
(2002) 08 BOM CK 0072

In the Bombay High Court

Case No : Writ Petition No's. 444, 1295, 1634, 2465 and 2758 of 2001 and 319 and 646 of 2002

Naman Developers Pvt. Ltd. and Another, Lokhandwala Builders, Shri Randhir Singh Bhalla and Others, BPM Industries Limited and Another, Shri Prabhakar A. Mhaslikar and Malkani Construction Co.

APPELLANT

Vs

Municipal Corporation of Greater Mumbai and Others
 Nagari Nivara Parishad and Others Vs Brihan Mumbai Mahanagar Palika and Others

RESPONDENT

Date of Decision : 19-08-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Mumbai Municipal Corporation Act, 1888 — Section 217, 218(D)

Citation : (2002) 4 ALLMR 750 : (2002) 6 BomCR 561

Hon'ble Judges : R.M. Lodha, J;D.B. Bhosale, J

Bench : Division Bench

Advocate : Aspi Chinoy and Preeti Shah, in Writ Petition No. 2465 of 2001, Y.E. Moomen and M.B. Gawde, in Writ Petition No. 2758 of 2001, V.A. Thorat and Seema Sarnaik, in Writ Petition No. 1634 of 2001, Aspi Chinoy, Shyam Diwan, Paresh Shah, Payal Daftari and Shefali Desai, instructed by Shah and Sanghvi in Writ Petition No. 1295 of 2001, N.G. Thakkar, Milind Sathe and Tanvi Gandhi, instructed by Markand Gandhi and Co. in Writ Petition No. 444 of 2001, Bipin Joshi, in Writ Petition No. 319 of 2002 and A.Y. Bookwala and Tushar Bhavsar, instructed by V. Mistry and Co. in Writ Petition No. 646 of 2002, for the Appellant; K.K. Singhvi and N.A. Shaikh, instructed by S.J. Billimoria in Writ Petition Nos. 444, 1295, 1634, 2465 and 2758 of 2001 and 319 and 646 of 2002, for the Respondent

Judgement

R.M. Lodha, J.—This group of seven writ petitions was heard together as it involved common issue. The common issue being: "Whether the Assessor and Collector in the office of Municipal Corporation of Greater Bombay has acted without jurisdiction by fixing rateable value of land under construction thereby not following the law laid down by the Apex Court in the The Municipal

Corporation of Greater Bombay Vs. Polychem Ltd., or the petitioners should be relegated to the statutory remedy of appeal u/s 217 of the Mumbai Municipal Corporation Act, 1888 (for short, MMC Act, 1888) and question the legality, justification and/or correctness of fixation of rateable value of land under construction before appellate forum.

2. For the sake of convenience and brevity we refer to the facts obtaining in Writ Petition No.2465/2001. Pursuant to the Agreement for Sale dated 29.10.1993, Naman Developers Private Limited (the petitioner no.1) purchased property comprising of land together with bungalow, building and structures standing therein at Kandivali (West), Mumbai. The said property had the then bearing C.T.S. nos. 403, 404, 405, 409 and 410. The conveyance in favour of the petitioner no.1 for the aforesaid property was executed on 7.3.1996. After relocation, amalgamation and subdivision of the said property, new C.T.S. nos. of the said property are 403A, 403B, 403C, 403D and 403E. The first commencement certificate was obtained by the petitioner no.1 from Mumbai Municipal Corporation of Greater Bombay on 7.7.1994 after the agreement of sale was executed in their favour on 29.10.1993 and old and dilapidated structures were demolished for the period between 1994 and 1997. The construction work commenced in the month of September 1995. Prior to 31.3.1995 the entire property had a rateable value fixed at Rs.1335/-. For the period from 1.4.1995 to 31.3.1996 the assessor divided the plot notionally into two parts, one which was lying vacant and the other which was being built upon. The rateable value was fixed at Rs.1335/- for land lying vacant and the rateable value of the land which was under construction was fixed at Rs.2,53,140/-. The said rateable value was maintained for the year 1.4.1996 to 31.3.1997. Vide communication dated 29.3.1997 the Assessor and Collector, R/South Ward intimated that rateable value for land under construction shall be increased to Rs.11,98,200/- from 15.3.1997. The petitioner no.1 lodged complaint against fixation of the said rateable value on 31.3.1997 by writing to the concerned Assessor and Collector that rateable value fixed was on higher side and needed to be reduced to the minimum. Pursuant to the lodging of the complaint, the petitioner no.1 was issued notice on 2.8.1997 for hearing on 28.8.1997. The concerned Assessor and Collector, after hearing the party reduced the rateable value for land under construction to Rs.10,40,690/- with effect from 15.3.1997. While rateable value for land which was lying vacant was fixed at Rs.885/-. The petitioners were called upon to make payment of the due property tax for the land under construction amounting to Rs.10,40,690/- together with penalties but when such amount was not paid, warrant of attachment was ultimately issued. The petitioners, it may be noted, prayed to the authorities for payment of property taxes by way of installments. By communication dated 14.3.2001 the petitioner no.1 was allowed to pay the balance amount of property taxes in three monthly equal installments though the prayer of the petitioners was to grant them quarterly installments for payment of arrears of property taxes and the penalty. The petitioners did not pay the complete property taxes as demanded

