
(1993) 07 BOM CK 0060
In the Bombay High Court
Case No : Writ Petition No. 2882 of 1989

Ramniklal Ratilal Mehta

APPELLANT

Vs

Y.A. Sathaye and others

RESPONDENT

Date of Decision : 07-07-1993

Acts Referred:

Urban Land (Ceiling and Regulation) Act, 1976 — Section 1, 2, 2(q), 2(q)(i), 20

Citation : (1994) MhLj 51

Hon'ble Judges : M.L. Peruke, J;A.P. Shah, J

Bench : Division Bench

Advocate : D.D. Madan with B.K. Barve and Colabawalla instructed by M/s. Mulla and Mulla and Craigie Blunt and Co, for the Appellant; R.V. Desai with K.C. Sidhwa, for the Respondent

Final Decision : Allowed

Judgement

A.P. Shah, J.—This petition arises out of proceedings of declaration of surplus vacant land under the Urban Land (Ceiling and Regulation) Act, 1976, (hereinafter referred to as "the said Act"). Admittedly, the petitioner is the owner of the following two pieces of land, viz. land survey Nos. 248. 247 (Pt.), 375 situated at Mulund admeasuring 1,15,160 Sq. Mtrs. (hereinafter referred to as "the Mulund land") and land Survey Nos. 186 (Pt.), 187 (Pt.) and 189 (Pt.) situated at Ghatkopar admeasuring 13,764 Sq. Mtrs. (hereinafter referred to as "the Ghatkopar land").

2. Before the Competent Authority, it was the contention of the petitioner that the said lands at Mulund and Ghatkopar have no independent means of access from any public road or street and no construction is permissible on the said lands under the Development Control Regulations of Greater Bombay and, therefore, the said lands are excluded from the definition of "vacant land" by virtue of the provisions of sub-clause (1) of clause (q) of section 2 of the said Act. It was also contended by the petitioner that there is unauthorised hutment upon the Ghatkopar land and, therefore, it is not a "vacant land" as defined by

section 2(q) of the Urban Ceiling Act. Both the contentions were rejected by the Competent Authority, who declared an area of 1,00,641.8 Sq. Mtrs. as excess vacant land. In Appeal, the Additional Commissioner confirmed the order passed by the Competent Authority.

3. Shri Madan, learned counsel for the petitioner, submits that there are no means of access from any public road or street in respect of the petitioner's lands at Mulund and Ghatkopar and as such, the construction of building is not permitted on the said lands and, therefore, the lands cannot be said to be "vacant lands" within the meaning of section 2(q) of the said Act. Shri Madan submits that sub-clause (1) of section 2(q) excludes from the definition of "vacant land" the 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, and as the construction of a building is not permissible under the relevant Development Control Rules of Greater Bombay, the lands of the petitioner cannot be said to be "vacant lands". According to the learned counsel, the vacant land has to be determined with reference to the date of commencement of the Act i.e. 17th February, 1976. The counsel, therefore, describes the impugned orders treating the petitioner's lands as "vacant lands" on the assumption that access might be available in future as patently illegal. The counsel brings to our notice the orders passed by the Municipal Corporation refusing building permission in respect of the Mulund land in support of his submissions. The counsel also submits that there is unauthorised hutment on the Ghatkopar land and having regard to the fact that the said Ghatkopar land is declared as "slum" under the Maharashtra Slum Areas (Improvement, Gearance and Redevelopment) Act, 1971, the same cannot be regarded as "vacant land".

4. In order to appreciate the contentions raised before us, it is necessary to refer to few provisions of the Act. u/s 3 of the Act, it is provided that except as otherwise provided in the Act, on and from the commencement of the Act, no person shall be entitled to hold any vacant land in excess of the ceiling limit to the territories to which this Act applies under sub-section (2) of section 1. "Vacant Land" is defined in section 2(q) of the Act, which reads as follows:?

