
(1989) 04 GUJ CK 0011
In the Gujarat High Court

Station Road Cabin Holders Association APPELLANT
Vs
Mehsana Nagar Palika and Another RESPONDENT

Date of Decision : 04-04-1989

Acts Referred:

Constitution of India, 1950 — Article 14, 14, 16, 16
Gujarat Municipalities Act, 1963 — Section 185, 185, 185(2)

Citation : (1989) 2 GLR 891

Hon'ble Judges : P.R. Gokulakrishnan, C.J.;J.U. Mehta, J

Bench : Division Bench

Judgement

P.R. Gokulakrishnan, C.J.—Rule This Special Civil Application is for declaring the action of the respondent-Nagar Palika of issuing a Notice dated 30-5-1986 as unconstitutional being violative of Articles 14 and 16 of the Constitution of India, illegal, null and void, and for quashing the same. There is a further prayer for declaring Section 185 of the Gujarat Municipalities Act, 1963 as unconstitutional being violative of Articles 14 and 21 of the Constitution and illegal, null and void. Other consequential prayers have been made. The short facts of this case are. that the petitioner is an Association representing the cabin holders at the Station Road. It has 46 members and they belong to Pakistan originally and are here as refugees after partition. The members of the petitioner-Association are petty traders and it is alleged that they got the land from the respondent-Nagar Palika on a rental basis and constructed small cabins for carrying on their trade. Their trading activities are of different kinds. For the last 38 years, they have been occupying this lands and the cabins and have been carrying on the business and earning their livelihood. According to the petitioners, they were paying rent to the Nagar Palika even though in some of the receipts it is stated as fees. The Government of Gujarat issued a Circular dated 17-6-1976, pointing out that these refugees should not be evicted from their shops or cabins without providing a suitable alternative accommodation so that they can be permanently settled without any fear of threats of eviction from anywhere. It is the further case of the petitioner that they are not obstructing any traffic and they are

peacefully carrying on their business after having established their cabins for over a number of years. According to the petitioners, the Nagar Palika, without following the procedure u/s 185 of the Gujarat Municipalities Act and against the principles of natural justice, have come forward with the present notice which is being impugned in this Special Civil Application. It is further contended that, if it is held that there is no need to give notice before invoking the provisions of Section 185 of the Municipalities Act, the same has to be struck down as violative of Articles 14 and 21 of the Constitution. With these averments, the petitioners have come forward with the present Special Civil Application. The Nagar Palika, in its reply has refuted all the averments made by the petitioners and has stated that the cabin holders in the Station Road are obstructing the traffic and their cabins are great hazards to the smooth flowing of the traffic and because of these cabins, number of accidents are taking place. It is further stated that the procedure envisaged u/s 185 has been followed and the cabin holders, who are the members of the petitioners-Association, had ample opportunity to represent their case and the Nagar Palika took the decision only after affording sufficient opportunity to the cabin holders to explain their contentions. It is further averred by the Nagar Palika that alternative accommodation has been provided which is hardly two minutes walk from the present place of business and that the petitioners for the reasons best known to them are not occupying the same. With the above said averments, the respondent-Nagar Palika prayed for dismissal of the Special Civil Application. We issued notice to the respondents herein and they are represented by Mr P. K Jani. The petitioner is represented by Mr. Girish Pale! By consent of parties. Rule is issued and the learned Counsel appearing for the respondent waived service of Rule. By consent of parties, the matter was taken for final hearing and the arguments were heard. Annexure C to the Special Civil Application is the notice issued by the Chief Officer, Mehsana Nagar Palika. In and by the said notice, it has been specifically stated that the members of the petitioners-Union are occupying cabins on the street and unauthorisedly and illegally that their cabins are on the main road, that due to the cabins lot of difficulties are experienced by both the pedestrians and by the traffic, that accidents take place due to the presence of cabins on the road and that for maintaining public safety, the cabins have to be removed. The notice further states that, alternative accommodation has already been provided and that it is for the members of the petitioners-Union to take advantage of the same, finally, the notice says that, if the cabin holders fail to take advantage of the shops already constructed on or before 17-6-1988, the encroachment illegally caused by their cabins will be removed at their cost and risk without any notice u/s 185 of the Gujarat Municipalities Act, 1963. Section 185 of the Gujarat Municipalities Act deals with obstructions and encroachment upon public streets and on any open spaces. Section 185(1) and (2) reads as follows:

(1) Whoever in any area after it has become a Municipal borough,

(a) shall have built or set up, or shall build or set up, any wall, or any fence, rail, post, stall, verandah, platform, plinth, step or any projecting structure or thing or

other encroachment or obstruction, or

(b) shall deposit or cause to be placed or deposited any box, bale, package or merchandise, or any other thing in any public place or street or in or over or upon any open drain, gutter, sewer or adueduct in such place or street shall be punished with fine which may extend to fifty rupees and with further fine which may extend to ten rupees for every day on which such projection, encroachment, obstruction or deposit continues after the date of first conviction for such offence.

