

(1990) 02 OHC CK 0029
In the Orissa High Court
Case No : O.J.C. No. 1138 of 1987

Chaturbhuja Modi

APPELLANT

Vs

Special Officer and Competent Authority, Urban
Agglomeration and Others

RESPONDENT

Date of Decision : 02-02-1990

Acts Referred:

Orissa Municipal Act, 1950 — Section 264 , 265
Orissa Municipal Rules, 1953 — Rule 530, 534B, 534C, 534D, 534E
Urban Land (Ceiling and Regulation) Act, 1976 — Section 2(q), 6(1), 6(2), 8, 9

Citation : (1990) 1 OLR 533

Hon'ble Judges : D.P. Mohapatra, J;A. Pasayat, J

Bench : Division Bench

Advocate : B.K. Mohanti, Bibek Mohanti and G.N. Padhi, for the Appellant; P.K. Mohanty, Additional Government Advocate, for the Respondent

Judgement

A. Pasayat, J.—Treatment of a piece of land held by the Petitioner to be vacant land includible in the computable area for the purpose of determination of the question as to, whether the Petitioner held land in excess of the ceiling limit under the provisions of the Urban land (Ceiling and Regulation) Act, 1976 (for short the Act") is the subject-matter of challenge in this writ application.

2. According to the Petitioner, the land in question was not vacant land as defined in the Act while the functionaries under the Act have held otherwise. The essential facts necessary for adjudication, of the question are as follows:

Land measuring 3.419 acres situated near National High way No. 5 and surrounded by the said High Way No. 5 railway line and Taladanda Canal Embankment in the Cuttack Urban Agglomeration was disclosed in the return filed u/s 6(1) of the Act to be unsuitable for construction of any building and therefore, not vacant land under the statute. The Petitioner submitted that the land in question consisted of a silted up tank and was covered by acquit weeds. Photographs of the area and a Xerox copy of the not final Parcha were filed in

support of the contention. The competent authority-opp. party No. 1 on Verification of the Sabik record-of-rights found that the classification of the land in question was Puratan Patit with an endorsement that a house stood thereon. He held that the contention that the land in question constitutes of a silted up tank is without any basis. He further referred to the not final record-of-rights and found that two plots bearing Nos. 3748(P) and 3853(P)(Sabik)(Hal Plot No. 19) were recorded as jalasaya at the attestation stage, though prior to that stage it was recorded as Gharbari land. According to him, there is an outlet in the Canal Embankment for drainage of surplus water and since the land in question was lying fallow and drainage facility was inadequate it was covered by aquatic grass. In the near by area stood a building complex of the State Financial Corporation. This according to him indicated that it would not be correct to say that the land was unsuitable for construction of building. Accordingly, he did not accede to the prayer of the Petitioner to exclude the land in question from computation while preparing the final statement u/s 9 of the Act. It is relevant to mention here that on receipt of the draft statement u/s 8 of the Act, the Petitioner had filed objection taking the stand as indicated above. In appeal, the appellate authority (Member, Board of Revenue opp. party No. 2) upheld the finding recorded by the competent authority. He concluded that only a tank cannot be treated as vacant land and can be exempted u/s 2(c)(i) of the Act, and since the land was fit for construction, the view taken by the competent authority was correct. These order are questioned in this writ application.

3. Mr. B.K. Mohanti, learned Counsel appearing for the Petitioner, has submitted that the authorities without considering the actual nature of the land erroneously came to the conclusion that the land in question was vacant land. According to him, there was abundant evidence on record to show that the land in question was such that construction would be impossible and impermissible thereon. He placed reliance on Rule 530(b)(iv) of the Orissa Municipal Rules, 1953 (hereinafter referred to as the O.M. Rules") for this purpose. It was also submitted that in terms of Rule 534-B, 534-C 534-D and 534-E, such portions of the land on which construction was not permissible should have been excluded even if for the sake of argument it was conceded but fact accepted that the land in question was vacant land, as held by the functionaries under the Act. Relying on a decision of this Court in the case of Benjamin Mohanty Vs. State of Orissa and Another, , it was submitted that the materials on record inescapably prove that the construction was impermissible and the authorities have erroneously held otherwise. On behalf of the opposite parties, Mr. P.K. Mohanty, learned Addl. Government Advocate countered the arguments by submitting that there was no absolute prohibition for construction and therefore the arguments of the Petitioner are not tenable and are without substance. According to him, the authorities have rightly concluded that the land in question being not a tank, the ratio of Benjamin Mohanty's case (supra) has no application. It was also submitted as a corollary that the prohibition if any contained in the O.M. Rules related to the masonry buildings only and there was no absolute prohibition for

construction in any building regulations as defined under the Act and therefore, the question of any exclusion whatsoever does not arise. The contentions need careful consideration and it will be relevant to refer to some of the relevant provisions in the Act, the O.M. Rules and the Orissa Municipal Act 1950 (for short the O.M. Act).

