

(2018) 12 BOM CK 0115

In the Bombay High Court

Case No : Writ Petition No. 2356, 2371, 2372, 2381 Of 2017

Aminabee Abdul Wahab Malik

APPELLANT

Vs

State Of Maharashtra And Another

RESPONDENT

Date of Decision : 20-12-2018

Acts Referred:

Maharashtra Regional and Town Planning Act, 1966 — Section 49, 127
Constitution of India, 1950 — Article 142, 226

Citation : (2018) 12 BOM CK 0115

Hon'ble Judges : Prasanna B. Varale, J; Mangesh S. Patil, J

Bench : Division Bench

Advocate : S.P. Shah, P.R. Patil, S.Y. Mahajan

Final Decision : Dismissed

Judgement

Mangesh S. Patil, J

1. Rule. Rule is made returnable forthwith. With the consent of the parties the matters are heard finally.

2. These are the petitions under Article 226 of the Constitution of India seeking declaration under Section 127 of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as the M.R.T.P. Act) about the lapse of reservation. Since the facts and the law applicable to the fact situation in all these four petitions is same except the petitioners and their respective lands, all these writ petitions have been heard together and are being disposed of by this common judgment.

3. The learned advocate for the petitioners submitted that the respective properties of the petitioners were reserved as site no.165 in the development plan of Jalgaon Municipal Corporation which was published on 10.08.2004 and which came into effect from 01.10.2004. The writ properties were reserved for playground, primary school and D.P. Road. The petitioners served first purchase notice on 09.04.2012 as contemplated under Section of the 127 of the M.R.T.P.

Act and again served a second purchase notice on 05.09.2014 which was duly received by the respondent no.2-Jalgaon Municipal Corporation on 12.09.2014, even the documents were supplied to it on 10.03.2016. Still the respondents failed to take appropriate steps for acquiring the writ properties within the time stipulated under that provision and therefore the reservation stood lapsed. He would therefore submit that the petitioners' properties cannot be allowed to be put under the cloud for years together and necessary declaration for lapse of reservation should follow. He submitted that the Supreme Court as well as this Court in several judgments has given such a declaration and the same course should be followed even in these matters. He refer to and relied upon the decision in the case of Girnar Traders & Anr. V/s. State of Maharashtra & Ors.; (2007) 7 SCC 555, Hasmukhrai V. Mehta V/s. State of Maharashtra & Ors.; (2015) 3 SCC 154 and Jaika Vanijya Ltd. V/s. State of Maharashtra & Ors.; 2013 (4) Mh.L.J. 161.

4. Per contra, the learned A.G.P. for the respondent no.1 and the learned advocate for the respondent no.2 referring to the affidavit in replies filed by the Assistant Director of Town Planning, Jalgaon and the Commissioner of respondent no.2-Jalgaon City Municipal Corporation vehemently submitted that there is no apparent dispute about the facts. However, notice which is issued firstly on 09.04.2012 and even the second notice dated 05.09.2014 are premature in as much as those have been issued even before expiry of the statutory period of ten years available with the developing authority to acquire the properties. When the statute has laid down a specific period, any attempt to invoke the provisions of the M.R.T.P. Act by issuing a notice before expiry of period of ten years is illegal. For this reason alone, the declaration as claimed by the petitioners cannot be granted.

5. The learned advocate for the respondent no.2 further submitted that assuming that the communication dated 10.03.2016 sent on behalf of the petitioners is treated as a notice under Section 127 of the M.R.T.P. Act, still it suffers from couple of infirmities. Firstly, on the ground that the person who has sent this communication is admittedly not the owner of the property and also cannot be held to be a person having interest in the writ properties.

Section 127 contemplates that the purchase notice should be issued by the owner of the property or a person having interest therein. When the person who has sent this communication is not the person who is either the owner or a person having interest within the meaning of that phrase, the notice is illegal. Secondly, to the learned advocate for the respondent no.2, if it is to be treated as a notice under Section 127 of the M.R.T.P. Act, it is dated 10.03.2016 and by that time an amendment was effected to Section 127 of the M.R.T.P. Act and the period within which the property could be acquired has been extended to twenty four months from the date of service of notice and which amendment has come in to effect from 29.08.2015 and if that be so, on the date of filing of these petitions which is 16.02.2017, the period of twenty four months had not lapsed.

Therefore, on the date of filing of the writ petitions the petitioners were not entitled to seek any declaration regarding lapse of reservation. Thus, according to the learned advocate for the respondent no.2, the notices dated 09.04.2012 and 05.09.2014 were premature since those were issued before expiry of ten years from the date on which the development plan came into effect i.e. 01.10.2004 and if the subsequent letter dated 10.03.2016 is to be treated as a purchase notice, the petitioners ought to have waited for twenty four months before filing the writ petitions. Therefore, in any event the petitions are liable to be dismissed.