(2) The Chief Officer shall have power to remove any such obstruction or encroachment, and shall have the like power to remove any unauthorised obstruction or encroachment of the like nature in any open space not being private property, whether such space is vested in the Municipality or not, provided that if the space be vested in Government the permission of the Collector shall have first been obtained, the expense of such removal shall be paid by the person who has caused the said obstruction or encroachment, and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under Chapter IX.

2. It is clear from Set. 185(2) that the Chief Officer shall have power to remove any such obstruction or encroachment and shall have the like power to remove any unauthorised obstruction or encroachment of the like nature in any open space not being private property, whether such space is vested in the Municipality or not. The notice, which is at Annexure "C to this Special Civil Application clearly gives opportunity to the cabin holders to remove the cabins. It is also clear from Annexure "C that, alternative accommodation has been offered to such cabin holders. Mr. Girish Patel, the learned Counsel appearing for the petitioners as his first contention submitted that the cabins are not on public street; that the cabin holders are not encroachers: that they are lessees and they are in exclusive possession of the land on which the cabins are erected. The reply affidavit filed by the Nagar Palika clearly makes out that the cabin holders are illegally and unauthorisedly occupying the land which is a public street. It is, specifically averred that the cabin holders create traffic hazards and it is difficult for the public at large to move freely because of the heavy traffic. Hence, the submissions made by Mr. Girish Patel as his first contention in view of the clear and specific averment made by Municipality, cannot be countenanced. The second contention put forth by Mr. Girish Patel is that no reasonable opportunity was given as envisaged u/s 185(2) of the Gujarat Municipalities Act. According to Mr. Girish Patel, the learned Counsel appearing for the petitioners, Annexure "C cannot satisfy the requirement contemplated u/s 185(2) of the Municipalities Act. In this connection Mr. Girish Patel relies upon the decision reported in *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, . The Supreme Court, with regard to the hutment dwellers in Bombay, had an occasion to consider the provisions under the Bombay Municipalities Act in evicting these hutment dwellers. In that connection, the Supreme Court observed, "If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in

the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down. Considered in its proper perspective. Section 314 is in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner in appropriate cases, to dispense with previous notice to persons who are likely to be affected by the proposed action. It does not require and, cannot be read to mean that, in total disregard of the relevant circumstances pertaining to a given situation, the Commissioner must cause the removal of an encroachment without issuing previous notice. The primary rule of construction is that the language of the law must receive its plain and natural meaning. What Section 314 provides is that the Commissioner may, without notice, cause an encroachment to be removed. It does not command that the Commissioner shall, without notice, cause an encroachment to be removed. Putting it differently, Section 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner to as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. We must lean in favour of this interpretation because it helps to sustain the validity of the law. Reading Section 314 as containing a command not to issue notice before the removal of an encroachment will make the law invalid." Proceeding further, the Supreme Court held: "it must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem pattern rule could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when, so required, the burden being upon those who affirm their existence." In Section 185(2), the Chief Officer is invested with the power to remove any obstruction or encroachment. The facts reveal that the cabin holders are obstructors and encroachers. They are on the public road causing traffic hazards as revealed by the affidavit-in-reply filed by the Nagar Palika. The observations made by the Supreme Court can be usefully invoked in favour of the Municipality in view of the specific averment in the affidavit-in-reply regarding the necessity, urgency and public safety. Further, the Annexure "C to the Special Civil Application, gave ample opportunity to the cabin holders to represent their case. In this connection, we can also refer to the fact that the members of the Petitioners-Association had an opportunity to inspect the

