The State of Bombay

Vs

Pandurang Vinayak Chaphalkar and Others

Criminal Appeal No. 62 of 1951

(M. C. Mahajan, Bhagwati JJ)

13.03.1953

JUDGMENT

MAHAJAN J. -

The respondents were charged with having committed an offence punishable under section 9(2) read with section 4 of the Bombay Building (Control on Erection) Act, 1948, for commencing the work of erection of a cinema theatre without obtaining the necessary permission from the controller of buildings, Bombay. The sub-divisional magistrate, Ratnagiri, held that the Act not having been validly extended to Ratnagiri, no permission of the controller of buildings was necessary for the construction. He accordingly acquitted them. On appeal by the State Government, the order of acquittal was maintained by the High Court. This appeal is before us by special leave from the concurrent orders of acquittal.

Special leave was granted on the Attorney-General for India undertaking on behalf of the State Government of Bombay that whatever the decision of the court might be, no proceedings will be taken against the respondents in respect of the subject-matter under appeal. At the hearing of the appeal it was made plain by the learned Attorney-General that no adverse consequences will flow to the respondents or to their building being completed, by the acquittal order being pronounced as bad, and that the State Government will not in any way interfere with the respondents when they take steps to complete the building, the construction of which was commenced without the permission of the controller. The State Government merely wants to have the question of law decided as a test case because the decision of the High Court, if left unchallenged, would have far-reaching effects.

The facts giving rise to the prosecution of the respondents, shortly stated, are these : There was in force in the State of Bombay an Ordinance, Bombay Building (Control on Erection) Ordinance, 1948. It was applicable to certain areas specified in the schedule. The district of Ratnagiri was not one of the areas therein specified. Sub-section(4) of section 1 of the Ordinance empowered the provincial government by notification in the official gazette to extend to any other area specified in such notification its provisions. It further empowered the provincial government to direct that it shall apply only in respect of buildings intended to be used for such purpose as may be specified in the notification. On 15th January, 1948, the Government of Bombay issued the following notification :-

"In exercise of the powers conferred by sub-section (4) of section 1 of the

> Bombay Building (Control on Erection) Ordinance, 1948 (Ordinance No. I of 1948), the Government of Bombay is pleased to direct that the said ordinance shall also extend to all areas in the province of Bombay other than the areas specified in the schedule to the said Act and that it shall apply to said areas only in respect of buildings intended to be used for the purpose of cinemas, theatres and other places of amusement or entertainment."

The consequence of this notification was that in the district of Ratnagiri no cinema building could be commenced without the permission of the controller after that date.

Ordinance I of 1948 was repealed by Act XXXI of 1948, "The Bombay Building (Control on Erection) Act, 1948". It was made applicable to areas specified in the schedule. Sub-section (3) of section 1 authorized the provincial government by notification in the official gazette to direct that it shall also extend to any other areas specified therein. It further authorized the provincial government to direct that it shall apply only in respect of buildings intended to be used for such purposes as may be specified in the notification. By section 15(1) of the Act it was provided that -

> "The Bombay Building (Control on Erection) Ordinance, 1948, is hereby repealed and it is hereby declared that the provisions of sections 7 and 25 of the Bombay General Clauses Act, 1904, shall apply to the repeal as if that Ordinance were an enactment."

The respondents started constructing a cinema at Ratnagiri on 15th August, 1948, after the commencement of Act XXXI of 1948 without obtaining the permission of the controller of buildings as required by the Act under the impression that the Act had application only to areas specified in the schedule and the district of Ratnagiri not having been specified in the schedule, the provisions of the Act had no application to that area. As above stated, they were prosecuted for committing an offence under section 9(2) read with section 4 with the results abovementioned.

The order of acquittal was based on the ground that although the notification extended the scope of the ordinance to areas other than those which were mentioned specifically in the schedule thereto, it did not extend to those areas the provisions of the Act in spite of the application of the provisions of section 25 of the Bombay General Clauses Act. In our judgment, the construction placed by the High Court on the language of section 15 is erroneous and full effect has not been given to its provisions or to the provisions of section 25 of the Bombay General Clauses Act. We think on a true construction of section 15 of the Act and section 25 of the Bombay General Clauses Act, the notification issued on 15th January, 1948, under the ordinance continued in force under Act XXXI of 1948 and that by it the provisions of the Act stood extended to other areas in the State to the extent indicated in the notification. Section 25 of the Bombay General Clauses Act, 1904, provides-

> "Where any enactment is, after the commencement of this Act, repealed and re-enacted by a Bombay Act, with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, bye-law or form made or issued under the repealed enactment shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted unless and until it is superseded by any appointment, notification, order, scheme, rule, bye-law or form made or issued under the provisions so re-enacted."

