

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

**ELAT 1028/15**

**In the matter of :-**

**Rajkumar Gunes**

**Appellant**

v/s

**District Council of Flacq**

**Respondent**

**DETERMINATION**

1. The present appeal is against a decision taken by the District Council (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for the excision of a plot of land of 844.17 sq.m from a bigger plot of an extent of 16082.14 sq.m at Vimobha Lane, Lallmatie, for residential purposes. The decision of the Council was communicated to the Appellant by a letter dated 6<sup>th</sup> November 2015. The letter states that the Council rejected the application on the ground that the plot of 6A21p is to be construed as an 'original lot' of which the portion of 4A09p acquired by the Appellant emanates, and as such more than three excisions have already been effected out of the original lot. The Council therefore recommended that the Appellant applies for a morcellement permit at the Morcellement Board.
2. The Appellant has appealed against this decision on three grounds, namely, that the Council has been wrongly advised on the question of "original plot of land", the Council failed to give a proper meaning to the term "original plot of land" and that the Council erred in rejecting the application for excision.

3. The Appellant testified and was cross-examined by Counsel for the respondent. The representative of the Council, Mr. Sowaruth, acting Planning and Development Officer, testified and was cross-examined by the Attorney for the Appellant. Both legal representatives argued on matters of law so that the only live issue to be determined before this Tribunal is whether the plot in question is to be construed as an 'original plot' so that **section 3 of the Morcellement Act 1990** can find its application or that the application is exempted from it. We have duly considered the evidence before us as well as submissions of legal representatives.
  
4. As background to the present case, the undisputed evidence is that the appellant became the owner of a plot of land of the extent of 4A09p at Lallmatie in 1983 as evidenced by an authentic deed dated 20.10.1983, duly transcribed in TV 1612 No. 157. This plot of 4A09p was all that remained from a larger plot of 6A 21p following several distractions made by the father of the appellant of the extent of 1A08p, 26p, 53p and 25p from one plot. The appellant carried out one excision in 2013 which was approved by the Council and applied for a second excision in 2015 which was refused for the reasons given above and is the subject matter of the present appeal.
  
5. The starting point would be to look at the wording of **section 3 of the Morcellement Act 1990**, which states

***"3. Application of the Act***

*(1) Subject to subsection (2), this Act shall apply to every morcellement.*

*(2) Without prejudice to any planning requirements under any enactment, **this Act shall not apply** in relation to any land which is divided for the purpose of –*

*(a) a sale to the Government or a compulsory acquisition under the Land Acquisition Act;*

*(b) a mortgage or a fixed charge;*

*(c) a sale or a donation of not more than one lot, where that lot is excised from another lot for the purpose of the sale or the donation and –*

*(i) either lot is not further parcelled out within 12 months of such sale or donation without a morcellement permit; and*

*(ii) not more than 3 excisions in all are made out of the original lot without a morcellement permit;*

*(d) a division in kind between –*

*(i) co-heirs;*

*(ii) ascendants and descendants.”*

6. The question that needs addressing is what constitutes an “original lot”? The contention of the appellant is that his plot of land of 4A09p should be considered as an “original plot” since the **Morcellement Act** only came into force in **1990** after he became owner of the plot in **1983**, therefore the Council should consider that state of affairs at the time the Act came into force and as such the Act cannot be applied retrospectively. It was also submitted, as per the Statement of case of the appellant, that if the reasoning of the Respondent is followed then the concept of the original plot of land should start as from the time when this island came under the control of the French and the English or from the time when Mauritius adopted its constitution in 1968. The Council, conceded that it allowed the appellant’s first application for distraction but took the view that the **Morcellement Act 1990, section 3**, does apply because the plot of land of the extent of 6A 21p which belonged to the father of the appellant is the one to be taken as being the “original plot of land”.

