

(1980) 05 GUJ CK 0007
In the Gujarat High Court

Case No : Spl. Civil Application No's. 724 to 727 and 1042 of 1980

Patel Shankerbhai Mahijibhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-05-1980

Acts Referred:

Constitution of India, 1950 — Article 226
Land Acquisition Act, 1894 — Section 4, 6, 9

Citation : AIR 1981 Guj 67 : (1980) 2 GLR 239

Hon'ble Judges : S.L. Talati, J; S.H. Sheth, J

Bench : Division Bench

Advocate : V.B. Patel and Kanubhai M. Patel, for the Appellant; C.K. Takwani, Asstt. Govt. Pleader, instructed by Bhaishanker-Kanga and Girdharia-1, for the Respondent

Judgement

S.H. Sheth, J.—All these Petitions are directed against the land acquisition proceedings, Notification under section 4 of the Land Acquisition Act was issued on 16th June 1972 and was published in Gujarat Government Gazette on 13th July, 1972. It was in respect of four survey numbers with their subdivisions.

Therefore, as many as five petitions have been filed challenging that notification. Thereafter on 11th of April, 1974 Town Planning Scheme in respect of the area in question was finalized and notices to the parties were issued under the Bombay Town Planning Act. On 11th July, 1975 declaration under section 6 of the Land Acquisition Act was issued and it was published in Gujarat Government Gazette, Extraordinary. On the same day on 15th October, 1979, an addendum to the declaration under S. 6 was issued and it was published on 27th December, 1979. The addendum was issued because the survey numbers in respect of which the impugned acquisition proceedings were instituted had become a part of the Town Planning Scheme and had come to bear final plot numbers. By the addendum, therefore, in addition to the description of the land in terms of their survey numbers, description of the land, in terms of final "Plots and the extent of the

areas in terms of square metres was Published. The extent of the area of the land under the impugned acquisition was in the first instance published in terms of the hectares.

2. Before we deal with the contentions which Mr. Patel has raised before us on behalf of the petitioner, it is necessary to state that the first four petitions were posted for hearing today and that the fifth petition was not posted for hearing. However, we are deciding the fifth petition with the consent of the Parties because the subject matter of challenge in that petition is the same as in the other four petitions.

3. The first contention which Mr. Patel has raised is that the notification Issued under section 4 of the Land Acquisition Act was void ab initio and non est because it did not specify public Purpose in respect of which the impugned land acquisition Proceedings were instituted. In order to examine the contention which Mr. Patel has raised, it is necessary to reproduce the opening part of the first paragraph of that notification. It reads as under:

"Whereas it appears to the Government of Gujarat that the lands specified in the schedule hereto are likely to be needed for a public purpose, viz. for Gujarat Housing Board, it is hereby notified under the provisions of Sec. 4 of the Land Acquisition Act, 1894 (1 of 1894) that the said lands are likely to be needed for the purpose specified about

According to Mr. Patel, a mere statement that it was required for a public purpose did not indicate any public purpose. The argument raised by Mr. Patel is eminently correct.

4. The second argument which he has raised is that reference to the Gujarat Housing Board is a reference to the instrumentality and not reference to the public purpose.

5. Mr. Takwani who appears on behalf of the respondents has argued that reference to "the Gujarat Housing Board is a reference to the Public Purpose. It is difficult for us to uphold this argument because the Public purpose and the instrumentality are two different things. An instrumentality cannot be substituted for a public purpose. That "instrumentality" and "public purpose" are different is made clear in the instant case by the declaration made under section 6 of the Land Acquisition Act. It in, terms stated that "the lands under acquisition, ; -on were required for construction of houses by the Gujarat Housing Board." This specification in Col. 4 of the declaration made under section 6 clearly distinguishes, between "the Purpose" and "the instrumentality". It is clear, therefore that the notification issued under Sec. 41 did not specify any purpose whatsoever but specified only the instrumentality.