6. As is mentioned herein-above cursorily, there is no dispute as far as the facts are concerned. There is no dispute that the development plan had come into effect on 01.10.2004 and the petitioners' respective lands were reserved as Site no.165. There is no dispute that the petitioners had issued first purchase notice on 09.04.2012 and followed it by a second purchase notice on 05.09.2014. The period of ten years prescribed under Section 127 admittedly would have expired on 30.09.2014 and ex facie the first purchase notice and second purchase notice were issued before expiry of period of ten years.

7. A plain reading of Section 127 of the M.R.T.P. Act clearly shows that the owner can call upon the planning authority or the development authority to acquire the land if it has not acquired the land by agreement within ten years from the date the development plan comes into force. It is apparent that the right which accrues to the owner to issue such notice is only after expiry of period of ten years. Therefore, any attempt to invoke this provision by issuing a notice prior to the expiry of the period of ten years cannot be said to be a legal step towards invoking the right to claim that the reservation has lapsed.

8. It is pertinent to note that a further period of twelve months which was earlier six months and which has now been increased to twenty four months w.e.f. 29.08.2015 is available with the development authority to take appropriate steps to acquire the land. When such a time line has been laid down by the statute, in our considered view the parties must conform to such a time frame and any deviation howsoever slight it might be cannot be condoned. Therefore, we are of the considered view that since the two notices dated 09.04.2012 and 05.09.2014 were issued before expiry of ten years from the date the development plan came into effect i.e. 01.10.2004, the notices were clearly premature and were not in conformity with the legal requirements.

9. The learned advocate Mr. Shah for the petitioners, faced with the situation submitted that the whole purpose and object of providing for lapsing of reservation by incorporating a provision in the form of Section 127 needs to be borne in mind. The right to property though is no longer a fundamental right, still it is a constitutional right and the power of the State of eminent domain cannot be unbridled, keeping the property under such embargo for an indefinite period. Even if two notices are premature, the fact remains that even after filing of these petitions till date no steps have been taken by the respondents to acquire the

writ properties. The properties have been reserved since the year 2004, for last fourteen years and the respondents have failed to take steps for acquisition. Therefore, the petitioners would be put to avoidable harassment if they are required to issue fresh notices under Section 127 and wait for a further period of twenty four months and once again to approach this Court for the same relief. He would point out that in the case of Girnar Traders (supra) and Hasmukhrai (supra) cognizance was taken by the Supreme Court about the lapsing of several years and the relief was granted to the owners. Similarly, even the learned advocate pointed out that the Division Bench of this Court in the case of Birulal (Bherulal) s/o Premchand Patil & Ors. V/s. The State of Maharashtra & two ors. in Writ Petition No. 195 of 2015 by the judgment dated 15.12.2016 has taken similar view. He submitted that in a similar fact situation where purchase notice under Section 127 was issued before the completion of 10 years, the Division Bench had taken in to account the fact that by the time the judgment was passed seventeen years had lapsed and no steps were taken for acquisition. The learned advocate for the petitioners also pointed out that in doing so, the Division Bench had placed reliance on the decision of the Supreme Court in the case of Hasmukhrai (supra).

10. We have carefully gone through all the above the decisions. It is apparent that even in those cases the notice under Section 127 was served before expiry of ten years and still the Supreme Court and the Division Bench of this Court followed the course as was done in the case of Hasmukhrai (supra). At the first blush, the submission of the learned advocate for the petitioners seems to persuade us to follow a similar course as was followed by the Division Bench in the case of Birulal (supra). However, it needs to be noted that in the case of Hasmukhrai (supra) a similar argument had found favour with the Supreme Court and the only fact that was considered by the Supreme Court was that by the time the judgment was passed already a period of twenty years had lapsed and the argument of the State that the notice ought to have been issued only after expiry of ten years did not find favour and was refuted. The observations in paragraph nos.9 and 13 read thus:

"9. In reply to this, on behalf of the State, it is contended that notice could have been served by the writ petitioner/ appellant only after expiry of ten years of the Development Plan, and the respondents were not required to take note of the purchase notice given by the appellant within the period of ten years.

Above reply, in our opinion does not answer as to why steps have not been taken for acquisition for last twenty years.

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13. In view of the principle of law laid down by this Court, as above, we are of the view that in the present case since neither steps have been taken by the authorities concerned for acquisition of the land, nor the land of the appellant is purchased under purchase notice, nor he is allowed to use the land for last more

than twenty years, the land will have to be released as the appellant cannot be deprived from utilizing his property for an indefinite period".

