

(2011) 03 GUJ CK 0142
In the Gujarat High Court

Case No : Letters Patent Appeal No. 2339 of 2010 in Special Civil Application No. 5274 of 2010

Kartik Mohanbhai Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 28-03-2011

Acts Referred:

Constitution of India, 1950 — Article 166, 166(1)
Gujarat Town Planning and Urban Development Act, 1976 — Section 65, 70, 71

Citation : (2011) 03 GUJ CK 0142

Hon'ble Judges : S.J. Mukhopadhaya, C.J.;J.B. Pardiwala, J

Bench : Division Bench

Advocate : D.D. Vyas and Dhaval D. Vyas, for the Appellant; Krina Calla, Asst. Government Pleader for respondent 1, for the Respondent

Final Decision : Allowed

Judgement

J.B. Pardiwala, J.—By way of the present appeal, the Appellant-original Petitioner seeks to challenge judgment and order dated 15th September 2010 passed by the learned Single Judge wherein the petition of the Appellant-writ Petitioner came to be dismissed.

2. The brief facts relevant for the purpose of deciding the present appeal can be summarised as under:

The Appellant is the owner of land bearing Plot No. 476 part admeasuring 26,669 square meters (Original Plot No. 98/2-3). The Appellant received a communication from the Chief Executive Officer, Vadodara Urban Development Authority (VUDA) intimating that Town Planning Scheme No. 1 (Bil) has been finally sanctioned and for the implementation of the said scheme with respect to the said area, a meeting has been convened on 19th June 2008. The Appellant informed the authority that he may be provided with all the details and only thereafter a meeting may be convened. The Appellant was not provided with the requisite information and even the map which was shown to the Appellant was

incomplete. The Appellant sought certain information under the Right to Information Act, 2005. Even under the Right to Information Act, 2005 no satisfactory reply was given to the Appellant. The Appellant, therefore, thought it fit to approach this Court by way of filing Special Civil Application No. 11742 of 2008 and prayed for appropriate reliefs for the purpose of setting aside the Town Planning Scheme No. 1 (Bil) so far as it affected the property of the Appellant bearing Plot No. 476 part admeasuring 26,669 square meters.

3. The record reveals that the aforesaid petition was taken up for hearing by the learned Single Judge and during the course of hearing it was submitted on behalf of the State of Gujarat that as per the provisions of law once preliminary scheme is sanctioned u/s 65 of the Gujarat Town Planning and Urban Development Act, 1976 (hereinafter referred to as "the Town Planning Act"). The only remedy available with the aggrieved party is to approach the State Government u/s 70 or 71 of the Town Planning Act. It was also submitted on behalf of the State Government that as the applicant has not preferred any application for variation of the Town Planning Scheme, as provided u/s 70 and 71 of the Town Planning Act, the petition was not maintainable. In that view of the matter, the learned Single Judge relegated the Appellant to approach the State Government by preferring the appropriate representation for variation in the scheme u/s 70 of the Act. With these directions, the petition was ordered to be disposed of.

4. The record further reveals that pursuant to the said order passed by the learned Single Judge in Special Civil Application No. 11742 of 2008, the Appellant preferred application with the State Government u/s 70 of the Town Planning Act for variance of the Town Planning Scheme. The said application is produced at page 37 (Annexure-F). We noticed that the application is quite exhaustive and all relevant aspects of the matter have been incorporated in the said application. After this representation was preferred, the Appellant received a communication in the form of a letter addressed by one L.G. Mehta, Section Officer in the Urban Housing and Urban Development Department of the State Government informing that the representation has been considered and the same has been ordered to be rejected. The said communication is at page No. 27, which is running in about six lines.

5. The Appellant being aggrieved by the said communication from the State Government in its Urban Housing and Urban Development Department preferred Special Civil Application No. 5274 of 2010 and challenged the same on various grounds. The learned Single Judge came to the conclusion that as the Town Planning Scheme was already sanctioned way back in the year 1996 variation in the Scheme would not be in the public interest. The learned Single Judge taking this view of the matter, rejected the petition. It is this order of the learned Single Judge which is the subject matter of challenge in the present appeal.