"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;

(ii) in an area where there are building regulations, the land occupied by any building which has been constructed before, or is being constructed on, the appointed day with the approval of the appropriate authority and the land appurtenant to such building; and (iii) in an area where there are no building regulations, the land occupied by any building which has been constructed before, or is being constructed on, the appointed day and the land appurtenant to such building:

Provided that where any person ordinarily keeps his cattle, other than for the purpose of dairy farming or for the purpose of breeding of livestock, on any land situated in a village within an urban agglomeration (described as a village in the revenue records), then, so much extent of the land as has been ordinarily used for the keeping of such cattle immediately before the appointed day shall not be deemed to be vacant land for the purposes of this clause." Broadly, the definition defines "vacant land" as any land not being land mainly used for the purpose of agriculture, but the three sub-clauses in the definition describe the land which is not to be treated as "vacant land". In the present case, we are concerned with the sub-clause (i) of section 2(q) which excludes from the definition of "vacant land", the land on which construction of a building is not permissible under the Building Regulations. The decided cases on section 2(q) and, particularly, sub-clause (i) of the said section have a bearing on the questions raised in the present petition and we will now refer to few of them beginning with Dattatray Shankarbhat Ambalgi and Others Vs. State of Maharashtra and Others, . In Dattraya 's case, the lands were served for various public purposes. The contention of the petitioners was that no building activity was permitted on the lands so far as the petitioners were concerned. The petitioners could not develop the lands and undertake any construction activity as they are reserved for public purpose and, therefore, the lands are not "vacant lands" within the meaning of clause (q) of section 2 of the Act. Reliance was placed on a judgment of Delhi High Court in Shanti Devi Vs. Delhi Administration and Others, . The Division Bench rejected the contentions raised by the petitioners holding that there must be total prohibition upon construction of buildings upon the land under the relevant Building Regulation in order to attract sub-clause (i) of section 2(q) and simply because the Building Regulations or the Town Planning Schemes reserved the land for the public purpose, it cannot be said that it is taken out of the purview of the definition of the "vacant land". In this context, the following observations of the Division Bench are relevant:?

"Reading sub-clause (i) of clause (q) of section 2, Urban Land (Ceiling and Regulation) Act as a whole for understanding the expression "vacant land" it must be held that when the legislation refers to land on which construction of a building is not permissible, it means that the activity is not permissible on the date when the land is sought to be dealt with and not at any future time. The possibility that such activity could come to be permitted in future or that there are buildings constructed in the area or that there is no prohibition to construct in an unapproved colony or that there is no permanent prohibition to construct would not be sufficient to treat the land as "vacant land" within the meaning of the provision. In this case, construction of buildings in the locality was not permitted in the absence of Zonal plans prepared under the Delhi Development Act at that time and the land was therefore held covered by section 2(q)(i) and was therefore not "vacant land"."

5. The next decision is by a Full Bench of this Court in Prabhakar Narhar Pawar Vs. State of Maharashtra and Another, . In this case, it was contended that in all

cases 2/3rds area of the plot on which building cannot be constructed in accordance with the building regulations, that area must be necessarily excluded from the definition of "vacant land" in section 2(q) of the Act. It was alternatively contended that the land which is required to be left open on the front and rear sides under the building Bye Laws is liable to be excluded from the definition of "vacant land". Reliance was placed on a decision of the Division Bench of this Court in *B.E. Billimoria vs. State* in Writ Petition No. 1771 of 1979 decided on 31st January, 1983. The Full Bench did not agree with the view of the Division Bench in *Billimoria's* case that if on a particular area of a piece of land construction of a building is not permissible, then that area must necessarily be excluded from the definition of "vacant land". As regards the scope and the applicability of sub-clause (i) of section 2(q), the Full Bench observed as follows:?

