
(2011) 08 GUJ CK 0084
In the Gujarat High Court

Case No : Letters Patent Appeal No. 908 of 2010 in Special Civil Application No. 1582 of 2010

Surnarayan Co-operative Housing Soc. Ltd.

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 26-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Gujarat Town Planning and Urban Development Act, 1976 — Section 65, 68
Gujarat Town Planning and Urban Development Rules, 1979 — Rule 33, 48A

Citation : (2011) 08 GUJ CK 0084

Hon'ble Judges : S.J. Mukhopadhaya, C.J;K.M. Thaker, J

Bench : Division Bench

Advocate : G.M. Joshi, for the Appellant; Krina Calla, AGP for Respondent 1 - 2, Dipak C. Raval, for Respondent 3, Satyam Y. Chhaya, for Respondent 4, Mahendra K. Patel, for Respondent 7 and Bharat Prajapati for Respondent 7, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Thaker, J.—This Appeal, under Clause 15 of the Letters Patent, is directed against the judgment and order dated 25.2.2010 passed by the learned Single Judge in a writ petition preferred by present Appellant with a request, inter alia, to declare that the Town Planning Scheme No. 21 (Motera) in respect of Survey No. 238 i.e. Final Plot No. 148 is bad in law and to set aside the said Town Planning Scheme qua the Petitioner's property. The learned Single Judge rejected the writ petition by the judgment impugned in present appeal. Aggrieved by the judgment, the original Petitioner has preferred present Appeal.

1.1 The Appellant is a Co-operative Housing Society [hereinafter referred to as "the Society"]. The Society had preferred a writ petition, through its Chairman, against the Town Planning Scheme No. 21 [hereinafter referred to as "said TP Scheme"], essentially upon being aggrieved by (a) provision made in the Scheme for a 9 mt. road; and (b) subsequent modification in the Scheme whereby the

provision for reservation under the category "sale for residence" came to be removed.

1.2 So far as the Appellant's objection against the first issue is concerned, the learned Single Judge did not accept the objection on the ground that any objection were not filed by the Appellant at the relevant time i.e. at the stage when objections were invited by the Competent Authority and that therefore, the objections at such belated stage cannot be entertained; and so far as the objections against the second issue is concerned, the learned Single Judge accepted the submission of Respondent authority that the Scheme is pending at preliminary stage with the Government for its sanction and the objections by the concerned and affected parties are still under consideration and that therefore, the objections against the triangular portion at the farther end of the land bearing S. No. 238 will be taken into account by the State Government and that on such ground neither the Scheme can be set aside nor petition can be entertained.

2. The appeal arises in backdrop of below mentioned facts:

2.1 The Appellant-Petitioner is a society situate on a parcel of land bearing S. No. 238-P. The said land is included in the said TP Scheme. In the said TP Scheme, the said S. No. 238 is assigned original Plot No. 234 and proposed Final Plot No. 148. From the record, it appears that adjacent to the plot at which the Appellant Society is situate, there are other two parcels of land viz. the land bearing S. Nos. 237/2 and 237/1 which are assigned original plot Nos. 232 and 233 and Final Plot Nos. 145 and 146 respectively. In light of the provisions of the Gujarat Town Planning & Urban Development Act [hereinafter referred to as "the Act"] initially a Draft TP Scheme was prepared. In the said Draft TP Scheme, the aforesaid two plots viz. Final Plot Nos. 145 and 146 were shown as "reserved" in the category of "sale for residence".

2.2 At this stage, it is relevant to note that under the Draft TP Scheme [hereinafter referred to as "Draft Scheme"], a provision for 9 mt. road was made. The proposed road was shown as passing between original S. No. 238 i.e. Final Plot No. 148 and Survey No. 237/2 and 237/1 i.e. Final Plot Nos. 145 and 146. Subsequently, the Draft Scheme was forwarded for sanction by the State Government. After due consideration, the State Government sanctioned the said Draft Scheme vide order dated 19.12.2003. Thereafter, the Preliminary TP Scheme [hereinafter referred to as "Preliminary Scheme"] was prepared by the Town Planning Officer, which came to be sanctioned u/s 65 of the Act.

