
(2016) 06 BOM CK 0005

In the Bombay High Court

Case No : Writ Petition No. 1576 of 1996

Ms Fatima Razak Shaikh

APPELLANT

Vs

The Municipal Commissioner of Greater Bombay

RESPONDENT

Date of Decision : 17-06-2016

Acts Referred:

Citation : (2016) 4 AIRBomR 504

Hon'ble Judges : A.S. Oka and C.V. Bhadang, JJ.

Bench : Division Bench

Advocate : Mr. Pravin Samdani, Senior Counsel a/w Mr. Hemant Mehta i/b Mehta & Co, for the Appellant; Ms Geeta Joglekar, Advocate, for the Respondent

Final Decision : Allowed

Judgement

A.S. Oka, J.—(As Bhadang, J. is not available at Mumbai, signed Judgment is pronounced by A.S. Oka, J as per Rule 296 (iii) of the Bombay High Court Original Side Rules).

The petitioners who are claiming to be the owners of a plot of land in Mumbai which is more particularly described in Exhibit-A to the petition are seeking a writ of mandamus on the basis of a notice under section 127 of the Maharashtra Regional and Town Planning Act, 1966 (for short the MRTP Act"). A writ of mandamus is prayed for declaring that the reservation on the plot subject matter of this petition (for short the said plot") provided in the sanctioned development plan has lapsed.

2. The development plan for the city of Mumbai was sanctioned under section 31 of the MRTP Act on 7th July 1967. The said plot was shown reserved for play ground and development plan road in the said sanctioned development plan. On 15th March 1979, a declaration dated 20th January 1979 was published by the State Government under the provisions of section 6 of the Land Acquisition Act, 1894 (for short the said Act of 1894") for acquisition of the said plot. According to the specific case of the Mumbai Municipal Corporation which is the Planning

Authority for the city of Mumbai, the acquisition proceedings initiated on the basis of the said notification lapsed. It appears that revised development plan for the city of Mumbai was sanctioned with effect from 4th May 1993 under sub-section 1 of section 31 read with section 38 of the MRTP Act under which the said plot was again shown reserved for play ground.

3. Before the revised development plan came into force, a notice dated 1st July 1992 under section 127 of MRTP Act was issued by the Advocate for petitioners to the Commissioner of the Municipal Corporation calling upon the Municipal Corporation to take steps for acquisition of the said plot. On 21st September 1992, the notice was replied by the Executive Engineer (Development Plan) of the Municipal Corporation by stating that the Municipal Corporation has already requested the District Collector vide letter dated 29th August 1992 to initiate acquisition proceedings in accordance with sub-sections (2) and (4) of section 126 of the MRTP Act. A reminder was issued by the Advocate for the petitioner to the Municipal Commissioner on 26th March 1993 on the basis of the earlier notice under section 127 of the MRTP Act. To the said reminder, there was a reply dated 27th April 1993 issued by the Executive Engineer of the Municipal Corporation to the Advocate for the petitioners informing them that by a letter dated 29th August 1992 requisition has been submitted to the Collector to initiate acquisition proceedings.

4. The present petition was lodged on 15th July 1996. Till that date, the acquisition proceedings were not initiated and therefore, a relief was sought in the present writ petition on the basis of the aforesaid notice under section 127.

5. There is a reply dated 30th April 2010 filed by Shri Narendra S. Pagare, the Assistant Engineer (Development Plan) on behalf of the Mumbai Municipal Corporation which is the Planning Authority. In the reply, it is accepted that the acquisition on the basis of the notification dated 20th January 1979 issued under section 6 of the said Act of 1894 which was published on 15th March 1979 has lapsed. In the affidavit, reliance is placed on the requisitions made from time to time to the District Collector for initiating acquisition proceedings. It is further submitted that a prayer for deleting reservation in the revised sanctioned development plan of 1993 cannot be considered in this writ petition as the notice under section 127 is of the earlier date.

6. The learned senior counsel appearing for the petitioners submitted that it is the specific stand of the Mumbai Municipal Corporation that the proceedings on the basis of the declaration published on 15th March 1979 had lapsed. He submitted that in the year 1979, clause(c) of sub-section (1) of section 126 of the MRTP Act was not on the statute book. He relied upon the provisions of section 126 which were in force as on 15th March 1979. He submitted that there was no provision under the unamended section 126 of the MRTP Act on par with clause(c) of sub-section (1) of section 126 as amended providing for the vesting of the reserved land. In any case, the said acquisition has admittedly lapsed. He submitted that there is no dispute about the service of notice under section 127

on 1st July 1992 and the fact that a notification for acquisition was not issued within the time of six months stipulated under the unamended section 127. It is an admitted position and therefore, on 1st January 1993 in view of section 127 of the MRTP Act, the reservation of the said plot had lapsed. He submitted that there was a reservation for the play ground and Development Plan road in the sanctioned development plan of the year 1967 and in the revised sanctioned development plan which came into force on 4th May 1993, the reservation was for the same public purpose. He urged that in view of the settled law, after lapsing of the reservation for the same purpose in the original sanctioned development plan, the same reservation could not have been provided in the revised sanctioned development plan. He pointed out that during the pendency of this petition, on 16th July 2011, a notification under sub-section (4) of section 126 of the MRTP Act read with section 6 of the said Act of 1894 was issued on the basis of the reservation for the play ground provided in revised development plan brought into force on 4th May 1993. He urged that as the reservation has already lapsed, the said notification which is placed on record along with an additional affidavit of the petitioners is inoperative.

