

(1995) 11 GUJ CK 0001
In the Gujarat High Court

Shilpa Park Co.-op. Housing Society Ltd.	APPELLANT
Vs	
Surat Urban Development Authority and Others	RESPONDENT

Date of Decision : 22-11-1995

Acts Referred:

Bombay Town Planning Rules, 1955 — Rule 21(3)
Gujarat Town Planning and Urban Development Act, 1976 — Section 34(1), 51(i), 52, 52(1)(i)
Gujarat Town Planning Rules — Rule 13, 26(3)

Citation : (1996) 2 GLR 707

Hon'ble Judges : N.N. Mathur, J

Bench : Single Bench

Judgement

N.N. Mathur, J.—The challenge in this Special Civil Application is the Town Planning Scheme framed pertaining to the City of Surat for the area Karanj, Scheme No. III, Survey No. 7, Plot No. 4.

2. Petitioner is a registered Co-operative Housing Society having more than 190 members, who are the plot-holders of the society. The say of the petitioner-society is that it purchased the land bearing survey No. 7 of village Karanj, for the purpose of construction of residential houses.

3. The original owner of the land executed Satakhat (Agreement to sale) in favour the Co-operative Housing Society on 25-6-1975, and delivered the possession of the said land. As the said piece of land was within the territorial jurisdiction of Karanj Panchayat, permission was sought from the said Panchayat before raising the construction. Now the survey No. 7 which was given the original plot number as plot No. 4, on reconstitution, has been marked as Plot No. 5 and 8, has been reserved for garden and the other part of the piece of land marked as Plot No. 54, has been reserved for school under the Town Planning Scheme. Stating the facts with respect to the Town Planning Scheme, it is stated that after coming into force of the Gujarat Town Planning Act, 1976, Surat Urban Development Authority (hereinafter referred to as "SUDA") framed a scheme, in

the year 1980 for the development of the areas which were originally under the Panchayats.

4. In 1984, objections came to be invited vide Annexure "D". However, no objections were submitted by the petitioner as no notice was served on the petitioner and in fact the Society had no knowledge of this. In the year 1988, the respondent-authority invited objections vide Annexure "E" dated 17-9-1988. The petitioner-society for the first time, came to know about the fact that the proposed development Scheme affects the interest of the society and therefore, in reply to the advertisement, written objection were filed. The petitioner-society took the objection that the society was not intimated personally either with respect to the proposed Draft Plan or Scheme, that the proposed Plan was not published along with the advertisement. Request was made by the petitioner to supply copy of the proposed Plan or to permit them to take copy of the proposed Plan and the Scheme.

5. The respondent, vide communication dated 18-11-1988, replied to the petitioner-society that the plans which they prepare are tentative and are subject to change, and therefore, copy of the same cannot be given. The petitioners were not even permitted to inspect the Draft Plan and the Scheme and appear before the respondent-authority through technical expert. It was expressed that it was not possible for the petitioner-society to submit effective Objection as neither the copies of the Draft Plan and/or the Scheme was supplied, nor were they allowed to inspect or even to appear through technical expert. The relevant communications have been placed on record by the petitioner. It is also stated that if the Scheme is given effect to, this will close down a 30 ft. wide road passing through the society by joining two survey numbers which are acquired by the respondent-authority. If the said road is closed down, the members of the petitioner-society will be put to great difficulty. It is alleged that in the original Scheme, reservation in survey No. 24 and 25 was proposed. But subsequently, it was changed to survey No. 7 at the behest of some influential political leaders.

6. Mr. Dhirajlal I Darji, Deputy Engineer (East Zone) in the Municipal Corporation, Surat has filed affidavit on behalf of respondent No. 3. The respondent has denied that the petitioner is a registered society and so as the membership of the petitioner-society has also been denied. With respect to the Agreement to sale, it is stated that an agreement was entered into with Chief Promoter of the society and not with the society and that is no agreement in the eye of law, Further, by Agreement to sale, no title is vested in the society and as such the petitioner-society is not entitled to file the present Special Civil Application. With respect to the construction of the residential houses and permission by the Panchayat, Karanj, it is stated that at the relevant time, the Gram Panchayat had no authority to give any permission of construction on the land in question. It is also stated that the Gujarat Town Planning and Urban Development Act, 1976 came into force in 1976 and as such it was incumbent on the part of the holders of the land to obtain permission from the SUDA.

