

(1993) 05 AHC CK 0036

In the Allahabad High Court

Case No : Writ Petition No. 1241 (M/S) of 1993

Nishatganj Vyapar Mandal

APPELLANT

Vs

state of U.P. and others

RESPONDENT

Date of Decision : 18-05-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 21, 226
Railways Act, 1890 — Section 16, 17, 18, 19
Urban Land (Ceiling and Regulation) Act, 1976 — Section 20

Citation : AIR 1994 All 84

Hon'ble Judges : B.C. Saksena, J;A.N. Guptal, J

Bench : Division Bench

Advocate : P.K. Mehrotra and H.S. Jain, for the Appellant; Umesh Chandra, J.K. Sinha and Manik Sinha and S.C., for the Respondent

Judgement

B.C. Saksena, J.—Counter affidavit on behalf of opposite parties except opposite party No. 6 Nagar Mahapalika, Lucknow have been filed. Rejoinder affidavits have also been filed. As pleadings were complete, with the consent of the learned counsel for the parties, the writ petition was taken up for final hearing. We have heard learned counsel for the parties.

2. The petitioner by means of this writ petition have prayed for a writ of mandamus commanding the opposite parties not to construct the flyover in question in the Nishatgang Area in the city of Lucknow. A further writ of mandamus has been prayed for requiring the opposite parties not to construct any wall near the railway track at gate No. 4 in the Nishatganj area. By way of consequential relief, further writ of mandamus has been prayed for commanding the opposite parties to allow movement of vehicles in the Nishatgang area and to pay compensation/ damages to the affected persons of the locality due to the construction of the flyover.

3. The petitioner's case is that railway line of N. E. Railway passes through Bad shah Nagar Railway station to Charbagh through Nishatganj. A proposal to

construct over-bridge in main Nishatganj area has been finalised. The opposite parties, in their counter affidavit have filed the relevant lay-out plan of the over bridge at crossing No. 4. The writ petition was filed on the basis of an assumption that the Hanuman Mandir standing on the Nishatganj crossing is likely to be damaged and affected by the construction of the flyover. Various pleas have been raised by learned counsel for the petitioner. Foremost of them being that the flyover is being constructed without deciding the petitioner's representation. It is submitted that the flyover is being constructed in violation of human needs and against the welfare of the residents of the locality i.e. Nishatgang area. It is alleged that the flyover is being constructed in a way that it will affect human health, wealth and property and basic human needs as there would be no passage of ambulance and fire-brigade etc. The main grievance of the petitioner centres around the construction of a wall covering railway line at gate No. 4 at Nishatgang crossing and providing for a subway for pedestrians and cyclists to cross over to the other side. The other ground urged is that the object for which the flyover is being constructed, such as traffic jam, would not be solved but would be worsened due to construction of wall at gate No. 4.

4. On behalf of opposite parties, a preliminary objection was raised with regard to the locus standi of the petitioner Vyapar Mandal to file writ petition. It has been stated that the Nishatgang flyover is being constructed under policy decision of the State Government as well as the Central Government, considering the critical condition in controlling heavy traffic in the density populated Nishatganj area and considering general demand of the public who was facing trouble every day due to traffic jams in said area. It is submitted that a high level committee consisting of expert engineers as well as higher authorities of the State and Central Governments was constituted and thereafter the plan was sanctioned and approved after thorough survey and inspection of the area in question and taking into consideration the requirements and facilities and also the proposals of the citizens of the locality including the Vyapar Mandal. It has been stated in the counter affidavit that the construction work of flyover has been started in January 1993 and is now in speedy progress and six piers and retaining walls have already been constructed. Photographs of the construction have also been filed. It has been stated that huge investment has already been made in respect of the construction of the flyover. The constructions have been allowed to be executed by the U. P. State Bridge Corporation and it is required to be completed within the year 1994. In the counter affidavit, it is stated that the grievance of the petitioner association has been considered while making the plan and while approving the same. It has also been averred that other departments have also started the work of shifting services, e.g. Lesu., Jal Nigam, Nagar Mahapalika and Railways etc. It is stated that the lay-out plan takes care to provide for traffic towards Faizabad and one arm of the flyover goes towards Faizabad to provide easy access to the Nishatganj Market. A pedestrian sub-way under the railway track has also been provided and the wall is being constructed to make the sub-way effective. It has also been stated that parking

lots will be provided under the flyover on both sides of the walls that would be constructed at the two ends of the subway. It has also been stated in the counter affidavit that there would be enough space under the flyover for the ambulance and fire brigade to reach the area concerned in case of emergency.