11. With utmost respect, in a subsequent judgment of the Supreme Court in the case of Chhabildas V/s. The State of Maharashtra and Ors.; (2018) 2 SCC 784, it has been observed that inordinate long delay of over twenty years was taken into consideration in the case of Hasmukhrail (supra) as well as in the case of Vijayalakshmi V/s. Town Planning Member; (2006) 8 SCC 502 to do complete justice on the facts of those cases, by invoking the powers under Article 142 of the Constitution of India. Importantly, even in that very matter Chhabildas (supra), it has been held that the purchase notice must be served in accordance with the provisions of Section 127 in order that lapsing can take place and even in that matter the Supreme Court had invoked Article 142 of the Constitution of India to declare that the reservation had lapsed. The observations in paragraph nos. 27 to 31 read thus:

"27. This Court, in Hasmukhrail V. Mehta v. State of Maharashtra and Ors., MANU/SC/1131/2014 : (2015) 3 SCC 154, held that where an inordinately long delay takes place from the date on which the appropriate authority makes an application to acquire the land (in that case 20 years), the land in question stands released from reservation.

28. In the aforesaid judgment, the purchase notice Under Section 49 of the Act was dated 17th August, 2000. The Director, Town Planning, wrote a letter to the Chief Officer of the Khopoli Municipal Council stating that proceedings for land acquisition for an Agricultural Produce Market Yard would be initiated within one year from 16th March, 2001. Consequently, the Khopoli Municipal Council wrote a letter on 23rd April, 2001 to the Agricultural Produce Market Committee to initiate acquisition proceedings. As nothing was done, the Appellant ran from pillar to post and ultimately filed a writ petition in February, 2004, complaining that the Respondents are neither acquiring the land belonging to the Appellant nor releasing the same from reservation for the Agricultural Produce Market Yard. The High Court dismissed aforesaid writ petition stating that as per the provisions of Section 127 were not attracted, there could be no lapse. This Court, after referring to Sections 49 and 127 of the Act, held:

12. We think it pertinent to mention here that APMC, Respondent 5, even after service of notice, has not cared to contest this appeal. Also, we think it relevant to mention that till date no steps appear to have been taken for acquisition of the land in question or to release the same.

The land of the Appellant, in our opinion, cannot be held up, without any authority of law, as neither the same is purchased till date by the Respondent authorities, nor acquired under any law, nor the Appellant is being allowed to use the land for the last more than twenty years.

29. It thereafter referred to Vijayalakshmi v. Town Planning Member MANU/SC/8559/2006 : (2006) 8 SCC 502 and Girnar's case (supra) and then held:

15. In view of the principle of law laid down by this Court, as above, we are of the view that in the present case since neither have steps been taken by the authorities concerned for acquisition of the land, nor is the land of the Appellant purchased under purchase notice, nor is he allowed to use the land for the last more than twenty years, the land will have to be released as the Appellant cannot be deprived from utilising his property for an indefinite period.

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18. Accordingly, we allow the appeal and set aside the impugned order passed by the High Court. Since no steps appear to have been taken till date for the last more than twenty years either for acquisition or for purchase of the land under the MRTP Act, 1966 by the authorities concerned, as such, the land in question stands released from reservation Under Section 127 of the MRTP Act.

30. The aforesaid judgment lays down that since more than 20 years had elapsed since the date of the purchase notice Under Section 49 on the facts of that case, the land will have to be released from acquisition. No doubt this Court held that over 20 years is an inordinately long period of delay, and therefore, lapsing has taken place Under Section 127 of the MRTP Act. However, on the facts of that case, no purchase notice Under Section 127 was issued after 10 years had elapsed from the date of publication of the requisite plan. This being the case, we read the judgment as having allowed a lapse to take place, in view of the inordinately long delay of over 20 years, by really doing complete justice on the facts of that case Under Article 142 of the Constitution of India.

31. In the present case, 15 years have passed since the date of publication of the development plan, and over 10 years have passed since the date of the purchase notice issued Under Section 49. Considering the fact that there has been no stay at any stage by any Court, it is clear that an inordinately long period of time has elapsed, both since the date of publication of the development plan, as well as the date of the purchase notice served Under Section 49. No doubt, the letter of 26.9.2008 shows that an application was made within the requisite time period to acquire the aforesaid land. However, on the facts of this case, since after the aforesaid letter nothing has been done to acquire the Appellant's property, we are of the view that the reservation contained in the development plan as well as acquisition proposal have lapsed. We make it clear that we hold this in order to do complete justice between the parties Under Article 142 of the Constitution of India. However, in all future cases that may arise under the provisions of Section 49, the drill of Section 127 must be followed, i.e. that after 10 years have elapsed from the date of publication of the relevant plan, a second purchase notice must be served in accordance with the provisions of Section 127, in order that lapsing can take place under the aforesaid section. With these observations, the appeal is disposed of."

