

(1994) 02 BOM CK 0046

In the Bombay High Court

Case No : Appeal No. 893 of 1992 in Writ Petition No. 2745 of 1987

Shri A.R. Bhujbal, Special Land Acquisition Officer,
Maharashtra Housing And Area Development Authority
Bombay and Others

APPELLANT

Vs

M/s. Sam Hiring Co. and Others

RESPONDENT

Date of Decision : 03-02-1994

Acts Referred:

Constitution of India, 1950 — Article 226

Maharashtra Housing and Area Development Act, 1976 — Section 103, 2(7), 41, 74, 76

Citation : AIR 1994 Bom 297 : (1994) 2 BomCR 456 : (1994) 96 BOMLR 424 :
(1994) 1 MhLj 766 : (1994) MhLj 766

Hon'ble Judges : M.L. Pendse, J;M.L. Dudhat, J

Bench : Division Bench

Advocate : Shri L.V. Kapse, Govt Pleader, for the Appellant; V.C. Kotwal, Mukund Madekar, B.B. Madekar, A.T. Marques and N.V. Sanglikar, for the Respondent

Judgement

Pendse, J.—Haji Abdulla Noor Mohammad Machiswala Charitable Trust was the owner of two plots of land situated at D"Lima Street, "E" Ward, of Mazgaon Division. On the plot of land admeasuring approximately 162.21 sq. meters, building bearing No. 142/146 was standing, while on the other plot of land admeasuring approximately 1162.21 sq. meters, building bearing No. 385 was constructed. Both the buildings were in dilapidated condition and required heavy and major repairs. The buildings were used for the purpose of residence and buildings were liable for payment of repairs and reconstruction cess in accordance with the provisions of Section 82 of the Maharashtra Housing and Area Development Act, 1976 (hereinafter referred to as the "Act"). Adjoining to Building No. 385 on the plot of land admeasuring 1162.21 sq. meters, certain sheds and garages were constructed and they were in occupation of respondent No. 1 which is partnership firm, and is used for the purpose of manufacturing compressors. The sheds in which the partnership firm manufactures compressors is separately assessed for house property tax by Municipal Corporation of Greater

Bombay.

2. The Board constituted under the Act is required to carry out repairs in respect of buildings on which building repairs and reconstruction cess is levied. Section 83(j) of the Act provides that the buildings which are exclusively used for non-residential purposes are not liable for payment of repairs and reconstruction cess. Section 88 requires the Board to undertake structural repairs on satisfaction that any building which is occupied by a person is in ruinous or dangerous condition and is likely to fall unless structural repairs are carried out and the building is rendered fit and safe for habitation. Subsection (3) of Section 88 of the Act provides that if the Board is of opinion that the cost of structural repairs to a building would exceed certain amount per square metre, then the Board shall issue a certificate to that effect. The Executive Engineer of Bombay Housing and Area Development Board issued such certificate on January 25, 1980 in respect of the building standing on two plots of lands. The certificate recites that the cost of the structural repairs to the buildings exceeds Rs. 120/- per square metre and the buildings are not capable of being repaired to render fit and safe for habitation at reasonable expenses.

On July 16, 1986, the Deputy Chief Engineer (Re-construction) of Housing Board addressed letter to the Secretary to the Government of Maharashtra proposing that the land admeasuring 1324.42 sq. metres with existing buildings in property bearing City Survey Nos. 55 and 56 at Mazgaon Division should be acquired for constructing a new building on the same site. The proposal sets out that the plans have been approved by City Engineer and the scheme is approved by the Board and the cost of the proposed building is estimated to be Rs. 80.70 lakhs. The proposal further recites that the number of occupants in the existing building will be accommodated in new building and in addition, accommodation could be provided for 120 residential and 22 non-residential tenements. The proposal also sets out that portion of the building No. 385 has been demolished up to first floor level and similarly Building No. 145 has been demolished. The State Government was requested to accord approval to the proposal in accordance with sub-section (1) of Section 93 of the Act. The proposal covers the area of both the plots and the sheds in which respondent No. 1 firm is carrying on manufacturing activities also falls within the area proposed to be acquired. The Government of Maharashtra by resolution dated September 10, 1986 passed in exercise of powers of subsection (1) of Section 93 of the Act gave approval to the proposal submitted by the Housing Board for acquisition of land along with existing buildings thereon. The land to be acquired admeasures approximately 162.21 sq. metres and which covers the area of Plot No. 55 and land admeasuring 1162.21 sq. metres which covers the entire area of Plot No. 56. The sheds which are in occupation of respondent No. 1 firm and used for manufacturing purposes fall within the boundaries of Plot No. 56.