5. At the hearing of the writ petition, learned counsel for the petitioner fairly stated that the Nishatganj Vyapar Mandal does not have objection to the construction of the flyover. It is conceded that demand of heavy traffic on the road in question required construction of the flyover. It is, however, urged that construction of walls along with the railway track would obstruct the flow of traffic from the Mahanagar side to Hazrat-ganj side under the flyover and business of the members of the Nishatganj Vyapar Mandal would, thus, be affected. The opposite parties, on the other hand, as would be adverted to in the later part of the judgment, have justified the construction of the said walls. On behalf of the railway administration it has been urged that the construction of walls is a statutory requirement under the provisions of Sections 16 to 19 of the Indian Railways Act. This submission will be considered at the proper place. Learned counsel for the petitioner urged that since construction of the flyover would affect the members of the petitioner Mandal, the representation submitted by it should have been considered. It is urged that said representation has not been considered and is pending. As noted herein above, the opposite parties have stated in the counter affidavit that the representation made by the petitioner Mandal has been considered and has been kept in view while according approval to the construction of the flyover. It has been stated that Sri Teerath Ram Agarwal, President of Lucknow Vyapar Mandal of which Nishatganjg Vyapar Mandal is an associate has been apprised from time to time of the decision on Mandal's representation. Learned counsel for the petitioner however, submitted that no positive reply to the representation made by the petitioner Mandal has been given in writing. On the other hand, submission of the learned counsel for the opposite parties is that it was not necessary to pass a speaking order or positive order on the representation made by the petitioner Mandal, it is sufficient that the representation made by the petitioner Mandal was taken into consideration while drawing up the lay out plan and approving the same by the authorities. It has been stated that a huge investment of about 56 crores is being made in the construction of the flyover and that this huge expenditure has been sanctioned after a thorough survey of the area in question. It has also been stated that the area in question was surveyed by the National Transportation Planning and Research Centre and it has submitted a report of Traffic Management Scheme for selected areas in the city of Lucknow including the areas of Nishatganj. I.T. College, Aminabad etc. The report of National Transportation Planning and Research Centre has been placed before us for our consideration by the learned counsel.

6. The question, therefore, which falls for consideration is whether the petitioner can insist on a written reply to the representation submitted by them. No doubt, since the flyover is likely to cause some inconvenience and may be loss to

business to the members of the Nishatganj Vyapar Mandal, they had a right to make a representation and bring to the notice of the authorities concerned their grievances which would arise in the event of construction of the flyover. In view of the averments in the counter affidavit that the representation and grievances indicated have been kept in view while designing the lay-out and according final approval, we are satisfied that it is difficult to hold that there has been violation of principles of natural justice.

7. Learned counsel for the petitioner next contended that Section 19 of the Indian Railways Act uses the words "public safety" and it is not equivalent to "public convenience". Section 19 of the Indian Railways Act reads thus:--

"19(1). Where a railway administration has considered lines of rails across a public road at the same level, the State Government or the local authority maintaining the road, may, at any time, in the interest of public safety, require the railway administration to take the road either under or over the railway by means of a bridge or arch with convenient ascents and descents and other convenient approaches, instead of crossing the road on the level or to execute such other works as may in the circumstances of the case, appear to the State Government or the local authorities maintaining the road to be best adapted for removing or diminishing the danger arising from the level crossing."