7. It is asserted that the alleged construction of apartment style building is illegal, and therefore, the same is liable to be demolished. With respect to the compliance or the provisions of law, it is simply stated that the petitioner-society is not owner and as such no individual notice was required to be given. It is further submitted that the Town Planning Scheme was prepared by the Town Planning Officer appointed by the State Government and the respondent-Corporation is the only implementing authority. It is, however, casually stated that all the procedure was followed by the Town Planning Officer of the SUDA. With respect to the supply of copy of the Draft Plan or Scheme, it is stated that before finally sanctioning the preliminary Scheme, the tentative reconstitution plan is prepared, which always is subject to change. As per the practice, no such certified copy of the tentative plan is given to any person. However, the said Plan is always open for inspection. A reference has been given to Sections 13 and 14 of the Act. It is also stated that the petitioner has mixed up the Development Plan and the Town Planning Scheme in raising contentions in this petition. The allegation with respect to closure of 30 ft. wide road, the existence of such road has been denied. The allegation of the change of the Scheme under the influence of the local political leaders has also been denied.

Respondent No. 1 - SUDA and respondent No. 2 - Town Planning Officer or the State of Gujarat - respondent No. 4 have chosen not to file reply to the petition. Thus, the allegation with respect to non-compliance of the provisions with regard to the Development Plan and the Town Planning Scheme have gone unrebutted.

8. Mr. D.J. Bhatt, learned Advocate appearing for the petitioner contends that the Town Planning Scheme qua survey No. 7 for Karanj is bad in law, being arbitrary, mala fide and in breach of the provisions of Section 51(i) of the Town Planning Act and the Rules thereto which are mandatory in nature. He further submits that the part of the Scheme prejudicially affects the interest of the petitioner-society. He submits that the publication of the draft scheme does not indicate which is the survey number and which are the two plots under reservation. Elaborating the contention, he submits that one is not affected simply because his land falls under the Scheme, but he is affected if the particular land belonging to him is reserved. The plan or Scheme does not indicate which plot has been reserved. In absence of details of particular land under reservation, simple publication of draft plan or Scheme does not meet with the requirement of the Act and the Rules. In this background, the non-supply of draft plan and the Scheme and further refusal of inspection, gathers importance as it amounts to violation of mandatory requirement of principles of natural justice. The petitioner has read the definition of "owner" and has pointed out that as the members of the society are in possession of the land in question, they are the owners of the land, and they are entitled to individual notices.

9. On the other hand, Mr. P.G. Desai, learned Advocate for respondent No. 3 submits that this writ petition deserves to be rejected on the preliminary objection that the preliminary scheme is sanctioned, and therefore, in view of the

provisions of Sub-section (3) of Section 65 of the Act of 1976, it has become part of the Act and it cannot be a matter of judicial review unless otherwise it comes within the parameters indicated in the Full Bench decision of this Court. Mr. Desai relies on a decision by the Division Bench of this Court in the case of *Kashiben v. State of Gujarat and Anr.* reported in 1989(2) GLR 1176.

10. Mr. D.J. Bhatt, learned Advocate for the petitioner, on the other hand, submits that *Kashiben's* case (supra) is based on the Full Bench decision of this Court. In the case of *Dungarlal Harichand v. State of Gujarat and Ors.* reported in 1976 GLR 1152 (FB) which has been overruled by the Supreme Court in the case of *Mansukhlal Jadavji Darji and another etc. Vs. Ahmedabad Municipal Corporation and others*, , as also in the case of *Jaswantsingh Mathurasingh v. Ahmedabad Municipal Corporation and Ors.* reported in 1991(2) GLH 309. In this view of the matter, the law laid down by this Court in *Kashiben's* case (supra) does not hold to be a good law. Mr. Desai submits that the decision of the Supreme Court in *Jaswantsingh's* case (supra) has been distinguished by the Division Bench of this Court in Special Civil Application No. 1608 of 1979 decided on 20-4-1992.