3. In pursuance of the resolution passed by Government of Maharashtra, the Special Land Acquisition Officer served notice under sub-sections (3), (4) and (5)

of Section 93 of the Act on the occupants of the buildings as well as on respondent No. 1 who are in occupation of sheds adjoining the building on Plot No. 56. On February 27, 1987, the partnership firm lodged objection to the proposed acquisition before the Special Land Acquisition Officer. The objections were that the sheds in which the firm is carrying out manufacturing activities is not liable to pay cess as the sheds are used only for non-residential purpose and sheds are separately assessed by the Municipal Corporation and, therefore, it is not open to acquire the land covered by the sheds in exercise of powers u/s 76 of the Act. The Special Land Acquisition Officer gave personal hearing to the partners of the firm on March 30, 1987 and thereafter invited response from the Executive Engineer of the Board in regard to the objections filed. The Executive Engineer by letter dated May 22, 1987 informed that the shed erected by the partnership firm is on City Survey No. 56 and the area covered is wrongly mentioned by the Special Land Acquisition Officer as 18-48 sq. metres and it should be 98.48 sq. metres and the compensation should be determined accordingly. The Executive Engineer found that the shed is not erected on a separate plot but the shed is included in the whole building which is on City Survey No. 56. The Special Land Acquisition Officer passed order on July 6, 1987 rejecting the objection raised by the firm by holding that combined scheme of reconstruction on plots bearing City Survey Nos. 55 and 56 is prepared and the sheds in occupation of respondent No. 1 firm are part of City Survey No. 56. The plot bearing City Survey No. 56 was originally reserved for parking but was de-reserved for residential purpose by the Government of Maharashtra. In pursuance of rejection of objection, the Special Land Acquisition Officer published order in exercise of powers under sub-section (1) of Section 93 of the Act declaring that with effect from August 4, 1987, the acquisition proposal stands sanctioned and will become operative. The effect of the declaration under subsection (5) of Section 93 is that the lands with the existing buildings thereon vest absolutely in the Board and free from any encumbrances.

4. The respondent No.1 challenged the action of respondent No. 1 (sic) -- Special Land Acquisition Officer -- by filing Writ Petition under Article 226 of the Constitution of India on August 10, 1987 on the Original Side of this Court. The grievance made by respondent No. 1 was three-fold; first that the Board had no authority to acquire structure or shed in occupation of respondent No.1 as the shed does not form part of the building standing on Plot No. 56. It was claimed that the structure in possession of the firm is a separate structure and which is used for non-residential purpose and, therefore, not liable to pay reconstruction and repair cess and consequently, the power to acquire u/s 76 of the Act cannot be exercised in respect of the said structure. The firm also complained that the Special Land Acquisition Officer had violated principles of natural justice as letter dated May 22, 1987 addressed by the Executive Engineer to the Special Land Acquisition Officer was not disclosed, nor the Executive Engineer was tendered for cross-examination. The third grievance was that the certificate dated January 25, 1980 issued by the Executive Engineer certifying that the cost of structural

repairs to the building exceeds Rs. 120/- per sq. metre and the buildings are not capable of being repaired to render fit and safe for habitation was issued without prior notice or hearing to the firm. It was also claimed that the order passed by the Special Land Acquisition Officer suffers from non-application of mind because the order does not specifically deals with the objections raised by the firm to the acquisition. The grievance of respondent No. 1 was controverted by the Board by pointing out that the structure in occupation of the firm forms part of Plot No. 56 and the authority had ample power u/s 76(d) to acquire the structure as well as the land on which the structure was standing. The authority also pointed out that merely because the structure was separately assessed by the Corporation and the repair and reconstruction cess is not recovered, cannot entitle the firm to claim that the structure does not come within the definition of "building" as defined under subsection (7) of Section 2 of the Act. The authority further pointed out that issuance of certificate under sub-section (3) of Section 82 of the Act merely determines the subjective satisfaction of the Executive Engineer about the amount required for effecting structural repairs and whether the building is capable of being repaired for making it fit for human habitation and the certificate does not determine any right of the owner or occupier of the property and consequently, it is incorrect to claim that prior notice and hearing is required to be given before issuance of certificate. The complaint that the principles of natural justice were violated was denied by pointing out that the letter written by Executive Engineer in no manner refers to any fact which is adverse to the firm. The ground of non-application of mind was denied. Curiously, the owners of property were not even joined as party respondents to petition.

