

(1989) 01 GUJ CK 0008

In the Gujarat High Court

Case No : Special Civil Application No. 7019 of 1988

Kashiben and Another

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 27-01-1989

Acts Referred:

Bombay Town Planning Act, 1954 — Section 18

Constitution of India, 1950 — Article 226

Gujarat Town Planning and Urban Development Act, 1976 — Section 124, 40(3), 53, 65(3), 67

Citation : AIR 1990 Guj 24 : (1989) 2 GLR 454

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

Bench : Division Bench

Advocate : R.N. Shah, for the Appellant; G.N. Desai, for the Respondent

Judgement

1. This Special Civil Application is for issuing a writ, direction or order for quashing and setting aside the sanctioned plan wherein the Surat Urban Development Authority had shown Final Plot No. 109 of the petitioners for reservation of the cottage industry by the Surat Municipal Corporation. There is a further prayer for restraining the respondents in any way from implementing the said plan. Further consequential prayers have also been made in this Special Civil Application. Rule was issued. Mr. G. M. Desai, the learned counsel, appears for the 2nd respondent and waives service of Rule. Mr. Chhaya appears for the 1st respondent and waives service of Rule. As far as the 3rd respondent is concerned, we feel that this petition can be disposed of in his absence on the facts and circumstances of this case. Since the learned counsel appearing for the petitioners and the 1st and 2nd respondents are agreeable to dispose of the matter finally, we have taken up this petition for final disposal. Hence, we have heard the respective learned counsel for the petitioners and 1st and 2nd respondents.

2. The short facts of this case for the purpose of disposal of this Special Civil Application are that the petitioners who own plot No. 109 in the Town Planning

Scheme object for inclusion of this Plot in the Town Planning and reserving it for cottage industries by the Surat Municipal Corporation. They question the preliminary and final Town Planning Scheme on the grounds that the original draft development plan was made under the provisions of the Bombay Town Planning Act, 1954 and hence, the preliminary and final scheme settled under the provisions of the Gujarat Town Planning & Urban Development Act, 1976 cannot be sustained, that the provisions of the Bombay Town Planning Act, 1954 and the Gujarat Town Planning & Urban Development Act, 1976 for settling the Town Planning Scheme are different and as such there must be fresh development plan as per the Gujarat Town Planning & Urban Development Act, 1976 and then only the preliminary and final Town Planning Scheme can be settled; that there was no notice before settling preliminary Town Planning Scheme nor the subsequent final Town Planning Scheme to the petitioners herein and as such the same is null and void; that the original purpose for which the development plan was submitted is for having a play ground for a School while the present purpose is for cottage industries and as such the same has to be struck down and that it is not the function of the Municipal Corporation to have cottage industries as per the provisions of the Bombay Provincial Municipal Corporations Act and as such the acquisition under the Town Planning Scheme for cottage industries cannot be sustained. With the above said contentions, the petitioners wanted to quash the Town Planning Scheme. Mr. R. N. Shah, the learned counsel appearing for the petitioners put forth the above said contentions and submitted that the Town Planning Scheme in respect of Plot No. 109 has to be quashed. Mr. G. N. Desai, the learned counsel appearing for the Surat Municipal Corporation pointed out S. 124 of the Gujarat Town Planning & Urban Development Act, 1976 and contended that the proceedings started under the Bombay Act 27 of 1955 are saved; that the notice was given before the Town Planning Scheme was settled; that the preliminary Town Planning Scheme was settled as early as 1980 and it is too late on the part of the petitioners to question both the preliminary and final Town Planning Scheme as late as 1988; that the Surat Municipal Corporation has ample power to establish cottage industries and acquire the land for the same; that the petitioners had notice with regard to the purpose for which the land is included in the Town Planning Scheme and that there is absolutely no merits in any of the contentions put forth by the petitioners herein.

3. We have carefully considered all the submissions made by the respective counsel appearing for the parties herein.

4. The draft development plan in this case was made as early as 6-9-1971. Naturally, this was under the Bombay Town Planning Act, 1954. S. 18(2) of the Bombay Town Planning Act, 1954 deals with the provisions that have to be made in the Town Planning Scheme.

S. 18(2)(e) reads as follows:

18. Subject to the provisions of this Act or any other law for the time being in

force

(2) such town planning -scheme may make provisions for any of the following matters

(a) "the allotment or reservation of land for roads, open spaces, gardens, recreation grounds, schools, markets, green belts and dairies, transport facilities and public purposes of all kinds."

