

(1962) 12 GUJ CK 0003
In the Gujarat High Court

Case No : Criminal Appeal No's. 517, 518 and 519 of 1961

State of Gujarat

APPELLANT

Vs

Mangaldas Amulakharai and Others

RESPONDENT

Date of Decision : 03-12-1962

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 223, 392(1)

Citation : AIR 1963 Guj 296 : (1963) CriLJ 519(1) : (1963) 4 GLR 505

Hon'ble Judges : M.R. Modi, J;J.M. Shelat, J

Bench : Division Bench

Advocate : A.D. Desai, Asst. Govt. Pleader, for the Appellant; S.K. Zaveri, for the Respondent

Final Decision : Dismissed

Judgement

Shelat, J.—These three appeals are against the orders passed &y the learned Judicial Magistrate, First Class, 1st court (Municipality), Ahmedabad, whereby he acquitted the respondents in three cases filed against them u/s 392(J) of the Bombay Provincial Municipal Corporation Act, 1949. The charge against the three accused was that they had failed to comply with the requisition made by the Municipal Corporation of Ahmedabad u/s 223 of the Act requiring them to pave a private street bearing survey Nos. 2460 and 2465. These two survey numbers are jointly owned by the respondents and 14 others residing in that locality end admeasure 36 and 44 sq. yds. respectively. It seems that these two survey numbers form a private street and action was taken by the Municipal Corporation at the instance of the respondents. The points involved in all these three appeals are the same and relate to the same properties and they all arise in respect of the same notice u/s 223 of the Act issued by the Municipal Corporation. It would be expedient, therefore, to dispose of all the three appeals by a common judgment.

2. It appears that three notices dated December 9 1959 were served upon the respondents requiring them and the other joint owners of the land to level the

two survey numbers and pave them with stones, which work would, according to the Corporation, cost a sum of about Rs. 674. It is an admitted position that the respondents-and the other owners did not carry out the work as required, by the notices and thereupon on September 7, 1960. complaints were lodged inter alia against the respondents u/s 392(1) of the Act.

3. Long before the complaints-were lodged, the respondents by their letter dated December 28, 1959, intimated the Municipal Commissioner that the survey numbers concerned were not of the sole ownership of the respondents, but that certain other neighbours were the co-owners of me land along with them and that when they tried to comply with the requisition contained in the notices and started the work of levelling the ground and paving it with stones, the other co-owners came to assault them and did not allow them to comply with the notices. They stated that, in these circumstances, though they were ready to comply, with the requisition they could not do so and expresses their helplessness and inability to carry out the requisition made by the Corporation. They also stated that the municipality should acquire the land and if the Municipal Corporation did so, they were even ready "to let go our ownership", presumably meaning thereby that they were wining to give up the compensation that would be payable to them in respect of their share and interest in the lands. In the alternative they stated that if the Corporation was not willing to acquire the lands, it should carry out the work in question and in that event they were prepared to pay to the Corporation their share of the cost of the work incurred by the Corporation. Bhaichand Shrimali, an Inspector in the service of the Municipal corporation, who gave evidence for the prosecution stated that he did not receive the aforesaid letter which, he said, the respondents might have addressed to the Municipal Commissioner that statement does not appear to be true, for, we find from the record of the case that the letter was addressed by the respondents" advocate to the Municipal Commissioner and that record contains a postal acknowledgment whereon a clerk in the office Of the Municipal Commissioner has affixed his signature against the stamp of the Municipal Commissioner under the date December 30, 1959. These facts clearly show that the respondents had expressed their inability owing to circumstances beyond their control to comply with the municipal requisition and had gone to the extent of suggesting to the corporation either to acquire the land in question or to carry out the work, in which event, they were even agreeable to let go their compensation and if the Corporation carried out the work, were prepared to give their share, of the cost of the work. In their statement which they filed in the Court of the learned trial Magistrate, they again stated the same things.

