

(1972) 11 GUJ CK 0008
In the Gujarat High Court
Case No : Second Appeal No. 318 of 1963

Madhukantaben

APPELLANT

Vs

The State of Gujarat and Another

RESPONDENT

Date of Decision : 30-11-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Land Acquisition Act, 1894 — Section 3(3), 4(1), 5

Citation : AIR 1973 Guj 176 : (1973) 14 GLR 506

Hon'ble Judges : J.B. Mehta, J;A.N. Surti, J

Bench : Division Bench

Advocate : S.B. Majmundar, for the Appellant; K.M. Chhaya, Asst. Government Pleader, for the Respondent

Judgement

J.B. Mehta, J.—The plaintiff - appellant's suit challenging the two acquisition notifications and for an injunction restraining the defendant Government from taking possession of the lands in question having been dismissed by both the Courts the plaintiff has filed the present second appeal. When it came up before the learned Single Judge. as there was some conflict between the decision of the Supreme Court in Ratilal Shakarabhai and Others Vs. The State of Gujarat and Others, and the decision of the Division Bench. the learned Single Judge has referred this matter to the Division Bench and accordingly it has come up before us.

2. The notification u/s 4 was issued on August 1. 1954, acquiring these two lands of the petitioner along with the other lands for the public purpose viz. for the Kaumudi Co-operative Housing Society Ltd., Dabhoi. Section 6 notification was issued on December 14. 1958. The plaintiff's father in whose name the land stood on the record expired on March 15. 1957. It was therefore. the plaintiff's case that the notice issued in the name of the deceased father u/s 4 (1) and served by the Vartania in question by throwing in the plaintiff's house could not be said to fulfill the necessary condition precedent and, therefore, the plaintiff's

right of hearing at the statutory enquiry u/s 5-A having been denied in the circumstances of the case, the acquisition was illegal and ultra vires. It was also contended by the plaintiff that the acquisition for such particular co-operative society could not be said to be for a public purpose especially as on that date the amendment by Gujarat Act No. 30 of 1965 which amended the definition of a public purpose i. e. in Section 3 (f) (3) was not on the statute book. The plaintiff widow of the deceased Maganlal Dwarkadas had, therefore challenged the present acquisition. The possession had been handed over as per the receipt Ex. 82 dated August 13, 1969, The plaintiff had even received compensation under protest. At the earlier stage it was held that the reference at the instance in view of Section 25 (2) of the Act. In First Appeal No. 341 of 1962 decided on 7-4-1967 (Guj), the Division Bench consisting of M. U. Shah and J. M. Sheth JJ. had in terms held that the mandatory provision of Section 9 notice had not been complied with and therefore. the plaintiff's widow had no reason to appear before the Land Acquisition Officer to prefer her claim and. therefore she was entitled to maintain the reference. Accordingly the plaintiff's compensation matter is still pending in First Appeal before this Court. The plaintiff in this suit has only challenged the acquisition as she had accepted the compensation amount under protest.

3. Mr. Majmundar raised the same two grounds in this appeal :--

(1) That the acquisition for such particular Co-operative Housing Society in the absence of any scheme for acquisition for co-operative societies in general could not be said to be for a public purpose, and

(2) That Section 4 (1) notice having been issued in the name of a dead person and having been said to be served on the plaintiff-widow by throwing it in the house, the mandatory provisions of Section 4 (1) read with Rule 1 and Section 5-A had not been complied with.

4. At the outset we may clarify the erroneous impression of the appellate Court that in this case. the provisions of Section 5-A enquiry had been dispensed with by direction u/s 17. It is true that such draft notification was prepared but in the final notification issued u/s 4 (1) which is now referred to us by Mr. Majmundar dated August 2. 1957, published in the Bombay Government Gazette, Part I dated August 15. 1957, we find no such direction dispensing with the enquiry u/s 5-A. That is why the final notification u/s 6 Ex. 74, in terms mentioned that the Government had acquired this property after considering the report u/s 5-A. Therefore, we will proceed to examine these two points raised by Mr. Majmundar in the light of these correct facts which are not disputed now even by Mr. Chhava in view of the aforesaid gazette notification u/s 4 (1).