2.3 It is at this stage i.e. in the Preliminary Scheme, that the reservation in respect of Plots No. 145 and 146 from the category as "sale for residence" was removed, however, the provision for 9 mt. road came to be retained, but with slight modification to the extent that at the end of the road a curve came to be provided.

2.4 The Petitioner felt aggrieved by the said Scheme when a notice for taking

possession of the land for the purpose of 9 mt. road came to be served in October-2007 u/s 68 of the Act read with Rule 33 and Rule 48 (A) of the Act and the Rules framed thereunder. However, the petition was filed somewhere in February-2010.

2.5 The Appellant-Petitioner approached the Court in February-2010 by way of writ petition under Article 226 against the said TP Scheme No. 21 (Motera) with a request that the Scheme, to the extent it affected the Society, may be set aside by declaring it to be bad in law. In support of its request, the Petitioner submitted that the Society had purchased the land admeasuring 4047 sq. mts. in June-1994, under a registered sale deed. The Appellant-Petitioner also claimed that the Ahmedabad Urban Development Authority had granted permission for construction of residential houses on the said Survey No. 238 in favour of the predecessor in title. The Appellant-Petitioner also claimed that necessary permission for non-agricultural use was also granted by the District Development Officer. The Appellant-Petitioner also claimed that the Draft Scheme was sanctioned in December-2003. The Petitioner also admitted that in the Draft Scheme, provision for 9 mt. road was also made. The Petitioner has, however, claimed that the said road was actually existing road of the Petitioner society and not public road and since the road was already existing, the Petitioner was not much affected by the provision in the Draft Scheme.

2.6 After the Draft Scheme was sanctioned, the Town Planning Officer was appointed who issued the notices in accordance with the provisions of the Act and invited objections. The Petitioner has alleged that though the notices were issued in November-2005, any notice to the Petitioner society or its members was not issued despite the fact that the Petitioner society had purchased the land in 1994 and the notice was allegedly sent to the erstwhile owner.

2.7 In respect of the Preliminary Scheme, the Petitioner society has claimed that because of the provisions in the Preliminary Scheme, some of the houses of its members will be affected and the internal road of the society upon being widened it will be turned into public road, without considering any objections of the Petitioner society.

2.8 It appears that the Petitioner is essentially aggrieved by the said effect in respect of the road i.e. the alleged internal road would, upon implementation of the scheme be converted into public road of 9 mt. and upon widening of the road the houses of some of the members and the trees, etc. will be effected. of course, the Petitioner society has also made grievance against removal of the reservation which was provided in respect of Survey Nos. 237/2 and 237/1 (i.e. Final Plot Nos. 146 and 145).

2.9 The learned Single Judge considered the objections raised by the Petitioner society and having noticed that the Petitioner society had not submitted any objections at the relevant time against the provision for the road, did not accept the Petitioner's objection against the provision for the road and with reference to

the other aspect, the learned Single Judge found that the Appellant-Petitioner has submitted its objection against the Preliminary Scheme and the same have been forwarded by the Town Planning Officer to the State Government.

3. We have heard Mr. Joshi, learned Counsel for the Appellant, Ms. Calla, learned AGP, for the Respondent -State Government, Mr. Raval, learned advocate for the Respondent No. 3, Mr. Chhaya, learned advocate for the Respondent No. 4 and Mr. Patel, learned advocate for the Respondent No. 7. We have also perused the record.

4. Mr. Joshi, learned Counsel for the Appellant, submitted that before effecting any variation viz. the removal of the reservation, the Appellant - Petitioner have not been heard. He also submitted that the preliminary scheme is absolutely contrary to the provisions of law and has been made without application of mind. It is also contended that the learned Single Judge erred in not appreciating that on account of implementation of the impugned Scheme, the constructed residential houses of the members will be affected inasmuch as part of them abutting to the road will be demolished and that such consequence would occur only because of non-application of mind by the Respondent authority and its arbitrary attitude. The learned Counsel also attempted to attribute malafides or consideration of extraneous reasons so as to extend favour towards the developers and builders who propose to develop the Final Plot Nos. 145 and 146 i.e. by providing additional access to the said plot owners. The Appellant has alleged colourable exercise of power by the authority.