6. The next question which has arisen for our consideration in this context is whether omission to specify the public purpose renders notification under section 4 void ab initio and non est or merely invalid. It is necessary to decide this point

because finding on this point will have a material bearing on the question of delay which Mr. Takwani on behalf of the respondents has very strenuously argued. Our attention has been invited by both the learned Advocates to a few decisions.

7. The first decision is in *Munshi Singh and Others Vs. Union of India (UOI)*, . It has been observed in that decision that when the notification merely mentions that the land is needed for "Planned development of the area" and when there is no proof that the interested persons are either aware of or shown the scheme or the master plan in respect of the planned development, it must be held that they are unable to object effectively and therefore the acquisition proceedings must render themselves liable to be quashed. In that case, it was not, a complete omission on the part of the Land Acquisition Officer to specify the purpose. He had specified the purpose which read as follows: "Planned development of the area". Such a purpose, in the facts and circumstances of the case, was regarded as no Purpose at all because, according to the Supreme Court, unless the persons interested were aware of any such, plan, they would not be able to effectively exercise their right of lodging objections against the proposed acquisition. -If such a vague description of a purpose renders a notification issued under section 4 invalid because it does not give an effective opportunity, - to the persons interested to lodge objections u/s 5-A, it must be more so when notification issued under section 4 does not specify the purpose at all. A declaration under section 6 is not a cure because it follows the enquiry u/s 5-A of the Land Acquisition Act.

8. In order to convince us that a notification which does not specify the public purpose is void or non est and is not so much required to be set aside. Mr. Patel has invited our attention to the decision of the Supreme Court in *Union of India (UOI) Vs. Tarachand Gupta and Bros*, . It was a case under the Imports and Exports (Control) Act 1947. The principle which has been laid down in that case is that an order which is passed in excess of jurisdiction is a nullity. Therefore, the question of having such an order set aside does not arise.

9. The third decision to which our attention has been invited is in *The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others*, . It was a case under Bihar Private Irrigation Works Act, 192-2. The principle which has been laid down in that decision is that what Section 5-A requires is the conclusion that irrigation works for the purposes set out in Section 5-A should be immediately taken on hand and completed and that there is such an emergency in having the work completed that it cannot brook any delay. This decision does not have much relevance to the contention which Mr. Patel has advanced before us.

10. There is no doubt in "our minds that specification of a public Purpose which would enable the interested persons to lodge the objections effectively u/s 5-A is the core of Section 4. If that requirement of section 4 is not satisfied, notification issued u/s 4- must be held to be void.

11. On behalf of the respondents, It has been argued by Mr- Takwani that these petitions are barred by delay and laches and that, therefore, we should not entertain them. The facts which he has placed before us in that behalf are as follows. Notification under section 4 was published on 13th July, 1972. Declaration under Sec. 6 was published on 11th July, 1975. The present petitions were filed in 1980, In other words, according to Mtn, these petitions were filed a little less than eight years after the impugned notification under section 4 was issued. So far as these facts are concerned, there is no controversy. It may, however, be stated in order to complete the narrative in this context that the addendum to the declaration under section 6 was published on 27th December, 1979. According to Mr. Takwani, such stale petitions should not therefore be entertained. He has invited in that behalf our attention to three decisions of the Supreme Court,"

12. The first decision is in *Aflatoon and Others Vs. Lt. Governor of Delhi and Others*, . In that decision, the Supreme Court has observed as follows :