and instead by letter dated 27.9.2001 addressed to Joint Municipal Commissioner set up the case that the property is the land under construction which is not assessable to rateable value and no property tax can be levied or charged in respect thereof on the basis of letting value thereof. The petitioners called upon the Joint Municipal Commissioner to withdraw the notices issued to them from time to time and further asked him to not to take any steps to attach or auction petitioners properties. They also claimed refund of the excess payment made by them. Having not accepted the case set up by the petitioners in their letter dated 27.9.2001, the petitioners have filed the present writ petition inter alia for the reliefs that it be declared that property belonging to the petitioner no.1 being land with partially constructed structures thereon cannot be assessed for property tax on the basis of letting value being land under construction; for declaration that the assessment of the property taxes, orders for penalty and demands for recovery of amount from 1.4.1995 onwards in respect of the land under construction are illegal and contrary to law and for direction to respondents to cancel all notices and demands and to not to make further assessments or recovery so long as property land is under construction.

3.The respondents are vehemently opposing the case of the petitioners and have set up the defence that the land which is being built upon is assessed as a plot of land only and reference to land under construction is only to identify land which is being built upon from the land which is existing vacant simplicitor. It is the specific case of the respondents that while fixing rateable value the construction has not been taken into consideration and the land has been rated as a plot of land. It is stated that the rateable value has been fixed as per the tabulated ward report. According to the respondents, under the principles of rating, once the identity of the plot undergoes change, the rateable value is bound to undergo the change and the respondents are entitled to fix the rateable value as per the current letting rates. In relation to the facts obtaining in writ petition no.2465/2001, it is stated that the land bearing C.T.S. nos. 403, 404 and 410 purchased by petitioner no.1 consisting of full of trees and was assessed at Rs.1125/net per annum (NPA). The owners of the land amalgamated two more CTS nos. i.e. 405 and 409 with their sub-numbers on which there existed 12 separate structures and the total area of these five CTS numbers became 25645.10 sq.mtrs. These five CTS numbers were brought under one unit vide revised sanctioned plan dated 15.3.1997. The owners demolished the existing structures and they also cut some trees and shifted reservations to the boundary side of the plot and made a buildable plot area of 7292.14 sq.mtrs. and started construction work of RCC building. In view thereof, the respondent no.2 i.e. the Assessor and Collector notionally subdivided the land into land under construction from the remaining land comprising of area for playground, area for recreation ground and vacant land. The reservation and the amenity spaces (play ground and recreation ground) were nominally assessed at Rs.10/- per sq.mtrs. The rateable value of land under construction as land was fixed at Rs.11,98,200/- net per annum while the rateable value of vacant land was fixed

at Rs.885/- n.p.a. It is submitted that for land under construction i.e. land being built up rateable value has been fixed as land; it is higher because of potentiality and the current letting rates in the area. The respondents have also set up the plea that though the rateable value for land under construction is legal and justified but if the petitioners intend to question the same, they have alternative and effective remedy u/s 217 of MMC Act, which having not been availed of, writ petition is liable to be dismissed.

4. As a matter of fact we were given to understand by the learned counsel appearing for petitioners in the matters that as the question raised in this group of petitions is a question of law, reference to facts of individual case is not necessary and accordingly we do not deem it necessary to narrate the facts of each case for consideration of the issue referred to hereinabove.

