

(2023) 06 CAL CK 0030

In the Calcutta High Court

Case No : FMA No. 302 Of 2019, IA No.CAN 3 Of 2021

State Of West Bengal & Ors.

APPELLANT

Vs

M/S. K.C. Das Pvt. Ltd.

RESPONDENT

Date of Decision : 19-06-2023

Acts Referred:

Constitution Of India, 1950 — Article 252(2)
Kolkata Municipal Corporation Building Rules, 2009 — Rule 2(9), 70
Urban (Ceiling and Regulations) Repeal Act, 1999 — Section 1(3)
Urban Land (Ceiling and Regulation) Act, 1976 — Section 2(g), 2(q)(i), 6(1), 20, 33

Citation : (2023) 06 CAL CK 0030

Hon'ble Judges : Supratim Bhattacharya, J

Bench : Single Bench

Advocate : S.N. Mookherjee, T.M. Siddiqui, Soumitra Bandopadhyay, Aniruddha Sen, Saktinath Mukherjee, Saptangsu Basu, Tapas Sil, Subhabrata Datta

Final Decision : Allowed

Judgement

Subrata Talukdar, J

The short point to be decided in this appeal is whether the land in issue (hereinafter referred to as the said land) was a vacant land and, if that was so on the appointed date of coming into force of the Urban Land (Ceiling and Regulation) Act, 1976 (for short, the 1976 Act) which was the 14th of February 1976, whether the Competent Authority (for short, referred to only as the CA) was entitled to declare the said land to be in excess.

The Hon'ble Single Bench by its Judgement and Order dated 14th of March 2017 in WP 11004 (W) of 2011, which is impugned in this appeal, has, inter alia, discussed as follows:-

"25. Considering the submissions advanced by the learned Advocates appearing for the parties, perusing the records I find that it is evident from the schedule of the indenture dated 11th day of September, 1951, between Amulya Charan Dutt

@ Amulya Krishna Dutt and Lalmohan Dutt and Dwijendra Nath Dutta of the 1st part and Arun Bose of the 2nd part and K.C. Das Ltd the 3rd part that all that piece or parcel of bare land and tank together with a brick built privy containing a total area of 1 Bigha 15 Cottahs 3 Chittaks and 26 sq. ft. more or less situate lying at and being premises no.2 Jogendra Nath Bose Lane formerly known as No.1 Jogendra Nath Bose Lane purchased by the petitioner company was not at all a vacant land. There was tank as well as a brick built privy also.

26. It is also evident from the KMC record appearing at Page 42 of the writ petition which is a certified copy of inspection book in respect of 4 Tara Sankar Sarani with effect from 3/79-80, relevant portion whereof is quoted below :-

Premises No.4

Description

Name and address of recorded owner

4

Cor D.H. & Land

4 M/s. K.C. Das Ltd, 3, Ram Krishna Lane, Cal-3

Details

Corner plot

Total Area= 1B-15CH-25 Sft.

Addn.

Cor/BW-1r+Ver-Muraridhar Tewari (Owner's Darwan))

R.T. /B.W. -1r++1r (Sm) Thakurghar)--730-p.m. + Tax + 1P !Asb/B.W-1r)

Land 1B-8CH @ 40/- P.K. P.M. = 9840/-

Certified copy of Inspection Book in respect of Premises No.4 TarasankarSarani.Wd-005, Qtr.3/73-74.Assessee No.11-00524000090.Challan No.A0261729 Dt. 28/2/2011.

Premises No.