5. As regards the first question the definition of the words `public purpose' before this amendment by the Gujarat Amendment Act 30 of 1965 in Section 3 (f) (3) merely includes the provision of village sites in the District in which the appropriate Government shall declare in the official Gazette that it is customary

for the Government to make such provision of the housing schemes as defined in the Land Acquisition Bombay Amendment Act. 1948. By the aforesaid amendment sub-clause (3) was added as under :--

"and (3) a housing scheme which the State Government may from time to time undertake for the purpose of increasing accommodation for housing persons and shall include any such scheme undertaken from time to time with the previous sanction of the State Government by a local authority or company."

The expression "company" as defined as the Land Acquisition Act includes a cooperative society within the meaning of Co-operative Societies Act. Therefore, under the amended definition in Section 3 (f) (3) acquisition in question would be clearly one for public purpose. In *Ratilal Shakarabhai and Others Vs. The State of Gujarat and Others*, . where the acquisition was for the co-operative housing society, their Lordships in terms relied on this definition even though Section 6 notification was issued in that case on October 1, 1964 prior to the date of this amending Act. Relying on this amendment definition their Lordships in terms held at page 985 that the proposed acquisition was clearly for a public purpose. At page 986 their Lordships further supported their conclusion in this regard by relying on the earlier decision in *Pandit Jhandu Lal and Others Vs. The State of Punjab and Others*, . Further proceeding it was in terms held that their Lordships were unable to accede to the contention that a housing scheme for a limited number of persons could not be considered as a public purpose even though there were only 20 members in the co-operative society in question who were to benefit by that housing scheme. Their Lordships in terms held that even the need of a fraction of public like this can be considered as a public purpose and ordinarily the Government was the best authority to determine whether the purpose in question was the public purpose or not and when the action taken by the Government was not shown to be fraudulent one the declaration issued u/s 6 was the conclusive evidence of the fact that the land in question was needed for a public purpose as decided in *Smt. Somavanti and Others Vs. The State of Punjab and Others*, which categorically laid down that conclusiveness in Section 6 (3) must necessarily attach not merely to the need but also to the question whether the purpose was a public purpose. In view of this categorical pronouncement of their Lordships Mr. Majmundar could hardly raise the first contention. Mr. Majmundar vehemently argued that their Lordships had failed to consider the question that this amendment in 1965 could never apply to an earlier acquisition which was made by the notification u/s 6 issued on October 1, 1964. In *Somvanti's* case. their Lordships have concluded this question in terms holding concluded this question in terms holding at pages 160-161 that the their Lordships does not depend on whether a particular argument was considered therein or not provided that the point for reference to which an argument was subsequently advanced was actually decided. The point is specifically decided by their Lordships that acquisition for a particular co-operative society consisting even of 20 members was the acquisition for a public purpose. Besides, it should be noted that their Lordships did not rest the decision solely on the amended

