Bombay Metropolitan Region ... vs Gokak Patel Volkart Ltd. & Ors on 13 December, 1994

Equivalent citations: 1995 SCC (1) 642, JT 1995 (1) 155

Author: S.C. Sen

Bench: S.C. Sen, B.P. Jeevan Reddy

PETITIONER:
BOMBAY METROPOLITAN REGION DEVELOPMENT AUTHORITY, BOMBAY.

Vs.

RESPONDENT:
GOKAK PATEL VOLKART LTD. & ORS.

DATE OF JUDGMENT13/12/1994

BENCH:
SEN, S.C. (J)
BENCH:
SEN, S.C. (J)
JEEVAN REDDY, B.P. (J)

CITATION:
1995 SCC (1) 642 JT 1995 (1) 155
1994 SCALE (5)256

ACT:

HEADNOTE:

JUDGMENT:

SEN, J.:

1. Leave granted.

2. On 28th May, 1974, Gokak Patel Volkart Ltd. submitted a plan for construction of two houses at premises No. 124126 Wodehouse Road, Colaba, Bombay, to the Municipal Corporation of Greater Bombay. The said two houses were occupied by tenants. The plan was for construction of a thirty storeyed building utilising Floor

Space Index (for short FSI) of 2.45 of the said plot.

3. The Development Control Rules existent at the relevant time permitted construction of building on the F.S.I. of 2.45 under R-8 F.S.I. Zone in which the above property was situated. The plan was approved by. the Corporation and on 13th September 1974 Intimation of Disapproval (I.O.D.) was granted to the Company under section 346 of the Bombay Municipal Corporation Act, It was stipulated in the I.O.D. that no work should be started unless the existing structures proposed to be removed were in fact removed. It was also stated in the I.O.D. that it was given exclusively for the purposes of enabling the party to proceed further with arrangements of obtaining "No Objection" Certificate from the Housing Commissioner under section 13(bb) of the Bombay Rents, Hotel and Lodging House Rates Control Act. In pursuance of the I.O.D. granted by the Corporation, the Company initiated proceeding for eviction of the tenants from the existing structures on the property in question. Ultimately in August 1979, the tenants were evicted and old structures were demolished. In the meantime, in 1975, the State Legislature of Maharashtra enacted the Bombay Metropolitan Region Development Act, 1974 (Maharashtra Act No.IV of 1975) to provide for the establishment of an authority for the purpose of Planning, co-ordinating and supervising the proper, orderly and rapid development of the areas failing within that region. The said Act came into force with effect from 26th January, 1975. Section 13 of the Act provides:-

" 13.(1) Notwithstanding anything contained in any law for the time being in force, except with the previous permission of the authority, no authority or person shall undertake any development within the Metropolitan Region of the type as the Metropolitan Authority may from time to time specify, by notification published in the Official Gazette, and which is likely to adversely affect the overall development of the Metropolitan Region. (2) Any authority or person desiring to undertake development referred to in sub-

section (1) shall apply in writing to the Metropolitan Authority for permission to undertake such development.

(3) The Metropolitan Authority shall, after making such inquiry as it deems necessary and within 60 days from the receipt of an application under sub-section (2), grant such permission without any conditions or with such condition as it may deem fit to impose or refuse to grant such permission. If such permission is not refused within 60 days as aforesaid, it shall be deemed to have been granted by the Authority.

(4) Any authority or person aggrieved by the decision of the Metropolitan Authority under sub-section (3), may, within 30 days, appeal against such decision to the State Government, whose decision shall be final."

4. The Metropolitan Authority, in exercise of powers under sub-section (1) of Section 13 of the said Act, published in the Official Gazette a notification dated 10th June, 1977 providing, inter alia, that no construction or reconstruction of any building including addition to any existing building shall be carried out so as to have a floor space index exceeding 1.33.

5. As a result of the provisions of Section 13(1) of the Act and the notification dated 10.6.1977, a person desiring to undertake development in contravention of the notification had to apply in writing to the authority for permission to undertake such development. The authority could grant permission without any condition or with such conditions as it thought fit or refuse to grant such permission. This has to be done within 60 days from the receipt of the application under sub-section (2) of Section

13. If the permission was not refused within the aforesaid period of 60 days under sub-section (3) of Section 13, such permission should be deemed to have been granted by the authority.