11. In view of the controversy involved, it would be appropriate to deal with the preliminary objections before further going into the merit of the case.

While dealing with the preliminary objection, it would be necessary to read Section 65 of the Act of 1976, thus:

On receipt of the preliminary scheme or, as the case may be, the final scheme, the State Government may -

(a) in the case of a preliminary scheme, within a period of two months from the date of its receipt, and

(b) in the case of final scheme, within a period of three months from the date of receipt,

by notification, sanction the preliminary scheme or the final scheme or refuse to give sanction, provided that in sanctioning any such scheme, the State Government may make such modifications as may, in its opinion, be necessary for the purpose of correcting an error, irregularity or infirmity,

Sub-section (2) provides that -

The scheme shall be kept open for inspection by the public, and Sub-section (3) provides that -

On and after the date fixed in such notification, the preliminary scheme or the final scheme, as the case may be, shall have effect as it were enacted in this Act.

12. The question raised before the Full Bench in *Dungarlal's* case (supra) was whether before finalisation of the Town Planning Scheme under the Bombay Town Planning Act, 1954, the Town Planning Officer was required to be issued special

notice under Sub-rule (3) of Rule 21 of the Bombay Town Planning Rules, 1955 to the person who claims to be tenant of whole or some portion of the land. Before the Full Bench two questions were raised - firstly, whether special notice to individual under Rule 21(3)(4) of the Act of 1976 of at least 3 days duration is mandatory; and secondly whether the finally sanctioned scheme, in view of the provisions of Section 65(3) is immune from challenge being a legislative Act. So far as the first question is concerned, a Division Bench of this Court in the case of Kaushikprasad Chandulal Mahadevia v. Ahmedabad Municipal Corporation reported in 1970 GLR 993, took the view the Rule 21 is a salutary rule intended to safeguard the property rights of citizens who are affected by making of the Town Planning Scheme. Again in the case of Mohanlal Jesinghbhai v. P.J. Patel reported in 1970 GLR 1035, the Court held that behind Rule 21 Clause (4) clearly is that all must have a opportunity of stating their views in making their representation before a decision is taken by the Town Planning Officer affecting them. The Court further held that a tenant of the land to be acquired is a person affected within the meaning of Clause (4) of Rule 21. Both the aforesaid decisions were referred in Dungarlal's case (supra) for reconsideration to the Full Bench. The Hull Bench, after examining the various provisions of the Bombay Town Planning Act, 1959 and the Rules, held that the two decisions referred in 1970 GLR at pages 993 and 1035 were wrongly decided only to the extent that a right to individual notice under Rules 21(3) and 21(4) is held to be so mandatory as to have a nullifying consequence. The Court held that Sub-rules (3) and (4) are merely additional procedural safeguards and not the essential minimum requirements. So far as the second question is concerned, the Full Bench held that the validity of legislative measure can be gone into even in writ jurisdiction only to the limited extent, i.e.

1. Whether there is any transgression of jurisdiction of authorities concerned,
2. Whether the scheme is finally emerged is totally inconsistent with the Act and,
3. Whether the minimum statutory essentials are not complied with and as such there is fundamental breach resulting into total lack of jurisdiction,
4. It was also held that the other procedural errors or defects that would render a scheme which has become legislative measure and part of the Act liable to attract or challenge in a Court on the ground that it is null and void.