"A valid notification under section 4 is a sine qua non for initiation of proceedings for acquisition of property. To have sat on the fence and allowed the Government to, complete the acquisition proceedings, on the basis that the notification under section 4 and the declaration under section 6 were valid and then to attack the notification on grounds which were available to them at the time when the notification was published would be putting a premium on dilatory tactics." The Supreme Court, therefore, dismissed the writ petitions. The principle which Mr. Takwani has asked us to apply to the facts of this case is that the petitioners had sat on the fence for such a long period as eight years and allowed the Land Acquisition Officer to complete the acquisition Proceedings. Therefore, they cannot be allowed to turn round and challenge the validity of the notification issued u/s 4. In *Aflatoon's* case (supra), the land acquisition proceedings were completed. In the instant cases, they have not been completed. Award of compensation has not yet been made. The Government itself took nearly three years under section 6 of the Land Acquisition Act, again took three years to publish an addendum to it and then issued notices to the interested persons under section 9 of the Land Acquisition Act, 1894. So far as *Aflatoon's* case (supra) is concerned, it appears to us that the Supreme Court refused to entertain stale petitions not merely on the ground of delay and laches but because the passage of time had given rise to the rights of third parties. Para 12 of the report makes it clear that after the acquisition Proceedings were finalized, the Government had allotted a large portion of land to co-operative housing societies. The Supreme Court therefore, expressed the view that to viash the title (Notification at that stage would deprive the respondents of their right to represent. Which the concept of ; Way and Inches enunciates, therefore, cannot be applied to the facts of the "t, wtvat esises factiv because the land acquisition proceedings have not been completed and secondly because- the rights of the third parties have not yet come in existence.

13. The next decision to which our attention has been invited is in *Smt. Ratni Devi and Another Vs. Chief Commissioner, Delhi and Others*, . It was a case under Land Acquisition Act, 1891. It has been laid down in that decision that a valid notification under section 4 is a sine qua non for the initiation of proceedings for acquisition of a property. It also appears from the report that the acquisition proceedings in that case had been allowed to be completed on the basis that the notification issued under section 4 and declaration made under section 6 were valid. In that case, notification under section 4 was issued in 1959. It was followed by a declaration under section 6 made in July 1961) and again in October, 1961. The writ petitions were filed in 1971, that is to say after a lapse of nearly a decade. Therefore, since the land acquisition Proceedings had been allowed to be completed by the petitioners in that case without challenging the validity of the notification under section 4 and declaration u/s 6, the Supreme Court pressed into service the doctrine of delay and laches and refused to give to the petitioners therein any relief.

14. The next decision to which our attention has been invited is in *Babu Singh and Others Vs. Union of India (UOI) and Others*, . It was a case under Land Acquisition Act. In that case, a writ petition challenging the declaration made under section 6 was filed nearly six years and somewhat after the publication thereof -and about five years after the award was made. No explanation was tendered by the petitioner showing why the petition was filed after such an inordinate delay. The entire process of acquisition was over. The Supreme Court, therefore, took the view that the writ petition was liable to be dismissed in limine on account of delay. While doing so, the Supreme Court has observed that if a provision allows the Government to complete the acquisitory proceedings on the basis that the notification under section 4 and the declaration under section 6 are valid and then attacks the notification on the grounds which were available to him at the time when it was published, it would be putting a premium on dilatory tactics. It has been further observed in that decision that the length of delay is an important circumstance because of the nature of the acts done "within the interval on the basis of the notification and the declaration. Therefore, the challenge to a notification under section 4 and a declaration under section 6 of the Act should be made within a reasonable time thereafter. If it is not so done, the petition is liable to be dismissed. In *Babu Singh's* case (supra), the Supreme Court refused to interfere with the acquisition in question because the entire acquisition proceedings had been completed.

15. The decisions to which we have made reference firstly lay down the principle which supports our finding on the first contention raised by Mr. Patel. The validity of notification under Sec. 4 is a sine qua non of all valid land acquisition proceedings. So far as delay is concerned, what we find in the decisions referred to above is as follows. If the land acquisition proceedings have been completed or if the rights of third parties have come into existence during the period intervening between the issuance of notification under section 4 or the declaration under section 6 and the institution of the writ petition, delay as-

sumes a very great importance and should be pressed into service in order not to disturb the settled rights or proceedings which have been finalized.