Nature of use

Name and address of recorded owners

4

Land +Tank

M/s. K.C. Das Ltd, 3, Ramkrishna Lane, Cal-3

27. It is also evident from the objection letter dated 24th December, 1980 issued

by the Governing Director of K.C. Das Private Ltd to the competent authority Kolkata under the Urban Land (Ceiling & Regulation) Act, 1976, Some extract of the said objection letter is quoted below :-

"3-That with a view to expansion of its business both at home and abroad, your petitioner purchased vacant land at No.2 Jogendra Nath Bose Lane, now No.4, Talla Park Avenue, Calcutta-700 002, measuring 2355.94 sq. metres in 1951 in order to construct a new and modern factory with Research and Development Division, Export Division, Laboratory, Staff and Director's quarters. That the said land was improved upon after purchase by building 1-1/2 ft high boundary wall, tube well and Darwan's quarters. Your petitioner has been unable to construct the proposed new factory due to lack of adequate funds and other factors beyond its control.

4. That your petitioner has constructed a factory and opened a showroom in Bangalore in 1972. Your petitioner has a plan to set up a factory in or around Bombay in the near future. Your petitioner desires to set up the proposed new factory in Calcutta on its own land before setting up anymore factories in other States, because of the increasing demand for your petitioner products in West Bengal, and it will be more economically viable and convene from the point of view of management and control. Your petitioner submits that the setting up of its factory on its own land in Talla Park Avenue, Calcutta-700002 will not only offer opportunities of employment to some more personnel but also augment the State and Central revenue by means of its increased sales in the States and through it exports abroad.

5. That your petitioner submits that it will be against public policy and interest to acquire the aforesaid excess land causing serious damage and hardship to a thriving industry leading to the loss of the opportunity for employment of more workers in the business.

6. Your petitioner states that it is necessary or expedient in the public interest to allow your petitioner to set up its proposed new factory on its said land.

7. If the provisions of Chapter III of the Urban Land (Ceiling and Regulation) Act, 1976 are enforced upon your petitioner, it will cause undue hardship to your petitioner in as much as it will not be possible for your petitioner to acquire and/or purchase any other suitable land at a reasonable price, for establishing its said proposed factory in order to attain its object by new and improved means. The price of the land has risen by more than 100% and it is almost impossible for your petitioner to acquire suitable land for establishing your petitioner's new factory, at the present market price."

28. I find though the Governing Director being an old lady inadvertently described the entire land as a vacant land in her statement but in the letter dated 14th November, 1980 Smt. Annapurna Das, filed a statement under Section 1 of the said Act of 1976 in the capacity of Governing Director of the K.C. Das Private Ltd of the Form holds vacant land to the extent of 2355.94 Sq. mt. at

premises no.4 Talla Park Avenue. The Court cannot shut its eyes as to the record wherefrom it revealed that along with vacant land there was a tank and a brick built privy also. Under Section 2 (q) of the said Act of 1976 land with a structure cannot be treated as vacant land.

31. Court also cannot shut its eyes on the point that the competent authority passed the final order in the said matter on 29th May, 1981 thereby holding 1855.94 Sq. mt. out of total 2355.94 as vacant land though till date no copy of the enquiry report ever served upon the petitioner.

32. It is also not out of place to mention that on the one hand the competent authority held that the entire land as vacant land and allowed only 500 Sq. mt. to be retained by the petitioner and on the other hand the competent authority being satisfied about the hardship of the petitioner in case of acquisition of the vacant land advised the petitioner to make application for exemption under Section 20 of the said Act. Therefore, unless the extent of vacant land was properly determined after providing the benefit under Section 2 (g) of the said Act of 1976 the authority could not legally declare the entire land as vacant land. Unfortunately the authority instead of accepting the contention of the petitioner assured that the application for exemption if made would be considered sympathetically.

Though on 29th July, 1981 the petitioner filed an application for exemption under Section 20 of the said Act before the Assistant Secretary Land Reforms Department but the petitioner received final statement on 10th November, 1981 wherefrom it revealed that despite there being two separate dwelling units boundary walls and the tube well the competent authority arbitrarily illegally whimsically in violation of Section 2 (g) of the said Act have declared 1855.94 Sq. mt. out of total 2355.94 Sq. mt. to be surrendered as vacant land as contended by the petitioner. On the other hand it is evident that by an order dated 13th November, 1984 in exercise of power conferred by Clause (a) Sub Section (1) of Section 20 of the said Act the State Government was pleased to exempt the said vacant land from the provisions of Chapter III of the said Act on certain conditions."