5. The appeal, like the petition, is resisted by the Respondents essentially on the ground that any objection against sanctioned scheme are not tenable, more so when at the relevant time any objection was not raised. The allegations about malafides and colourable exercise of power are, of course, denied. It is also submitted that the Draft Scheme also contained the provision for 9 mt. road and that therefore, any objection with regard to the said road at the stage of Preliminary Scheme is unsustainable.

5.1 The Respondent No. 7 has also filed affidavit. The said Respondent No. 7 is another society which appears to be situate at the other side of the disputed road.

5.2 The said Respondent No. 7 has claimed that the said road is the only approach which provides access to the said society and that after considering the said aspects, the learned Single Judge dismissed the petition and that therefore, the judgment does not deserve to be set aside.

6. It appears that the notice issued by the authority claiming possession of the land for the purpose of the road made the Petitioner to approach the Court. On one hand, the Petitioner has not stated anything with regard to notice to the Petitioner at the stage of Draft Scheme and on the other hand, the Petitioner has maintained silence as to the contention of the Respondent authority that any objection was not raised-filed by the Petitioner against the provision for road in

the draft TP Scheme. The said assertion by the Respondent is not denied by the Petitioner. There is also No. denial by the Petitioner as to the fact that the provision for 9 mt road was contained even in the Draft Scheme as well.

6.1 Thus, when the aforesaid aspects are taken into account and a composite picture is looked at, then, it emerges that the provision for road was made in the Draft Scheme and the Petitioner society and/or any of its members had not raised any objection against the provision for the road at the stage of Draft Scheme.

6.2 Subsequently, the State Government sanctioned the Draft Scheme with the provision for the said road. Thereafter the stage of preliminary Town Planning Scheme arrived and the preliminary Scheme came to be prepared and was laid for objection which is followed by notice for possession of requisite land for the road purpose. It is at the said stage that the Petitioner started raising objections.

7. The learned Single Judge considered the said objection as too late in time and unsustainable on the ground of delay in raising objection.

7.1 We wonder how can we find fault with the said view, more so when there is No. dispute or denial from the side of the Petitioner as to the fact that any objection with regard to the proposal for road as contained in the Draft Scheme was not raised and submitted by the society or its members of the said relevant stage. Though it may be considered a subsequent development, (probably subsequent to the stage of draft TP Scheme) however, we also cannot be oblivious to the fact and development that there is No. denial from the side of the Petitioner as to the claim of the Respondent No. 7 that the proposed 9 mt road is the only approach for its members to their houses in the Respondent No. 7 society.

7.2 An objection by the Petitioner at the such stage of the Scheme and that too after having lost the opportunity to raise objection when the draft TP Scheme was under consideration, is certainly very belated and therefore, unsustainable.

8. Before going to the second objection, we should also mention that the Petitioner itself has described the proposed road as existing road. of course, it is alleged by the Petitioner that the said road is existing as an internal road. However, any material to substantiate such claim is not made available. Furthermore, the sketch/drawings and maps which are placed on record would show that the road does not appear to be passing through and bifurcating/dividing the final plot No. 148 [i.e. through original Survey No. 238 (original plot No. 234)] in two parts but it appears that the entire plot is on one side of the (proposed) road while the other plots i.e. Survey Nos. 237/2 and 237/1 (i.e. original plot Nos. 232 and 233 which are allotted final plot Nos. 145 and 146 respectively) are on the other side of the proposed road. Therefore, in absence of any other evidence or any other material, it is hard to assume that the internal road of a housing society is sought to be converted into public road.