Now, when a question arises as to whether construction of a building is not permissible under the building regulations in force, it is possible that there may be an absolute ban or prohibition under the relevant master plan where under no circumstances construction of building is possible on a given piece of land. Such piece of land may have been reserved for a purpose and on such reservation construction of a building would not at all be permissible. But, when we come to an instance like the present one in which there is an open plot of land which is admittedly a house site on which a building could be constructed, it is difficult to see how any part of the land can be excluded under sub-clause (i) of section 2(q) on hypothetical considerations. Section 3 of the Act and the procedural provisions thereof which are intended to implement the provisions of the said section contemplate the determination of the quantum of vacant land on facts as they exist on the date of commencement of the Act. Therefore, in a given case where the owner of a land claims that certain land which is owned by him should be excluded on the ground that construction of a building is not permissible under the building regulations in force, it is obvious that he will have to show that the building regulations are attracted in his case. For a person, who, on the commencement date, never even intended to construct any building on his land or for a person who has not even submitted a plan for construction of any building, the relevant building regulations are wholly irrelevant and he is not affected by the building regulations. It appears to us that when sub-clause (i) refers to land on which construction of a building is not permissible under the building regulations, it was contemplated that on the date of commencement of the Act, that is, 17th February, 1976, the owner intended to construct a building on the plot in question and the plan of the building was either already sanctioned or he had submitted the plan for sanction. Where a building plan is already sanctioned and such sanctioned plan is operative on 17th February, 1976, or a plan has already been submitted for sanction, it could be ascertained with certainty as to how much land could be identified as land on which construction of a building is not possible. Sub-clause (i) of section 2(q) does not, in our view, contemplate a general exclusion of land from the purview of the Act to the extent of two-thirds or one-half or whatever may be the extent of land on which no

building can be constructed under the relevant building regulations in force in the area under consideration irrespective of whether a building is proposed to be constructed or not on the date of commencement of the Act.

The Full Bench was pleased to overrule the decision in Billimoria's case. The Full Bench also dissented from the judgment of the Delhi High Court in Shanli Devi's case. The concluding portion of the Full Bench judgment which is material in the present case may be reproduced as follows:?

"While these observations have our respectful concurrence, we have already pointed out that so far as section 2(q)(i) of the Act is concerned, there must either be complete prohibition for construction activity by development plan or master plan or there must already be a sanctioned plan or a plan submitted for approval on the date of commencement of the Act on the basis of which land on which a building cannot be constructed u/s 2(q)(i) could be definitely ascertained. In the absence of any of the above conditions in the case of open land which falls in clause (i) of section 2(q), all land in excess of the ceiling limit specified in section 4 will be taken over by the Government."

On close scrutiny of the Full Bench judgment in Prabhakar's case, the true scope and effect of sub-clause (i) may be summarized thus. In order to attract provisions of sub-clause (i) of clause (q) of section 2. there has to be a total prohibition or ban on the construction of building under the relevant Building Regulations. Further, such area of land which is unbuildable cannot be excluded on hypothetical considerations. It will be necessary for the owner to show the unbuildable area with reference to the building plans which were already sanctioned prior to the appointed date or which were submitted before the said date. It is not permissible to exclude the land under sub-clause (i) of section 2(q) on abstract and hypothetical basis.

6. We may hasten to add that the judgment of the Division Bench in Dattraya 's case and the judgment of the Full Bench in Prabhakar's case are approved by the Supreme Court in State of Gujarat and Others Vs. Parshottamdas Ramdas Patel and Others, . The plea before the Supreme Court was that as the lands were reserved under the Town Planning Scheme for a public purpose, namely, building staff quarters, the lands cannot be regarded as "vacant land" in view of sub-clause (i) of clause (q) of section 2 of the Act. The Supreme Court had to say as follows:?

"Section 29(1)(a), Bombay Town Planning Act, 1954, only requires a person who owned a piece of land situated within an area included in the Town Planning Scheme to obtain the permission from the local authority before erecting or constructing any building as provided therein. Merely because section 29(1)(a), Bombay Town Planning Act, 1954 requires a person owning the land to which a scheme applied to obtain permission of the local authority to construct a building on it, it cannot be said that the land was one on which construction of building was not permissible. The embargo in question was not total. It was only where

the ban was complete it could be said that no construction was permissible on the land. In view of the fact that the owners were entitled to construct buildings on the lands after the permission was accorded by the local authority it could not be said that by virtue of section 29(1)(a), Bombay Town Planning Act, 1954 the lands fell outside the definition of "vacant land" in the Act." "The plea that because the lands in question have been reserved under the Town Planning Scheme for purposes of building staff quarters the lands could not be treated as vacant lands would not be tenable because the construction of buildings on the lands in question is permissible though not by the owners of land. Sub-clause (i) of clause (q) of section 2 of the Act does not provide that a land on which the owner cannot construct a building will cease to be vacant land for purposes of the Act. As long as construction of building can be done on a land by some person or authority, the land does not get excluded from the definition of the expression "vacant land" under the Act. The lands in question, therefore, are vacant lands".

