

(1989) 10 GUJ CK 0008

In the Gujarat High Court

Case No : Letters Patent Appeal No. 246 of 1989

Municipal Commissioner, Bhavnagar

APPELLANT

Vs

Nandumal Pahelmumal and Others

RESPONDENT

Date of Decision : 17-10-1989

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 50

Citation : (2002) 22 GLH 389

Hon'ble Judges : Jagdish Udes Shankar Mehta, J; A.P. Ravani, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.P. Ravani, J.—This L.P.A, is directed against an interim order passed by the learned Single Judge of this High Court in Special Civil Application No. 2462/89. By the interim order, the learned Single Judge directed the respondents not to obstruct the petitioners in putting up cabins on the lands which they were occupying and from carrying on the business over the land in question. Hereinbelow the parties are referred to by their original position in the petition. Few undisputed facts be noted. In the wake of partition of the country, many people residing in the entire sub-continent were uprooted from the land of their origin. Several persons were forced to come to this part of the country and some of them settled in the town of Bhavnagar in the year 1948-49. Initially they started their business in the area known as Percival market. Some time in the year 1956 they were asked to shift from this place and were accommodated to another place known as "Kapad Galli". Since then they occupied a part of the public street over which they put up their own cabins. For the land occupied by them the Municipality charged fees. After the municipality was converted into Corporation, the same position continued. As per the affidavit filed by the City Engineer of the respondent-Municipal Corporation, fees from the cabin holders were charged for the period covering upto 31st March, 1989. It appears that the aforesaid amount might have been recovered by the former office-bearers of the

Corporation. The averments in the affidavit-in-reply that amount of fees were recovered by the former Municipality is incorrect and erroneous. The Municipal Corporation is the same. The office-bearers may come and go.

2. As stated in the petition, the appellants-petitioners apprehended some unlawful action on the part of respondent-Corporation. Therefore they had filed a Civil Suit No. 905/86 in the Court of Civil Judge (J.D.), Bhavnagar and had obtained interim relief on September 26, 1986. By this interim relief the respondent-Corporation has been restrained from disturbing the possession of the appellants petitioners and it is ordered that status quo be maintained. The day on which the action of demolition and removal of cabins took place the order of injunction was in operation. This is so stated in the petition. This averment is not denied by the City Engineer Mr. Lakhani, who has filed affidavit-in-reply on behalf of respondent-Corporation, nor the same has been denied by Shri Upadhyay, Sub-Judicial Magistrate, who has also filed affidavit-in-reply. In para 5 of the petition necessary facts are stated. Reading the averments in the petition and the affidavit-in-reply the following facts emerge :

(i) That the petitioners did occupy the place in question since the year 1956 and were carrying on the business of selling cloth and other sundry articles since the year 1956. The Municipal Corporation did charge fees for the occupation of the land over which the petitioners put up their cabins. In these cabins even electric connection was there. In some of the cabins there were telephone connection also. The details with regard to the telephone connections are given in the petition by way of annendment.

(ii) That nearby this place, there is a building known as Darbargadh constructed by erstwhile ruler of Bhavnagar. Several Government offices are situated in this building and in the surroundings of this building there are private business shops and offices. In this "Darbargadh" building there are certain lattices which are good carvings and have been declared as ancient monument in the year 1956. However, there is nothing on the record to show that the petitioners' cabins were adjoining to these carvings and on account of the existence of the cabins of the petitioners, the carvings have been, or are likely to be damaged or destroyed.

(iii) On the night of March 24, 1989, the Municipal Commissioner Mr. Verma, the District Collector, Mr. Pradip Pujari, the D.S.P. Mr. Dimri, the Sub-Divisional Magistrate Mr. Upadhyay and one Mr. Desai, City Mamlatdar along with several other subordinate officers and police constables had gone to this bazar area. The area was cordoned at 12.30 midnight and the operation of demolition of cabins was started. The cabins were destroyed, demolished and removed. The goods of the petitioners and others lying therein were also removed.

(iv) Mr. Upadhyay, the Sub-Divisional Magistrate, in his affidavit-in-reply has assumed the responsibility of the action in question. However, his version is that as guardian and director of the Ancient Monuments he has taken the action of removal of the cabins. According to his version at about 7.00 p.m. the

announcement was made and people were given notice to the effect that encroachment will be removed. It may be noted that no contemporaneous document is produced on record to show that any such notice: was given to the people. The assertion that such notice was given has been denied by the petitioners.

(v) The petitioners came to know about their shops being demolished and destroyed in the mid-night after about 12.30 or so and they rushed to their place of business and they were not allowed to enter the area as the same was cordoned; by police. The petitioners could not enter into the area till next day morning. On the next day when some of the petitioners whose names are disclosed in para 8 of the petition met the Municipal Commis-; sioner, he did not give any satisfactory reply. Thereafter the petitioners, named in para 8 of the petition, approached the Collector, but he also refused to give any reply. (It may be noted that the aforesaid averments in the petition have remained uncontroverted.)