definition of Section 3 (3) of the Act. Their Lordships considered the position as concluded even by the earlier decision in Pandit Jhandu Lal and Others Vs. The State of Punjab and Others, which was also an acquisition for a co-operative society and which was held to be for a public purpose. Their Lordships had in terms considered this question in the context of the need of such fractions of the community consisting of the members of the co-operative society to be the need for a public purpose and the acquisition would be for the general interest of the community as the housing shortage problem would be solved to that extent. Mr. Majmundar however vehemently relied on the decision of the Division Bench consisting of the learned Chief Justice and Vakil J. in Musamiyan Imam Haidarbux Razvi and Others Vs. The State of Gujarat and Others, . The learned Chief Justice speaking for the Division Bench in terms held at p. 12 that the purpose of construction of houses for members of a co-operative society was not per se a public purpose. The said purpose may be for a public purpose in certain circumstances i.e. when a co-operative society was formed of persons belonging to the scheduled caste or backward class whose welfare in the context of the prevailing socio-economic conditions is a matter of serious concern to the entire community. At page 10 it was held that unless there was a scheme of acquisition of land for a co-operative society pursuant to which or in implementation of which a particular acquisition was made for a co-operative society, the acquisition for one particular co-operative housing society would not be for a public purpose because the accent in such case was on need of the particular society and not on the general interest of the community. These observations of the learned Chief Justice would no longer hold good after the decision of their Lordships of the Supreme Court where it is categorically held that even the needs of 20 members of a particular housing society would also be a need of a section of the community and the acquisition in such case would subserve the general interest of the community and would be obviously for a public purpose. Their Lordships of the Supreme Court in terms pointed out that the position was concluded by Pandit Jhandu Lal and Others Vs. The State of Punjab and Others, which was not unfortunately referred to before the learned Chief Justice. Besides, the amending definition on which their Lordships relied was also not pointed out to the learned Chief Justice. Therefore, the Division Bench decision is clearly per incuriam where the attention of the learned Chief Justice was not invited to the binding decision in Jhandulal's case as well as to the amendment made by the legislature. Mr. Majnumdar vehemently argued that this would be giving retrospective effect to the 1965 amendment. This question is no longer res integra before this Court in view of the aforesaid decision of their Lordships of the Supreme Court which probably proceeds on the footing that this amendment is only explanatory. In Keshavlal Jethalal Shah Vs. Mohanlal Bhagwandas and Another, the Full Bench of seven Judges had in terms explained at page 872 what was the explanatory Act. It was pointed out by their Lordships that an explanatory act is generally passed to supply an obvious omission or to clear doubts as to the meaning of the previous Act. The expression `public purpose' in the context of such co-operative housing society was the subject matter of

various judicial decisions and its import and implication was not precisely understood and the meaning being in doubt. this amendment clarified the said doubt by offering the legislative explanation of the expression "public purpose" which was so wide in its nature and which definition in Section 3 (f) itself was inclusive. In any event. without recourse to this amendment, if, their Lordships could hold that an acquisition for a particular co-operative housing society was for a purpose by referring to the general test of what subserves the need of a fraction of a community and by referring to the earlier decision in Jhandulal's case. it is obvious that the decision of our Division Bench could not be tread as any longer good law and must be deemed to be impliedly overruled. Even in Ram Sarup Vs. The Land Acquisition Officer, Aligarh and Others, , the acquisition of land for a co-operative housing society was again found to be for a public purpose. In that view of the matter. the first contention raised by Mr. Majmundar must obviously fail and the finding of both the Courts must be upheld that the present acquisition was for a public purpose.

6. As regards the second contention Mr. Majmundar relied upon the decision of the Division Bench of the learned Chief Justice and Vakil J. in Ashok Kumar Gordhanbhai v. State (1968) 10 G LR 503. At pages 514-515, Vakil J. speaking for the Division Bench in terms pointed out that it was true that neither S. 4 (1) nor S. 5-A provides for any such personal notice. Rule 1" which was enacted u/s 55 for the guidance of the officers dealt with the provisions of Section 5-A and reads as follows :--

"Whenever any notification u/s 4 of the Act has been published but the provisions of Section 17 have not been applied and the Collector has under the provisions of Section 4 (1) issued notices to the parties interested: and on or in these notices in this behalf any objection is lodged under S. 5-A (2). firstly, the Collector shall record the objection in his proceedings secondly. the Collector shall consider whether the objection is admissible according to these rules."

Vakil J. therefore, in terms observed that this Rule 1 contemplated notice u/s 4 (1) being issued to the parties interested. The said notice was not contemplated by Section 4 (1) and, therefore, the words "under the provisions of Section 4 (1)" were incongruous and inapt. But the intention of the rule making authority could be called out by the necessary implication that personal notice was intended. to be given to persons interested and therefore it was held by Vakil J. that it was desirable that the persons interested and atleast persons in occupation about whose interest the Government in normal circumstances would be expected to know, whether they were given personal notice to file their objections. In such case when a person was to be deprived of his property against his will. mere consideration of difficulty or extra burden being thrown on the authority could not be any criterion to put a construction which would adversely affect an important right of the subject. Therefore it was held that the personal notice was required to be served on the persons interested and this being a condition precedent to the issuance of the notification u/s 6, the