16. In the instant case, it is true that the petitioners have not explained in the Petitions why they filed these Petitions nearly eight years after the impugned notification under section 4 was published. However, there are certain facts which speak for themselves. Before we summarize them in this judgment, it is necessary to note that on behalf of the respondents, a cursory affidavit has been filed. Such an affidavit has left many a statement made by the petitioners uncontroverted. We do not propose to dismiss these petitions in limine on the ground of delay on account of the following reasons. Firstly, the impugned notification issued under section 4 of the Land Acquisition Act was void and non est because it specified no public purpose at all and was not merely invalid as would be the case if some public purpose was specified but was found to be vague or inadequate. In case of an invalid notification, fence-sitters cannot be allowed to challenge it after undue delay. In case of a notification which is void - ab initio and non est, bar of delay cannot be invoked because since it is non-existent in the eye of law, it can be called in question in any Proceedings. Secondly, acquisition proceedings which started with the publication of the notification under section 4 have not yet been over. Thirdly, no rights of third parties have come into existence during the intervening period. In a given case, they will have to be taken into account even where the notification is void and non est and not merely invalid. Fourthly, the Land Acquisition Officer or the Government, as the case may be, has itself acted in a leisurely and tardy manner. The last conclusion is evidenced by the following facts which we recapitulate for the purpose of ready reference, Notification under section 4 was Published on 13th July, 1972. Declaration under section 6 was made nearly three years thereafter, that is to say on 11th July, 1975. Addendum to the declaration under section 6 was published more than four years after the publication of the declaration "under Section 6. that is to say, 27th December, 1979. Notice under section 9 was issued on 26th February, 1980. Indeed, it was issued very quickly after the addendum was published. The Land Acquisition Officer has not yet made his award for compensation even though eight years have passed since the publication of the notification u/s 4. Though we do not propose to observe as a matter of rule, we are constrained to say that if the Land Acquisition Officer or the Government, as the case may be, acts in such a leisurely and tardy manner, a person who is aggrieved by such an acquisition cannot be called upon to act quickly and post-haste. The objection raised by Mr. Takwani to the maintainability of the present petitions is, therefore, rejected.

17. and 18. xx xx xx xx

19. The next contention which Mr. Patel has raised and we can appropriately deal with at this stage is that the notice under section 9 was issued as late as on 28th February, 1980, that is to say, 4 1/6 years after the publication of the declaration u/s 6 according to Mr. Patel. There are circumstances to

explain the reasons why such an, inordinately long time was taken to issue notice under section 9 it, must be struck down. Before we examine the proposition which Mr. Patel has advanced before us, it is necessary to note that on behalf of the respondents, a plan has been placed on record to show why notice under 9 was, issued about 41/2 years after the publication of the declaration under section 6 of the Land Acquisition Act-

20. Turning now to the contention which Mr. Patel has raised. I would note that, according to Mr. Patel, "exercise of power by Government or by any public authority must be, within a reasonable period of time. He has in that behalf invited our attention to the decision of the Supreme Court in *Gujarat State Transport Corporation Vs. Valji Mulji Soneji and Others*, . It was a case under the Land Acquisition Act. Therein the decision of this Court reported in *Valji Mulji Soneji V. State of Gujarat* (1970) 11 Guj LR 95 . "was challenged. This Court had taken the view that power to make a declaration under section 6 must be exercised within a reasonable period of time after the publication of notification under SEIF.4 because, if undue delay is caused in the exercise thereof, the rights of interested parties are likely to be adversely affected. On a close reading, of the decision of the Supreme Court, we find that the Supreme Court has approved the principle that the statutory power must be exercised reasonably which, implies that it must be exercised within a reasonable period of time though it has not said so expressly. When the Supreme Court said that the High Court primarily relied upon the postulate that every statutory power must be exercised reasonably, a doctrine "too firmly" entrenched in our jurisprudence to brook any refutation. It appears to have referred only to what was argued before the High Court and what was decided by it. It does not appear to have expressly approved that principle. However, the Supreme Court has also not refuted it. "If this principle was refuted by it." The Supreme Court would have allowed the appeal by writing a very short judgment" and, without examining on facts whether delay, of fifteen years was satisfactorily explained and without bringing into play the amendment to section 6 made by the Land Acquisition (Amendment and Validation) Ordinance, 1967. That is why we say that the Supreme Court has by necessary implication approved the principle that the statutory power must be exercised within a reasonable period of time. In this behalf, we may state that the Supreme Court in the context of the provisions of Bombay Land Revenue Code has expressly laid down this principle in *The State of Gujarat Vs. Patil Raghav Natha and Others*, and a Division Bench of this Court has, in a different context in a case under the same Code, has applied it in *Habib Nasir Khanji v. State of Gujarat* (1970) 11 Guj LR 307.