(vi) Having failed to get redressal from the top executive officers of the district and from the top executive officers of the Municipal Corporation, the petitioners have invoked the extraordinary jurisdiction of this High Court under Articles 226/227 of the Constitution of India. Petitioners prayed that the respondents be directed to restore the cabins at the places wherefrom they have been removed and be directed to hand over back the goods to the petitioners. The petitioners have also prayed for suitable amount of compensation by way of damages. They have also prayed for interim relief pending admission, final hearing and disposal of the petition to the effect that the respondents be directed to restore the cabins and the goods lying therein and/or the respondents be restrained from obstructing the petitioners in putting up the cabins and earring on their business. As indicated hereinabove, the learned Single Judge has restrained the respondents from obstructing the petitioners in putting up their cabins on the land in question and from carrying on the business over the land.

(vii) The learned Single Judge has passed the aforesaid order after considering the affidavit-in-reply filed by respondent No. 4 who has owned up the responsibility for taking action and after hearing the Learned Counsels appearing for the parties.

(viii) Two Letters Patent Appeals were filed against the aforesaid order. One being L.P.A. No. 272/89 was filed by the Collector and the Sub-Divisional Magistrate and another, the present L.P.A. No. 246 of 1989 is filed by the Municipal Commissioner, respondent No. 1 in the original petition. The learned Advocate General appeared in both the appeals. After duly arguing the matters, the learned Advocate General sought time to consider as to whether the appellants would like to withdraw the appeal or not. After obtaining necessary instructions from the appellants in L.P.A. No. 272/89, (i.e. the appeal filed by Collector and Sub-Divisional Magistrate), the learned Advocate General sought permission to withdraw the appeal. Permission has been granted and that appeal stands

disposed of as withdrawn as per order passed on October 11, 1989. Hence now we are required to deal with the L.P.A. No. 246/ 89 filed by the Municipal Commissioner alone.

3. It is contended that the land on which the petitioners were carrying on their business was a part of public street and members of public have right to use the same. The cabins put up on the land was obstructing the user of the public street by people. Therefore it is submitted that the Court ought not to have issued the order of injunction which would be prejudicial to the right of the people. It is also contended that the Court of Civil Judge (S.D.), Bhavnagar, in Civil Suit No. 424/89 filed by some persons, the Trial Court has granted injunction to the Municipal Commissioner and the Collector directing them not to create any obstruction or make construction on the land in question. Therefore it is submitted that the order passed by this Court is likely to come in conflict with the order passed by the Court of Civil Judge (S.D.), Bhavnagar. Hence it is prayed that the interim order passed by the learned Single Judge is required to be vacated:

4. The injunction order passed by the Trial Court is to the effect that on the land in question which was open land at the relevant time, the defendants should not create any obstructions by themselves or by their servants or agents. This order of injunction does not in any way conflict with the order passed by the learned Single Judge. The learned Single Judge has not directed the Municipal Corporation to create any obstruction or construction on the public land. Therefore, on examining the facts of the case, this contention has no merits. Moreover, as observed by the learned Single Judge, the petitioners were not party to that civil suit. Therefore, we are in agreement with the learned Single Judge that the order of injunction passed in Civil suit cannot adversely affect the interest of the petitioners.

5. It is contended on behalf of the petitioners that the suit has been filed by two residents of Bhavnagar town during the pendency of the petition in this Court and it is a collusive suit. It is also contended that the injunction has been invited or obtained by the Municipal Commissioner and the Collector with a view to confuse the proceedings of the petition in this High Court. Be that as it may, it is not necessary to decide these contentions on merit at this stage. As far as this L.P.A. is concerned, we are in agreement with the learned Single Judge. We are also of the opinion that the injunction granted by the Trial Court in Civil Suit No. 424/89 pending in the Court of Civil Judge (S.D.), Bhavnagar is not at all relevant for deciding this proceedings.

6. Now the contention that the land in question is a public street and the petitioners have no right to use the same and therefore they could be removed by the appellants be examined. The petitioners may not have any legal right to occupy land of the public street. At the most they would be in the position of unauthorised occupants. Therefore, at the highest they may be described as persons who have committed civil trespass. But trespassers also have a right to

be dealt with in just, fair and reasonable manner. They cannot be removed in high-handed, ruthless and inhuman manner, much more so when the authorities were restrained from taking action by a Court of competent jurisdiction. Be it noted that the appellant himself, i.e. the Municipal Commissioner, has not filed affidavit-in-reply in the petition. One Mr. Lakhani, City Engineer of the Municipal Corporation has filed affidavit-in-reply on his behalf. Even in this affidavit-in-reply the City Engineer has not denied the fact that the injunction order passed by the Court of Civil Judge (Junior Division), Bhavnagar in Civil Suit No. 905 of 1986 was in operation. The Municipal Commissioner was bound to obey and comply with this injunction order. In defiance of this injunction order, no action whatsoever could have been taken by the Municipal Commissioner.

