

(2008) 01 GUJ CK 0009

In the Gujarat High Court

Case No : Special Civil Application No. 6105 of 1992

Janardan Jaishankar Jokharkar and Another

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 09-01-2008

Acts Referred:

Citation : (2008) 2 GLH 717

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : Dharendra Mehta, for Petitioners 1 and 2, for the Appellant; H.S. Munshaw, for Respondent 1 and Phalguni Patel, Asst. Government Pleader for Respondents 4-5, for the Respondent

Judgement

K.M. Thaker, J.—In the present petition, the petitioners have, inter alia, challenged order dated 11.2.1992 passed by Secretary in Case No. SRD/LaKaPa/ST/1/89 whereby the said authority rejected present petitioners' revision application against the order dated 11.2.1989 passed by D.D.O., original and competent authority and confirmed the said order dated 11.2.1989 of the said authority.

2. The facts, giving rise to present petition, are as follows;

The petitioners are owners of land bearing Block No. 364 at Mandvi Taluka, Surat District. The petitioners had applied for "Non-Agricultural Use" ["NA use"] permission for the said land and the competent authority by his order dated 15.1.82 granted NA use permission for 13,245 sq.mtrs. By the same order, the petitioners were also authorised to construct a cinema building in the area admeasuring 655 sq.mtrs. It is the case of the petitioners that pursuant to the said order and permission, the petitioners constructed cinema theatre and said assertion of petitioners is not disputed by respondents.

3. It appears that subsequently the petitioners constructed a shopping centre on the balance open land in respect of which NA Use permission was granted. The

said shopping centre came to be constructed by the petitioners in area admeasuring about 448 sq.mtrs.

4. The said action of the petitioners gave rise to an action from the respondents who were of the view that the petitioners had committed breach of the conditions of the NA use permission and the said construction was made without obtaining permission for change of use.

5. In that view of the matter, the respondents issued a notice dated 12.12.1988 calling upon the petitioners to show cause as to why the construction should not be removed. The copy of the notice dated 12.12.1988 was not on record, however, the petitioner was asked to submit a copy on record and at the time of hearing the petitioner tendered a copy thereof which is taken on record. The petitioners replied the said notice vide their communication dated 14.12.1988 representing, inter alia, that the area was mainly populated by Adivasis and so as to provide facility to the residents of the said area for purchasing the equipments, husbandry, insecticides etc., at one place, the said shopping centre was constructed. The petitioners in their reply-cum-representation, also prayed for regularising the construction by pleading that they were unaware about the provisions for obtaining further permissions, even after the NA use permission was granted. The petitioners represented that since the NA use permission was granted they bona fide believed that no further permission was required.

6. The respondents were not satisfied with the said explanation and were also not inclined to grant the request, consequently the competent authority passed order dated 11.2.1989 directing the petitioners to demolish the said construction.

7. Aggrieved by the said order, the petitioners challenged the same before the Secretary [Appeals], Revenue Department. The said authority was also not persuaded by the submissions of the petitioners and dismissed the Application by his order dated 11.2.1992. Aggrieved by the said two orders, the petitioners are before this Court.

8. The petition was admitted in 1993 and yet the respondents have not filed any affidavit opposing the petition even after 15 years.

9. Heard Mr. Mehta, learned advocate for the petitioners and Ms. Phalguni Patel, learned AGP for the respondents.

10. Mr. Mehta, learned advocate, submitted that the construction of the said shopping centre was, in any case, not contrary to the relevant and applicable bye-laws and regulations pertaining to building construction and in fact the plans were also got approved by the petitioners before undertaking the construction and by resolution=order dated 1.12.1986, permission (NOC) was also granted by the Panchayat vide Resolution No. 2 passed in the meeting held on 1.12.1986. In submission of Mr. Mehta, learned advocate for the petitioners, the petitioners were granted NA use permission by the competent authority, in respect of the lands in question, by order dated 15.1.1982 and after constructing the cinema

house, the petitioners had subsequently constructed the shopping centre after getting the plans approved and getting necessary permission from Panchayat and that therefore there was no basis or justification for the authorities to not to grant the request for regularization. Mr. Mehta, submits that the impugned orders suffer from the vice of total non-application of mind which has also resulted into arbitrariness.

11. Ms. Patel, learned AGP appearing for the respondents, supported the orders and submitted that the authorities have recorded reasons in support of the order and have, for valid and good reasons, not accepted the explanation of the petitioners for not complying with the requirements before undertaking the construction of shopping centre and there is no illegality or arbitrariness in the said decision of the authority. Except the said submission, Ms. Patel, AGP has not urged any other submission.

12. On perusal of the order, it is noticed that the authority has not accepted the petitioner's explanation regarding their failure in obtaining necessary permission on the ground that the petitioners are educated persons and are running business and therefore the explanation that they were not aware about the requirements, i.e., the plea of ignorance of law, cannot be accepted. Obviously, no fault can be found with the said reasoning of the authority.

13. However, when the impugned orders are further examined, particularly in light of the NA use permission which was granted in favour of the petitioners by order dated 15.1.1982 then, it transpires that the authorities have lost sight of the fact that the said NA use permission was granted in respect of land admeasuring 13,245 sq.metres and the permission to construct cinema house was granted in respect of land admeasuring 655 sq.mtrs only. In other words, even after the construction of cinema house pursuant to the permission for construction over the land admeasuring 655 sq.mtrs., the NA use permission in respect of balance land survived.