Thereafter at Paragraph 34 of the said impugned Judgement, the Hon'ble Single Bench further concluded as follows:

"34. It is crystal clear from the Section 2 (g) of the said Act of 1976 that land appurtenant in relation to any building means as follows :-

"Section 2 (g)- "land appurtenant", in relation to any building, means,-

(i) in an area where there re building regulations, the minimum extent of land required under such regulations to be kept as open space for the enjoyment of such building, which in no case shall exceed five hundred square metres; or

(ii) (ii) in an are where there re no building regulations, an extent of five hundred square metres contiguous to be land occupied by such building and includes, in

the case of any building constructed before the appointed day with a dwelling unit therein, an additional extent not exceeding five hundred square metres of land, if any, contiguous to the minimum extent referred to in sub-clause (i) or the extent referred to in sub-clause (ii) as the case may be”.

Therefore, as per definition of Section 2 (g) of the said Act of 1976 that land kept as open space for the enjoyment of such building cannot be described as vacant land as has been argued by Mr. De.

It cannot also be ignored by the Court that vacant land does not include tank. In the present case it is evident from the records that there is a tank in the said land. That being the scenario in my considered view such land cannot be treated as vacant land by the authority. According to KMC Building Rule 23 of 1951 there was a provision that the total area covered by building shall not exceed 1/3 while according to the 1990 KMC Building Rule maximum percentage of ground coverage of a plot size of 500 Sq. mt or more in case of residential building shall be 50 % . It is also the same under Rule 70 in KMC Building Rules, 2009.”

While Mr. S.N. Mukherjee, Ld. Senior Counsel appearing for the appellant/ the State, has assailed the order of the Hon’ble Single Bench to be both factually and legally unsustainable, Mr. Shaktinath Mukherjee, Ld. Senior Counsel appearing for the writ petitioners (the Company), who are the respondents to this appeal, has not only supported the findings of the Hon’ble Single Bench based on its interpretation of the application of Section 2 (g) of the 1976 Act but has further relied on the pronouncement at Paragraph 6 of the authority reported in 2003) 7 SCC 336, In Re: State of Maharashtra and Anr.vs. B.E. Billimoria and Ors. to argue that the Company is additionally entitled to protection under Section 2 (q) (i) of the 1976 Act.

Apropos the discussion of the Hon’ble Single Bench on the vacant status of the said land (supra), it would be relevant for this discussion to refer to the findings of the Appellate Authority as dictated by its Order dated 8th June, 2011 in Appeal Case No. 01 of 2011 filed by the Company under Section 33 of the 1976 Act challenging the order of the CA, Kolkata vide Notification dated 7th December 2010 declaring 1855.94 square meters of the said land to be vacant and in excess of the ceiling limit under the 1976 Act.

The findings of the Appellate Authority read as follows:

ORDER SHEET

District -- Case No. 01 of 2011

Nature of the case:- Appeal Case No. 01 of 2011 filed by M/s. KC Das Pvt. Ltd. U/s 33 of the Urban Land (Ceiling and Regulation) Act, 1976, against the order of CA, Kolkata

Serial No. and date of order

Order & Signature of Officer

Notice of action taken order

08.06.2021

Appellants present. Appeal hearing is taken up to day for disposal. As called for on the last day, the report of the Competent Authority dated 07.06.2011 is received and is discussed.

The appellant's brief points are as follows:

- a) That there was a structure of construction on the land on the appointed date i.e. 17-02-1976 which was not taken into account by the Competent Authority;
- b) That there was no enquiry made by the CA on the statement under Section 6(1) filed by the appellant on 14-08-1976. The appellant refers to Hon'ble High Court judgement reported in 1979 (1) CLJ Page 427;
- c) That an IB inspection report of the KMC dated 1979 shows that there was indeed a construction on the land.

Considered.