6. We have heard learned Senior Counsel, D.D. Vyas appearing with Dhaval D Vyas and Ms Krina Calla, learned Assistant Government Pleader for the Respondent-State. During the course of hearing, this Court noticed from

Annexure-A (page 27) that the application of the Appellant u/s 70 of the Act had been rejected and communicated by a Section Officer of Urban Housing and Urban Development Department. This Court also noticed that there was nothing on record to even remotely suggest that the State Government had taken any decision u/s 70 of the Act. Accordingly, the State was directed to file an affidavit enclosing the decision of the State taken on the application made by the Appellant u/s 70 of the Town Planning Act. Pursuant to the direction issued by this Court vide order dated 22nd December 2010 an affidavit was filed by one Paresh L Sharma, Officer on Special Duty and Ex Officio Joint Secretary of the Urban Housing and Urban Development Department, Government of Gujarat. It would be appropriate at this stage to quote the relevant part of the affidavit-in-reply filed on behalf of the State dated 27th January 2011:

4. I state that in compliance to the order passed by the Hon''ble Court dated 22.12.2010 the present affidavit in reply is filed for the limited purpose of placing the explanation to the communication dated 10.2.2010 which was impugned in Special Civil Application No. 5274 of 2010 in as much as that the said communication dated 10.02.2010 was issued upon the decision taken by the Secretary, Urban Development and Urban Housing Department, in the original file of this case. I state that as the order was passed in the original file, I may be permitted to show the original file before this Honourable Court as and when necessary by the Hon''ble Court.

7. Thereafter, on 28th January 2011 one Mr K.M. Pandya, Chief Town Planner, produced the original file. After perusing the original file, this Court passed the following order:

Mr KM Panchal, Chief Town Planner produced the relevant portion of the original File No. TPS/15/2010/120744/L wherein a note has been made by the Section Officer and some officers put their signature. Three more lines in Gujarati have been written and two officers have signed therein. Alongwith the affidavit filed by Mr Paresh L Sharma, Officer on Special Duty & Ex-Officio Joint Secretary, Urban Development & Urban Housing Department, Government of Gujarat, a copy of a letter dated 8.4.2009 written in Gujarati has been enclosed.

The Respondents are directed to provide English version of the office note and the letter dated 8.4.2009.

Post the matter on 2nd February, 2011 within ten cases.

8. In the aforesaid background of the entire matter, the contentions of behalf of the Appellant - original Petitioner are as under:

It is vehemently contended that the authorities, namely, the State Government has not considered the representation of the Appellant praying for variation of the scheme as the Government is empowered u/s 70 of the Town Planning Act. It is submitted that the entire consideration is nothing but an eye wash and it cannot be said to be a consideration with application of mind. It is also submitted

that the State Government owes a duty to consider each and every aspect highlighted in the representation and pass an order in this regard as to why it is not possible to vary the scheme in exercise of the powers u/s 70 of the Town Planning Act. It is also submitted that the communication at page 27 cannot be termed as an order. The letter dated 10th February 2010 is nothing but just a communication sent by the Section Officer of the Urban Development and Urban Housing Department. It is submitted that the State Government maybe asked to reconsider the entire matter and maybe asked to pass a reasoned order in this regard.

9. On behalf of the State Government, Ms Krina Calla, learned Assistant Government Pleader, has put forward the following contentions:

It is submitted by the learned Asst. Government Pleader that the learned Single Judge has rightly rejected the petition. It is submitted that the learned Single Judge has rightly taken into consideration the fact that the Scheme has become final way back in the year 1995 and now there is no question of any variation. It is submitted that all the relevant aspects have been taken into consideration. However, the learned Asst. Government Pleader was fair enough to submit that so far as order is concerned, except the notings made in the files, there is no other order rejecting the representation of the Appellant-original Petitioner.

10. Having regard to the rival contentions of the respective parties and having regard to the facts and circumstances of the case, we are of the view that the approach of the State Government is very lackadaisical. As per the provisions of Section 70 of the Act, even if the scheme is finalised, there is power with the authority to consider the matter for variation of the scheme, if the scheme is defective on account an error, irregularity or infirmity. Such power can be exercised upon the application of the appropriate authority or the State Government itself can also consider the matter for variation. It appears that there is an inbuilt mechanism under the Act for considering the question of variation in the preliminary or final scheme on account of an error or irregularity, the court of law may not be required to exercise the power of striking down or setting aside the scheme to that extent and that is the reason why earlier the learned Single Judge rightly directed the Appellant - original Petitioner to prefer an appropriate application / representation to the State Government to consider the question of variation on the various grounds available to the Appellant.

11. In the present case, we are not at all satisfied with the manner in which the entire representation has been disposed of and decided against the Appellant. The most important question that crops up is as to whether the notings made in the files and based on those notings if something is communicated to the Appellant can it be said to be an order and that too to be a government order. The law in this regard is very well settled. Way back in the year 1963 the Constitution Bench of the Supreme Court in a landmark judgment in case of Bachhittar Singh Vs. The State of Punjab, considered the effect of an order passed by a Minister on a file, which order was not communicated. The Supreme

Court relying upon Article 166(1) of the Constitution, held that the order of the Revenue Minister, PEPSU could not amount to an order by the State Government unless it was expressed in the name of Rajpramukh as required by the said article and was then communicated to the party concerned. The Honourable Supreme Court in para 9 of the said judgment observed as under:

The question, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by Clause (1) of Article 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file. As long as the matter rested with him the Revenue Minister could well score out his remarks or minutes on the file and write fresh ones.