The learned single Judge by impugned judgment accepted each of the grievances made on behalf of respondent No. 1 and held that the acquisition in respect of the land on which the structures of respondent No. 1 stand is bad in law and illegal. The learned Judge held that it was essential for the Executive Engineer to give prior notice to respondent No. 1 and also hearing before issuance of certificate under sub-section (3) of Section 88 of the Act and failure to do so leads to certificate being invalid and of no effect. The learned Judge relied upon decision of single Judge reported in 1991 MLJ 805 Vatsalabai Ganuji Shinde v. Maharashtra Housing and Area Development Board in support of the finding. The learned Judge also held that the order of the Land Acquisition Officer suffers from non-application of mind as well as on the ground of violating principles of natural justice. On merits, the learned Judge held that the Special Land Acquisition Officer had no authority to acquire the land and the structures of respondent No. 1 standing thereon in exercise of powers u/s 76 of the Act. The Special Land Acquisition Officer, the Government of Maharashtra and the Maharashtra Housing and Area Development Board feeling aggrieved by the decision have preferred this appeal.

5. Shri Kapse, learned counsel appearing on behalf of the appellants, submitted that the finding of the learned single Judge on each of the grievances made on

behalf of respondent No. 1 is incorrect and unsustainable. We find considerable merit in the submission urged by Shri Kapse. As mentioned hereinabove, subsection (1) of Section 88 of the Act provides that the Board on being satisfied that the building is in ruinous condition and is likely to fall unless structural repairs are undertaken, then the Board should subject to the provisions of sub-section (3) of Section 88 undertake such repairs. Sub-section (3) provides that if the Board is of the opinion that the cost of structural repairs to the building will exceed certain amount per square metre, then the Board may not consider such building for repairs and may issue certificate to that effect to the owner of the building. The Board is also required to affix a copy of the relevant certificate in some conspicuous part of the building for the information of the occupiers. It is not in dispute that a certificate as contemplated under sub-section (3) of Section 88 of the Act was issued by the Board and served on the owners of the two buildings. It is also not in dispute that the copy of the relevant certificate was affixed in a conspicuous part of the two buildings for information of the occupiers. Shri Kapse submits, and, in our judgment, very correctly that the principles of natural justice cannot be stretched to absurdity to suggest that before issuance of the certificate, it is essential that notice should be served on each of the occupiers and hearing also should be afforded to each of the occupiers. The plain reading of sub-section (3) makes it clear that notice or hearing is not contemplated. The finding of the learned single Judge that on the true interpretation of sub-section (3) such a requirement can be spelt out cannot be sustained. The learned Judge felt that in view of the decision of the single Judge reported in 1991 MLJ 805, it is not even open for the authority to advance contention that notice and hearing is uncalled for. In our judgment, the findings of the learned single Judge as well as the decision reported in 1991 MLJ 805, are entirely incorrect. The notice and the hearing are contemplated only in those cases where the action of the authority is likely to deprive the person of any civil rights. The certificate issued by the Board merely sets out the subjective satisfaction that the cost for structural repairs of the building exceeds certain limit and it is not possible to repair the building, within the limits permissible by the statute. The certificate by itself does not deprive either the owner or occupier of the title to building or the possession of the occupiers. Shri Kotwal, learned counsel appearing on behalf of respondent No. 1, submitted that issuance of certificate is the beginning or first step for making proposal by the Board to the State Government for acquisition of the land and by acquisition, the rights of the owners and the occupiers are going to be affected and, therefore, prior to the issuance of the certificate, notice must be given and hearing should be afforded. We are unable to appreciate any merit in the contention. Notification u/s 4 of the Land Acquisition Act is published for proposed acquisition and nobody can even suggest that before issuance of the notification, notice must be given to the persons whose lands are proposed to be acquired by publication of the notification. Shri Kotwal did not dispute that after issuance of the certificate, it is necessary for the Board to make a proposal for acquisition of the land and the owner as well as the occupiers are heard before decision is taken to acquire the