7. Counsel for the Respondent argued that the **Morcellement Act 1990** had retrospective effect and in favour of his argument on the application of the Act to the present case, relied on the case of **Mungroo v K. Nath Varma and Ors [2002] SCJ 122** to support the fact that the application of **section 13** of the **1990 Act** has retrospective effect. The transitional provision as set out at **section 13 of the Morcellement Act 1990** states-

*“Every application for a morcellement permit made before the commencement of this Act shall be deemed to have been made under this Act.”*

8. We believe it is more apt to deal with the issue of retrospectivity at this juncture. Whilst the Constitution, under **s.46 (4)**, does recognize the retrospectivity of laws, as a general rule, there is no retrospective effect in the application of a primary enactment except where the Act clearly so stipulates. In **Maxwell on the Interpretation of Statutes**, at Page 769, it is stated that *“Every legislation is prima facie prospective unless it expressly or by necessary implication made to have retrospective operation.”* In addition, **section 14 of the Interpretation and General Clauses Act 1974**, deals the exercise of powers before the commencement of an enactment and stipulates the following

***“14. Exercise of powers before commencement***

*(1) No appointment, instrument, notice, form, direction, or other thing made, granted, issued, given, prescribed or done under a power conferred by an enactment shall, unless it is necessary for bringing the enactment into effect, have effect until the enactment comes into operation.*

*(2) Where an enactment which is to come into operation after its publication in the Gazette confers power—*

*(a) to make an appointment;*

*(b) to make, grant or issue an instrument;*

*(c) to give or issue a notice or direction;*

*(d) to prescribe a form; or*

*(e) to do any other thing for the purposes of the enactment,*

*the power may be exercised after the publication of the enactment to enable the enactment to come into operation at its commencement.”*

**Section 14** can provide some guidance that laws and the exercise of powers under a law, are forward looking hence in the absence of clear wording, we cannot attribute to the Morcellement Board, acting under the **Morcellement Act**, a power to determine applications on a state of affairs (excision of land) existing before the promulgation of the Act.

9. The Respondent's argument is that the wording of the '*Transitional provision*' under **section 13 of the 1990 Act** makes reference to applications made for the morcellement permit before the commencement of the Act shall be deemed to have been made under the Act. A transitional provision is a statutory provision that regulates a process that starts before the amendment or enactment of the statute that has come into force. In other words, as a matter of sound legislative drafting, such a provision is included to ensure the smooth transition in the process from what the state of affairs used to be until the time when changes are brought about. Transitional provisions are normally meant to apply for a limited period of time and are intended to facilitate the transition from one statute to another. The emphasis we wish to lay here is that there is that there was a previous state of affairs in that such matters were dealt with under a previous statute. The authority for the entertainment of applications for morcellement permits must have been derived from some other primary enactment, before the coming into force of the **Morcellement Act 1990**. We do not agree with counsel for the respondent when he says that there was no previous legislation. The very existence of a transitional provision shows the "transit" in the process from one situation to another with the understanding that for there to be such a "transit" there must be a previous situation which existed.

10. We refer to an extract of Hansard dated 20<sup>th</sup> July 1990 of parliamentary debate regarding the Morcellement Bill. It appears, from the relevant minister's speech at the reading of the bill, that prior to the enactment of the **1990 Act**, the applications for permits for morcellement were entertained under the **Roads Act** which empowered the Minister of Works to give their approval for morcellement applications. One has to make sense of **section 13** of the **Morcellement Act**. In our interpretation of **section 13**, this section would apply to those "pending" applications for morcellements which were made prior to the coming into force of the **Morcellement Act 1990** but yet to be determined by the then relevant authority.

11. In the case of **Mungroo** *supra*, the situation was different in that there was a plan for a morcellement of two arpents with 18 lots out of which the appellant had been promised lot no.4. We do not have sufficient information before us to know in what context the Magistrates had to consider the retrospective effect of **section 13 of the 1990 Act**, which their Lordships were privy to when they heard the matter on appeal. What we can take judicial notice of, however, is that there was a mechanism already in place to determine morcellement applications. As stated earlier, previously applications for morcellement permits were dealt with under the Roads Act and subsequently under the **Morcellement Act** so that any interpretation as regards the retrospectivity of the application of **section 13** could only relate to application for morcellement permits made while the **Roads Act** was still in force but yet to be determined so that they were ultimately assessed by requirements, conditions and standards set out in the 'new' **Morcellement Act 1990**. We do not believe, strictly speaking, that there can be retrospectivity when it comes to a transitional provision. It would be a misnomer. We do not know the facts of the case and the evidence in **Mungroo** *supra*, to know in what context their Lordships made the statement to the effect that **section 13** has retrospectivity. We will thus not surmise.