(emphasis supplied)

12. Bachhittar Singh's case (supra) has been recently considered by the Honourable Supreme Court in the case of Union of India (UOI) and Another Vs. Kartick Chandra Mondal and Another, In paragraphs 17 and 18 of the said decision the Honourable Supreme Court has observed as under:

17. The next issue that we are required to consider pertains to internal communications which are relied upon by the Respondents and which were also referred to by the Tribunal as well as by the High Court. Ex facie, the aforesaid communications were exchanged between the officers at the level of board hierarchy only.

18. An order would be deemed to be a Government order as and when it is issued and publicized. Internal communications while processing a matter cannot be said to be orders issued by the competent authority unless they are issued in accordance with law. In this regard, reliance may be placed on the decision of this Court in State of Bihar and Others Vs. Kripalu Shankar and Others, wherein this Court observed, in paragraphs 16 and 17, as follows:

16. Viewed in this light, can it be said that what is contained in a notes file can ever be made the basis of an action either in contempt or in defamation. The notings in a notes file do not have behind them the sanction of law as an effective order. It is only an expression of a feeling by the concerned officer on the subject under review. To examine whether contempt is committed or not, what has to be looked into is the ultimate order. A mere expression of a view in notes file cannot be the sole basis for action in contempt. Business of a State is not done by a single officer. It involves a complicated process. In a democratic set up, it is conducted through the agency of a large number of officers. That being so, the noting by one officer, will not afford a valid ground to initiate action in contempt. We have thus no hesitation to hold that the expression of opinion in

notes file at different levels by concerned officers will not constitute criminal contempt. It would not, in our view, constitute civil contempt either for the same reason as above since mere expression of a view or suggestion will not bring it within the vice of Sub-section (c) of Section 2 of the Contempt of Courts Act, 1971, which defines civil contempt. Expression of a view is only a part of the thinking process preceding Government action.

(Emphasis Supplied)

13. The Honourable Supreme Court in the case of Sethi Auto Service Station and Another Vs. Delhi Development Authority and Others, in paragraphs 12 to 14 has observed as under:

12. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department; gets his approval and the final order is communicated to the person concerned.

In *Bachhittar Singh v. The State of Punjab*, a Constitution Bench of this Court had the occasion to consider the effect of an order passed by a Minister on a file, which order was not communicated to the person concerned. Referring to the Article 166(1) of the Constitution, the Court held that order of the Minister could not amount to an order by the State Government unless it was expressed in the name of the Rajpramukh, as required by the said Article and was then communicated to the party concerned. The court observed that business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. Before an action is taken by the authority concerned in the name of the Rajpramukh, which formality is a constitutional necessity, nothing done would amount to an order creating rights or casting liabilities to third parties. It is possible, observed the Court, that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion which may be opposed to the earlier opinion. In such cases, which of the two opinions can be regarded as the "order" of the State Government? It was held that opinion becomes a decision of the Government only when it is communicated to the person concerned.

To the like effect are the observations of this Court in *Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr.*, wherein it was said that a right created under an order of a statutory authority must be communicated to the person concerned so as to confer an enforceable right.

14. We are of the view that in light of settled position of law the communication

at page 27, which was the subject matter of challenge in the original writ petition cannot be termed as an order by any stretch of imagination. This aspect has not been considered by the learned Single Judge. In this view of the matter, we are left with no other option but to quash and set aside the order passed by the learned Single Judge and remit the matter to the State Government for fresh consideration with appropriate directions.

15. Under the above circumstances, the following directions shall meet the ends of justice:

(a) The State Government shall consider the question of correcting or varying afresh the Town Planning Scheme No. 1 (Bil) of VUDA so far as the land of the Appellant bearing Block Nos. 466 and 469 are concerned. The State Government shall decide the issue of variation after giving opportunity of hearing to the Appellant - original writ petition as well as to the Corporation or any other parties affected thereby and pass appropriate order in accordance with law. Such exercise shall be completed within three months from the date of receipt of order of this Court;

(b) Until the aspect of the variation is decided by the State Government in accordance with law, the status quo qua the present possession of the land in question shall be maintained by the parties.

16. For the reasons indicated above the appeal stands allowed to the aforesaid extent. No cost.