6. In view of the above developments, on 14th July, 1977, Gokak Patel Volkart Ltd. (hereinafter described as 'the respondent-Company'), applied to the Bombay Metropolitan Region Development Authority (hereinafter described as 'B.M.R.D.A. ') under Section 13(2) of the Bombay Metropolitan Region Development authority Act, 1974 (hereinafter referred to as 'the Act') for permission to undertake the above development with the F.S.I. of 2.45. The said application was received by the B.M.R.D.A. on 15.7.1977. The pennission was refused by the Metropolitan Authority under Section 13(3) of the Act on 8th September, 1977. The respondent Company preferred an appeal to the State Government under Section 13(4) of the Act on 19th September, 1977 which was allowed by the State Government on 23rd February, 1978. Accordingly, the respondent-Company was given a commencement certificate under Section 344 and 345 of the Bombay Municipal Corporation Act on 31st March, 1980.

7. Soon thereafter a Writ Petition was filed by the residents of Colaba challenging the above order of the State Government under Section 13(3) of the Act allowing the appeal of the respondent-Company against the order of the Metropolitan Authority. By a judgment dated 5.4.1984 passed. by the Bombay High Court, the order of the State Government as well as the order passed by the Metropolitan authority under Section 13(3) of the Act rejecting the application of the respondent-Company were set aside with a direction to the Administrator of the Municipal Corporation of Greater Bombay to consider the application afresh and pass appropriate orders.

8. The material part of the order was as under?

> "Accordingly, the petition succeeds and the impugned order dated February 23, 1978 passed by Minister for Housing and BMR.D.A. is set aside and so also the order passed by respondent No.3 rejecting the application and which was communicated to respondent No.4 on September 8, 1977. Respondent No.3 is directed to reconsider the application dated July 14, 1977 filed by respondent No.4 under sub- section (2) of Section 13 of the Act, in accordance with the observation made in this Judgment and pass appropriate orders. Respondent No.3 shall pass the orders as expeditiously as

possible."

9. The Metropolitan Authority took up the application of the respondent-Company under Section 13(3) of the Act for reconsideration in pursuance of the above order of the Court and by the order dated 19th September, 1984 rejected the application under Section 13(3). Against that, the respondent-Company filed appeal on merits before the State Government on 16th October, 1984 which is still pending.

10. On the very next day, the Writ Petition was also filed in the High Court of Judicature at Bombay by the respondent Company, challenging the order of the Metropolitan Authority passed under Section 13(3) rejecting the application of the respondent-Company under Section 13(2) of the Act on the ground that in the facts and under the circumstances of the case and in view of the lapse of sixty days stipulated in Section 13(3) of the Act, permission was deemed to have been granted to the respondent-Company by the Metropolitan Authority and in that view of the matter, the order of rejection passed under Section 13(3) was illegal and without jurisdiction.

11. The Division Bench of the Bombay High Court upheld the contention of the Company and held that permission must be deemed to have been granted to construct the building according to the plan in view of the fact that such permission had not been refused within 60 days as required by sub-section (3) of section 13 of the Act. In coming to this decision the Division Bench took note of the following facts. The judgment in the earlier writ petition had been delivered on 5th April, 1984 by which order of the Metropolitan Authority passed under section 13(3) had been set aside. There was a direction to pass a fresh order, that direction was not carried out at all. BMRDA applied for certified copy of the judgment on 18th April, 1984, on 24th May 1984 the Company communicated the operative part of the order dated 5th April, 1984 to BMRDA. The Executive Committee of the BMRDA sat on 18th July, 1984 and again on 24th July, 1984 and finally decided to reject the application of the respondent-Company under section 13(2) of the Act on 17th September, 1984. The BMRDA had no jurisdiction to pass any order under section 13(3) of the Act on 17th September, 1984, as the requisite period' of 60 days provided by under section 13(3) had expired by that time. It was held by Division Bench that the order dated 17th September, 1984 refusing to gram permission passed by the Authority was illegal. The said order was passed beyond the statutory period of 60 days, therefore, permission shall be deemed to have been granted by the Authority in terms of sec-

tion 13(3) of the Act.

12. The contention of the appellant in this appeal is that in the first place the writ petition should not have been entertained. The writ-petitioner had an adequate alternative statutory remedy. The writ-petitioner had in fact already taken advantage of alternative remedy provided by the Statute and had preferred an appeal against the judgment of the Tribunal. While the said appeal was pending the writ-petitioner invoked the writ .jurisdiction of the Bombay High Court praying more or less the same remedy as was prayed in the appeal.

13. We are of the view that the point taken by the appellant is of substance. This is a case, where there is not only the existence of an alternative remedy but the writ petitioner actually had availed of

that remedy. The writ-petitioner's appeal before the Statutory Authority was pending. In that view of the matter this writ petition should not have been entertained.