7. The learned counsel for the Mumbai Municipal Corporation submitted that the acquisition on the basis of the notification published on 15th March 1979 never lapsed as section 11A of the said Act of 1894 was not applicable to the acquisition under the MRTP Act and in any event, section 11A of the said Act of 1894 was incorporated on the statute book on 24th September 1984. Her submission is that in view of the objection raised by the petitioners, fresh proposals were repeatedly submitted by the Municipal Corporation to the State Government for initiating acquisition proceedings but the State Government has not taken any steps. Her submission is that in fact, on the basis of the notification published on 15th March 1979, there was a vesting in the Mumbai Municipal Corporation and therefore, Mumbai Municipal Corporation cannot be divested now of the said plot.

8. We have carefully considered the submissions. Section 126 (unamended) as existed on 15th March 1979 which is reproduced by the petitioners in the documents tendered across the bar at the time of hearing reads thus:

S. 126 Acquisition of land required for public purposes specified in plans.

(1) When after the publication of a draft Regional Plan, a development or any other plan or town planning scheme, any land is required or reserved for any of the public purposes specified in any plan or scheme under this Act at any time the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority may except as otherwise provided in Section 113-A, acquire the land, either by agreement or make an application to the State Government for acquiring such land under the Land Acquisition Act, 1894.

(2) On receipt of such application, if the State Government is satisfied that the land specified in a application is needed for the public purpose therein specified,

or if the State Government (except in cases falling under Section 49 (and except as provided in Section 113-A) itself is of opinion that any land in any such plan is needed for any public purpose, it may make a declaration to that effect in the Official Gazette, in the manner provided in Section 6 of the Land Acquisition Act, 1894, in respect of the said land. The declaration so published shall, notwithstanding anything contained in the said Act, be deemed to be a declaration duly made under the said section:

Provided that, no such declaration shall be made after the expiry of three years from the date of publication of the draft Regional plan, Development plan or any other plan).

(3) On publication of a declaration under the said Section 6, the Collector shall proceed to take order for the acquisition of the land under the said Act, and the provisions of that Act shall apply to the acquisition of the said land, with the modification that the market value of the land shall be"

9. Sub-section (1) of section 126 as amended with effect from 25th March 1991 by Maharashtra Act No. 10 of 1994 reads thus:

"(1) When after the publication of a draft Regional Plan, a Development or any other plan or town planning scheme, any land is required or reserved for any of the public purposes specified in any plan or scheme under this Act at any time the Planning Authority, Development Authority or as the case may be, [any Appropriate Authority may, except as otherwise provided in section 113A] [acquire the land,-

(a) by agreement by paying an amount agreed to, or

(b) in lieu of any such amount, by granting the land-owner or the lessee, subject, however, to the lessee paying the lessor or depositing with the Planning Authority, Development Authority or Appropriate Authority, as the case may be, for payment to the lessor, an amount equivalent to the value of the lessor's interest to be determined by any of the said Authorities concerned on the basis of the principles laid down in Development Rights (TDR) against the area of land surrendered free of cost and free from all encumbrances, and also further additional Floor Space Index or Transferable Development Rights against the development or construction of the amenity on the surrendered land at his cost as the Final Development Control Regulations prepared in this behalf provide, or

(c) by making in application to the State Government for acquiring such land under the Land Acquisition Act, 1894, and the land (together with the amenity, if any, so developed or constructed) so acquired by agreement or by grant of Floor Space Index or additional Floor Space Index or Transferable Development Rights under this sections or under the Land Acquisition Act, 1894, as the case may be, shall vest absolutely free from all encumbrances in the Planning Authority, Development Authority, or as the case may be, any Appropriate Authority.]

10. Now, under clause(c) of sub-section (1) of section 126, there is an express

provision for vesting of the reserved land in the Planning Authority or the Acquiring Authority on the date of making an Application under clause (c) of sub-section (1). That is how the amended sub-section (1) has been interpreted by the Apex Court in the case of *Manohar Joshi v. State of Maharashtra and others*, (2012) (3) SCC 619. There was no such provision on 15th March 1979. The said decision interprets clause(c) of sub-section (1) of section 126 as amended with effect from 25th March 1991. Therefore, the said decision will not be applicable to the facts of this case.