It is established that there is a construction on the land. Not only that it is existing, but it has also increased in size over the years as is evident from successive enquiry conducted by the CA on 28-07-2004 and 01-06- 2011. It can therefore, be safely assumed that the structure is still being expanded and there is a distinct possibility that the structure came into existence after the appointed date in 1976. The biggest argument is that the appellants on their own accord in their report under Section 6(1) had admitted that the land in question was a clear land without any construction as on the appointed date, that is, in 1976. The Inspection Report Book records produced all relate to dates after the appointed date. The records, therefore, do not establish that there was a structure existing on the appointed date. On the other hand, a copy of the inspection report conducted on the 3rd quarter on 1973-74 by KMC shows that there was no structure. It is evident that new structure came into being any time between 1973 and 1979. This, viewed with the fact that the appellants themselves had admitted in their 6(1) statement that the land was vacant and had later prayed for exemption on the assumption that the land was liable to be vested, proves that the plot was vacant and free of any structure on the appointed date in 1976 and that it was a vacant land. It is not true that the CA did not conduct enquiries; on the contrary there was more than one enquiry conducted which acknowledge that there was a structure existing on the date of enquiry but there was no evidence to show that the statement u/s 6(1) submitted by the appellants in 1976 were not true. I refer to the report of the CA as called for and as referred to above and reproduce certain parts of it.

"The Inspection Book Report has been collected by the Revenue Officer of this office – Mr. Dhritiman Mandal which has been submitted by him on 30.5.2011. The copy of which is being annexed herewith which shows that in the year

1973-74 the character of the premises was "Land and Tank" only. But in the year 1979-80 the nature of the land of the premises changed and became "corrugated Dwelling House and land" which clearly shows that the tank was filled up to make vacant land And in the year 1985-86, 1997-98, the character of the land remains the same i.e. "corrugated dwelling house and land".

So, the claim of the appellant that there was structures in the subject premises on the appointed date of 17.2.1976 is not being established by the Inspection Book report as stated above.

Till date the appellant could not produce any authenticated document which proves that there was structure or dwelling house on the subject premises on the appointed date of 17.2.1976.

It is also mentioned herewith that the Return u/s 6 of the Act which was submitted by Smt. Annapurna Das, the then Governing Director of KC Das Pvt. Ltd. on 14.08.1976 clearly shows that there was only vacant land which proves that on the appointed date of 17.02.1976 there was no structure.

Not only that, at the time of submission of objection on 26.12.1980 against the Draft Statement u/s 8(1) of the Act, the then Governing Director did not mention of any structure over the subject premises."

I, therefore, hold that the evidence produced before me does not convince me that there was a structure existing on 17.02.1976 or that the CA had failed to observe the due process of Law. I, therefore, consider that the appeal is not maintainable and I hereby reject the appeal accordingly.

Inform all accordingly.

From the facts on the ground it also transpires that the Company acted on the foundational basis of its Return submitted under Section 6 (1) of the 1976 Act on 17th August 1976, that is close to the appointed date, in respect of the said total land comprising 1 bigha 15 cottahs 3 chataks and 25 sq. ft. located at Premises Nos. 4, Tala Park Avenue, Kolkata 700002 (presently known as Tarasankar Sarani), declaring the entirety of it to be a vacant land. Acting on such basis, the Company claimed exemption under Section 20 of the 1976 Act. The Company also sought judicial redress and, by an Order dated 19th March 1982 passed by a Hon'ble Single Bench of this Court the CA was directed to decide the Company's application for exemption.

The consequence of such decision was that the Company would start its factory on the said vacant land within a period of 6 months from the date of issue of the Memorandum by the competent authority which was 13th November 1984 and, the proposed factory should start functioning within a period of 2 years from the date of issuance of the order.

It has not been denied by the Company that even after the lapse of more than 10 years from the grant of exemption on 13th of November 1984(supra), the

Company had failed to construct the factory and start its operations, thereby compelling the CA to withdraw the exemption order vide a subsequent Memo. dated 6th of September 1995.