Urban land (Ceiling and Regulation) Act, 1976. Vacant Land:

Section 2(q), vacant land" means land, not being land mainly used for the purpose of agriculture, in an urban agglomeration but does not include.

(i) land on which construction of a building is not permissible under the building regulations in force in the area in which such land is situated;

x x x x

Building Regulations:

Section 2(b) building regulations means the regulations contained in the master plan, or the law in force governing the construction of buildings.

Orissa Municipal Act, 1950:

Section 265. Necessity or prior approval of site The Executive Officer shall not grant permission to construct or reconstruct a building unless and until he has approved of the site on application made u/s 264.

Orissa Municipal Rules, 1953:

Rules 530. Area of plots and, built up area (a)xxxxxx(b) No land shall be used as site for the erection or re-erection of the masonry building (i) to (iii)xxxxxx (iv) if the soil or sub-soil is saturated with water in consequence of which there is likely to be dampness of floor and walls of the building.

Undisputedly the O.M. Act and the O.M. Rules and the Orissa Town Planning and Improvement Trust Act, 1956 (for short the Improvement Trust Act,) were the building regulations in operation at the relevant time. On a consideration of the provisions quoted above, it is apparent that only if the soil or sub-soil is saturated with water as a consequence of which there is likelihood of dampness of floor and walls of the building, it cannot be used as a site for erection of a building. The functionaries under the statute have proceeded on the basis that since the land in question was not a tank it was to be treated as a vacant land. The basis of such conclusion has been indicated to be the ratio of Benjamin Mohanty's case (supra). We are afraid, the same is not a proper reading of the decision. In that case, the Court was concerned with a tank and giving a factual finding that construction was impermissible thereon decided the case. Reliance was placed by the Court on a decision of the Calcutta High Court in the case of *Srila Moitra Vs. State of West Bengal and Others*, . The Calcutta High Court was considering the legality of inclusion of area relating to a tank vis-a-vis the provisions of the Calcutta Municipal Act, 1951, and Rules 1 and 2 of Part I of

Schedule XVI appended thereto. Under Rules 1 and 2 of the Schedule a tank was not fit to be considered the building site. Therefore, the Calcutta High Court had held that a tank was not to be included while computing the ceiling area of the land-holder, Under the O. M. Act or the O.M. Rules or the Improvement Trust Act and the Rules thereunder, tank has not been defined and there is no specific provision relating to a tank. "Land" has not been defined under the Act. In *Reg v. Lees and Liverpool Canal Co.* (7A and 685) it has been held that land is not the less land for being covered with water, land occupied by tank/pond is treatable as land. But in order to ascertain whether it could be excluded from the definition of vacant land" u/s 2(q) of the Act it is necessary to know how tanks and ponds are treated under the building regulations in force in the areas concerned, This is revealed from the Government of India Notification No. 2/35/73-UCU New Delhi, dated the 23rd November, 1978. A tank is land no doubt but it is not a solid land. In our view, a tank contains an embankment, underground land and the bed of the tank. Similar view was expressed by the Patna High Court in the case of *Sobharam Mahato Vs. Raja Mahton and Others*, . In a tank there is stagnated water. A filled up tank on the contrary is not a tank but a solid land and may be considered to be a vacant land in the sense that after the tank is filled the land is no longer used for storage of water. Once the water of the tank is drained out and the excavation is filled; construction is not interdicted. Not necessary every tank can be deemed to be unfit for construction and vice versa. There may be tanks where the stagnated water is so deep that the soil and sub-soil have become saturated rendering it unfit for construction, with likelihood of dampness of floor and walls of the proposed building. In that event alone it cannot be treated as vacant land. There may be case where the water is of minimal quantity and though the tank is not dried up, yet it would not be of such a nature as to render construction impermissible and impracticable. In that event it would be open to the authorities to consider it to be vacant land under the Act. We are afraid, the authorities have generalised the observations in *Benjamin Mohanty's* case (supra) to mean that every tank is beyond the operation of the Act for the purpose of classification of vacant land. In the instant case, the authorities have proceeded under an erroneous impression, and the enquiries have not been directed in right direction. There is another factor which renders their decisions vulnerable. The findings recorded were based on the inspection report with reference to the date of inspection. A perusal of the inspection report shows that the conclusion contained therein were with reference to the date of inspection. What is material is the position as prevalent on the appointed day under the Act and not the date of inspection. No finding relating to actual position on the appointed day has been recorded. We may point out here that in almost all cases, 17-2-1976 has been treated to be relevant date. That is contrary to the statutory provisions. A bare reading of the proviso to Section 6(1) and 6(2) makes it abundantly clear that the relevant date is 17-2-1975. This is also the view of the Allahabad High Court in the case of *Hari Ram Kamani v. State of Uttar Pradesh*, reported in 1985 Allahabad Law Journal 411. The view has our concurrence.