alternative accommodation shown by the Municipality. It is an admitted case that the Municipality had provided alternative accommodation by pucca construction which is only 2 minutes walk from the present place wherein the cabin holders are having their cabins. Mr. Girish Patel, the learned Counsel appearing for the petitioners states that, even though the pucca construction has been made, the same is not broad enough and the passage leading to the said shop is narrow. He also states that the shops are not abetting the front portion but inside the building. Mr. Girish Patel is not able to dispute the fact that the present accommodation provided is much bigger than the cabins in which the members of the Petitioner-Association are carrying on the business as at present. It is also an admitted fact that the shopping complex provides number of shops and as such, it cannot be said that the public will be unaware of the existence of such shops inside the newly constructed shopping complex. Finding it difficult to counter such factual aspects of the case, Mr. Girish Patel submitted that, before constructing the shopping complex, the people affected ought to have been involved in the decision making process. If it has not been done, the alternative accommodation provided cannot, in any way, affect the constitiional right the cabin holders are agitating in this petition. According to Mr. Girish Patel that, if only the cabin holders had been consulted, they would have suggested the open space just adjoining the present cabins and by pushing the cabins somewhat inside those open spaces, the road and its margin would have been left free. The cabin holders, who according to the Municipality; are occupying the road which is illegal and unauthorised, cannot stipulate a particularr place at which they can have their shops shifted.

3. Mr. P.K. Jani, the learned Counsel appearing for the Municipality, pointing out the averments in the affidavit-in-reply, stated that the cabins are on the road which connect the Railway Station and the S.T. Bus Stand. It has been specifically averred that the cabins of the members of the Petitioners-Association create traffic hazards and it is difficult for the public at large to move freely because of the heavy traffic. Even though the members of the Petitioners-Association started to function in the cabin some years back, due to the population explosion, the Town has become crowded and the cabins which are now on the road, create traffic hazards. It is also the say of the Municipality that the members of the petitioners-Union who are having their cabins are only licensees and their licences were already terminated with effect from 1st April, 1985. There is also specific averment to the effect that, alternative accommodation has been provided for them and the said averment has already been discussed by us in paragraph supra. As regards the lack of opportunity given to the members of the petitioners-Union, the reply affidavit clearly states as follows:

I further say and submit that even for the purpose of making smooth allotment, members of the petitioner-Association were called on 26-8-1985, 9-9-1985 and 7-3-1986, I crave leave to refer to and rely upon the proceedings of the said meetings between tbe members of the Petitioner-Association and the Nagar

Palika at the time of hearing of this petition. I, therefore, submit that the decision to allot the shops to the members of the Petitioner-Association was taken after affording the fullest opportunity to all cabin holders. The grievance of the members of the Petitioner-Association were taken into consideration and, thereafter, for the benefit of the public at large, it was decided to allot the shops to the members of the Petitioner-Association in the manner in which the reference is made in the notice which is at Annexure "C" to the petition.

It has also been stated in the affidavit-in-reply that the members of the Petitioners-Association were provided opportunity of hearing in person. Reading all these statements made by the Municipality, we are not able to appreciate the argument of Mr. Girish Patel to the effect that the Municipality has acted unreasonably and unjustly and has issued the notice without even affording minimum opportunity to the members of the petitioners-Union to represent their case. Such an argument has no substance in view of the elaborate discussions we have made regarding the opportunity the members of the petitioners-Union had, to represent their case. Thus, it is clear from the facts of the case that the members of the petiioners-Union cannot have any right much less legal right to claim any relief by way of the present Special Civil Application. The first respondent herein has acted fairly and reasonably in issuing the notice and has also afforded an opportunity to the cabin holders to have an alternative accommodation. Considering all these facts, we do not find any merits in the contentions raised by the learned Counsel appearing for the petitioners herein.

4. For all these reasons, this Special Civil Application is dismissed. There will be no order as to costs. Rule discharged. Ad-interim relief granted is vacated.

5. It is stated in the petition that the petitioner-Association has authority to file the writ petition on behalf of the members since common question of law and facts is involved in the petition, In Annexure "D" to the Special Civil Application, a statement showing the names of the members of the petitioner-Association, numbering as many as 45 members, is given. It is made clear that the above said decision will bind all these members given at Annexure "D".

6. After the pronouncement of the judgment, Mr. Shahani, on behalf of Mr. Girish Patel, the learned Counsel appearing for the petitioner-Association, requests this Court to grant stay of eviction in respect of the members of the petitioner-Association, in order to enable the petitioner-Association to approach the Supreme Court. Considering the fact that the members of the petitioner-Association is having cabins for over number of years, there will be stay of eviction of the members of the petitioner-Association, upto 5th May, 1989.