notification would be invalid and would have to be struck down. Mr. Majmundar wrongly invokes these observations in this case. Vakil J. in terms contemplated in this implied reading of a personal notice to persons interested that they were persons in occupation about whose interests the Government in normal circumstances would be expected to know and that such persons must be given a personal notice to file their objections u/s 5-A. In the present case even if Maganlal, the husband of the plaintiff expired on March 15, 1957, the plaintiff widow never took any steps to get her name mutated in the Government record. u/s 135 (c) of the Land Revenue Code it was obligatory on her to send such intimation within the period of three months. It is in these circumstances that the notice was issued in the name of the deceased Maganlal in whose names these two lands stood in the Government record. Therefore, this was not a case where the Government in normal circumstances could be expected to know that the person in whose name the lands stood must have expired and, therefore, a personal notice to file objections must be given to the heirs. It should also be borne in mind that Section 4 (1) required this notification u/s 4 (1) to be gazetted so that every one could have a notice. Section 4 (1) further provides that the Collector shall cause public notice of the substance of such notification to be given at a convenient place in the said locality. Therefore, even where such owners have remained negligent in not getting their names duly mutated they would get ample notice so that they could file objections because the notification is published not only in the gazette but its substance is notified at a convenient place in the locality. An identical question had arisen before their Lordships in *Bhola Shanker Vs. The Distt. Land Acquisition Officer, Aligarh and Others*, where the notification were challenged under Sections 4 and 6. The person concerned had purchased the plot in dispute in 1951 subsequent to the publication of the notification u/s 4. He had taken no steps to get his name mutated. When the time came for service of notice u/s 9 of the original owners were still shown in the final papers as the tenure holders of the plot in question and, therefore notice which is mandatorily required u/s 9 (3) was issued to those owners and not to the purchaser. In these circumstances, their Lordships held that High Court was right in holding that it was this purchaser who himself was to blame. A public notice u/s 9 (1) had been fixed at a prominent place in the locality and, therefore, the High Court was held to be right in its conclusion that this purchaser must have knowledge of the land acquisition proceedings. In the present case the facts are too eloquent to show how the petitioner widow had full knowledge of all the facts leading to this acquisition. The other lands mentioned in the notification under S. 4 (1) are found to belong to neighbours and even tenant of the petitioner had been served with the notice and all of them had participated in the acquisition proceedings. It is in these circumstances that both the Courts refused to believe the case of the plaintiff and her son. The plaintiff even in her deposition at Ex. 53, categorically stated that she did not raise any objection after knowing the fact that these lands were to be acquired by the housing society but that she had filed this suit. Therefore she even admitted that fact that the Talati was sending Bartanias during the relevant period, even during

the mourning period of one year after her husband. Her only plea was that the Vartania was telling her to pay revenue. She was clearly falsified by the evidence of Vartania Vithal. Ex. 60. who had categorically deposed that he went and served notice under S. 4 (1) on the deceased Maganlal by giving it to the widow. The widow refused to accept this notice and therefore, he threw the notice in the house. He made immediate report to the Talati Mukundlal, Ex. 57. who has corroborated him. Even the plaintiff's son Dr. Jayant Kumar Shah. Ex. 42 who was practising in Bombay in 1957 before the death of his father and who went at Dabhoi to reside permanently after the death of his father could not give the date on which he applied for the mutation of the land in the name of the heir. It was even his case that he had registered his objection in the office of the Prant Officer before the Diwali of 1957. No such objection could be traced. Therefore. both the Courts rightly disbelieved the plaintiff and her son in view of this voluminous evidence and the finding could never be said to be perverse so as to be challenged in the Second Appeal that the plaintiff had full knowledge and she had failed to lodge any objection in the enquiry u/s 5-A. Therefore. the plaintiff was herself to blame and the Government could never be held not to have fulfilled the condition precedent for the present acquisition. The relevant personal notice under Rule 1 could only be issued to the persons interested whose interest the Government in the normal circumstances would be expected to know. When the death of Maganlal was not known to the Government, the Government, could never be blamed for not issuing notices to the heirs when the heirs remained negligent by not getting their names duly mutated. In such circumstances if the heirs did not get any notice they themselves were to blame and they could never be heard to say that the condition precedent to the issuance of Section 6 notification was not complied with in the present case. Besides, in such cases of an administrative enquiry u/s 5-A where the officer makes the statutory report which is to finally considered by the Government before deciding to acquire the land in question. such personal notice is implied by way of fair play. Such notice is in addition to the notice u/s 4 (1) which is published not only in the Government gazette but in the locality. Therefore, if in such circumstances when it was not practicable for the Government to issue such a personal notice on the heirs assuming that the man must have been dead, it could never be held that the condition precedent for issuing notice u/s 6 was not fulfilled in the present case. In fact, in any event the plaintiff and her son had full knowledge of all these facts leading to acquisition and if they failed to lodge their objections as admitted by this widow they had clearly waived their right. In *East India Co. v. Official Liquidator. Raj Ratna Mills* (1969) 11 G LR 457. Division Bench consisting of the learned Chief Justice and Vakil J. in terms pointed out at page 479 that audit alteram partem rule did not require that the Court or Tribunal must give to the person an opportunity to be heard even if he did not want it and was prepared to waive it. The principle of waiver ought to be applied as part of the person concerned, there was really no breach of audi alteram partem. Therefore. Mr. Majmundar's contention is thoroughly misconceived that there was breach of audi alteram partem rule because the right to offer objection u/s 5-A was taken

