

CASE NO.:
Appeal (civil) 4801 of 2005

PETITIONER:
Indian City Properties Ltd. & Anr.

RESPONDENT:
The Municipal Commissioner of Greater Bombay, & Anr.

DATE OF JUDGMENT: 05/08/2005

BENCH:
Ruma Pal & Dr. AR Lakshmanan

JUDGMENT:
J U D G M E N T
(Arising out of Special Leave Petition (Civil) No..13573 of 2001)

RUMA PAL, J.

Leave granted.

The appellant is the owner of Plot No. 2M/748 situated at M.L. Dhanukar Marg, Mumbai. On the plot, there is a bungalow, an out-house, cooling towers, a pump room, servants quarters and a watchman's room. The first appellant has let out the bungalow and the outhouse to the appellant No.2 for use as a guest house. On 16th November, 1999 a notice was issued to the appellants under Section 299 of the Mumbai Municipal Corporation Act, 1888, (hereinafter referred to as "the Act") to the effect that the Corporation would take possession of "certain land not occupied by a building" forming part of the premises within the regular line of public street as prescribed by the Commissioner, under Section 299 of the Act\005.. together with its enclosing wall, hedge, or fence, if any, and any platform, verandah, step or other structure, which may be found upon the said land". Notice was also given that if necessary the authority issuing the notice namely, the Deputy Municipal Commissioner (Zone-I), Greater Bombay, would "proceed to clear the building".

Section 299 in so far as it is relevant is extracted verbatim below:-

"299. Acquisition of open land or of land occupied by platforms, etc, within the regular line of a street.

(1) If any land not vesting in the corporation, whether open or enclosed, lies within the regular line of a public street, and is not occupied by a building, or if a platform, verandah, step or some other structure external to a building abutting on a public street, or a portion of a platform, verandah, step or other such structure, is within the regular line of such street, the Commissioner may, after giving to the owner of the land or building not less than seven clear days' written notice of his intention so to do, take possession on behalf of the corporation of the said land with its enclosing wall, hedge or fence, if any, or of the said platform, verandah, step or other such structure as aforesaid,

or of the portion of the said platform, verandah, step or other such structure aforesaid which is within the regular line of the street, and, if necessary, clear the same and the land so acquired shall thenceforward be deemed a part of the public street".

The question is whether the land in the appellant's premises which is sought to be affected by the notice is "not occupied by any building" or occupied by "some other structure external to a building"? In terms of the Section, if the land is occupied by a building it is outside the scope of Section 299; but if there are only structures external to a building, action may be taken under Section 299 by the respondent to take possession of the land and demolish the structure. The notice was challenged by the appellants under Article 226 of the Constitution contending that the former was true in its case. By an order dated 2nd May, 2001, the High Court directed the Prothonotary and Senior Master of the High Court to appoint an Officer of the Court to visit the property and verify whether the proposed acquisition affected any of the structures of the appellant. Pursuant to the order, the Commissioner was appointed. The Commissioner visited the premises upon notice to the parties and submitted a report. According to the report, the proposed acquisition affected the following permanent existing structures in the premises to the extent indicated:

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|---|---|
| 1. Servants Room in two parts
(Gr. Floor structure) | a) 13'-6"x 9'-6" 128.25
b) 12'-6"x20'-6" 256.25 |
| 2. Security Cabin(Gr.Floor Structure) | 6'-6"x6'-6" 42.25 |
| 3. Pump Room with Compressor
(Gr.Floor Structure) | 9'-0"x6'-0" 54.00 |
| 4. Under ground RCC tank with
Cylinder shape pre-cast tank
on Top | 14'-6"x11'-6" 166.75 |
| 5. A.C. Plant | 12'-6"x 10'-6" 131.25 |
| 6. Part portion of Main Structure in
two parts viz. Ground and First
Floors, staircase, part bed room
Part bed room and balcony. | a) 2x13'.6"x10'-0" 270
b) 2x9'-0"x2'-6" 22.50
2 |

The writ petition was ultimately dismissed on 15th July 2001 by the High Court which held Section 299 of the Act permitted such action against the six structures which were held to be "other structures" external to the main building within the meaning of the phrase in Section 299. The High Court however noted the respondents' submission that "the petitioners will be entitled either for compensation or permissible FSI in accordance with the relevant provisions and rules".