21. It has been argued by Mr. Takwani that the principle laid down by this Court in a decision which has been reversed by the Supreme Court cannot be relied upon. The argument raised by Mr. Takwani is in principle sound. "However, -it does not prevent us from discovering what the Supreme Court has expressly laid down and what it has approved -by necessary implication. The reversal, of the decision of this Court is based upon the following grounds: (1) on facts", the

Supreme Court appreciated evidence and recorded the conclusion that delay, of 15 years between the publication of notification under section 4 and making of the declaration u/s P was caused by the litigation which the land owner in that case instituted and which -consumed such a long period of time. In that litigation, the State of Gujarat succeeded in all Courts except the Supreme Court and the State could have done nothing during the pendency of litigation in anticipation of its probable loss in the - litigation in Supreme Court when -it had succeeded in all Courts below: (2) there was no unreasonable delay between the issuance of notification under section 4, (10th October, 1932) and the first declaration under Section 6 (14th August, 1953). Delay of " 15 Yrs was caused by the protracted litigation which intervened between the issuance of notification under Section 4 (10th October, 1952) and the second declaration made - under section 6 (10th October, 1967) on the conclusion of the litigation which "started in the Civil Court in 1953. and. ended in Supreme Court on 8th May 1967 and which was followed "by" the view of the majority in the Supreme Court which in its turn was "ratified" on 13th September. " 1965. (3) proviso to S. 6 (2) inserted by the Amendment Ordinance referred. to above specifically saved all declarations under section 6 if they were made within 2 years of the said Amendment Ordinance in cases in which notifications under section 4 were issued prior to the promulgation of the said Amendment Ordinance. In that case, second declaration was made under section 6 within 2 years from the date of the promulgation of the said Ordinance and (4) if the statute pre-, scribes a period of time for doing a particular thing, no further fetter on the exercise of that power can be placed upon the general notion that the power ought to have been exercised within a reasonable Period of time.

22. These grounds of reversal do not affect the implied acceptance or approval by the Supreme Court of the principle that where the statute does not prescribe any period of time for the exercise of a particular power, it must be exercised - within a reasonable period of time

23. In the instant case, we are concerned with delay between the declaration made under section 6 and the notice issued under section 9 a period of 4 1/2 years. Therefore, this delay can be tested on the ground of reasonableness. Now, what is a reasonable period..of time in a given case depends upon the facts of that case. It is a highly flexible concept and its application varies from case to case - depending upon the facts of each case.

24. There is nothing on record in the instant case to show why notice under section 9 was issued after a lapse of 4 1/2 years from the date of the declaration under section 6 except that the addendum was issued some time in December, 1979. We have already held that the addendum was purely elucidatory and did not bring about any change in the area or the identity of the land under acquisition. Secondly, need to issue the addendum could not have withheld the issuance of notice under section 9. Assuming that we are wrong in making this observation, addendum could have been issued in 1977 when the