It is also relevant to note that for the second time acting on the foundational basis disclosed in its Return under Section 6(1) of the 1976 Act (supra) that the said land was vacant land, the Company prayed for issuance of a fresh exemption order under Section 20 of the 1976 Act, this time for the purpose of setting up a modern diagnostic laboratory and nursing home. Thereupon, the competent authority directed that the spot enquiry be held on the said land and the Company be directed to disclose all details connected to the nursing home project within a specified period. The Company having failed to process the requirement of a nursing home as demanded by the Authority, the exemption under Section 20 of the 1976 Act stood finally withdrawn.

Thereafter, the appeal challenging the declaration of excess land by the Competent Authority being dismissed by the Appellate Authority by its order dated 8th of June 2011 (supra), the writ petition being WP 11004 (w) of 2011 came to be filed by the Company for setting aside the declaration of excess vacant land.

For the purpose of this discussion it is illuminating for this Court to notice that the Company had twice prayed for exemption treating the said land to be vacant land under Section 20 of the 1976 Act. Such prayers for exemption were made by the Company in the spirit of the discussion by the Appellate Authority vide its order dated 8th June, 2011 in Appeal Case No. 1 of 2011 (supra) by treating the said land to be vacant land.

To the mind of this Court, the factual assertions in the order of the Appellate Authority dated 8th of June 2011 as understood in the light of the Company's action seeking exemption to construct on the said vacant land, belie the discussion by the Hon'ble Single Bench conferring upon the Company protection under Section 2 (g) of the 1976 Act.

This Court therefore intends to hold that the attempt by the Company to ringfence its position over the said land on the pretext of alleged structure and a tank invoking Section 2 (g) of the 1976 Act cannot be finally sustained.

It would be also apposite for this Court to appreciate the status of the said land corresponding to the appointed date (supra). In the view of this Court the Return filed under Section 6(1) of the 1976 Act by the Company on the 14th of August 1976, followed by its back-to-back applications for exemptions treating the said land to be vacant land and thereby seeking permission to construct thereon, goes against any argument purporting to employ Section 2 (g) of the 1976 Act in its defence.

The next argument of Mr. Shaktinath Mukherjee is based on Paragraph 6 of In Re: Billimoria (supra). Mr. Mukherjee would argue that Paragraph 6 of Billimoria

confers on the Company a right to be protected under Section 2 (q)(i) of the 1976 Act.

Paragraph 6 of In Re Billimoria reads as follows:-

"6. Shri Dholakia has next submitted that the High Court has erred in excluding two-third area of CTS No. 82, Koregaon Park, Pune, while determining the ceiling area applicable to each of the respondents. Learned counsel has urged that as no construction had been made on the plot and the same was totally vacant, it could not be ascertained as to on which portion of the plot the building would be constructed and which portion had to be left vacant under the building regulations and therefore the respondents could not contend that while determining the vacant land only one-third of their share in the plot should be taken into consideration. Section 2(q) of the Act defines "vacant land" and sub-clause (i) thereof which is relevant is being reproduced below:

"2. (q) "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;"

A plain reading of the provision would show that any land on which construction is not permissible under the building regulations in force in the area would not come within the ambit of "vacant land". Sub-rule (9) of Rule 2 of the Building Rules framed by the Collector of Pune for Koregaon Park lays down that not more than one-third of the total area of any building plot shall be built upon and in calculating the area covered by a building the plinth area of the building and other structures excepting compound walls, shall be taken into account. It further provides that any area covered by staircase and projections of any kind shall be considered as built over. The appellant does not dispute the applicability of this building rule to Koregaon Park area where the plot of land CTS No. 82 is situate. The definition of "vacant land" as given in Section 2(q) clearly provides that land on which construction of a building is not permissible under the building regulations in force in the area has to be excluded. As under the relevant rules in force in the area construction was not permissible on two-thirds of the area of the plot, the High Court was perfectly justified in holding that for determining the vacant land in CTS No. 82, Koregaon Park, Pune, two-third portion of each of the respondents had to be excluded and thus the vacant land held by each one of them in the said area was only 905 sq metres. In fact, on the plain language of the statute and the prohibition contained in the Building Rules in Koregaon Park area, which are in operation, it is not possible to take any other view."