(Emphasis supplied by us)

12. In view of such subsequent pronouncement, in our considered view, for want

of power under Article 142 of the Constitution of India, a High Court cannot ignore the time frame which is to be followed by the owner of a property seeking a declaration for lapsing of reservation as contemplated under Section 127. In our considered view, the judgment of the Division Bench in the case of Birulal (supra) was pronounced on 15.12.2016, relying upon the decision in the case of Hasmukhrai (supra). Since the Supreme Court in the case of Chhabildas (supra) has now clarified that the powers which were invoked in the case of Hasmukhrai and Vijayalakshmi (supra) were invoked under Article 142 of the Constitution of India, we cannot follow the course that was followed in the case of Birulal (supra). No such power is available with the High Court to ignore or condone time frame laid down by the statute under Section 127 of the M.R.T.P. Act. Therefore, the submission of the learned advocate for the petitioners seeking to rely upon the decision in the case of Birulal (supra) does not persuade us to follow the same course. We therefore conclude that the owner of a property seeking to invoke the provisions of Section 127 of the M.R.T.P. Act must strictly conform to the time frame laid down therein and even a slightest of deviation would not be permissible.

13. Now coming to the submission of the learned advocate for the petitioners that in such an eventuality the communication dated 10.03.2016 which is issued after lapse of ten years can be considered as a notice under Section 127 of the M.R.T.P. Act does not appeal to us for the same reason as is mentioned herein-above. If the communication dated 10.03.2016 is to be treated as a notice under Section 127 of the M.R.T.P. Act, the petitioners ought to have waited for a period of twenty four months to enable the respondents to acquire the lands since the amendment in the Act came into effect from 29.08.2015. As is observed herein-above, in the case of Chhabildas (supra), it has been clearly laid down that a party must strictly comply with Section 127 in order that lapsing can take place, the petitions which are filed before expiry of the period of twenty four months from the date of communication dated 10.03.2016 and the attempt to seek a declaration regarding lapsing of reservation is not legally sustainable.

14. Apart from the above state of affairs, the communication dated 10.03.2016 is merely in the nature of a reminder to the respondent no.2 rather than a notice under Section 127 of the M.R.T.P. Act. Besides, the person who has sent this communication on behalf of all the four petitioners has mentioned therein that he was authorized and was writing it on behalf of the the petitioners as their family member. But in our considered view merely by being a family member he cannot be said to be a person having interest. True it is, as is pointed out by the learned advocate for the petitioners, a Division Bench of this Court in the case of Madhukar Prabhakar Korgaonkar V/s. State of Maharashtra; 2017 SCC OnLine Bom 8973 has held that the person who had issued the notice was a Power of Attorney holder of the original owner and was thus legally authorised to issue a notice under Section 127 of the M.R.T.P. Act. However, ex facie the fact situation is completely different. In the matter in hand no such power is vested in the person who had issued the communication on behalf of the petitioners on

10.03.2016 claiming to be their family member. Therefore, the submission of the learned advocate seeking to place reliance on the decision in the case of Madhukar Prabhakar Korgaonkar (supra) is not legally tenable.

15. True it is that in the affidavit in reply filed on behalf of the respondents they have not raised any objection as regards competency of the person who has sent the communication dated 10.03.2016. However, when admittedly he is not the owner of the writ properties and was merely writing the communication on behalf of the petitioners, in our considered view when the facts are admitted and which do not demonstrate as to how he was a person having interest in the properties and when the law in the form of Section 127 of the M.R.T.P. Act requires that a notice thereunder should be issued by the owner or a person having interest, the objection raised by the learned advocate for the respondent no.2 is legal and tenable.

16. We have also carefully considered few other decision of the Division Benches of this Court in the case of Jaika Vanijya Ltd. (supra), Vinod Dadu Chougale and Ors V/s. The State of Maharashtra and Ors.; MANU/MH/0991/2018, Lalita Gyanchandji Sanchaity V/s. State of Maharashtra and Ors. in Writ Petition No. 4491 of 2016 decided on 03.11.2017. In our considered view, fact situations in all these matters are altogether different and do not cover the situation existing in the matters in hand. The petitioners are not entitled to reap any benefit therefrom.

17. In this view of the matter, we are of the considered view that the petitioners have failed to establish any right to seek the declaration regarding lapsing of reservation and all the petitions must fail.

18. The petitions are dismissed. The rule is discharged.