7. In the petition it is alleged that in presence of, and with the help of the officers of the Municipality and by using the vehicles and other instruments of the municipality, demolition drive has been carried out. These allegations have been vaguely denied in affidavit-in-reply filed by Mr. Lakhani, City Engineer. However, he has not stated that he was present when the actual demolition of the cabins was carried out. Therefore, the vague denial by Shri Lakhni cannot be accepted. There is no affidavit-in-reply filed by the appellant himself denying the allegation that he along with others is responsible for the action of demolition and removal of the cabins. Therefore, prima facie at this stage, on the basis of the position as it is available from the record, the allegations made in the petition are required to be believed. Therefore the irresistible conclusion is that the demolition drive has been carried out in high-handed and inhuman manner, totally disregarding all the norms of civilized society. Even in absence of injunction order from Civil Court, such action cannot be justified. However, in view of the injunction order passed by the Civil Court, this action may even amount to brazen contravention of the injunction order passed by the Court of Civil Judge (Junior Division) which was in operation and binding to the Municipal Corporation at the relevant time. Therefore the argument based on the fact that the land is that of public street and public has a right to use the same and therefore the Municipal Corporation has duty to clear the same has no merits.

8. This argument cannot be accepted also for the reason that the order passed by the learned Single Judge rests on the basic principle that no one can be adversely affected unless he is afforded an opportunity of being heard. In the case of *Nehru Marg Cabin Association v. Modasa Nagar Palika*, reported in 29 (1) G.L.R. 441 it is held that in view of the decision of the Supreme Court in the case of *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, even trespassers cannot be removed without affording an opportunity of being heard and without giving sufficient notice so as to enable them to remove themselves from the place alleged to have been encroached upon. The observations made and the conclusion arrived at in the case of *Nehru Marg Cabin Association* (supra) are eminently just and proper. We are of the opinion that in absence of prescribed procedure under any Act or rules, the procedure indicated in the aforesaid decision of this Court is required to be followed by the executive

authorities before removing the persons who might have allegedly encroached upon the land of public street.

9. This requirement as to procedure is again based on first principles. It is an established principle of our jurisprudence that all the authorities functioning under the Constitution and exercising constitutional or statutory powers are required to act in just, fair and reasonable manner. Requirement of just, fair and reasonable manner applies to the procedural aspect also. What would be just fair and reasonable is absence of specific rules or statutory provisions in that behalf, would depend on facts and circumstances of each case. In each case, it will be for the Court to decide whether the procedure laid down by any particular law for depriving a person of his personal liberty or for depriving any other fundamental or legal right is just, fair and reasonable or not. It is so held by the Supreme Court in *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746, The necessary corollary of the observations made by the Supreme Court in the case of *Francis Coralie* (supra) is that in a given case the Court may indicate as to what would be just, fair and reasonable procedure.

10. In the case of *Nehru Marg Cabin Association* (supra) this Court has indicated just, fair and reasonable procedure to be followed in such type of cases and it reads as follows :

"(i) The respondent-authorities shall not take any action of removal of the petitioners from the business premises occupied by them without affording them an opportunity of being heard :

(ii) Such opportunity of being heard would also include :

(a) Notice in writing to be served upon each of the occupant, calling upon him to show cause as to why he should not be removed from the place in question;

(b) The occupant concerned shall be afforded an opportunity of leading evidence in response to the notice; and

(c) the occupant concerned shall also be afforded an opportunity of being heard in person either by himself or through an Advocate;

(iii) In case the respondent-authorities after the enquiry as stated hereinabove, come to the conclusion that the occupant concerned is required to be removed from the place, and any decision adverse to the occupant is taken, the same shall not be implemented for a period of one month from the date of communication to the occupant.

(iv) The order that may be passed by the respondent-authorities shall be served upon the occupant preferably by registered A.D. post. The same shall also be sent by an ordinary post under certificate of posting and the order shall also be affixed on the premises in question."

We are also of the opinion that in case of removal of alleged encroachment or demolition of cabins and other encroachment on public road, the minimum that

may be required of the executive authorities would be to follow the just, fair and reasonable procedure, in absence of any statutory provision should confirm with what is stated hereinabove. Admittedly such procedure has not been followed in the instant case.

11. The Learned Counsel for the appellant submits that the petitioners have no right to occupy any portion of the public street and it is undisputed that the land occupied by the petitioners is part of public street. Therefore, the learned Single Judge ought not to have passed the impugned order. In support of the aforesaid contention the Learned Counsel has relied upon the following decisions :

(i) *Sodan Singh v. New Delhi Municipal Committee and another*, reported in *Judgement Today* (September 11, 1989 issue) at page 583.