4. The question, therefore, is whether the respondents can be said to have failed to comply with the requisition lawfully made u/s 223 of the Act, Section 223 provides that if any private street or any other means of access to a building be not levelled, metalled, flagged or paved, etc., to the satisfaction of the Commissioner, he may, with the sanction of the Standing committee, by written notice, require the owner or owners of the several premises fronting or adjoining

the street or other means of access or abutting thereon or to which access is obtained through such street etc., to carry out any one or more of the aforesaid requirements in such manner as he shall direct. The notice dated December 9, 1959 was issued in pursuance of the powers conferred upon the Commissioner under this Section. Section 392(1)(b) under which the instant complaints were filed provides that whoever "fails to comply with any requisition lawfully made upon him under any of the said Sections, sub-sections or clauses, shall be punished etc." It should be observed that Section 392(1)(b) does not use the words "omits to comply" but advisedly uses the words "fails to comply". Prima facie failure to comply means something more than mere omission to comply. To fail to comply would mean to decline to comply by a person though such a person is able to or is in a position to carry out something which the authority directs him to carry out. In other words, it is not a mere omission due to some disability or some reason beyond his control. If, therefore, a person expresses his willingness to comply but establishes that he is not able to carry out a requisition by reason of some cause beyond his control, he can hardly be said to have failed or refused to comply or to have wilfully disobeyed a direction to do something which he is bound in law to do. We are fortified in this construction by a decision in *Hanks v. Bridgman* (1896) 1 QB 253-In that case a passenger having paid the fare and received the ticket inadvertently lost it and was thus unable to deliver it up when required. He declined to pay the fare over again and was summoned by the Company for breach of a by-law. The by-law made by the Tramway Company and enforceable by a penalty provided that each passenger, shall, when required so to do, either deliver up his ticket or pay the fare legally demanded for the distance travelled over by such passenger. Lindley L.J. and Kay L.J. held that on these facts, the passenger was liable to be convicted. Lindley L.J. observed that the fare was legally demandable and that on the passenger's refusal to pay, he became liable to conviction. He observed that it was not found in the case that the passenger had no money to pay his fare over again. On the contrary, the fact was that when he was asked to pay he refused to do so. He, however, added that if the passenger had been unable to pay, for instance, if he had had his pocket picked and had lost both his ticket and his money, he would have been extremely reluctant to say that in such a case he had incurred the penalty. Similarly, Kay, L.J. observed that the passenger had wilfully disobeyed the by-law in the sense that though he was in a position to pay he refused to pay the fare, though he had received the ticket and had the money to pay the ground of his refusal being that he having once paid the fare for the ticket and having lost that ticket inadvertently, he was not bound to pay it over again. It is clear from this decision that the learned Law Lords were of the view that the passenger was liable to be convicted on the footing that he had wilfully disobeyed and committed breach of the by-law. Refusal to pay in that case, therefore, was something more than a mere omission to pay. It would not have been refusal to pay if, as Lord Lindley observed, the passenger had lost both his ticket as also his purse, in which event his omission to pay would have been not on the ground of declining to pay but on the ground of inability to pay arising from some

reason beyond his control.

5. In the instant case, the respondents never refused to comply with the requisition made by the Corporation. On the contrary, as we have observed, the proceedings were started at their instance. Their case as early as December 1959, I.e. long before the present complaints were lodged, was that they were willing to carry out the requisition but were prevented from doing so by the other joint owners under duress and threat that if they came out the requisition they would be assaulted by them. The respondents then, in these circumstances, went to the extent of suggesting that the two pieces of land should be acquired by the Corporation and that if the Corporation did so, they would not even demand compensation in respect of their interest in the lands. In the alternative they also suggested to the Corporation to carry out the work and expressly stated that in such an event, they would be willing to pay their share of the cost of the aforesaid work. In these circumstances, it is impossible to say that the respondents failed to carry out or comply with the requisition made by the Corporation, and, therefore, could not be convicted.

6. For the reasons aforesaid, we are of the view that the learned Magistrate was right in declining to convict, the respondents u/s 392(1)(b) of the Act. The appeals, therefore, fail and are dismissed.