13. This view endorsed by another Full Bench in the case of Saiyed Mohammed v. Ahmedabad Municipal Corporation and Ors. reported in 1977 GLR 549. The Supreme Court in Jaswantsingh's case (supra) has overruled the judgment of the Full Bench of this Court in Dungarlal's case (supra) only to the extent of first part of its judgment, i.e. with respect to non-compliance with the requirement of Sub-rules (3) & (4) of Rule 21. In Dungarlal's case, Kaushikprasad's case and in Mohanlal's case, the decisions rendered by the earlier two Division Benches were held to be wrongly decided. The Supreme Court reversed the said view and held that both the said judgments laid down the law correctly. It would be convenient

to read para 15 of the judgment of the Supreme Court as reported in 1992 (Suppl.) (1) SCC 5 as under:

Accordingly, we are of the considered view that the judgment in Kaushikprasad Chandulal Mahadevia v. Ahmedabad Municipal Corporation and Mohanlal Jesinghbhai v. P.J. Patel, Town Development Officer, Ahmedabad Municipal Corporation, laid down the law correctly. The finding of the Full Bench in the first part of its judgment to the effect that non-compliance with the requirement of Sub-rules (3) and (4) of Rule 21 does not vitiate the scheme is not sound in law.

Thus, it is clear that the Supreme Court has reversed the judgment in Dungarlal's case only on the first question. Thus, the law laid down in Dungarlal's case on the second question is a good law being approved by the Apex Court.

14. So far as the contention of the learned Advocate for the respondent that the decision referred to by the Supreme Court in Jaswantsingh's case has been distinguished by the Division Bench of this Court is concerned, it may be stated that it relates to the first question only. The question before the Division Bench in Special Civil Application No. 1608 of 1979 was whether before finalisation of the Town Planning Scheme under the Bombay Town Planning Act, 1954, the Town Planning Officer was required to be issued special notice under Sub-rule (3) of Rule 21 of the Bombay Town Planning Rules, 1955 to the person who claims to be tenant of some portion of the land. The petitioner in that case relied on the decision in the case of Jaswantsingh's case reported in 1992 (Suppl.)(1) SCC 5 and in another case Mansukhlal Jadavji Darji and another etc. Vs. Ahmedabad Municipal Corporation and others, . It was pointed out that the ratio laid down in the case of Jaswantsingh's case by the Supreme Court would not be applicable as Rule 21(3) of the Bombay Town Planning Rules, 1955 was substituted by Notification dated 30-5-1974 and as per the said substituted rule, a special notice is not required to be given to the interested person in any plot. In view of the amendment, the Division Bench of this Court held that after the amendment of Sub-rule (3), notice to each and every interested person is not required to be issued. The notices as provided under the substituted rule are required to be published in newspapers, official gazette, at the office of the Town Planning Officer and of the local authority. The substance of the notice is required to be posted at the convenient place in that locality. The Court, therefore, held that non-issuance of notice would not vitiate proceedings of the Town Planning Officer.

15. In view of the aforesaid, the position emerges is thus -

(1) In view of the substitution of Sub-rule (3) of Rule 21 of the Bombay Town Planning Rules, by Notification dated 30-5-1974, no special notice is required to be given to every individual. Notice is required to be given only in cases where Statutes require to do so by specific provisions.

(2) Once the final scheme is framed and sanctioned, in view of the provisions of Sub-section (3) of Section 65, it is immune from challenging except on the

following grounds

- (i) Where there is any transgression of jurisdiction of the authorities concerned,
- (ii) Where the scheme is finally emerged is totally inconsistent with the Act and
- (iii) Where the minimum statutory essentials are not complied with and as such there is fundamental breach resulting into total lack of jurisdiction.

16. Thus, the question which springs up for consideration in the present case is whether non-issuance of notice u/s 52(1)(i) read with Rule 26, failure to give details with respect to the plot reserved, and non-supply of the documents demanded by the petitioner are of the nature of fundamental breach.

Mr. Bhatt, learned Advocate for the petitioner submits that Section 52(1)(i) cast duty on the Town Planning Officer to give notice to the persons affected by the scheme before demarcation of the area allotted or reserved for any public purpose. He further submits that Rule 26 provides the procedure to be followed by the Town Planning Officer u/s 51 and Sub-section (1) of Section 52. He has particularly invited my attention to Sub-clause (3) of Rule 26 which provides that the Town Planning Officer shall, before proceeding to deal with the matters specified in Section 52, publish a notice in Form H in the Official Gazette and in one or more Gujarati newspapers circulating within the area of the appropriate authority. Such notice shall specify the matters which are proposed to be decided by the Town Planning Officer. In order to appreciate the contention, it will be appropriate to read Section 52(1)(i) and Sub-section (3) of Rule 26:

52. (1)(i) After giving notice in the prescribed manner and in the prescribed form to the persons affected by the scheme, define and demarcate the area allotted to, or reserved for, any public purpose, or for a purpose of the appropriate authority and the final plots.