land. In our judgment, the learned single Judge was in error in holding that the acquisition proceedings are vitiated because notice and hearing was not given prior to the issuance of the certificate u/s 88(3) of the Act. In our judgment, the decision reported in 1991 Mah LJ 805, is not correct and is overruled.

6. The finding of the learned Judge that the order of acquisition stands vitiated because of violation of principles of natural justice also suffers from serious infirmity. The contention urged on behalf of respondent No. 1 is that after personal hearing was given to respondent No. 1 on March 30, 1987, the Special Land Acquisition Officer addressed letter to the Executive Engineer of the Board and sought response to the objections filed on behalf of respondent No. 1. The Executive Engineer by letter dated May 22, 1987 informed the Land Acquisition Officer that the shed erected by respondent No. 1 is on Plot bearing City Survey No. 56 and the measurement of the shed sets out in the notice published by the Land Acquisition Officer is not accurate and should be corrected. The correction is for the benefit of respondent No. 1. Shri Kotwal submitted that it was the bounden duty of the Special Land Acquisition Officer to furnish a copy of the letter of respondent No. 1 and tender to the Executive Engineer for cross-examination before passing order on July 7, 1987 overruling the objections raised by respondent No. 1. We are unable to accede to the claim because, in our judgment, the concept of violation of principles of natural justice should not be examined in the air and on the facts and circumstances of the case, it is impossible even to suggest that any undue advantage is taken by the Special Land Acquisition Officer with reference to the letter written by Executive Engineer. The letter written by the Executive Engineer merely sets out the factual position and which is not in dispute. It is, therefore, difficult to appreciate how the letter has caused any prejudice whatsoever to the interest of respondent No. 1. It is also difficult to appreciate from perusal of the order passed by the Special Land Acquisition Officer as to how the contents of the letter had affected the decision. In our judgment, the trial Judge was clearly in error in holding that the order of the Special Land Acquisition Officer should be struck down because of failure of principles of natural justice.

The finding of the learned single Judge that the order passed by the Special Land Acquisition Officer suffers from non-application of mind also cannot be sustained. The learned Judge held that respondent No. 1 had raised specific objection that the shed forms part of a separate building and is not assessed and, therefore, the power to acquire is not available and the objection was not specifically considered. We are unable to share the view of the learned single Judge. It must be remembered that the Land Acquisition Officer was not delivering judgment dealing with each and every contention and giving reasons. The objection was that the provisions of the Act are not applicable and the land could not be acquired. The Land Acquisition Officer rejected the contention, and as has been discussed hereinabove, very correctly. In our judgment, the order of acquisition could not have been struck down on the ground of non-application of mind.

7. The principal contention raised by Shri Kotwal is that the shed in which respondent No. 1 is carrying on manufacturing activity is not liable to be acquired even though the shed is part of plot bearing City Survey No. 56. Shri Kotwal submitted that the shed in occupation of respondent No. 1 is not liable for payment of repairs and reconstruction cess and is separately assessed by the Municipal Corporation, Greater Bombay, and, therefore, the certificate issued by Executive Engineer cannot cover the shed in dispute. Shri Kotwal also submitted that the power to acquire is only in respect of buildings which are liable for payment of repairs and reconstruction cess and the structure of respondent No. 1 not being liable to payment of repairs and reconstruction cess cannot be acquired. The gravamen of the complaint is that the Board can move the State Government only to acquire old and dilapidated building which in the opinion of the Board are beyond repairs and for the purpose of reconstruction of the new building thereon in exercise of powers under S. 76(d) of the Act. Shri Kotwal urged that the State Government can be moved to acquire the buildings which are beyond repairs and the expression "building" under Chapter VIII will not cover the buildings which are not liable to pay repairs and reconstruction cess due to exemption u/s 83(j) of the Act. It is not possible to accede to the submission of the learned counsel. The expression "building" is defined u/s 2(7) of the Act and reads as under :

" "Building" for the purposes of Chapter VIII, means building in respect of which the cess is levied under that Chapter and includes a tenement let or intended to be let or occupied separately and a house, out-house, stable, shed, hut and every other such structure but does not include any such building or structure which as a whole is unauthorised or any building which is a temporary building as defined in clause (sb) of Section of the Bombay Municipal Corporation Act."

