority files a complaint against a person in a criminal court, as has been done by the Delhi Development Authority against the petitioners, the whole of the administrative action is open to judicial scrutiny by a court of law. The concept of legal power is broadly divisible into two, namely, (a) executive power and (b) judicial power. To exercise the executive power of recovery of penalty from a person for using the premises contrary to the Master Plan, the Authority has to submit to the judicial power of the criminal court by proving its case against the petitioners to the satisfaction of the criminal courts. This judicial scrutiny has to precede the ultimate executive action to be taken by the Authority against the petitioners. The merits of the complaint of the Authority against the petitioners can be fully gone into by the criminal court including all questions of fact and law. Similarly, in a statutory appeal against administrative action the merits are open to the scrutiny of the court. The petitioners would, therefore, be getting 'true review' of administrative action on merits if they urge all their contentions against the prosecutions in the criminal courts.

(6) The second type of review is the independent or the collateral attack on administrative decision which is made by way of writ petitions to seek the extraordinary reliefs under Article 226 of the Constitution. In these proceedings, quite often, the merits of the administrative action are not open to review. Further, the High Court is not ideally situated in inquiring into questions of fact. Our jurisdiction is peripheral restricted to the scrutiny of constitutionality and legality of administrative action. In the present petitions, there is no constitutional attack on any of the provisions of the Act. Nor is there any serious constitutional objection shown against the prosecutions. The objections would be mostly concerned with questions of fact as to whether the premises were situated in the residential use zones and whether the user complained of really amounted to commercial user or whether it could be justified as residential user. The decision of such questions would involve the study of the maps, inspection of the spot and appreciation of evidence. As a result of the consideration of the evidence, the conclusion would be whether the petitioners have committed the offences punishable under section

29(2) of the Act or not. This is essentially the function of the ordinary criminal court. There is absolutely no justification why such ordinary criminal cases should not be allowed to be tried by the ordinary criminal courts and why such questions of fact as to whether the petitioners are guilty or not should be decided by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution. If necessary, the appeals against the decisions of the criminal courts would be considered by the Courts of Session and perhaps later by the High Court if this can be done under the provisions of the Criminal Procedure Code. That would be the proper procedure and proper forum for deciding these cases. Article 226 is not the forum.

(7) In *Sita Ram Chhawehharia & Another v. The State, of Bihar & another* (Criminal appeal 144 of 1968 decided by the supreme Court on 10-10-1968) certain persons were being prosecuted under section 7 of the Essential Commodities Act. Even though they had challenged the Bihar Kerosene Dealers' Licensing Order, 1965, as being ultra vires, still the High Court dismissed the writ petitions of the accused in limine and the decision of the High Court was upheld by the Supreme Court which pointed out that it was open to the accused persons, if necessary, to persuade the criminal court to make a reference to the High Court under section 432 of the Code of Criminal Procedure if the criminal court was satisfied that the provision of any Act Ordinance or Regulation was ultra vires. This was a stronger case than the writ petitions before us. For, the provisions of the Act have not been challenged as unconstitutional before us. We, therefore, confine ourselves to the decision, of the legal question of the sanction to prosecute being valid under section 49 of the Act. The rest of the questions arising in these writ petitions are best heard by the criminal courts concerned, We, therefore, decline to consider them. With these observations, we dismiss the writ petitions without any order as to costs.