

(1989) 03 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 2747 of 1988

Chhaganbhai Motibhai Bhoi and Another

APPELLANT

Vs

Anand Area Development Authority, Anand and Another

RESPONDENT

Date of Decision : 17-03-1989

Acts Referred:

Bombay Town Planning Act, 1954 — Section 51, 52, 53, 54, 68
Constitution of India, 1950 — Article 226

Citation : AIR 1990 Guj 76 : (1989) 2 GLR 913

Hon'ble Judges : P.R. Gokulakrishnan, C.J.; J.U. Mehta, J

Bench : Division Bench

Advocate : Pradeep Roye, for the Appellant; M.R. Anand, for Anand Nagarpalika and Chhaya, for the Respondent

Judgement

P.R. Gokulakrishnan, C.J.—This Special Civil Application is preferred for issuance of a writ of mandamus or any other appropriate writ, order or directions in the nature of mandamus by quashing and setting aside the show cause notices at Annexs. "A" and "B" and directing the respondents to treat it as null and void.

2. The short facts of this case are that plot No. 170/1 was originally owned by respondent No. 4 herein. This plot was divided into plots Nos. 165/1 and 165 /12. Plot No. 165/1 admeasures 457.40.65 sq. mts. while plot No. 165/2 admeasures 229.12.50 sq. mtrs. respectively.

3. Under the Town Planning Scheme, in place of original plot No. 170/1, which was acquired, plot No. 165/1 was given back to the respondent No. 4 who is the original owner of plot No. 170/ 1. It is alleged by the petitioners that the petitioners herein were the original tenants under respondent No. 4 in respect of original plot No. 170/ 1. After the division of this plot and allotting plot No. 165/1 to respondent No. 4 the petitioners continued to live in plot No. 165/2 which was given to another person under the Town Planning Scheme; but in 1978 the final scheme of the Town Planning came into force while in 1965 the preliminary scheme came into force. In respect of this plot No. 165 / 2 on which the

petitioners are residing and which came to be allotted to the person whose plot No. 308 was acquired by the "Town Planning Officer, the Anand Urban Development Authority is trying to evict the petitioners who are on plot No. 165/2. In those circumstances, after getting notices referred to above, the petitioners have now come forward with the present special civil application before this Court.

4. Mr. Pradeep Roye, the learned counsel appearing for the petitioners, on pointing out the Ss. 68 and 81 of the Town Planning Act, contended that these petitioners cannot be evicted without following the procedure. Section 68 of the Act reads as under:

"68. On and after the date on which a preliminary scheme comes into force, any person continuing to occupy any land which he is not entitled to occupy under the preliminary scheme shall, in accordance with the prescribed procedure, be summarily evicted by the appropriate authority."

5. Reading this section it is clear that the petitioners are continuing to occupy the land and as per the Town Planning Scheme, which has become final as early as in 1978 this plot has been allotted to a third party who is not even a party respondent herein. As correctly laid down in the case of Saiyed Mohammed Abdullamiya Uraizee and Others Vs. The Ahmedabad Municipal Corporation, Ahmedabad and Others, , the eviction power vested with the authority would be merely an administrative power of eviction and such eviction would be of the same nature as of the persons who are evicted under the provisions of the Land Acquisition Act. The petitioners have been put on notice and questioning the same. Only the petitioners have come forward with the present special civil application. Considering these facts, we do not think that there is any violation of S. 68 of the Town Planning Act in evicting the petitioners herein.

6. Section 81 of the Town Planning Act reads as under:

"81. Any right in an original plot which in the opinion of the Town Planning Officer is capable of being transferred wholly or in part, without prejudice to the making of a town planning scheme, to a final plot shall be so transferred and any right in an original plot which in the opinion of the Town Planning Officer is not capable of being so transferred shall be extinguished:

Provided that an agricultural lease shall not be transferred from an original plot to a final plot without the consent of all the parties to such lease."

On reading this section it is clear that this section is intended for adjustment of the land, which has been put under the Town Planning Scheme. Such adjustment can be done without prejudice to the making of the Town Planning Scheme. Section 52 of the Act deals with the contents of preliminary and final scheme. Section 52(1)(iii) states that in a preliminary scheme, the Town Planning Officer shall provide for the total or partial transfer of any right in an original plot to a final plot or provide for the transfer of any right in an original plot in accordance

with the provisions of S.81.

A cumulative reading of Ss. 52 and 81 clearly brings out that these sections are intended for adjustment of the land for proper working of the Town Planning Scheme and also for proper enjoyment of the land so allotted.

Section 68 referred above gives power to the appropriate authority to evict summarily. Mr. Pradeep Roye for the petitioners reading the sections states that adjustment must be made either for continuing the petitioners in the land in dispute or providing them with alternative accommodation. If such an interpretation has to be given the whole Town Planning Scheme will become futile and no town planning scheme can be executed.

Section 63(3) of the Town Planning Act clearly states that the provisions of this Act and the rules made there under shall, so far as may be, apply to each of such sections as if it were a separate draft scheme.

Section 65(3) of the Town Planning Act says that on and after the date fixed in such notification, the preliminary scheme or the final scheme, as the case may be, shall have effect as if it were enacted in this Act.

Section 67 of the Town Planning Act states as follows:

"67. On the day on which the preliminary scheme comes into force -

(a) All lands required by the appropriate authority shall, unless it is otherwise determined in such scheme, vest absolutely in the appropriate authority free from all encumbrances ;

(b) all rights in the original plots which have been reconstituted into final plots shall determine and the final plots shall become subject to the rights settled by the Town Planning Officer."