14. While attacking the order dated 11.2.1992 passed by the Secretary (Appeals), Mr. Mehta, learned advocate for petitioners submitted that the said order is wholly misconceived and without application of mind. In this regard, Mr. Mehta, learned advocate submitted that it is apparent that while passing the said order, the Secretary (Appeals) proceeded on the premise that the shopping centre was constructed near the State Highway and without maintaining required road-margin. On this count, Mr. Mehta submitted that while constructing the shopping centre necessary margin of 13.5 meters [55 feet] from the town-road, i.e., approach road to Mandvi Road has been maintained by the petitioners. Mr. Mehta, learned advocate further submitted that the said town-road is not a State Highway, as assumed by the Secretary while passing the impugned order dated 11.2.1992 and actually the State Highway is far away from the said Shopping Centre. Mr. Mehta, in this regard, referred to the Certificate issued by the Deputy Executive Engineer, Panchayat (R & B), Sub-Division, Mandvi on 9.3.2007, stating, inter alia, that the road passing nearby the construction of the said

shopping centre is a road of rural category. Mr. Mehta, learned advocate also referred to Certificate dated 2.1.1990 issued by Mandvi Nagar Panchayat certifying that the said shopping centre has been constructed after leaving margin of about 55 feet. On the basis of said documents, Mr. Mehta, learned advocate submitted that not only the impugned order passed by Secretary (Appeals) suffer from the vice of non-application of mind, but is also based on incorrect assumptions or assumptions contrary to the fact-situation.

15. On perusal of the record, it is noticed that in the notice dated 12.12.1988, pursuant to which the impugned order has been passed, no allegation about the construction touching the State Highway and/or insufficient margin was mentioned. In absence of any such reference in the notice, the impugned order passed by the Secretary (Appeals) turns into an order beyond the scope of the notice. The authority passing an order of adjudication cannot take into account the grounds or circumstances which are not alleged in the notice and/or in respect of which the petitioner is not put to notice. Otherwise, the very purpose of issuing notice and inviting explanation is frustrated, and going beyond the purview of the show cause notice or taking into account aspects not enumerated in the show cause notice and making them basis for the order also amount to violation of principles of natural justice. When an authority passes an order which is based on grounds or facts not alleged and stated in the notice, then such order results into denial of opportunity of hearing and becomes violative of audi alteram partem rule. In present case, it is obvious that the grounds of insufficient margin and/or the building touching the State Highway are not mentioned in the show cause notice. Not only this, but even the order of the original and competent authority also does not contain any such finding of fact at his stage in the order dated 11.2.1989. In this view of the matter, it was not permissible for the Secretary (Appeals) to take into consideration aspects which did not form part of the show cause notice and/or which were not reflected in the original order impugned before that authority. The impugned order, on this ground, alone deserves to be set aside.

16. It is, of course, a matter beyond dispute that if at all the petitioner wanted to subsequently put the said balance land to use, then he was under an obligation to seek necessary permission from the concerned authorities before undertaking any activity or work on the said balance land as per the order dated 15.1.1982. It is also beyond dispute that the petitioner had failed to take necessary permissions. It is also relevant to note that until the notice came to be issued the petitioner had not moved in the matter and it is not the petitioner who approached the concerned authorities with a request for regularization. It was only upon receipt of the notice that the petitioner woke-up from slumber and while tendering reply in response to the notice, made the request-representation for regularization of construction.

17. The authority was, nonetheless, required to properly consider and decide such request-representation with due application of mind and by taking into

account all relevant as well as attending circumstances, including those pleaded by the petitioners. If, after due consideration and proper application of mind, the authorities comes to the conclusion that the permission does not deserve to be granted, then the matter would stand on different footing. However, it also appears that the authority has not recorded any cogent and legally tenable reasons for not considering and/or granting petitioners' request for regularization. While considering the matter, including petitioners' request for regularization, the authority ought to have considered that the NA use permission has been granted in respect of land admeasuring 13,245 sq.mts. and the balance open land, after construction of cinema house on 655 sq.mts, continued to enjoy the NA use permission. The fact that the construction of the shopping centre was, as claimed by the petitioners, was carried out after obtaining permission (NOC) from Panchayat and after getting the plans approved also deserved application of mind while deciding the request for regularization. When these facts were duly pleaded by the petitioners, then the decision regarding granting or refusing request for regularization ought to have been taken after considering the said facts, but the authority does not appear to have paid due regard to the said aspects and facts. It, thus, follows that the learned advocate for the petitioners is justified in contending that the order suffers from the vice of non-application of mind.

18. In such circumstances and in backdrop of the facts stated above, and for the aforesaid reasons, the impugned orders deserve to be set aside and the matter deserves to be remanded to the original and competent authority for proper consideration of all relevant issues involved in the matter.

19. In aforesaid view of the matter, the impugned orders dated 11.2.1989 and 11.2.1992 are set aside. The case is remanded to the original and competent authority who shall independently decide the matter and the request of the petitioner for regularization in accordance with law and after taking into account all relevant and attending facts and circumstances as well as applicable bye-laws and regulations and after affording opportunity of hearing to all concerned and affected parties.

20. With the aforesaid directions and clarifications, the petition is partly allowed. Rule made absolute to the aforesaid extent. No order order as to costs.