away. This was wholly the result of the plaintiff's own negligence for which she alone was to blame. and in any event the plaintiff and her son after full knowledge of the facts had voluntarily chosen not to offer any objections although all the neighbours and even the tenant of this property defendant No. 2 had participated in the acquisition proceedings. In fact it is obvious from the facts which we have earlier set out that the plaintiff and her son were merely concerned with the compensation amount. This court had by earlier decision in First Appeal No. 341 of 1962 decided on 7-4-1967 (Guj) entertained reference of this widow and the question of compensation is still pending before this Court. That is why even the possession was voluntarily handed over and the compensation amount has been accepted by the plaintiff under protest. Therefore, this is not the case where the plaintiff could ever make any grievance that she has been denied an opportunity of urging objections in the enquiry u/s 5-A or that the mandatory requirement of personal notice which is a condition precedent for issuance of notification u/s 6 was not fulfilled in the present case. We may also mention in this connection that MR. Majmundar had vehemently relied upon the aforesaid Division Bench decision in First Appeal No. 341 of 1962 (Guj) in this connection. In that decision the question was of the mandatory notice u/s 9 and the question had arisen in the context of Section 25 (2) of the Act which provides that when the applicant had refused to make such claim in pursuance to the notice u/s 9 or had omitted without sufficient reasons to make such claim the amount awarded by the Court was in no case to exceed the amount awarded by the Collector. It was in that context that the Division Bench held that so far as the plaintiff was concerned, no notice was served on her. The notice was issued in the name of her deceased husband and therefore, the provisions of Section 9 (3) of personal service on the occupier and on persons known or believed to be known being not complied with, there was no bar of Section 25 (2). This decision could never be pressed in service in the present context when the question has to be resolved in the light of Rule 1 in which notice has been implied by this Court only in those cases of persons whose interests the Government in normal circumstances would be expected to know. In the present case there is no breach whatever and the principles of fair play have never been denied as pointed out earlier. We may also mention that because the Talati and Vartanias knew of the fact that Maganlal was dead, this would be the knowledge of the State. The knowledge of these persons could hardly be attributed to the State. In any event, if the plaintiff herself was negligent in not getting her name mutated in the Government record as required by the provisions of Section 135 (c) of the Land Revenue Code, she must thank herself and she could never complain that principles of fair play were violated in her case by not issuing notice in her personal name. In fact all the relevant requirements have been substantially complied with by serving her with this notice which she refused to accept and in pursuance of which even after full knowledge of the facts she refused to file any objections. Therefore, there is no substance even in the second contention raised by Mr. Majmundar that the condition precedent was not fulfilled for issuing the notification u/s 6. No other

point was pressed by Mr. Majmundar.

7. In the result this appeal must fail and must be dismissed obviously for different reasons which we have now given. We would make no order as to costs in the circumstances of the case.

8. Appeal dismissed.