By virtue of this provision, the draft development plans spell out the purpose in this case as required for a school building. Subsequent to this draft development plan, no other progress was made with regard to the development plan made and in the meantime, the Gujarat Town Planning & Urban Development Act, 1976 came into force on 1-2-1978. On 27-9-1978, preliminary scheme was prepared and on 27-10-1980, the said preliminary scheme was sanctioned. On 28-7-1987, the final scheme was sanctioned. In the preliminary scheme and in the final scheme, the purpose for acquiring this land is mentioned as cottage industry. The original purpose for, which the land is sought to be acquired for town planning is for school building. Mr. R. M. Shah submitted that, when the purpose is changed, there is no question of continuing the old development plan made in the old Act but a fresh exercise has to be made once over again for the purpose of sanctioning the town planning scheme. In this connection, Mr. Shah reads S. 52(3)(xi) which states "draw in the prescribed form the preliminary and the final scheme in accordance with the draft scheme provided that the Town Planning Officer may make variation from the draft scheme but no such variation, if it is of a substantial nature, shall be made except with the previous sanction of the State Government, and except after hearing the appropriate authority and any owners who may raise objections.

Explanations (i) For the purpose of this proviso "variation of a substantial nature" means a variation which is estimated by the Town Planning Officer to involve an increase of ten per cent in the costs of the scheme as is described in S. 77 or Rupees one race whichever is lower, on account of the provisions of new works or the allotment of additional sites for public purposes included in the preliminary scheme drawn up by the Town Planning Officer.

(ii) If there is any difference of opinion between the Town Planning Officer and the appropriate authority as to whether a variation made by the Town Planning Officer is of substantial nature or not, the matter shall be referred by the appropriate authority to the State Government whose decision thereon shall be final.

Mr. Shah further states that, in modifying the scheme, no notice was given. In the letter dt. 6-11-1978, written from the Office of the Additional Town Planning Officer, Surat to the husband of the 1st petitioner, it has been specifically stated that a temporary/ reconstituted plan has been prepared and the said reconstituted plan is made available for inspection in the office during office hours and that the party can get the explanation in person regarding the same.

There is further averment in this letter to the effect that, if within a period of 15 days from the receipt of the said letter, no representation is made, it will be presumed that the party has not made any representation about the said tentative reconstitution of the plan and suitable further proceedings for finalising the said plan will be initiated. By letter dt. 13-11-1978, the son of Pitamber Devchand, who is the husband of the 1st petitioner herein, had agreed to before the Town Planning Officer as follows:

"Town Planning Scheme, Surat No. 6 (Majura-Khatodara) ROSS. No. City Survey No. Original Dvn. No. 39A Plot No. 39B Final Plot No. 39.

The Town Planning Officer, according to the tentative reconstitution plan, a proposal is explained to us in connection with reconstitution and reallocation of our original plot Nos. 2,39A, 39B on finalising Town Planning Scheme, Surat No. 6.

I, Dhansukhbhai Pitambardas Umrao on behalf of my father inform by this writing that the proposal that in place of land bearing final plot Nos. 39A and 39B, the land bearing final plot No. 39 which is made, the same is agreed to by us."

The plan at the Town Planning Department, wherein Plot No. 109 is mentioned, is comprised of original plot No. 39A. Thus, the letter extracted above clearly reveals that the reconstituted purpose for acquiring this land was put on notice to the parties concerned and that the same was agreed to by the Son of Pitamber Devchand. Hence, there is absolutely no substance in stating that there was no notice when the purpose for acquiring the land was changed. Further, the S. 52(3)(xi) extracted above, in its Proviso, clearly gives power to the Town Planning Officer to make variation from the draft scheme. The purpose for which the acquisition for town planning both at the original stage and at the subsequent reconstituted stage, is for public welfare. There is no substantial change or variation in such acquisition. Therefore, there is no question of any transgression of statutory provisions as suggested by Mr. R. N. Shah. There is also no substance in stating that the Surat Municipality cannot reserve the land for cottage industry since it is not the function of the Municipality to have cottage industry. S. 40(3)(e) of the Gujarat Town Planning & Urban Development Act, 1976 clearly states that the town planning scheme may make provision for public purposes of all kinds. Having regard to the purpose for which this plot is intended, we cannot say that there is no public purpose involved in it.