The judgment of the Delhi High Court in Shanti Devi's case was overruled by the Supreme Court.

7. Now, we proceed to examine the facts of the present case in the light of the law as laid down by this Court and the Supreme Court. First, we will deal with the Mulund land. It is not disputed before us that the said Mulund land has no access from any public road or public street. In short, the said property is landlocked. It is also not disputed that under the relevant Development Rules of Greater Bombay, no building activity is permitted on the land unless there is an access either from a public road or public street as prescribed. The petitioner's application to the Bombay Municipal Corporation for sanction of the building plans was rejected by order dated 12th February, 1965, as there was no access to the property from any public road or street. The petitioner again made an attempt to obtain building permission in 1971, but the petitioner could not succeed in view of want of access to the property. The petitioner has produced on record the plans of the property along with the architect's report to show that there is no access to the property as required by the Development Rules. There is complete prohibition on construction of building on the petitioner's property. The petitioner intended to construct a building upon the property but he failed to obtain the sanction from the Municipal Authorities in view of the prohibition contained in the Development Rules. The petitioner's property thus squarely falls within sub-clause (i) of clause (q) of section 2 of the Act and, therefore, the same cannot be regarded as a "vacant land".

8. On perusal of the order passed by the Appellate Authority, it is seen that the case of the petitioner that the land has no access from any public road or street was accepted, but the Appellate Authority rejected the petitioner's case by making the following observations:?

"It appears that the lands have no access at present, but this does not mean that the access should be never available in future if the property is proposed to be

built upon so also, if appellant feels that no access will be available to the lands in future he may approach Government for exemption u/s 20 of the Act."

Shri Madan is right in his submission that the view expressed by the Authority is patently illegal. It cannot be disputed that the vacant land has to be determined with reference to the date of the commencement of the Act i.e. 17th February, 1976 and not with reference to some future date on hypothetical basis. The observations made by the Appellate Authority are completely misconceived and contrary to the provisions of the Act. The petitioner's land at Mulund is clearly excluded from the definition of "vacant land".

9. Now turning to the petitioner's property at Ghatkopar, we find that even this property is without any access from a public road or street. But, we are unable to record a finding in favour of the petitioner in the absence of evidence to show that the petitioner intended to develop the property prior to the appointed date and he could not do so by reason of want of access. As held by the Full Bench in Prabhakar's case, this issue cannot be decided on hypothetical considerations. We are inclined to remit back the matter to the Competent Authority as far as the Ghatkopar land is concerned for ascertaining whether the said Ghatkopar land falls within sub-clause (i) of clause (q) of section 2. The Competent Authority shall decide this question in the light of the observations made in this judgment and after giving an opportunity of hearing to the petitioner. The petitioner shall be at liberty to produce additional evidence before the Competent Authority.

10. Before we conclude, we will deal with the last submission of Shri Madan that there is unauthorised hutment on the Ghatkopar land and, therefore, the same cannot be treated as "vacant land". In the first place, there is no evidence to show that huts were in existence on the said land on the appointed date. In any event, we are of the opinion that merely because some temporary huts are erected on the land, it cannot cease to be a "vacant land" within the meaning of the said Act. A land is not excluded from the definition of "vacant land" simply because some outsiders have unauthorisedly put temporary huts upon the land. The Authorities were thus right in rejecting the submission of the petitioner.

11. For the reasons stated above, this petition must succeed. The impugned order dated 24th December, 1980 passed by the Competent Authority and also the impugned order dated 19th March, 1983 passed by the Appellate Authority are quashed and set aside. It is declared that the petitioner's land at Mulund is not a "vacant land" within the meaning of the said Act. As far as the petitioner's land at Ghatkopar is concerned the matter is remitted back to the Competent Authority for ascertaining whether the said land at Ghatkopar is liable to be excluded from the definition of "vacant land". The Competent Authority shall decide the matter in the light of the observations made in this judgment and after giving an opportunity of hearing to the petitioner. The petitioner will be at liberty to produce additional evidence before the Competent Authority. Rule is made absolute accordingly. In the circumstances of the case, there will be no

order as to costs.