Rule 26(3) The Town Planning Officer shall, before proceeding to deal with the matters specified in Section 52, publish a notice in Form H in the Official Gazette and in one or more Gujarati newspapers circulating within the area of the appropriate authority. Such notice shall specify the matters which are proposed to be decided by the Town Planning Officer and State that all persons who are interested in the plots or are affected by any of the matters specified in the notice shall communicate in writing their objection to the Town Planning Officer within a period of twenty days from the publication of notice in the Official Gazette. Such notice shall also be pasted at the office of the Town Planning Officer and of the appropriate authority and the substance of such notice shall be pasted at convenient places in the said locality.

Section 52(1)(i) only provides for giving notice to the persons affected by the Scheme. It does not provide for notice to each and every interested persons. The manner of notice has been provided under Rule 26 which provides that the notice shall be in Form H in the Official Gazette and in one or more Gujarati newspapers circulating within the area of the appropriate authority. It is not the case of the

petitioner that the notice was not published in the Official Gazette or in the newspapers. In view of this, there is no substance in the contention of the petitioner that the final Town Planning Scheme suffers from procedural fundamental breach as no notice was given to the person interested as required by Section 52(1)(i) of the Act.

17. It is next contended by the learned Advocate for the petitioner that the draft scheme does not indicate which is the survey number and which are two plots reserved in the absence of such details, the petitioner has been deprived of submitting an effective representation. He has referred to Rule 21 which provides that the draft scheme u/s 44 shall contain the particulars enumerated therein in addition to the particulars specified in Clause (a) to (g) of Section 44. He has particularly referred to Sub-clause (b) of Section 44, which reads as under:

(b) the particulars of land allotted or reserved under Clause (e) of Sub-section (i) of Section 40 with a general indication of the uses to which such land is to be put and the terms and conditions subject to which such land is to be put to such uses;

There appears to be some substance in the contention of the learned Advocate for the petitioner that the particulars of the land allotted or reserved under Clause (e) of Sub-section (3) of Section 40, i.e., allotment or reservation of land for roads, open space, garden, schools etc., particulars giving the general indication of use is required to be given. However, at this stage, Mr. Desai, learned Advocate for the respondent submits that the petitioner cannot be permitted to raise this contention as it is essentially a question of fact and the petitioner has not laid any foundation in this regard in the petition. The learned Advocate for the petitioner has failed to point out whether such a contention has been raised in the petition. In view of this, the petitioner cannot be permitted to raise this contention at this stage. Learned Advocate for the petitioner has referred to Rule 13 and contended that the said rule requires certain particulars to be mentioned in the scheme which includes item No. (vi) i.e. "use of the plot proposed to be made by him. "There is no substance in this contention also as the very reference to Rule) 3 is misconceived. The said rule refers to layout plan under Sub-section (1) of Section 34. Lastly, it is contended that the petitioner has been deprived of from submitting an effective objection as he has not supplied copy of the draft plan and the scheme. The petitioner's grievance is that at least he should have been allowed to inspect the documents. There is some substance in this contention. The respondent should have been allowed the inspection of the documents for which the petitioner specifically asked. The inspection was wrongly refused on the ground that it was only a draft plan. However, this cannot be a substantial ground to fall within the category of fundamental breach, more particularly, after the scheme has been sanctioned. If the petitioner had approached this Court at the relevant time, this Court could have considered under Article 226 of the Constitution of India to issue an appropriate direction either for the supply of the copy of the document or

allowing him the inspection.

18. view of the aforesaid, I find no merit in this Special Civil Application and the same is accordingly rejected. Rule discharged. The ad-interim relief stands vacated.