11. We have perused the notice dated 1st July 1992 addressed by the petitioners' Advocate under section 127 of the MRTP Act. The notice is perfectly in accordance with section 127 which was admittedly received by the Mumbai Municipal Corporation. Admittedly, a declaration under sub-sections (2) or (4) of section 126 of the MRTP Act read with section 6 of the said Act of 1894 was not issued within a period of six months from the date of service of the said notice. On expiry of period of six months from the date of service of the said notice, the reservation on the said plot lapsed. When the said notice was issued, section 127 provided for period of six months. The Apex Court in the case of *Shrirampur Municipal Council v. Satyabhamabai Bhimaji Dawkher and others*, (2013) 5 SCC 627 held that the steps taken towards acquisition can be said to have been really commenced when the State Government takes the action of issuing a declaration under section 6 of the said Act of 1894. In the present case, admittedly such notification/declaration was not issued within six months. Therefore, by virtue of notice dated 1st July 1992, the reservation on the said plot under the sanctioned development plan of the year 1967 lapsed.

12. As far as the revised development plan which came into force on 4th May 1993 is concerned, the same reservation for play ground has been provided therein on the said plot. The revised development plan was made in exercise of powers vested under section 38 of the MRTP Act. On this aspect, it will be necessary to make a reference to the decision of a Division Bench of this Court in the case of *Baburao Salokhe v. Kolhapur Municipal Corporation and others*, 2003 (3) Mh.LJ 820 In the said decision, the Apex Court observed that the reservation which has lapsed in terms of section 127 cannot be automatically revived by taking recourse to section 38. In paragraph 18, the Division Bench held thus:

18. The legal position as regards MRTP Act on the basis of aforesaid observations made by Apex Court in *Bhavnagar University* emerges that by imposition of a statutory obligation under section 38 on the part of the State or the appropriate authority to revise the development plan the rights of the owners accrued in terms of section 127 are not taken away. Section 38 of MRTP Act, in our opinion, does not and cannot be read to mean that substantial right conferred upon the owner of the land or the person interested under section 127 is taken away. In other words, section 38 does not envisage that despite the fact that in terms of section 127, the reservation lapsed, only because of a draft revised development plan or final revised development plan is made would automatically result in

revival of reservation that had lapsed. If the reservation of the petitioner's land for the purposes of garden had lapsed and as we found in fact has lapsed in 28-2-1992, because of draft revised plan made in the year 1992 and thereafter final revised development plan sanctioned in the year 1999 would not revive the lapsed reservation."

(emphasis added)

In fact, another Division Bench in the case of *Kishor Gopalrao Bapat v. State of Maharashtra* and another, 2006 (1) All MR 232 held thus:

"12. The above-referred observations of this Court make it evident that once reservation is lapsed in view of contingencies mentioned in section 127 of the MRTP Act, the necessary consequence under the scheme of section 127 of the MRTP Act must follow. The land which is released from the reservation becomes available to the owner for the purpose of development as otherwise permissible in the case of adjacent land under the relevant plan. This right which is conferred or accrued to the owner of the land due to lapsing of reservation cannot be taken away by the Planning Authority by exercising power under section 38 of the MRTP Act."

13. Therefore, the lapsing of reservation on the basis of the notice dated 1st July 1992 will hold the field notwithstanding the continuation of the same reservation in the revised development plan. Hence, the subsequent notification dated 16th July 2011 which proceeds on the footing that the reservation still continues is of no legal effect at all as on the basis of lapsed reservation, acquisition in accordance with section 126 of the MRTP Act could not have been commenced.

14. As far as the earlier acquisition on the basis of the notification published on 15th March 1979 is concerned, in the affidavit of Shri Narendra S. Pagare, the Assistant Engineer (Development Plan) filed on behalf of the Mumbai Municipal Corporation, a specific stand is taken in clauses(c) and (d) of the paragraph 5 that the acquisition proceedings on the basis of the notification dated 15th March 1979 lapsed. Moreover, there was no vesting on the basis of the said notification. As stated earlier, subsequent revised development plan is of no avail to the Mumbai Municipal Corporation. Accordingly, the petition must succeed. However, wider prayers made in this petition cannot be granted. If the petitioners have lost possession of the land in question, it is for them to take out appropriate proceedings in that behalf.

15. Accordingly, we pass the following order:

(I) The reservation imposed on the plot of land more particularly described in Annexure A to the petition under the development plan sanctioned on 7th July 1967 stands lapsed. Accordingly, same reservation imposed by the sanctioned revised development plan with effect from 4th May 1993 is inoperative. Consequently, the notification dated 16th January 2011 issued by the Additional Collector of Mumbai Suburban District under sub-section (4) of section 126 of the

MRTTP Act in respect of the said plot is of no legal effect whatsoever and further proceedings on the basis of the same shall not continue . Hence, the said plot of land shall be available to the owner thereof for the purposes of development as otherwise permissible in the case of adjacent land in the prevailing sanctioned development plan;

(II) We make it clear that this Judgment and Order will not preclude the State Government or the Mumbai Municipal Corporation from acquiring said plot of land in accordance with the law of compulsory acquisition;

(III) All contentions of the petitioners in respect of fresh acquisition proceedings, if any, are kept open;

(IV) Rule is accordingly made absolute on above terms with no order as to costs.