The appellants contend that the High Court misconstrued Section 299 of the Act and erred in treating the six items mentioned in the Commissioner's report as structures external to a building. According to the appellants each structure was a 'building' within the definition of the word in Section 3(s) of the Act of which possession could not be taken under Section 299 of the Act. Our attention was also drawn to several photographs in support of the submission. Learned counsel appearing on behalf of the respondents has submitted that the definition of the word "building" in Section 3(s) was subject to the context to the contrary and that in the context of the language of Section 299, it was clear that

at least items 1-5 in the Commissioner's report were structures in respect of which proceedings could be taken under Section 299. It is contended that the expression "other structure external to a building" in Section 299 means such other structures as are not part of the main building. It is said that an important test to determine what structure can be considered as part of a building is whether the FSI is exhausted by "such other structure". In reckoning the FSI of constructed structures, water tanks, pump rooms, security canopy or make-shift servant quarters with temporary construction are not counted. It is the respondent's case that in the present case no FSI is exhausted by the structures proposed to be taken away. Reference has been made to Regulations 3(42), 30 and 35 of the Development Control Regulations for Greater Bombay, 1991 (referred to as "the Regulations"). It is said that the land beneath the disputed structures was considered to be vacant. According to the respondent the legislative intent is to provide for acquisition of such external structures of buildings as are required in public interest to widen the road. It was also submitted that the need for taking over the portion of the premises in question was admittedly to widen the existing road on which the premises abutted and to bring it in within the regular line of the public street which had been determined by the Commissioner under Section 297. According to the respondents, the adjacent properties falling on the prescribed regular line had given or not contested the area needed for road expansion and that the appellants were really interested in the grant of a greater Floor Space Index (FSI) under the Regulations in lieu of the portion of the premises sought to be taken over by the Corporation. However it was said that the Corporation was not interested in item six of the Commissioner's report and it was conceded that the said item fell outside the purview of the Commissioner's power under Section 299. As far as the remaining part of the premises was concerned, the Corporation was willing either to grant FSI in terms of the Regulations or pay compensation to the appellants in respect of the loss or damage which may be suffered by reason of the widening of the street. The word 'building' occurs in different statutes and has been construed according to the context in which the word has been used. It is not necessary to consider those judgments given the fact that the word "building" has been defined in sub-section(s) of Section 3 of the Act as follows:-

(s) "building" includes a house, outhouse, stable, shed, hut, tank (except tank for storage of drinking water in a building or part of a building) and every other such structure, whether of masonry, bricks, wood, mud, metal or any other material whatsoever."

The body of the Section however qualifies the definition with the words "unless there be something repugnant in the subject or context". The phrase in Section 3 means precisely what it says namely, that the definition will apply unless excluded expressly or by necessary implication. The onus is on the person alleging such exclusion. It is not the respondent's case that the items found to be permanent existing structures by the Commission of the High Court, would not fall within the general definition of building. The submission is that the word should be read in a more restrictive manner in the context of Section 299. The question then is - has, the onus been discharged by the respondent?

The definition itself is in terms an inclusive one and is therefore to be widely construed. It seems to indicate that a structure would be a building if it has been erected by the use

of whatever material, which may or may not be used by human beings since it specifies stables and tanks as buildings. The respondent's submission is that the servant quarters, security cabin, the pump room, underground RCC Tank with Cylinder shape pre-cast tank and the AC Plant are temporary building and are ancillary to the main residential building and not buildings for the purposes of exclusion from Section 299.

Section 299 itself does not draw a distinction between a main building and an ancillary building, or between a permanent building and a temporary building. But the phrase 'temporary buildings' has been defined in Section 3(sb) of the Act which says that:-

"temporary building" means any building which is constructed principally of mud, leaves, grass, cloth, thatch, wood, corrugated iron or asbestos cement sheets or such other material and includes a building of whatever size constructed of whatever material which the Commissioner has allowed to be built as a temporary measure".