14. The second point urged by Mr. Salve is also of substance. The respondent had applied to BMRDA for permission to undertake the development work with the FSI of 2.45 under sub-section (2) of section 13 of the Act. That application was received by the BMRDA on 15th July, 1977. The application was rejected by an order passed on 8th September, 1977 within the requisite period of 60 days from the receipt of the application as laid down in sub-section (3) of section 13. The statutory fiction of deemed permission arises only if there is a failure on the part of the Metropolitan Authority to pass an order within 60 days of the receipt of the application. No question of this time limit arises when the Appellate Authority quashes the order and directs a fresh order to be passed. In such a situation there cannot be any question of passing an order within 60 days from the receipt of the application under sub-section (2) of section 13. The application was received by the Metropolitan Authority on 15th July, 1977. In order to accept the contention of the respondent it has to be deemed that the receipt of the application was on the date of the judgment which was passed on 5th April, 1984 or any subsequent date. There is nothing in the wording of sub- section (3) of section 13 justifying such a construction.

15. Mr. Nariman appearing on behalf of the Company drew our attention to the decision of this Court in the case of Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association CSI Cinod Secretariat, Madras; (1992) 3 SCC 3. A distinction was drawn between quashing an order and stay of operation of an order. It was explained in that judgment that quashing of an order resulted in restoration of the position as it stood on the date of passing of the order. The stay of the operation of the order, however, did not lead to such results.

16. It is true that the order dated 17th September, 1984 after being quashed did not remain in suspended animation. That would have been the case, had the order been merely stayed. That, however, does not mean that the Metropolitan Authority had failed to pass an order within 60 days of the receipt of the application.

17. As a matter of fact, the application received by the Metropolitan Authority on 15th July, 1977 was disposed of by an order dated 8th September, 1977 within the requisite period of 60 days. There-

fore, there is no question of the deeming provision coming into operation in this case at all. The order passed by the Metropolitan Authority may have been quashed by the High Court but the fact remains that an order was actually passed within the requisite period of time. The deeming provision would have come into operation only if no order was passed within 60 days of the receipt of the application on 15th July, 1977.

18. After the High Court quashed the order passed by the Metropolitan Authority on 17th September, 1984, a fresh order had to be passed under the direction of the Court and not on the basis of any fresh application. This fresh order could not have possibly been passed within 60 days of the receipt of the application on 15th July, 1977. The High Court could have fixed a time limit for passing a fresh order. If such a time limit had been fixed, the Metropolitan Authority had to pass an

order within that period. But in this case no time limit was fixed by the High Court. Therefore, the Metropolitan Authority had to pass a fresh order within a reasonable time.

19. It is well settled that when the Statute lays down the period of limitation for passing an order that requirement is fulfilled as soon as an order is passed within that period. If the order is set aside on appeal and the Appellate order directs a fresh order to be passed then there is no requirement of law that the consequential order to give effect to the Appellate order must also be passed within the statutory period of limitation. This proposition of law is well settled.

20. In the case of Director of lnspection of Income-Tax (investigation) New Delhi, and Anr. v. Pooran Mail and Sans and Anr. 96 ITR 390. this Court repelled the contention that the Income Tax Officer had no jurisdiction to pass an order under section 132(5) of the Income Tax Act when the order initially passed by him within the period of limitation had been set aside by the Appellate Authority. It was held in that case that the period of time fixed for passing an order under section 132 (5) applied only to the initial order and not to any subsequent order that may have to be passed under the direction given by a Statutory Authority or by a Court in a writ proceeding. It was observed :-

> "Even if the period of time fixed under section 132(5) is held to be mandatory that was satisfied when the first order was made. Thereafter, if any direction is given under section 132(12) or by a court in writ proceedings, as in this case, we do not think an order made in pursuance of such a direction would be subject to the limitations prescribed under section 132(5). Once the order has been made within ninety days the aggrieved person has got the right to approach the notified authority under section 132(11) within thirty days and that authority can direct the Income- tax Officer to pass a fresh order. We cannot accept the contention on behalf of the respondents that even such a fresh order should be passed within ninety days. It would make the sub-sections (11) and (12) of section 132 ridiculous and useless. It cannot be said that what the notified authority could direct under section 132 could not be done by a court which exercises its powers under article 226 of the Constitution. To hold otherwise would make the powers of courts under article 226 wholly ineffective. The court in exercising its powers under article 226 has to mould the remedy to suit the facts of a case."