5. Mr. Aspi Chinoy, learned senior counsel who led the arguments on behalf of the petitioners forcefully submitted, as he always does, that fixation of rateable value of land under construction is impermissible being in teeth of the judgment of the Apex Court in *Polychem (supra)*. The learned senior counsel extensively referred to the judgment of the *Polychem* and submitted that the ratio laid down by the Apex Court in *Polychem* is that until the building is completed or construction is complete to such an extent that at least a partial notice of completion is given, land for the purpose of rating can only be treated as vacant land and whole land is to be valued for the purpose of rating in the relevant year as vacant land just as it was being done in the period immediately preceding Mr. Chinoy, the learned senior counsel submitted that *Polychem* has been followed by this Court in *Rialto Co-operative Housing Society Ltd. vs. Municipal Corporation of Greater Bombay & others*, 1998(1) Bom.C.R. 397 and it was laid down in *Rialto* that land under construction has to be treated as vacant plot of land and rateable value could be fixed for the relevant period as vacant land only. Relying upon the judgment of the Apex Court in *East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, and Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, , the learned senior counsel submitted that by not following the law of the land as propounded by the Apex Court in *Polychem*, the Assessor and Collector has acted without jurisdiction and that must be corrected in extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, even if the petitioners can be said to have alternate remedy of appeal u/s 217 of MMC Act, 1888. The learned senior counsel also referred to three orders passed by the learned Single Judge of this Court where this Court interfered under Article 226 of the Constitution when the levy of property tax was found without any authority of law. Mr. Chinoy referred to the order dated 12.7.1999 passed in Writ Petition no.1142/1999 - *Nalva Metal and Alloys Ltd. & ors. vs. Municipal Corporation of Gr. Mumbai & ors.*, the order dated 13.10.1999 in Writ Petition No.2054/1999-*Bombay Gas Co. Ltd. & ors. vs. Municipal Corporation of Gr. Bombay & ors.* and the order dated 21.11.2000 in Writ Petition no. 2148/2000 *Aravali Co-operative Society Ltd. vs. Municipal Corporation of Gr. Bombay & ors.*

6. The learned senior counsel and the learned counsel appearing for petitioners in various petitions adopted the contentions advanced by Mr. Aspi Chinoy.

7. Refuting the submissions of the learned senior counsel for the petitioners, Mr. K. K. Singhvi, the learned senior counsel appearing for the respondents, on the other hand with equal force, submitted that the rateable value of land under construction has been fixed as vacant land only and, therefore, the contention of the learned senior counsel for the petitioners that the fixation of rateable value of land under construction is in contravention of law laid down by the Apex Court in *Polychem*, is wholly misconceived. Mr. K.K. Singhvi, submitted that it is always open to the Assessing Authority to value the land under construction for the purposes of rating as vacant land at a higher rate than the land which is not under construction. According to him, law only requires that land under construction must be treated as vacant land for the purposes of fixation of rateable value. He reiterated that the nomenclature of land under construction is only for the purpose of identifying the land which is under construction in contradistinction to the land upon which no construction activity is going on and nothing beyond it. The learned senior counsel submitted that the Apex Court in *Polychem* has held that the land upon which a building was under construction should be rated in the same way as vacant land and that is what has been done by the Assessor and, therefore, it cannot be said that the Assessor and Collector committed any error of jurisdiction. Referring to *Rialto* (*supra*) Mr. K.K. Singhvi, the learned senior counsel, submitted that in the said case the case of Corporation was that land under construction cannot be treated as vacant land and this Court in the light of the judgement of the Apex Court in *Polychem*, held that land under construction for the purpose of rateable value has to be treated as vacant land and, therefore, the assessment of land under construction other than vacant land was not justified. The learned senior counsel submitted that Section 217 of the MMC Act, 1888 provides efficacious statutory remedy of appeal to a aggrieved party who is not satisfied with legality and correctness of rateable value and the petitioners having not availed of alternative statutory remedy u/s 217 are not entitled to invocation of extraordinary jurisdiction. The learned senior counsel also referred to the conduct of the petitioners which in his opinion was sufficient to disentitle them from grant of relief by this Court under Article 226 of the Constitution of India.