The term "interest of public safety" which has been used in Section 19, has not been defined in said Act. The submission on behalf of petitioner is that the justification for construction of the flyover as given in the counter affidavits of the opposite parties is to ease traffic jams and to facilitate easy flow of traffic which, in other words, amounts to providing for "public convenience". It cannot, learned counsel for the petitioner urges, be construed as amounting to "interest of public safety". The submission no doubt is very attractive at the first blush. Since the term "interest of public safety" has not been defined, it has to be given a wider meaning. It is to be read with the context of other provisions of Section 19 wherein it has been held that the authorities may execute such other works as in the circumstance of the case appear to be best adapted for removing or diminishing the danger arising from the level crossing. The words "interest of public safety" if so construed in wider meaning would include everything which is fit for removing or diminishing the danger arising from the level crossing. On behalf of the railway administration it is urged that Section 19 is not to be read in isolation; it is to be read in conjunction with Sections 16 to 18 also. It is urged that acute traffic problem arises every day when the gates at the level crossing are closed resulting in chaotic traffic condition. To facilitate easy flow of traffic from the Hazratganj side to Mahanagar side as also towards Faizabad road and Faizabad-Barabanki highway and to provide easy flow of traffic to the newly developing colonies both on the Mahanagar side and Gomati Nagar side, the flyover is being constructed providing for such public convenience, in our opinion, does not militate against "public safety", rather it would facilitate "public safety" and thus, there is no need to strictly construe the words "public safety" laid down

in Section 19 of the Indian Railways Act. A level crossing is to be manned twenty four hours by railway employees on duty at the gate. It has been submitted that since the railway administration has met fifty percent of the expenditure on the flyover it would be in the interest of public exchequer to so construct the flyover as to totally avoid placement on duty for twenty four hours of railway employees at the level crossing. It is with this view that sub-way is being provided and is being constructed and a wall is being constructed on both sides of the subway so as to prevent flow of traffic over the railway line and to obviate the need of level crossing gate on the railway line.

8. Construction of flyover is totally an administrative matter. Scope of judicial review over policy decision or the process through which decision has been reached would be minimal. There are no allegations of mala fide. It cannot be believed that when such huge investment of Rs. 56 crores and odd is being made, the decision would have been reached very lightly or without taking into consideration the possible consequence that would flow from the construction of the flyover. This Court will not sit in appeal over the proposal to construct the flyover, its design and lay-out; that is for the experts in the matter viz. construction engineers etc. Some inconvenience is bound to be there when instead of a level road, a flyover is constructed in a particular area. The flyover results in shortening of width of the roads underneath the area. The lay-out plan has already been placed on record and a larger lay-out plan has also been shown at the hearing of the writ petition. We are prima facie satisfied that if the flyover is to be constructed keeping in view the needs and requirements of larger number of persons including the persons residing in the locality in question, there is no material before this court to take a view that the design and layout could have been different or there are defects in the said design and lay-out.

9. The petitioner's main grievance appears to be the proposal to construct walls on both the ends of the subway. The construction of walls, no doubt will obstruct flow of vehicles on the road beneath the flyover and across the railway line. As noted hereinabove, the railway administration has considered justification for the construction of the wall to obviate the need of physical manning of the level crossing. We see no justification to interfere in the matter of construction of the walls.

10. Learned counsel for the opposite parties also brought to our notice that under the flyover there is provision for providing parking lots for four-wheelers and two-wheelers. It is urged that there was no parking lot earlier. The parking lot is also provided on the other side of the subway of the main Nishatganj crossing. This parking lot would facilitate customers who wish to make purchases from the shops of the petitioner Vyapar Mandal.

11. It was next urged by the learned counsel for the petitioner that construction of the walls will obstruct approach of fire brigade and ambulances in the event of emergency. Learned counsel for the opposite parties, in reply, rightly urged that the Fire-Station is in Hazratganj and it can reach the area in question through

the paper-mill bridge and pass under the flyover through the side lanes on the level road. It has also been pointed that access of fire brigade and ambulances will not be obstructed since they can approach the area through Balda Colony. We need not consider in detail this aspect of the matter. We are satisfied that the authorities who have planned the lay-out of flyover, have borne in mind the need at any time for the fire-brigade to be called in the area in question and that should be sufficient. This Court cannot, while exercising writ jurisdiction, scrutinize in minute detail the plan for the flyover on the possibility of some such eventuality in case of emergency. The authorities cannot be said to have overlooked this aspect of the matter.