9. Now, so far as the Petitioner's objection as to the removal of reservation and/or the objection against the provision which creates a triangular portion at the other end of the road are concerned, the learned Single Judge has recorded the submission of the learned advocate for the Respondent authority that it was still open to the Petitioner to submit its objections. The learned Single Judge has recorded the submission of the Respondent's advocate as mentioned below:

4.1 It is further submitted by Mr. Chhaya, learned Advocate for the Respondent - Corporation that so far as dispute with respect to triangular portion of land which is going to Final Plot No. 150 (which was forming part of Survey No. 238) is concerned, at present that Scheme is at Preliminary stage pending with the State Government for sanction u/s 65 of the Act and therefore, Petitioner still submit objections with respect to same which will be considered by the State Government at the relevant time while sanctioning the Scheme u/s 65 of the Act and therefore, it is submitted that to that extent challenging Town Planning Scheme No. 21 (Motera) with respect to that portion of land, petition is premature. Therefore, it is requested to dismiss present Special Civil Application.

9.1 Having regard to the Petitioner's said objection and the above noted submission of the Respondent authority, the learned Single Judge has observed, in the impugned judgment that:

8. Now so far as dispute with respect to triangular portion at the rear portion of land bearing Survey No. 238 which is going through Final Plot No. 150 is concerned, it is to be noted that so far as that question is concerned, Scheme is at present at preliminary stage pending with the State Government for sanction u/s 65 of the Act. It is reported that Petitioner has already submitted some objections before the Town Planning Officer and therefore, Town Planning Officer is required to consider the same and send objections to the State Government along with preliminary scheme submitted by them and same is required to be considered by the State Government while taking final decision on the said Town Planning Scheme u/s 65 of the Act.....

9.2 Thus, what appears from the submissions of the Respondent authority and the observations by the learned Single Judge is that, the appellate - Petitioner has already submitted its objections before the Town Planning Officer.

9.3 The said aspect is not denied by the Appellant before us. Hence, when the objections are already submitted, the Town Planning Officer is obliged to consider the same and forward the same to the State Government along with the preliminary scheme and the State Government in turn shall also consider the objections while taking final decision in respect of the town planning scheme u/s 65 of the Act.

9.4 In such factual background, the said observation and the view of the learned Single Judge cannot be faulted.

9.5 We are concerned with the decision taken by the learned Single Judge who,

has taken note of the fact that the objections have been submitted by the Appellant - Petitioner and the authorities including the State Government are statutorily obliged to consider such objections before taking final decision u/s 65 of the Act.

9.6 In such factual background viz. that the objections have been submitted and the same are not yet finally decided, much less rejected, then the decision of the learned Single Judge to not to interfere with the preliminary scheme at this stage (i.e. when objections are yet under consideration) cannot be faulted and does not warrant any interference in exercise of the jurisdiction under Clause 15 of the Letters Patent.

10. The Appellant has raised one more contention namely, that the 9 mt road is not required. The said contention is raised on the premise that when the reservation in respect of final plot Nos. 145 and 146 is removed and the said plots are No. more reserved for "sale for residence", then, any requirement for the road according to the Petitioner does not survive.

10.1 We think that such objection and considerations thereof are within the domain of the Competent Authority. The Appellant's contention that the scheme is bad because the authority has not considered the said aspect i.e. aspect of requirement, is therefore not sustainable. It is only the Competent Authority who can decide about the requirements and can determine as to whether in particular situation or at particular location road is required or not and Court cannot substitute its decision in such matters.

10.2 When the provision for road was provided by the authority in the Draft Scheme and any objection against the said provision for 9 mt. road was not raised by any one and it is approved by the State Government while sanctioning the Draft Scheme and when the Town Planning Officer also has maintained it while preparing the preliminary scheme, we cannot assume that the aspect of requirement is not addressed by the authority. On the contrary, the assumption would be in favour of the authority that the aspect of requirement is duly addressed at the time of preparing the preliminary scheme. We, therefore, are not inclined to accept the said contention of the Appellant.

11. In view of the foregoing discussion, we are of the view that the decision by the learned Single Judge cannot be faulted. We also do not find any justification or any strong and compelling reason to interfere with the Preliminary scheme when the Draft scheme is already sanctioned by the State Government after taking into account whatever objections were received at the relevant time. The affidavit of the Respondent No. 7 society would also persuade us to not to interfere with the decision of the learned Single Judge which appear to have been taken after considering the aforesaid aspects.

In the result, the appeal fails in light of and for the aforesaid reasons. We are not inclined to accept the appeal and therefore, it is hereby rejected.