8. We have given our thoughtful consideration to the rival submissions of the learned senior counsel appearing for parties. Since the principal contention of the learned senior counsel for the petitioners is that the fixation of rateable value of the land under construction is without jurisdiction being in contravention of the law laid down by the Apex Court in *Polychem*, we must examine what constitutes the decision of the Apex Court in *Polychem* and what it is that is actually binding. The company M/s. *Polychem Ltd.* was the owner of land admeasuring 6652 sq. yds. Out of which, the piece of land admeasuring 450 sq. yds. was deducted for having fallen within the set back line. Thus remained area of land admeasuring 6202 sq. yds. Out of that land construction started on 1060 sq. yds. at the

relevant time whilst the area of land admeasuring 5142 sq.yds. was lying vacant during the period under consideration. The Assessor and Collector determined the market value for whole land as Rs.62020/ at Rs.10/- per sq. yds. He then calculated the hypothetical rent by taking a rate of interest of 3.1/2% per annum as the reasonable return on the said value and accordingly the hypothetical annual rental value came to Rs.2170/-. From 1.1.1962, the Assessor divided the plot notionally into two parts: (i) land of 1060 sq. yds. which was being built upon and (ii) the other of 5142 sq. yds which was lying vacant. He then assessed the probable market value of the plot which was being built upon as Rs.10,6000/- at Rs.10/per sq. yds. but as he considered it better developed, he fixed 5% p.a. interest as a reasonable return on it for determining its hypothetical rent which came to Rs.530/-. For the vacant land he valued at the same rate, but the annual rate of interest to determine reasonable return was taken as 3.1/2% only as was done previously for the whole land. Polychem aggrieved by the Assessors fixation of rateable value, appealed to Small Causes Court without success. The Company then appealed to High Court u/s 218 (D) which was summarily rejected by the learned Single Judge. On a further appeal, the Division Bench of this Court held that part of the land i.e. land admeasuring 1060 sq. yds. which was being built upon was not rateable at all as no tenant could or would take the property in that condition. The Division Bench thus applied the "doctrine of sterility". Dissatisfied with the decision of Division Bench, the Municipal Corporation of Greater Bombay went to the Apex Court. After surveying the relevant provisions of MMC Act, 1888 and the various judgements cited at bar, the Apex Court set aside the view of Division Bench in so far as applicability of doctrine of sterility was concerned. The Apex Court held that so long as building was not completed or constructed to such an extent that at least a partial completion notice could be given so that the completed portion can be occupied and let, the land can, for the purposes of rating, be only equated with or treated as vacant land. It is only when the building which is being put up is in such a state that it is actually and legally capable of occupation that the letting value of the building can enter into the computation for rating. The Apex Court observed that though under the definition of land, three kinds of land namely, land, land under construction and the building are covered yet for the purpose of rating only two categories i.e. (i) land and (ii) building are recognised under law and, therefore, all land must fall in one of these categories for the purposes of rating and not outside. With regard to land under construction, the Apex Court ruled that the land upon which a building was under construction could and should be rated as the same way as vacant land. Accordingly, the Apex Court sent the matter back to the Assessor and Collector of Bombay with regard to 1060 sq. yds which was being built upon and directed that the whole land be valued for the purposes of rating in the relevant year as vacant land just as it was being done in the period immediately preceding the year 1962. The Polychem is authority for the proposition that the land upon which the building is under construction should be rated in the same way as vacant land and that is ratio of the case. Mr. Chinoy, learned senior counsel, stoutly relied upon the