12. Learned counsel for the petitioner then urged that the construction of the flyover violates the provisions of Article 21 of the Constitution of India. Learned counsel cited the following decisions:--

- (1) Pt. Parmanand Katara Vs. Union of India (UOI) and Others,
- (2) M/s. Shantistar Builders Vs. Narayan Khimalal Totame and others,
- (3) Chhetriya Pardushan Mukti Sangharsh Samiti Vs. State of U.P. and others, and
- (4) S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others,

M/s. Shantistar Builders Vs. Narayan Khimalal Totame and others, has been cited by the learned counsel for the petitioner to support the plea that right to life guaranteed under Art. 21 includes that every citizen must be ensured of living in a well built comfortable house and fireproof accommodation. He placed reliance on paragraph 9 of said judgment and emphasised that the Supreme Court in said judgment has construed Art. 21 as providing right to life which takes within its sweep the right to decent environment and a reasonable accommodation to live in. He emphasised on the observations where it has been stated in said paragraph that the right includes the right of a fire-proof accommodation. Learned counsel's submission is that the construction of the flyover will affect environment in the area. On the assumption of his submission being right that after the construction of the flyover is complete, there would be no access for fire brigade, the learned counsel urged that this would violate the right to a fire-proof accommodation. Observations in a judgment are made in the context of the facts of a given case. It would not be appropriate to divorce the observation from the context in which they have been made. In said case, the respondents who claimed to belong to the weaker section of the society had filed a writ petition contending that the builder had violated the conditions imposed in the order of exemption issued by the Government of Maharashtra under the provisions of Sections 20 and 21 of the Urban Land (Ceiling and Regulation) Act, 1976. The respondents before the Supreme Court were aggrieved since their claim for allotment of housing accommodation had been overlooked. Exemption granted to the builder was challenged as being excessive and unwarranted. It was in that context that Art. 21 of the Constitution was construed. But even if it be held that the observation in paragraph 9 lay down a proposition of general application and

construing the provisions of Art. 21 of the Constitution and ambit thereof, there would be no difficulty in the present case in view of our finding that there is no basis for the assumption on the part of the petitioner that the construction of the flyover will totally obstruct the access of fire brigade in the event of such an emergency arising.

13. The next case relied is recorded in *Chhetriya Pardushan Mukti Sangharsh Samiti Vs. State of U.P. and others*, . In the said case Art. 21 was construed as (sic) enjoyment of quality of life and living to every citizen. Learned counsel for the petitioner on the basis of the observations made in paragraph 8 of said judgment urges that construction of flyover infringes fundamental right of the citizens of the area in question as also the members of the petitioner association to the enjoyment of quality of life and since it endangers or impairs that quality of life and living, the petitioners have a right to maintain the writ petition. The petition has been entertained and has not been dismissed on the ground of locus standi on the part of the petitioner Mandal. Consequently, not much benefit can be derived by the petitioner from said judgment of the Supreme Court. Learned counsel for the petitioner placed reliance on the decision reported in *S.M.D. Kiran Pasha Vs. Government of Andhra Pradesh and Others*, to urge that the right under Art. 21 is a reflex of a legal obligation of the rest of the society including the State and if there is any threat or immanent violation of that right even in respect of one person, it can be challenged. The said decision pertains to right of the appellant to liberty in a detention order passed against him u/s 2(3) of the *Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Da-coits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986*. We do not see what assistance can be derived from the said decision to sustain the pleas raised in the present petition.

14. Learned counsel for the petitioner again on the assumption that the construction of the flyover will obstruct the access of ambulance and fire brigade in case of emergency has cited the decision of the Supreme Court reported in *Pt. Parmanand Katara Vs. Union of India (UOI) and Others*, . Since we have already held that we are not satisfied about the assumption made by the petitioner that access of ambulance would be obstructed due to construction of the flyover, we need not consider in detail about the applicability of the proposition of law laid down in said decision to the facts of the instant case.