The plain reading of the definition makes it clear that the word "Building" takes in its sweep out-house, stable, shed and every other such structure. The claim of Shri Kotwal that the expression "building" can only cover those buildings or structures which are liable to pay repairs and reconstruction cess is devoid of any merit. The definition makes it clear that the expression "building" includes stable, shed and every other such structure and it cannot even be suggested that the stables are used for human habitation or for residential purposes and are liable to pay repairs and reconstruction cess. The fact that the stable and shed which are not used for residential purposes are included in the definition of the word "building" for the purpose of Chapter VIII and Section 74 to 103 which form part of Chapter VIII makes it clear that the contention that shed in occupation of respondent No. 1 and which is used for manufacturing purpose will not attract the expression "building" is fallacious. In our judgment, the contention that the authority lacked jurisdiction to move the State Government to acquire the shed occupied by respondent No. 1 is entirely faulty.

8. Shri Kotwal then submitted that the structure in occupation of respondent No. 1 does not form part of the residential building standing on Plot No. 56 and in

respect of which the certificate was issued under sub-section (3) of Section 88 of the Act certifying that the building was beyond repairs. It was contended that the structure in occupation of respondent No. 1 is not certified to be beyond repairs and consequently, the proposed acquisition was not justified. The submission is without any substance because the structure occupied by respondent No. 1 is not required to be repaired by the Board as the structure was used for non-residential purpose and repairs and reconstruction cess was not recovered. The certificate is issued in respect of the building which was used for residential purposes and which is on Plot No. 56. Shri Kotwal did not dispute that the acquisition is for entire plot but urged that when the plot covers a structure which is not in a dilapidated condition, then it is not open for the authority to acquire it. It is not possible to accede to the submission. The acquisition is undertaken with a view that a new building can be erected on the plot and is not possible for the Board to erect a new building by keeping the structure of respondent No. 1 intact. The F.S.I. available to the Board will be considerably reduced if the structure of respondent No. 1 is not acquired. In our judgment, the trial Judge was clearly in error in holding that the authority lacked jurisdiction, to acquire structure and the land underneath, in exercise of powers u/s 92 of the Act because the structure does not form part of the building and is not liable to pay repairs and reconstruction cess. Shri Kotwal contended that the power to acquire is also conferred on the State Government under Sectional of the Act and resort should have been made to those provisions in respect of structures which are not subject to liability of payment of repair cess. The submission is not correct because sub-sec. (1) of S. 41 of the Act confers power on the State Government to acquire lands and the structures cannot be treated as lands. Shri Kotwal referred to the definition "land" under S. 2(16) of the Act and claimed that the definition may cover even the structures. It is not necessary to determine that issue as in our judgment, the expression "building" covers the structure and the Land Acquisition Officer had ample power to acquire the land on which the structure was standing.

The acquisition is undertaken for the benefit of people residing in the building and whose life was in danger because of dilapidated and dangerous condition of the building. The Act provides that while erecting new building, additional F.S.I. is available to the authority and the authority is required not only to accommodate the existing occupiers of the building but also provide tenements for those who are dis-housed from other buildings. The two buildings standing on the two plots were demolished in year 1981 and the occupiers are accommodated in transit camps. The construction of new buildings has been withheld because of litigation commenced by respondent No. 1 and which, in our judgment, is without any merit. In our judgment, the judgment delivered by learned single Judge is unsustainable and is required to be quashed.

9. Accordingly, appeal is allowed and judgment dated July 30, 1992 delivered by learned single Judge in Writ Petition No. 2745 of 1987 is set aside and the petition stands dismissed. The respondent No. 1 shall pay the costs of the

appellant throughout.

Appeal allowed.