It cannot be contended that the notification was inconsistent with the provisions of Act XXXI of 1948. It is clearly in accordance with its scheme and purpose. The High Court did not combat the proposition that in view of the provisions of section 25 of the Bombay General Clauses Act the notification continued in force after the coming into force of the Act. It, however, held that even if the notification was taken as having been issued under Act XXXI of 1948, the notification merely extended the ordinance to those areas and not the Act. In the opinion of the High Court, the word "Act" instead of "Ordinance" could not be read in words of the notification by the force of section 25 of the Bombay General Clauses Act and the notification literally construed, only extended the ordinance to those areas. It was considered that if the intention was to extend the Act to these areas, such an intention could only be carried out by enacting in Act XXXI of 1948 a proviso like the one enacted in the Cotton Cloth and Yarn (Control) Order, 1945, or by use of language similar to the one used in section 9 of the Bombay General Clauses Act, 1904. The proviso in the Cotton Cloth and Yarn (Control) Order is in these terms :-

> "Provided further any reference in any order issued under the Defence of India Rules or in any notification issued thereunder to any provision of the Cotton Cloth and Yarn (Control) Order, 1943, shall, unless a different intention appears, be construed as reference to the corresponding provision of this order."

We do not find it possible to support this line of reasoning. It appears to us that the attention of the learned Judges was not pointedly drawn to the concluding words of section 15(1) of the Act. It is specifically provided therein that the provisions of sections 7 and 25 of the Bombay General Clauses Act shall apply to the repeal as if the ordinance were an enactment. The ordinance by use of those words was given the status of an enactment and therefore the word "ordinance" occurring in the notification has to be read accordingly and as extending the Act to those areas, and unless that is done, full effect cannot be given to the concluding words used in section 15(1) of the Act. The concluding words of section 15(1) of the Act achieve the purpose that was achieved in the Cotton Cloth and Yarn (Control) Order by the "proviso." By reason of the deeming provisions of section 15, the language used in the notification extending the ordinance to those areas as a necessary consequence has the effect of extending the operation of the Act to those areas. When the statue enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be restored to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. [Vide Lord Justice James in Ex parte Walton : In re Levy [17 Ch. D. 746, at p. 756.]]. If the purpose of the statutory fiction mentioned in section 15 is kept in view, then it follows that the purpose of that fiction would be completely defeated if the notification was construed in the literal manner in which it has been connstrued by the High Court. In East End Dwellings Co. Ltd. v. Finsbury Borough Council [[1952] A.C. 109.], Lord Asquith while dealing with the provisions of the Town and County Planning Act, 1947, made reference to the same principle and observed as follows :-

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. ....The statue says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

The corollary thus of declaring the provisions of section 25 of the Bombay General Clauses Act applicable to the repeal of the ordinance and of deeming that ordinance an enactment is that wherever the word "ordinance" occurs in the notification, that word has to be read as an enactment.

For the reasons given above we are satisfied that the High Court was in error in holding that the notification only extended the provisions of the ordinance to Ratnagiri district and not the provisions of Act XXXI of 1948 to that area. It may, however, be observed that the manner adopted by the legislature in keeping alive the notifications issued under the ordinance by use of somewhat involved language in matters where the rights of the citizens regarding the construction of buildings were being affected was not very happy. It has certainly led three judges to think that the intention of the legislature was not brought out by the language. People who are not lawyers may well be misled into thinking that the notification issued under the ordinance has terminated with its repeal and not having been re-issued under the Act, the provisions of which again in clear language provide that it only extends to areas specified in the schedule and which gives power to extend it, that those areas are excluded from the scope of the Act. It would have been much simpler if the legislature made its intention clear by use of simple and unambiguous language.

Because of the undertaking given by the learned Attorney-General not to proceed any further in this matter, it is not necessary to set aside the acquittal order of the respondents, which will remain as it stands.

Appeal allowed.

Acquittal not set aside.

Agent for the appellant : G. H. Rajadhyaksha.

Agent for the respondents : Ganpat Rai.

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