15. Learned counsel for the petitioner then urged that the decision for construction of the flyover was taken on 10th December 1992, i.e. just after four days of the dismissal of the elected Government. He urged that representations had been made to the Minister concerned in the State Government and he had visited the area and had extended assurance to look into the grievances raised by the petitioner Mandal. The decision for construction of the flyover may have been finally settled and taken on 10th December, 1992 but evidently it would be the culmination point of a longer process of survey, planning, designing and other collateral matters. The decision must not have been taken over-night.

There is no material on record to take a different view. Learned counsel for the petitioner, on the strength of decision reported in *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, urged that all statutory authorities in the matter of their actions including contractual dealings would be subject to judicial review; the Court can see if such body has followed the statutory purpose and acted in public interest and not in a mala fide or arbitrary or for a collateral purpose. It was urged that the action of the authorities must be reasonable and taken upon lawful and relevant grounds of public interest. In the said decision, it has been held that burden of proving mala fide and arbitrariness or collateral purpose lies on the petitioner assailing the action. No material has been placed on the record of the writ petition to support the plea of mala fide, arbitrariness except the averment that the decision was taken on 10th December 1992, just after four days of dismissal of the elected Government in the State. We have already expressed herein-above our opinion on the said plea. It is not necessary to repeat the same.

16. Learned counsel for the petitioner then urged that since a plea of arbitrariness has been raised, the opposite parties were under duty to explain and state the reasons for the action. This submission again is on the assumption that representation made by the petitioner was to be disposed of by passing a reasoned speaking order or at least by passing order in writing. This submission has already been dealt by us in the earlier part of the judgment and we do not find that there is any legal right in the petitioner to urge that the authorities should have passed written order on their representation in view of the fact that there is material on record to show that the opposite parties have not been oblivious to the representation made by the petitioner while considering the layout and finalisation of the design for the flyover. There has been no violation of principles of natural justice. There is no material to show that the policy decision for constructing the flyover suffers from mala fide or collateral purpose. On the contrary there is material on record to show that it has been reached in the larger interest of the public at large residing in the area in question and localities and areas beyond Nishatganj.

17. In the counter-affidavit filed on behalf of opposite party No. 7, i.e. the Railway Administration, it has been indicated that as per the instant instruction and the Rules framed by the Government of India, Ministry of Railways in respect of level crossings and road-over/ under bridges which were circulated through Railway Ministry's Circular dated 7-12-1989, a level crossing gate having over one lac train vehicles units is to be replaced by providing a road over bridge on safety and other considerations. It has further been stated that the level crossing at Nishatganj, on December, 1992 had four lacs twenty thousand eight hundred forty six train vehicle units and, thus, replacement of the level crossing by road-over-bridge was a legal obligation on the Railways u/s 16 of the Indian Railways Act as also Section 19 of said Act. It has been averred that the Central Government had discharged its legal duty in constructing the road overbridge in question. It has also stated that for diminishing the danger arising from the level

crossing below the road overbridge, walls are being raised on both sides of the railway line and a subway beneath the railway line is being provided. The petitioner, in its rejoinder has not denied the issuance of the Railway Ministry Circular dated 7-12-1989. The fact that as on December, 1992 the train vehicle units at the railway crossing at Nishatganj was four lacs twenty thousand eight hundred forty six has also not been disputed. We are, therefore, satisfied that the construction of the road over-bridge has rightly been undertaken in pursuance of the aforesaid Railway Ministry Circular.

18. Lastly it was urged by the learned counsel for the petitioner that in view of the changed circumstances and construction of road overbridge, the members of the petitioner Mandai will be affected in their business prospects and they are bound to shift their business to other places, and, as such, they are entitled for compensation or alternative sites for shifting their business. The plea for compensation or alternative site is far fetched. Neither any member of the petitioner Mandai is being evicted nor their business premises are being acquired. Consequently, no case for award of compensation or for providing alternative sites to the members of the petitioner Mandai arises.

19. In the light of discussion hereinabove, no case for interference is made out and the petitioner Nishatganj Vyapar Mandai is not entitled to any of the reliefs prayed for. The writ petition, therefore, deserves to be dismissed and is hereby dismissed.

20. However, in the circumstances of the case, we pass no order as to costs.

21. Petition dismissed.