12. Coming back to the issue of what constitutes an "original lot" within the meaning of **section 3 of the Morcellement Act**, we believe that in the absence of any clear definition in the law as to the meaning of the term, and in the absence of any apt ordinary dictionary meaning, one has to adopt a commonsense approach. The Respondent appears to be saying that the "original lot" is the plot owned by the father of the appellant of the extent of 6A21p. In our view, the Council is merely looking as far back as it can see. If the Council could evidentially trace the plot of 6A21p further back in time to conclude that the plot of 6A21p had been excised from an even bigger lot, would that mean that the goal posts then shifts? This, in our view, cannot be as it will lead to a very unstable state of affairs. The law cannot be applied in a haphazard or

whimsical way which is what the Council appears to have done by applying an arbitrary cut-off date. There has to be a clear demarcation.

13. For there to be such a demarcation, one has to look deeper, not just when the concept of morcellement came about and also the mechanism of granting morcellement permits but also the reason for bringing about the Morcellement Act and most importantly when the concept of "original plot" was first introduced in any enactment with regards to excision. We believe that all these answers lie in the parliamentary debates which took place on the Morcellement Bill. Parts of the second reading of the Morcellement Bill, as per extract of Hansard dated 20 July 1990 obtained from the National Assembly Library, is reproduced hereunder. The then Minister of Works stated,

*"2. The object of the Bill is to regulate the parceling of land and to provide for the issue of a morcellement permit to an applicant only after all infrastructural works relating to the provision of roads, drains, sewage disposal facilities and the supply of electricity and water have been completed satisfactorily.*

*3. At present a morcellement is regulated by provisions existing in the Roads Act which empowers the Minister to issue a morcellement permit to an applicant against a bank guarantee for an amount sufficient to cover the cost of the infrastructural works required.*

*4. However, this practice has not proved to be satisfactory as some cases have occurred where the works were not performed according to the approved plans, or were simply not carried out at all. The Ministry could not press for remedial action as the bank guarantees had lapsed or were not renewed. Such a situation could not be allowed to continue. Consequently, I have deemed it judicious, first, to provide for a separate legislation to better regulate morcellement, and second, to make provision therein for a morcellement permit to be issued only after satisfactory completion of all infrastructural works.*

...

6...*The measures have the double objective of ensuring that the land has been parceled out in strict conformity with approved plans and with any condition laid down for such development and that the interests of eventual purchasers are safeguarded.*

...

8...*The Bill exempts some specific cases of land parceling from the requirement of a morcellement permit. This exemption applies to division in kind amongst heirs and between ascendants and descendants, and in cases where an excision is made for (from?) a larger plot for the purpose of a sale or donation. No further excision can, however, be made from either plot within 12 months of the first excision without a morcellement permit. Any person exempted from the morcellement permit will still (need) to obtain a development permit before parceling his land....."*

Mr. S. Lallah, then third member for Port Louis South and Port Louis Central, in the course of his intervention suggests that with regard to **clause 3(2)(ii) of the Bill** (which later became **section 3 (2) (ii) of the 1990 Act**) that the word 'original' be included in that part of the text. The justification is that *"the limitation of 3 excisions for lots should be limited to the original owner only, in the sense, for example, it does not safeguard the rights of the children, of members of the family who, for financial constraints, have to dispose part, in order to get some money to be able to build to meet financial obligations."*

14. It is clear from the above that the term "original plot" was a creation of the **Morcellement Act 1990** so that from the date of proclamation of the Act the limitation to the number of excisions, as per **section 3 (2) (c) (ii)**, that can be done on a plot of land would be applicable thereafter, and the plot of land could only be taken to mean "original plot". Hence, on the facts of the present case, we are of the view that "original plot" within the meaning of the Act would mean the plot of 4A09p which the appellant owned as at 1990 when the **Morcellement Act 1990** came into force, since the limitations to the number of excisions become applicable from then onwards.

15. Having reached the above conclusion, we believe that the point was rightly taken by attorney for the appellant. The appellant's case therefore does not fall within the purview of the **Morcellement Act 1990**. For all the reasons, the appeal is therefore allowed.

Determination delivered on 17<sup>th</sup> November 2017 by

**Mrs. J. RAMFUL**

**Vice Chairperson**

**Mr. Rajee**

**Assessor**

**Mr. Imrit**

**Assessor**