direction given by the Apex Court in para 30 of the report, "We send back the case to the Assessor and Collector of Bombay municipal Corporation and direct that the whole land will be valued, for purposes of rating in the relevant year, as vacant land, just as it was being done in the period immediately preceding 1962." This direction is what it decides between the parties and not generally to be ratio decidendi. Besides what is directed by the Apex Court is that rating of the whole land must be valued as vacant land in the relevant year as was done immediately in the preceding year but it cannot be deduced from the aforesaid direction that the whole vacant land shall be valued for the purposes of rating in the relevant year at one rate only. If that was so, there was no reason for remitting the matter to the Assessor for determination of rateable value for part of the land admeasuring 1060 sq. yds. The Apex Court, as a matter of fact, accepted the concept of notional division of plot of land and for a part of land admeasuring 1060 sq. yds. which was being built upon, directed the Assessor to determine the rateable value afresh, of course to be valued as vacant land. The emphasis in the direction of the Apex Court in Polychem is that whole land including the land which is being built upon must be valued as vacant land. Take a case relating to a land of 10,000 sq. yds. for the purpose of fixation of rateable value. Part of such land say about 5000 sq. yds is ditch and remaining 5000 sq. yds. is a buildable land. Obviously in the facts and circumstances, the whole land of 10,000 sq. yds. needs to be notionally divided for the purposes of rating, because the rating of the land forming ditch may be much less than the rating of remaining land which is buildable. What has been decided by Apex Court in Polychem to be binding as ratio is that the land which is being built upon (in other words land under construction or under development) for the purpose of rating has to be valued as vacant land in the relevant year. That does not mean necessarily for whole land at the same rate. We endeavoured to find out whether the orders passed by the Assessor and Collector impugned herein are without jurisdiction as was sought to be contended by relying on the judgement of the Apex Court in Polychem which must be corrected in writ jurisdiction. We hold that contention of the petitioners cannot be accepted as the land which is being built upon has been assessed as vacant land though at much higher rate than the land which is not being improved upon. Legality, correctness or otherwise justification of the high rateable value fixed for land under construction as vacant land than the remaining land simpliciter has to be questioned by the aggrieved party in a statutory appeal provided u/s 217 of MMC Act, 1888 which is in the nature of original proceedings. Since, according to us, the petitioners have adequate and efficient statutory remedy in challenging the fixation of rateable value of land under construction, we need not go into the matter further and the petitioners, if so advised, may challenge fixation of rateable value in the statutory appeal.

9. Before we close, we may deal with Rialto decided by one of us (R.M. Lodha,J.). In Rialto, the question was whether it was open to the Assessor to assess land under construction as not vacant plot of land. The stand of Assessing Officer was

that land under construction cannot be treated as vacant plot of land. The stand of Assessor being contrary to the judgment of the Apex Court in Polychem, the writ petition was entertained and allowed though appeal against the impugned assessment was pending. Once the Apex Court had ruled that land under construction has to be treated as vacant land, obviously, the Assessing Officer had no jurisdiction to hold otherwise and treat land under construction not as vacant plot of land. The action of Assessing Officer in Rialto was ex facie without jurisdiction and, therefore, this Court was satisfied to invoke extraordinary jurisdiction under Article 226 of the Constitution of India. In this group of petitions before us, the Assessing Officer has valued land under construction for the purposes of rating, as vacant land only which is in conformity with the law laid down by Apex Court in Polychem, though at a much higher rate which may or may not have been justified at that rate but the order of the Assessing Officer cannot be said to be without jurisdiction.

10. We may observe that in Writ Petition no.1634/2001 Nagari Nivara Parishad & Ors. v/s. Brihan Mumbai Mahanagar Palika & ors. and 2758/2001 - M/s. Lokhandwala Builders vs. Brihan Mumbai Mahanagar Palika & ors., the petitioners have already preferred the statutory appeals u/s 217 of MMC Act, 1888 and the said appeals are pending. In other writ petitions also if the petitioners are so advised may prefer appeals. We observe that should the petitioners prefer appeals u/s 217 challenging the rateable value within six weeks from today and deposit the requisite amount of due taxes as per statutory provision, the Appellate Authority shall decide the said appeals on merits. In that event we also record the statement of Mr. K. K. Singhvi, learned senior counsel for the respondents that objection regarding limitation shall not be raised and delay in filing the statutory appeal shall be deemed to have been condoned.

11. Consequently, all the seven writ petitions are dismissed with the observations aforesaid. Needless to say that any observation made in this order shall not be construed to reflect our opinion on the correctness of the quantum of rating or rateable value fixed by the Assessing Officer in respect of land under construction which will be considered by the Appellate Authority in accordance with law and on the basis of the evidence that may be led by the parties before him since the statutory appeal against fixation of rateable value is in the nature of original proceedings and further appeal lies before this court against the order in such proceedings.

12. For a period of six weeks from today, no further steps shall be taken against the petitioners in respect of recovery of outstanding property taxes which is subject matter of these writ petitions.