

(2008) 02 GUJ CK 0053

In the Gujarat High Court

Case No : Special Civil Application No. 4845 of 2007

Vithalbhai Chhaganbhai (Since Decd.)

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 08-02-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Municipalities Act, 1963 — Section 185, 185(1), 185(2)

Gujarat Panchayats Act, 1961 — Section 98(1)

Citation : (2008) 1 GLH 656 : (2008) 1 GLH 655

Hon'ble Judges : M.S. Shah, J;K.A. Puj, J

Bench : Division Bench

Advocate : