

(1992) 06 CAL CK 0007
In the Calcutta High Court
Case No : F.M.A.T. 3518 of 1991

Goutam Roy

APPELLANT

Vs

The State and others

RESPONDENT

Date of Decision : 09-06-1992

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 398(4)
Urban Land (Ceiling and Regulation) Act, 1976 — Section 2, 3, 4, 4(11), 4(9)
Urban Land (Ceiling and Regulation) Rules, 1976 — Rule 3, 5

Citation : AIR 1993 Cal 266 : 97 CWN 302

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit Kumar Sengupta, J

Bench : Division Bench

Advocate : D.P. Bagchi, for the Appellant; Kazi Md. Ali, for the Respondent

Judgement

Shyamal Kumar Sen, J.—The facts, inter alia, leading to this writ petition are that the petitioner owns property at 7/5 Burdwan Road, Alipore, Calcutta, with four independent dwelling units. The said independent units in the buildings are existing for more than last 5 years. The said property contains a passage measuring 792 sq. metres, equivalent to 10 Cottahs 8 Chattaks 40 sq. feet, a horticulture measuring 488.00 sq. metres apart from the buildings.

2. On 17th December, 1986, the petitioner applied to the Calcutta Municipal Corporation for sanction of a building plan and on 20th January, 1987, the Building Committee of the Calcutta Municipal Corporation approved the said plan, but before, releasing the same, the Building Committee wanted the petitioner to obtain a "No Objection Certificate" from the Urban Land Ceiling . Authority. On 4th March, 1987, the petitioner applied for "No Objection Certificate" to the Competent Authority under the said Act of 1976. It is the case of the petitioner that on 15th May, 1987, the respondent No. 3 in C.O. No.8213(W) of 1987 Ranjit Chatterjee, inspected the premises of the petitioner. The said premises is a plot and the passage leading to the main building and other dwelling units is the only way meant for ingress and egress of the said premises and water line, sewerage,

electricity, telephone and all other essential items are passing through the said passage.

3. It has been alleged that the said Inspector, Ranjit Chatterjee to the utter surprise of the petitioner, in the course of his inspection on 15th May, 1987, demanded gratification openly and threatened the petitioner that certificate of "no objection" will be issued if the said gratification is paid. On 18th May, 1987, the petitioner met the Competent Authority Shri Prabir Guha Ray at his office and reported him about the said illegal demand of gratification by his said Inspector, and wanted that the inspection be held by any Inspector other than the said Ranjit Chatterjee. On 19th May, 1987, the said Inspector Ranjit Chatterjee again inspected the premises of the petitioner and in course of the said inspection, he refused to take note of the structures standing on the property. During July, 1987, the petitioner met the Competent Authority with his L.B.S. to obtain the "No Objection Certificate", but it was reported by the said Shri Prabir Guha Ray that no such certificate can be granted without any gratification and on the contrary, adverse report will be filed. On 3rd/4th August, 1987, the petitioner met the Competent Authority with the documents of title and the ancient documents relating to the particulars of the property and the details of measurement as to passage, garden etc. but the Competent Authority refused to take notice of any such documents.

4. On 12th August, 1987, when the petitioner visited the Competent Authority once again to know about the fate of "No Objection" Certificate", the petitioner was served with a notice on 7th August, 1987, to the effect that the Competent Authority has objection to the proposed demolition and construction of building by the petitioner, as there is excess vacant land. No particulars of the property which was held to be the vacant land nor any copy of the alleged inspection report was given to the petitioner by the respondents.

5. Challenging the said notice dated 7th August, 1987, a writ application was moved being CO. No. 8213(W) 1987 and in the said writ application, specific allegation of demand for gratification by respondents Nos. 2 and 3 was stated on oath by the writ petitioner, and in the said affidavit details of the property its structures, dwelling units, passage, garden were specifically mentioned.

Paragraph 6 of the stay application in the instant appeal mentions the following particulars regarding the said premises which are set out herein below:--

Dwelling Units (4) 862 Sq. Metres. (Total including land appurtenances)

(i) 498 Sq. Metres (main 2 storied building)

(ii) 249 Sq. Metres (single storied building)"

(iii) 25 Sq. Metres (Darwan"s Quarter)

(iv) 90 Sq. Metres (Garage/Servant Quarter)

(b) Horticulture 488 Sq. Metres.

(c) Passage leading to premises 792 Sq. Metres (Wrongly typed as 688 Sq. Metres as in terms of deed dated 27-8-1938 annexed to the stay application, the passage is measuring 10 Cottahs 8 Chattacks 40 Sq. Ft. equivalent to 1792 Sq. Metres and not 688 Sq. Metres)

6. The writ application was taken up for hearing on 16th September, 1987 when directions were passed for filing the affidavit-in-opposition and affidavit-in-reply. No affidavit-in-opposition, however, was filed pursuant to such directions.

On 5th May, 1988, another writ application was moved against the Calcutta Municipal Corporation by the petitioner, challenging the withholding of the sanction of building plan on the allegation of objection by the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976. On the said writ application an order was made directing the Calcutta Municipal Corporation to consider the application for sanction for building plan on merit without any reference to objection of the Urban Land Ceiling Authority. Accordingly, the Calcutta Municipal Corporation sanctioned the building plan on 16th May, 1988, and on 6th July, 1988, a notice was given to Calcutta Municipal Corporation under S. 398(4) of Calcutta Municipal Corporation Act, 1980 about commencing of erection of building and execution of work by the petitioner by demolition of existing one storied more than 80 years old building and construction of new building thereon.

7. On 15th May, 1989 the Calcutta Municipal Corporation was duly informed about the construction of building by the petitioner. It has been submitted on behalf of the petitioner that the total area of land with structure in the said premises as per the calculation of the respondents themselves is 2207.37 Sq. Metres. So far as the four dwelling units in the said premises are concerned the total area covered by the said buildings including land appurtenant as per S. 2(g) of the said Act of 1976 is 862 Sq. Metres. The land covered by horticulture is 488 Sq. Metres and the passage leading to the premises is 792 Sq. Metres. Therefore the total area covered by building including land appurtenant, horticulture and passage in the said premises are total 2142 Sq. Metres, under S. 4 of the said Act of 1976 every person is entitled to retain 500 Sq. Metres of vacant land. Therefore the total retainable area in the said property stands at 2642 Sq. Metres. It is needless to mention here that under S. 2(g) of the said Act of 1976 the vacant land does not include the land mainly used for the purpose of agriculture and as per the explanation A of S. 2(o) of the said Act of 1976, agriculture includes horticulture. Therefore according to the petitioner the land covered by horticulture to the extent of 488 Sq. Metres is excluded from the definition of vacant land. Further under S. 2(g)(i) of the said Act of 1976 land on which construction of a building is not permissible under the building regulations in force cannot be treated to be vacant land. Therefore in the present context since the passage measuring 792 Sq. Metres leading to the building is not a land on which construction of a building is permissible, the said passage cannot be treated to be a vacant land at all under the provisions of the said Act of 1976.

8. During the pendency of the writ application being CO. No.8213(W) of 1987 a notice was served upon the petitioner dated 23rd February, 1989 on 16th December, 1989 in suo motu Case No. 155 of 1987 under S. 9 of the said Act of 1976 and vested 959.45 Sq. Metres of the said property as excess vacant land. By the said notice the passage, horticulture including the single storied dwelling unit which was existing for last more than 80 years and on which new construction of building upon demolition has been made was sought to be vested. Immediately the petitioner moved a writ application being C.O. No. 1563I(W) of 1989 on 19th December, 1989 and ad interim order of the stay of the said notice was passed on 25th April, 1990, the respondents filed their affidavit-in-opposition of C.O. No. 15631(W) of 1989. The case of the respondents was inter alia that the notice under S. 6(2) of the said Act of 1976 was served by hanging outside the gate of the petitioner's premises that the passage is liable to be vested.

9. The writ application being C.O. No. 15631(W) of 1989 and C.O. No. 8213(W) of 1987 was heard together in this Court and by judgment and order dated 1st October, 1991 disposed of the writ application by quashing the notice dated 23rd February, 1989, and remanded the matter to the competent authority for initiation of a proceeding de novo under S. 6 of the said Act of 1976.

10. The present appeal has been preferred against the judgment and order passed in C.O. No. 8213(W) of 1987 heard analogously with CO. No. 15631(W) of 1989.

11. The question that arises in the instant appeal is if there is inherent lack of jurisdiction in initiating proceeding under the provisions of the said Act of 1976 in respect of the property in question. If so, was it proper for the learned single Judge to remand the matter to the competent authority for initiation of a proceeding de novo under S. 6 of the said Act of 1976? It has been urged on behalf of the appellant-petitioner that when allegations of mala fide has been made against the respondent No. 2 by name and respondent No. 2 did not deal with any such allegation such act of mala fide stands proved and the impugned proceeding for vesting is liable to be treated to have been vitiated by fraud on the statute. Learned Advocate in this connection relied upon the judgment and decision of the Supreme Court in the case of Asgar Ali Vs. District Magistrate Burdwan and Others, In that case it was held trial in case serious allegations of mala fide are made against any officer the particular officer against whom such allegations of mala fide have been made should swear an affidavit denying such allegations to repeal the same. Against the stay application filed in the appeal, an affidavit-in-opposition was filed by the respondents and the bias and mala fide conduct of the respondents was quite evident in the said affidavit. Although in the notice dated 23-2-1989 the respondents disclosed the existence of 2 dwelling units in the affidavit-in-opposition only 1 dwelling unit has been referred. That part of the horticulture has been excluded from exemption as the same is a private one. The horticulture is existing for more than 35 years as would be

evident from the letter dated 14-10-53. It has been submitted on behalf of the appellant that the 12" wide passage is the only ingress and egress of the said tandem plot. The U.L.C.R. authority in its order dated 23-2-89 sought to divide the passage vertically allowing the 6 feet wide passage to be retained by the petitioner and remaining 6 feet wide passage was shown in the drawing as vested. As a result, according to C.M.C. Act and the Rules, no building plan will be sanctioned in the said tandem plot of the petitioner in future for inadequacy of access. The U.L.C.R. Authority has no authority to damage or hamper the prospect of the property in question under the garb of vesting under the said Act. It may further be noted that in the event the passage is allowed to be vested in the manner indicated in the said plan referred to in the notice dated 23-2-89, no vehicle will be able to go into the said premises, far less any Ambulance or Fire Brigade. A school in the name of Alipore School of Music and Dance and Mickey Mouse Nursery School is operating in the said property for pretty long time and the requirement of Ambulance and Fire Brigade is out and out necessary for the purpose of the said institution. Over and above, if the petitioner, assuming but not admitting, admits the existence of vacant land in the said property and by exercise of option allows the U.L.C.R. Authority to vest the inside land and retains the passage exclusively which the petitioner can do under S. 6 of the said Act, the U.L.C.R. authority will be having no access in the property and, as such the whole proceeding for vesting stands infructuous in view of special characteristics of the property in question. It has further been submitted that the learned trial Judge totally ignored the aspect of mala fide which has been repeatedly canvassed in the writ application by the petitioner and in spite of the said allegation remains uncontroverted, the learned trial Judge threw the petitioner back to the selfsame authority who acted maliciously against the petitioner. The Supreme Court has held in the case of Ashok Kumar Yadav and Others Vs. State of Haryana and Others, that there will be violation of the principles of natural justice if a biased officer is entrusted to be a Judge of his own cause.

12. We have considered the respective submissions of the parties and the records produced before us. From the said records and the sketch plan and the drawing it appears that if the said common passage referred to therein vests there will be no other entrance to the main building. It also appears from the records that on the appointed day under and within the meaning of the said Act, the appellant held and owned the building with the dwelling units as described here-inbelow:--

(a) The four dwelling units/building covered by the land area measuring 862 Sq. Metres i.e. the land occupied by the building which were all constructed before the appointed day including land appurtenants (i.e. 498 Sq. Metres main two storied building, 249 Sq. Metres, single storied building both with land appurtenants which has been demolished and reconstructed 25 Sq. Metres Darwan's quarters and 90 Sq. Metres Garage and Servants Quarters).

(b) The land used since time immemorial for the purpose of horticulture/flower garden measuring 488 Sq. Metres.

(c) Passage leading to premises measuring 688 Sq. Metres.

13. There cannot be any dispute that the appellant resides in the extreme tendem plot and the private path/drivage (passage) measuring 625 Sq. Metres is the only access to the appellant's house. Without the said patty passage, the appellant has no other entry or entrance to the said building from anywhere. This private path passage is being used exclusively for the appellant's ingress and egress into the said building. Needless to stress, the said private path/ passage does not come within the sweep of the expression "vacant land" as defined in S. 2(q) read with S. 3 of the said Act. No construction is feasible, practicable and permissible on the said private path/passage exclusively used for the ingress and egress of the appellant into and from the said building. The private path/passage measures 688 sq. metres more or less.

14. The total land area according to the respondents as would appear from the impugned notice dated the 7th August, 1987 measures 2207.37 Sq. Metres, which includes the land occupied by the building, the land appurtenant to each of the buildings, dwelling units and servants' quarters, the said flower garden/ horticulture, the said private path/ passage itself measuring 688 Sq. Metres according to the impugned notice dated the 7th August, 1987 followed by the impugned notice dated 23-2-89.

15. If the said private path/passage and the flower garden which are being used as such since time immemorial even prior to the appointed day are not taken into account and excluded there is no question of serving the appellant with any notice under S. 4(9) of the said Act. Needless to state the provisions of S. 4(9) of the said Act shall apply to only when and if a person holds vacant land in excess of the ceiling limit i.e. exceeding 500 Sq. Metres. In other words, if a person does not hold any vacant land exceeding the ceiling limit he is not attracted to within the sweep of the said sub-section. The expression "vacant land", having an exclusive meaning and definition, land mainly used for the purpose of agriculture, which includes horticulture and the land on which no construction can be made under the Building Regulations .of the Calcutta Corporation which applies to the appellant is not and cannot be vacant land. The said flower garden/ horticulture and the private path together, on the latter, no construction of building is feasible and permissible, if excluded, which is to be excluded in law, the appellant does not and cannot hold any vacant land exceeding 500 sq. metres on the respondents "own calculations and, as such, the appellant is not hit by the provisions of sub-section (9) of S. 4 of the said Act.

16. In the circumstances aforesaid the said impugned notice under sub-sec. (9) of S. 4 of the said Act became and is consequently bad and null and void and is liable to be quashed.

17. The position is that indeed the impugned notice purportedly noticed under S.

9 of the said Act purported to be dated 23rd February, 1989 kept up the sleeves and served only the 16th December, 1989, which became the subject-matter of the second writ petition being C.O. No. 15631(W) of 1989, has been issued on the score of the said notice under sub-sec. (9) of S. 4 of the said Act, which, it is contended by the respondents has merged into the said final notice impugned issued under S. 9 of the said Act. On a plain reading of the provisions of Ss. 6, 7, 8 and 9 of the said Act, it would be clear that S. 9 is attracted to only when persons holding vacant land in excess of ceiling limit, have filed statement within the meaning of S. 6 of the said Act, whereafter the Competent Authority, after the disposal of the objections, if any, received under sub-sec. (4) of S. 6 of the said Act, would be entitled to issue the final notice. This position is also crystal clear when the provision of S. 9 are read with Rules 3 and 5 of the related Rules of 1976. In the instant case, on the aforesaid calculations, the question of the appellant's filing any return under S. 6 of the said Act does not arise at all and has never occasioned, and the appellant has not filed any return whatsoever. Therefore, the competent authority has always lacked in and suffered and suffers from the manifest want of jurisdiction in issuing the said notice under S. 9 of the said Act.

18. In the aforesaid view of the matter, as there was no legal authority for lack of competence for the issuance of the said notice under sub-sec. (9) of S. 4 of the said Act or for that matter of the said notice under S. 9 of the said Act, which can only be issued for and against persons having filed the statement/ return under S. 6 of the said Act followed by disposal of the objection under sub-sec. (4) of S. 8 of the said Act, the competent authority was not competent to take recourse to the provisions of S. 9 of the said Act, and the remedy, if at all, lay only in taking recourse to the provisions of S. 18 of the said Act, and not otherwise, which is very clear from the explanation to S. 4(11) of the said Act.

19. Moreover, it appears that N. K. Mitra, J. having considered the aforesaid objections of the appellant passed the order dated 23rd March, 1990 to restrain the respondents from giving any effect or further effect to the impugned notice under S. 9 of the said Act and directed the respondents to hold further inspection in respect of the said pre-mises through an Inspector other than the present respondent No. 3.

20. The respondents have not challenged the said order of March 23, 1990 higher up. Consequently, the said order is binding upon the respondents.

21. Subsequent to March 23, 1990 or thereafter, there has been no inspection of the said premises with the result that the said impugned notice u/s 9(4) of the said Act was and is a mere (sic) of the concerned respondents including the respondent No. 3.

22. That the respondent competent authority served a notice upon the appellant on 16-12-1989 under S. 9 of the Urban Land (Ceiling and Regulation) Act, 1976 under Memo No. 58 dated 23-2-1989 in suo motu case No. 155 of 1987 and

served upon the appellant the final statement of vesting of 959 square metres of land in the said premises, in spite of the fact that the notice dated 7-8-87 which is the seed of the said notice dated 23-2-89 was subjudice before this Court and neither any affidavit-in-opposition nor any denial of statements made in the writ petition was made by the respondents.

23. The appellant immediately on 19-12-89, moved another writ application before this Court being C.O. No. 15631(W) of 1989 challenging the said Act.

24. That by an order dated 19-12-89 passed in C.O. No. 15631(W) of 1989 the Hon'ble Mr. Justice N. K. Mitra was pleased to pass an interim order restraining the respondents from giving any effect or further effect to the notice dated 23-2-1989.

25. On March 23, 1990 the C.O. No. 8213(W) of 1987 being the first writ application came up for hearing before Justice N. K. Mitra, J. and after hearing the petitioner, the Court was pleased to pass an order on 23-3-1990 in terms of the prayer to the said writ application. Prayer to the said writ application is quoted hereunder:--

"Interim order restraining the respondents from giving any effect or further effect to the impugned order and to hold further inspection in respect of the said premises through an Inspector other than respondent No. 3."

26. That the said writ application being C.O. No. 8213(W) of 1987 and the writ application being C.O. No. 15631 (W) of 1989, came, up for hearing analogously before Justice Mohitosh Mazumder J. as His Lordship then was on 1-10-91 and the Court did not at all decide the C.O. No. 8213(W) of 1987. The Court even did not consider that by virtue of non-filing of any affidavit-in-opposition in C.O. No. 8213(W) of 1987 the writ application should succeed and Rule should be made absolute. Further, the Court did not consider that in spite of order dated 23-3-1990, passed in C.O. No. 8213 (W) of 1987, the respondents should not have relied on the inspection report of respondent No. 3 and there cannot be any fair adjudication unless an independent and impartial person holds an inspection in the premises in. question.

27. By judgment and order dated 1-10- 1991, passed in both the writ applications, i.e. C.O. No. 8213(W) of 1987 and C.O. No. 15631(W) of 1989, the Court was pleased to dispose of both the matters by holding inter alia that the competent authority should hold fresh hearing from the stage of S. 6 of the said Act, upon giving notice to the appellant and providing the opportunity of hearing to the appellant and not to give any effect or further effect to the notice under S. 9 of the Act.

28. Under such circumstances, it appears to us that the order passed by the learned single Judge remanding the matter to the Competent Authority with the directions to hold afresh hearing from this stage of S. 6 of the said Act upon giving notice to the petitioner and providing the opportunity of hearing to the

appellant-petitioner was not proper in the facts and circumstances of the case.

29. Accordingly, the appeal is allowed and the said judgment and order by the learned Judge dated 1-10-1991. The writ petitioners, accordingly, should succeed. The order directing the respondents not to give effect to Memo No. 283 dated 7-8-1987 being Annexure "B" to the writ petition in Co. 8213(W) of 1987 and Memo No. 58 dated 23-2-1989 being Annexure "D" to the writ petition in Co. 15631 (W) of 1989 stand quashed and set aside. The respondents will issue "No Objection Certificate" within four weeks from the date of communication of this order.

Ajit Kumar Sengupta, J.

30. I agree.

31. Appeal allowed.