7. In the Full Bench decision in the case of Dungarlal Harichand Vs. State of Gujarat and Others, , a Full Bench of our High Court has held (at p. 32 of AIR):

"So far as the validity of such legislative measure is concerned, the validity can be gone into even in writ jurisdiction only to the limited extent whether there is any transgression of jurisdiction of the authorities concerned and whether the scheme as finally emerged is totally inconsistent with the Act. It is only the fundamental breaches, that is, where minimum statutory essentials are not complied with, which result in a total lack of jurisdiction and not other procedural errors or defects that would render a scheme, which had become a legislative measure and a part of the Act, liable to attack or challenge in a Court on the ground that it is null and void."

Proceeding further, the Full Bench held (at p. 34 of AIR):

" x x x x x it was open to a person to waive individual special notice specified in sub-rule (3), which was only as an additional safeguard for the individual concerned that could never constitute the minimum essential of the scheme or

such a basic requirement that its non-compliance would have any nullifying consequence."

The Full Bench further held (at p. 35 of AIR):

"The provisions of" R. 21(1) lay down the minimum essentials for protecting public interest after the Town Planning Officer commences his work. That sub-rule is introduced in accordance with the principles of "audi alteram partem". Special individual notices under old sub-rule (3) cannot, therefore, be regarded as an essential minimum safeguard as in the case of sub-rule (1) so as to have the consequence of nullifying the final scheme."

Finally, the Full Bench held:

"Section 51(3) which gives effect to the final scheme as if enacted in the Act made it an Act of the Legislature so as to make it immune from the challenge -on the ground of procedural defects, which did not amount to exceeding the limit of jurisdiction under the Act to frame a Town Planning Scheme under the Act but were only in the nature of the breach of additional procedural safeguards, and which were not in the nature of essential minimum requirements, will not render the scheme null and void so as to entitle the party to challenge it under Art. 226 or in any Court after it becomes a part of the Act under S. 51(3)."

This decision, in our opinion, clearly satisfies the position to the effect that the settled preliminary scheme cannot be a subject matter of a writ proceeding unless otherwise it comes within the parameter mentioned in this Full Bench decision. The short facts of the present case, which we have discussed above, clearly establish that the scheme is not inconsistent with the Act nor any fundamental breaches have been committed by the Authority in sanctioning the schemes, nor any limited statutory essentials have been violated which will result in a total lack of jurisdiction.

8. In yet another Full Bench decision of our High Court in the case of Saiyed Mohammed Abdullamiya Uraizee and Others Vs. The Ahmedabad Municipal Corporation, Ahmedabad and Others, , the Full Bench, dealing with the impugned notice of eviction observed (at p. 86 of AIR):

"In view of S. 53, once property has vested absolutely in the local authority and all rights of these persons occupying the same have come to an end, the eviction power would be merely an administrative power of eviction. Such eviction would be of the same nature as of the persons who are evicted under the provisions of the Land Acquisition Act after the acquired land has vested in the State and the matter is only of taking possession."

This decision, the Full Bench has observed that, once the land vests with the authority concerned as per the Scheme, the Scheme has become a legislative measure under which the rights of the parties have totally ceased, to occupy the property and the power of eviction in such a context would be in the nature of an administrative power and, therefore, when the parties admittedly have no right

under the final scheme to continue their occupation, they could never invoke any prejudice or consideration of the principle of fair play and justice so as to have these impugned notices invalidated.

Thus, it is clear that the notices at Annexes. "A" and "B" issued by the authorities concerned, in the facts and circumstances of the case, are in accordance with the provisions of the Act and in view of the sections referred to above, the same cannot be questioned by way of this proceeding.

9. Mr. Pradeep Roye for the petitioners brought to our notice a Circular No. 1074/9719-F dated 24-2-75 of the Panchayat and Health Department, Sachivalaya, Gandhinagar for the purpose of showing that if any scheme for acquisition of land is submitted to the Government for its sanction, then alternative accommodation has to be provided to the persons who are already occupying such land. This direction, in our opinion, is not mandatory and it cannot be said that the town planning scheme will come into effect only if it is possible for the authorities concerned to provide an alternative accommodation to the persons who are evicted from the land concerned. Hence we do not think that this circular can, in any way, help the petitioners to quash the notices which are impugned in this special civil application. For all these reasons, we do not find any merit in any of the submissions made on behalf of the petitioners and accordingly this special civil application is dismissed.

10. Considering the averment to the effect that the petitioners are on the land for a number of years and coming from the poor strata of the society it is but fair for the Town Planning Authority and the Anand Nagarpalika to consider for providing alternative accommodation before they are so evicted. Mr. M. R. Anand, learned Counsel appearing for the Anand Nagarpalika fairly states that the petitioners may put in an application to the Anand Nagarpalika and the same will be considered sympathetically for finding out alternative accommodation to the persons concerned. In view of this statement made by Mr. Anand we direct the petitioners to put in an application within three days from today to the Anand Nagarpalika for the purpose of providing alternative accommodation to the persons concerned. We hope that the Anand Nagarpalika, considering the fact that all these petitioners are poor persons coming from the lower strata of the society and they are on the land for a number of years, will sympathetically consider the case and pass appropriate orders within a period of three weeks from this date. We make it clear that the petitioners will not be evicted from the land in question for a period of four weeks from today.

11. We also make it clear that these observations of ours to sympathetically consider the case of the petitioners will not give any right to the petitioners to be on the land since we have already considered the question as regards the right of the petitioners to occupy the land and since we have negated the contentions raised by the petitioners in that behalf in the above said special civil application.

12. Application dismissed.