Town Planning Scheme became a Part of the Bombay Town Planning Act. We, therefore, see no reason why more than 4% v. ears should have been taken for the issuance of the notice under section 9. Such a bona fide lapse of time subjects the landowner to a number of unforeseen and avoidable hardships. Some of them, listed below:-, (1) it freezes the investment of the owner in the land for an unduly long time, (2) he cannot get market value as on the date of the notification under Section 4. (3) he will not be able to take advantage of rises in the land values, (4) he will not be able to improve the land or repair the building, if a building is under acquisition. even though it may be requiring urgent repairs, except probably at the cost of incurring such an outlay, (5) the owner will enjoy only a qualified ownership and enjoyment of his property during this period because he cannot build upon the land under acquisition, (6) he cannot profitably let it out because no tenant, under the fear of being thrown out at any time, will take it on rent. and (7) the Government can always withdraw u/s 48(1) from acquisition before possession has been taken if prices are falling while the owner has no corresponding choice if the prices are rising. The interest on the amount of compensation allowed at 4 1/2% per annum is no substitute or solace for the loss which the owner suffers under several heads. Profits which investment in business brings or the interest which a Bank charges its unsecured borrowers are manifold higher than this paltry interest at 4 1/2% p. a. We are, therefore, of the opinion that notice under section 9 ought to have been issued within a reasonable period of time from the publication of the declaration under section 6 and, since it was not done in this case, it ought to be struck down.

25. The last contention which Mr. H. S. Patel has raised is that the recitals made in the notification issued under section 4 and the declaration made under section 6 are vitiated because at the relevant time there was no need for the land. In other words, the impugned acquisition was arbitrary. In that behalf, he has invited our attention to Para 14-A in the petition. "The material averments which have been made and which have not been controverted on behalf of the respondents are as follows. The first averment is that Gujarat Housing Board did not have any scheme on hand at the relevant time for the construction of houses. Proceeding further, it has been stated by the petitioners that the need for land for a public purpose must be an existing need or a near future need. It is further stated by the petitioners that no statement was made for the notification. Section 4, sub-section 3, clause (a) of the Land Acquisition Act provides: "Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose,..." The expression "is needed" has reference to the existing need. The expression "is likely to be needed" has reference to the future need. It cannot be gainsaid that a future need has reference to a foreseeable future. If land is not needed for a public purpose in a foreseeable future but is likely to be needed at a very distant or remote point of time for an anticipated need which may or may not come into existence, then, unless the need can be foreseen in a foreseeable future, no

resort can be had to Section 4. In support of this argument, of his, it has been urged by Mr. Patel that, looking-back, it can be said without any fear of contradiction that in 1972 the State Government did not need the land until 1980. The argument which Mr. Patel has raised is well founded. It appears to us that the notification under section 4 was issued in 1972 more for an illusory need in a distant future than for a need which could be visualized and foreseen in near future.

26. It is necessary in this context to note another averment which has been made in the petition in Para 15. "This the petitioner has reason to believe, as the petitioner understands that the Land Acquisition Officer has kept ready his award only for declaration." This averment has not been controverted on behalf of the respondents. However even in absence of any denial, it is difficult to hold that the petitioners had a definite knowledge that the Land Acquisition Officer had prepared before he heard the petitioners his award and had kept it ready for being pronounced. But this averment which has not been controverted by the respondents tends to show that whereas for eight years the respondents were not in a hurry to complete the land acquisition proceedings, they appear to be in hot hurry now, to complete them. This aspect lends factual weight to the observation which we have made that in 1972 when the State Government issued notification under section 4 of the Land Acquisition Act, it not only did not have any existing need but it also did not have any need which could be foreseen in a foreseeable future. - Therefore, the land acquisition proceedings which began with publication of the notification under section 4 were vitiated and they did not fall within the compass of Section 4.

27. We have answered all the contentions which Mr. Patel has raised before us and also one which has been raised on behalf of the respondents by Mr. Takwani. In view of the findings which we have recorded on all the contentions raised by Mr. Patel except one, we are of the opinion that notification- issued under section 4 and the declaration made under section 6 and the notice under section 9 of the Land Acquisition Act are liable to be quashed.

28. In the result, all the petitions succeed. The impugned notification under section 4 declaration under section 6 and the notice under section 9 are quashed. Rule is made absolute in each of the five petitions. The respondents shall pay to the petitioners costs in Special Civil Application No. 724 of 1980. In other writ Petitions, there shall be no order as to Costs.

29. Petitions allowed.