21. Mr. Nariman next drew our attention to the decision of the Court of Appeal in the case of Regina v. Paddington Valuation Officer & Anr., (1966) 1 QB 380. In particular we were referred to the judgment of Salmon L.J., wherein it was observed :-

> "I am not altogether satisfied that there would be any power to grant mandamus and keep the 1968 valuation list in force by the simple expedient of postponing certiorari until after a new list had been prepared. No doubt it would be convenient, if possible, to follow this course, were the appeal to be allowed; indeed grave inconvenience, if not chaos, would follow if the 1956 valuation list were to be revived - which both the appellants and respondents at first agreed would be the inevitable result of allowing

> me appeal. It may be that mandamus can be granted without certiorari, but mandamus cannot be granted if there is a valid valuation list in being. It is not enough that the valuation officer should have prepared the list badly or even very badly. In such a case, he could not be ordered by mandamus to correct his mistakes or make a new list. In order for mandamus to lie, it must be established that he has prepared the list illegally or in bad faith, so that in effect he has not exercised his statutory function at all and that accordingly there is in reality no valid list in existence: Reg. v. Cotham, etc., JJ and Webb; Ex parte William. Accordingly, it seems to me that a finding that the list is null and void is necessarily implicit in an order of mandamus."

22. We fail to see, how the respondents can derive any support for their case from these observations of Salmon L.J. That was a case where it was found that the valuation officer had prepared a valuation list of 31656 dwellings at Paddington erroneously. There was a prayer for 'certiorari to quash the list altogether. There was also another prayer for a writ of mandamus directing the valuation officer to prepare a new list. Lord Denning, M.R. held that if the valuation list was entirely quashed there will be chaos. Therefore, the existing list could remain until it was replaced by a new list, when the new list was prepared the old list will be quashed by writ of certiorari. Lord Denning was of the view that certiorari was not a necessary pre-requisite to mandamus.

23. Lord Salmon L..J. did not express any final opinion on the controversy. It was observed:

> "Having regard to the view, however, that I take of the facts, the point as to whether the 1963 list could be temporarily kept alive were mandamus to issue does not arise for decision and I express no concluded opinion upon it."

24. In the case before us the decision taken by Metropolitan Authority on the application of the respondent has been quashed. Direction has been given to dispose of the application afresh. This direction does not make any sense unless in reality there was an earlier order dealing with the application made by the respondent. It cannot be said that the Metropolitan Authority had not passed any order, erroneously or otherwise, within 60 days of the receipt of the application. The order that was passed may have become null and void in law but the fact of the matter is that an order had actually been passed, otherwise there would have been no question of issuance of a writ of certiorari for quashing of that order.

25. In the case of Supdt. of Taxes, Dhubri & Ors. v. Onkarmal Nathmal Trust etc. etc. (1975) Suppl. SCR 365; this Court dealt with the question whether a notice under section 7(2) of the Assam Taxation (on goods carried by Road or Inland Waterways) Act, 1961 was valid. The prescribed period of limitation under the Act was two years from the expiry of the relevant period. There was a difference of opinion on this point. The majority view was that the State was guilty of laches even though the State was restrained by an order from taking any action under the Act. The State did not pray for modification of the order. The State followed the policy of inactivity. Therefore, the notice under section 7(2) issued in that case was held invalid.

26. In the instant case, there is no question of any inactivity. The appellant had passed an order within 60 days, which was ultimately quashed by the High Court. The deeming clause under section 13(3) comes into operation only when the Metropolitan Authority fails to pass an order within a period of 60 days from the receipt of the application. But if an order is passed and that order is quashed by the Appellate Authority or by the High Court, the deeming clause does not become operative straightaway. The appellate order will now hold the field and a fresh order will have to be passed in terms of the order of the Appellate Authority or the Court.

27. The last contention of Mr. Nariman was that the impugned order dated 17th September, 1984 had been passed under section 13(3) of the BMRDA Act. The Metropolitan Authority had no jurisdiction to pass any order dealing with the application made by the respondent under any other provision except section 13(3). If the order is not under section 13(3) then the respondent will have no right to appeal against that order.

28. There can be no dispute about this preposition. The consequential order passed by the Metropolitan Authority after it was quashed by the High Court must be treated as an order under section 13(3) of the Act for the purpose of appeal and the limitation must be counted from the date of the fresh order. But that does not answer the question whether the time limit for passing an order under sub- section (3) of section 13 will apply to the fresh order which will now have to be passed. That question has been answered in the case of Pooran Mail (supra) referred to earlier in the judgment.

29. . In the premises this appeal is allowed. The judgment under appeal dated 15.6.1994 is set aside. The appellant will be at liberty to proceed in accordance with law. There will be no order as to costs. Civil Appeals Nos. 9153-54 OF 1994 (Arising out of S.L.Ps. (C) Nos. 15942 & 15982 of 1994)

30. Leave granted.

31. In view of our judgment in Civil Appeal No. 91521994 (arising out of S.L.P. (C) No. 16848 of 1994), the above appeals are also allowed. There will be no order as to costs.