The above argument of Ld. Senior Counsel for the respondent/ the Company is met by Mr. S.N. Mukherjee, Ld.. Senior Counsel appearing for the State/ the appellants, by relying on Paragraph 19 of In Re: Billimoria, (supra), which reads as follows:

"19. So far as the submission of Mr Dholakia to the effect that as on the appointed day, no construction had been made on the land in question and only a building plan therefor has been sanctioned, the exception contained in Section 2(q) of the Act would not be applicable is concerned, we may notice that sub-clause (i) of Section 2(q) excludes 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 from the definition of "vacant land". The 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 is also excluded. A plain and literal meaning attributed to sub-clause (i) of Section 2(q) leaves no manner of doubt that for the purpose of applicability thereof, it is not necessary that constructions must exist on the appointed day. What is necessary is as to whether construction of a building is permissible or not. The scheme of the Act, particularly Section 29 thereof clearly shows that regulation of construction of building with dwelling units was contemplated by the makers of the legislation. As regards the space which is to be left vacant for the purpose of construction of a building, a restriction on construction of building with dwelling units having been provided for in the Act, it is idle to suggest that for the purpose of exclusion of land in terms of sub-clause (i) of Section 2(q), constructions must have existed on the land on the appointed day. Had the intention of Parliament been to exclude only such lands which have been directed to be left vacant only on the constructed buildings in terms of the building regulations, the same would have been stated expressly."

To the mind of this Court the argument of Ld Senior Counsel for the respondent/ the Company that Paragraph 6 In Re: Billimoria (supra) confers the protection under Section 2 (q)(i) of the 1976 Act cannot be simply sustained on the question of calculating vacant land proportionate to the extent of any construction prohibited over the said land.

The terms of Paragraph 6 of Billimoria (supra) are not a feature of this case, more so when the existence of any structures and land appertainingthereto on the appointed date, are not conclusively proved from the facts on the ground.

This Court ipso facto on a combined reading of Paragraph 6 and Paragraph 19 of Billimoria (supra), does not find that the Company has been able to make out a case for protection under Section 2 (q)(i) (supra) particularly having regard to the historical narrative of the said land being vacant in terms of its Return corresponding to the appointed date as well as its back to back applications for exemptions to construct over the entire land.

Before parting with this discussion, this Court notices that at Paragraph 35of the impugned Judgement, the Hon'ble Single Bench has held as follows :

"35. The said Act came into force in 1976 in 64 urban agglomeration spread over 17 states and three Union Territories and covered towns with population of more

than two lakhs as per 1971 census”

This Court must notice, with respect, that the adoption of the Repealing Act of 1999 has been left to States under Clause 2 of Article 252 of the Constitution. Section 1 (3) of the Urban (Ceiling and Regulations) Repeal Act, 1999 (for short, the 1999 Act) reads as follows:

“3. It shall be deemed to have come into force in the States of Haryana and Punjab and in all the Union territories on the 11th day of January, 1999 and in any other State which adopts this Act under clause (2) of article 252 of the constitution on the date of such adoption; and the reference to repeal of the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) shall, in relation to any State or Union territory, mean the date on which this Act comes into force in such State or Union territory” Since the State of West Bengal has not yet adopted the Repealing Act of 1999, such repeal has no binding force in the facts of this case and the Hon’ble Single Bench could not have therefore held against the State on the basis of the provisions contained in the 1999 Act.

In the backdrop of the above discussion, this appeal must succeed.

FMA 302 of 2019 with IA No.CAN 3 of 2021 stands allowed.

The Judgement and Order impugned dated 14th of August, 2017 in WP 11004(w) of 2011 stands set aside.

Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.

Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I Agree.