In other words a temporary building is that which is not permitted to remain permanently. When the Act separately defines a temporary building as opposed to a "building" it indicates that, in the absence of the word 'temporary' in a particular section what is meant is a permanent building. This Court in *Municipal Corporation of Greater Bombay Vs. Indian Oil Corporation Limited* 1991 (Suppl.) 2 SCC 18, construed the words "every other such structure" in Section 3(s) in the context of Section 143 (a) of the Act (which authorizes a levy of general tax on building and land) and held that - a petrol storage tank although not fixed to the earth was such a structure, holding that permanency is the test. The context of Section 299 is Chapter 11 of the Act which deals with the regulation of streets. The chapter contains inter alia (a) provisions relating to the construction, maintenance and improvement of public streets and (b) preservation of the "regular line" in public streets. Section 296 of the Act falls within the first set of provisions and provides:-
"(1) The Commissioner may, subject to the provisions of Sections 90,91 and 92\027

(a) acquire any land required for the purpose of opening, widening, extending or otherwise improving any public street or of making any new public street, and the buildings, if any, standing upon such land;

(b) acquire in addition to the said land and the buildings, if any, standing thereupon, all such land with the buildings, if any, standing thereupon, as it shall seem expedient for the corporation to acquire outside of the regular line, or of the intended regular line, of such street;

(c) lease, sell or otherwise dispose of any land or building purchased under clause (b).

(2) Any conveyance of land or of a building under clause (c) may comprise such conditions as the Commissioner thinks fit, as to the removal of the existing building, the description of new building to be erected, the period within which such new building shall be completed and other such matters."

The power of acquisition under Section 296 is to be exercised by the Commissioner under the provisions of the Land Acquisition Act 1894 [See: Sections 87,91 (i)] Sections 297 to 311 are grouped together under the sub-title "Preservation of Regular Line in Public Streets". Section 297 prescribes the method by which the Commissioner may prescribe a line on each side of any public street which is called the "regular line" of the street. Section 298 allows the Commissioner to dispose of proposals relating to re-building or removal or re-construction or additions in respect of any part of a building abutting on a public street which is within the regular line of such street. In passing an order on the proposals under Section 345 or 346, the Commissioner may require such building to be set back to the regular line of the street. Section 301 mandates payment of compensation to be paid by the Commissioner to the owner of any building or land acquired for a public street under Sections 298 or 299 for any loss which such owner may sustain in consequence of his building or land being so acquired and for any expenses incurred by such owner in consequence of an order made by the Commissioner under either of the Sections.

It needs to be noted that in all these sections the word used is 'building' in contradistinction with Section 299 which speaks of 'structures' and 'buildings'. The word 'structure' is used as a generic term so that while all buildings may be structures, all structures are not buildings. That structure which is not a building and is a platform, verandah, step, or some other such structure external to a building may be taken over by the Commissioner under Section 299(1) if it is within the regular line of the street. The words "some other such" must be construed as structures similar or like platform, verandah and step. The words must be read ejusdem generis with the preceding words since the word 'such' means "of the type previously mentioned". The word "other" has also been held to indicate that it must be construed ejusdem generis. The underlying characteristic of platforms, verandahs and steps is that they are not independent structures and are external to a building, that is they are attached to the outside and form an inessential part of a building. In our opinion, therefore in order to be a building for the purpose of Section 299 the structure would have to be an independent, permanent structure. Thus there is no repugnancy if one were to read the definition of building and Section 299 and in our opinion the word 'building' has been used in Section 299 in the sense defined in Section 3(s).

Of the six items listed by the Commissioner in his report, learned counsel appearing on behalf of the respondents has, as we have noted earlier, already conceded that the part of the main structure described against serial No. 6 would be excluded from the purview of the action proposed in the impugned notice under Section 299. Even without the concession in our view, applying the test of independence and permanence each of the items fall within the definition of 'building' in Section 3(s) of the Act, and therefore, fall outside the purview of Section 299.

The next argument put forth by the respondent is that the word 'building' in Section 299 must be understood in the

context of floor space index (FSI) as provided under the Development Control Regulation of Greater Bombay 1991. The argument is unacceptable.

FSI merely relates to the permission to build having regard to various features such as height of the building, tenement density, object with which the building is to be erected etc. The computation of the FSI is in a context which is wholly different from the context in which the word has been used in Section 299. In any event it is in dispute which structures are taken into account for the purposes of calculating FSI.

Apart from the language of Section 299, and the immediate context in which the Section appears the power to take over possession conferred on the Commissioner under Section 299 in respect of certain structures is a summary power. Having regard to the nature of the power, it is unlikely that the legislature intended that the Commissioner would exercise such summary powers in respect of independent structures which have been defined as 'building' under the Act. Needless to say it is always open to the municipal authority subject to the provisions of the Act, to acquire any land or building under Section 296 of the Act.

In the circumstances of the case, we allow the appeal by setting aside the impugned judgment as well as the impugned notice dated 16th November, 1999. There will be no order as to costs.