(ii) Decision of the Division Bench of this High Court in the case of *Gujarat Hawkers etc., Sangh v. Ahmedabad Mun. Corporation*, reported in 1989 (2) G.L.R. 142.

The question is not whether the petitioners have any right to occupy the land in question. (Learned Counsel for the respondent-original petitioners asserts that the petitioners have right to occupy the land they are lawful occupants and not trespassers. However, that is not the issue.) The question is decided in this L.P.A, on the assumption that the petitioners are unauthorised occupants of the land (any may even be labelled as having committed civil trespass). Therefore the real question is, whether the action alleged to have been taken by the appellants-respondents and owned up by respondent No. 4 in the original petition is in accordance with the principles of just, fair and reasonable procedure to be followed by the authority exercising powers conferred under any statute.

12. A trespasser may not have any right to be on the land of public street, nor he may have any right to carry on business by encroaching upon the land of public street. But this does not mean that the trespasser can be dealt with otherwise than in accordance with law or in unjust, unfair and unreasonable manner. No one has right to commit rape or murder. No one has right to carry on smuggling activity. No one has right to evade tax, engage in black-marketing, hoarding and profiteering, and indulge in such other nefarious activities. Even so, when the police takes such a person into custody, he is not killed straightaway by the police. The police cannot do that. Such a person is not straightaway robbed of his property by the police, nor the police can straightaway punish him. The procedures prescribed by law as it exists will have to be followed in every case. Where there is no such procedure prescribed, just fair and reasonable procedure which should be in conformity with the basic principles of natural justice must be followed. Even a person committing robbery or committing dacoity or other heinous crime cannot be arrested without following the procedure of law nor the property of any person alleged to have committed the crime of tax evasion, black-marketing, hoarding or smuggling be seized without following the procedure of issuing seizure memo and without recording Panchnama. As provided u/s 50 of

the Criminal Procedure Code a person who is to be arrested is required to be informed as to for what offence he is to be arrested. Similarly, if any of his property is to be attached and seized, seizure memo is to be issued and regular Panchnama is required to be drawn when his property is seized and removed from his possession. If the seizure is effected otherwise than in accordance with law, it would prima facie be held to be illegal and void. The policeman or the executive officer arresting the person or seizing the property cannot say that ultimately the property is smuggled one and the action of seizure and arrest of such person is legal and therefore he was justified in ignoring the just, fair and reasonable procedure. Similarly the executive authority, be that a Municipal Commissioner or District Magistrate, cannot say that these persons were unlawful occupants and therefore they can be removed without following the procedure which would be in conformity with the basic principles of natural justice.

13. Would a citizen be not within his rights to assert that, if a smuggler, a murderer or a tax evader is entitled under the provisions of the statute to say that his property be not attached without issuing seizure memo and without recording Panchnama, I am an honest person doing lawful business and I am compelled to use public street out of sheer necessity and therefore please do not remove my property without making note thereof and without recording panchnama ? While doing so all that a citizen claims is equal treatment. In all earnestness his claim is that I am a poor little Indian. Before you robe me of my belongings, treat me on par with smugglers, black-marketeers, profiteers, tax-evaders, murderers and dacoits. We think that the claim is just and proper and no authority exercising powers under the Constitution and a valid statute would be justified in denying this legitimate claim. We are of the opinion that whenever there is no statutory provisions prescribing just, fair and reasonable procedure for removal of obstructions on public street, the procedure which is meant for effecting seizure and removal of property under the Criminal Procedure Code should as far as possible be made applicable to the removal of such alleged obstructions from the land of public street. Whenever it is shown that such procedure is not followed, the action of the authority will have to be labelled as unjust and arbitrary. Therefore, the submission that the petitioners have no right to occupy the land and therefore they could be removed has no merits and the same cannot be accepted.

14. It is an established principle of law that action taken in contravention of the principles of natural justice is nullity. In the instant case, we are also of the opinion that the minimum principles of natural justice and the minimum requirement of just, fair and reasonable procedure have not been followed and therefore prima facie the action taken by the appellant and other executive authorities is nullity. Therefore, status quo ante has got to be ordered to be restored.

15. Again it may be noted that the case of the petitioners is that they are occupying the land in question since the year 1956 with the permission of the

Municipal Corporation. They are also paying fees for the same. In fact they have paid fees for the period covering upto March 31, 1989. It is also their case that they have been given promise of being accommodated permanently at the same place. It is also alleged by the petitioners that from each one of them an amount of Rs. 500/- has been received by the Municipal Corporation for permitting them to put up pucca construction at the same place. Be that as it may, all these questions are not required to be gone into at this stage. For the foresaid reasons, there is no substance in the appeal. Hence the appeal is dismissed.