Since due and proper enquiry has not been conducted and no tangible material has been brought on record, we feel that a further enquiry as to the actual nature of the land is desirable. We would also like to deal with certain other submissions made on behalf of the Petitioner relating to the applicability of Rule 534-B, 534-C, 534-D and 534 E of the O.M. Rules and entitlement, if any, for exclusion. Strong reliance was placed in support of the contention on certain observations in Benjamin Mohanty's case (supra). The position has not been settled beyond dispute by the Supreme Court in the case of State of Gujarat and Others Vs. Parshottamdas Ramdas Patel and Others, . The Court has held that only when there is absolute prohibition; the question of any exclusion would arise. None of the provisions in Rules 534-B, 534-C, 534-D and 534-E provides for any absolute prohibition. Therefore, no exclusion under the and provisions is permissible. In Benjamin Mohanty's case (supra), the Court found on facts that restriction had been, imposed for not constructing on 1709.84 sq. metres and therefore, treated the said area to be exempted. From that it cannot be inferred that in all cases any specific area has to be excluded.

4. We shall also presently deal with the submission made on behalf of the State that there is no absolute prohibition contained in any of the building regulations and that the provisions contained relates to masonry buildings and not to buildings of any nature. This submission has only to be noticed and rejected. Rule 530(d) is an answer to the proposition submitted on behalf of the State. It lays down that no buildings other than masonry buildings shall ordinarily be allowed to be constructed or reconstructed. In that view of the matter, we are of the considered opinion that Rule 530(d) contains the provision relating to absolute prohibition.

5. Since in large number of cases, the propriety of inclusion of a tank in the ceiling area appears to be involved, we feel it proper to lay down certain guidelines which are illustrative in nature. The onus is on the land-holder to prove that any land held by it does not come within the purview of the Act. It has to place materials in support of its claim. If the land in question is a tank, it has to be shown that construction thereon is interdicted in terms of the prohibition contained in Rule 530(b)(iv) of the O.M. Rules. But the authorities would not be correct to treat the land as vacant land merely because the land-holder is not able to place sufficient materials in that regard. The entry if any regarding nature of land in contemporaneous revenue and settlement records should be given a due weight age but will not be conclusive. It would be open to the parties to lead supplemental or contradictable evidence. In a case where there exists a dispute as regards the nature of the land involved, the parties concerned would do well to seek opinion of the concerned authorities under the building regulations, Undisputedly, the Act is intended to provide for imposition of a ceiling on a vacant land so that the land in excess of the ceiling limit is acquired for certain beneficial uses. The object appears to be prevention of concentration of urban lands in the hands of few persons, speculation and profiteering therein. An equitable distribution of land in urban agglomerations to sub serve the common

good, in furtherance of the Directive Principles of State Policy under Article 39(8) and (C) appears to be the object of the Act. While the State is entitled to its pound of flesh, the land-holder should not be deprived of its property unjustly, and there should not be unjust enrichment of the State at the cost of the land-holder. That would be in consonance with equitable legislative intent. The orders in Annexure 1 and 2 are quashed and the matter is remitted back to the opposite party No. 1 (Special Officer and Competent Authority, Urban Agglomeration, Cuttack), who shall re-consider the matter keeping in view our observations made above and dispose of the matter as expeditiously as possible, but in any event not later than four months from the date of our order. Parties shall bear their respective costs.

D.P. Mohapatra, J.

6. I agree.

Ordered accordingly.