5. The argument, to the effect that the scheme cannot be finalised in respect of the draft development plan published under the old Act, has absolutely no substance in view of S. 124 of the Gujarat Town Planning & Urban Development Act, 1976. S. 124 reads as follows:

"(1) The Bombay Town Planning Act, 1954 is hereby repealed.

(2) Notwithstanding such repeat anything done or any action taken (including

any declaration of intention to make a development plan or town planning scheme, any draft development plan or draft town planning scheme published by a local authority, any application made to the State Government for the sanction of any draft development plan or draft town planning scheme, any sanction given by the State Government to the draft development plan or draft town planning scheme or any part thereof any restriction imposed on any person against carrying out any development work in any building or in or over any land or upon an owner of land or building against the erection or re-erection of any building or work, any commencement certificate granted, any order or suspension of rule, bye law, regulation, notification or order made, any purchase notice served on a local authority, any interest of an owner compulsorily acquired or deemed to have been acquired by it in pursuance of such purchase notice, any revision of development plan, any appointment made of Town Planning Officer, any proceeding pending before and any decision of, a Town Planning Officer, or a Board of Appeal any final scheme forwarded to or sanctioned, varied or withdrawn by, the State Government, any delivery, or possession enforced, any eviction summarily made, any notice served, any action taken to enforce a scheme, any costs of scheme calculated and any payments made to local authorities by owners of plots included in a scheme, any recoveries made or to be made or compensation awarded or to be awarded in respect of any plot, any rules or regulations made, under the repealed Act shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act, and provisions of this Act shall have effect in relation thereto.

(3) All proceedings pending before a Town Planning Officer or a Board of Appeal under the Act hereby repealed on the date of commencement of this Act shall be disposed of by the Town Planning Officer or the Board of Appeal, as the case may be, appointed or constituted under this Act in accordance with the provisions of this Act.

(4) The mention of particular matters in sub-section (2) shall not affect the general application to the repeal of the said Act of S. 7 of the Bombay General Clauses Act, 1904 (which relates to the effect of repeal)"

Except the fact that the land vests after the preliminary scheme as per the new Act and other minor procedural aspects, we do not find any inconsistency between the old Act and the new Act in preparing and finalising the Town Planning Scheme. Hence, as per the provisions of Section 124 of the new Act, the proceedings taken under the old Act was continued and the preliminary scheme came to be sanctioned as early as 27-10-1980 which was subsequently made final on 28-7-1987. S. 65(3) of the new Act which reads "On and after the date fixed in such notification, the preliminary scheme of the final scheme, as the case may be, shall have effect as if it was enacted in this Act," makes it clear that, once the preliminary scheme is sanctioned, it becomes the part of the Act. S. 67 of the new Act also 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."

Thus, it is clear that, not only the lands included in the preliminary scheme vest absolutely in the appropriate authority, but the preliminary scheme shall have the effect as if it were enacted in this Act. In the 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):

"..... it was open to a person affected to waive individual special notice specified in sub-rule (3), which was only as an additional safeguard for the individual concerned. Therefore, 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. 2 1 (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:

"S. 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 author rely in sanctioning the schemes, nor any limited statutory essentials have been violated which will result in a total lack of jurisdiction.

6. 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 :

"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."

In 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.

7. Considering the above said decisions and also the fact that the preliminary Scheme has been already sanctioned as early as 27-10-1980, which has become the part of the Act, the same cannot be questioned as late as in the year 1988.

8. From the foregoing discussions, we do not find any merits in any of the contentions raised by Mr. R. N. Shah, the learned counsel appearing for the petitioners and as such, this Special Civil Application is dismissed. Rule is discharged with no order as to costs.

9. It is prayed by Mr. R. N. Shah, learned counsel appearing for the petitioners, that the ad interim relief granted earlier may be extended for a further period of three months. Mr. Desai learned counsel appearing for Surat Municipal Corporation, has opposed such extension to interim relief. Mr. Shah submits that the petitioners have to approach the Supreme Court of India for necessary relief

and further submitted that the occupants of these lands are poor persons and they must be given some time to vacate.

10. Considering these submissions, ad interim relief granted originally in terms of para IX(D) is extended for a period of 10 weeks from today. Status quo as on date in respect of the suit land will be maintained by both the parties.

11. Application dismissed.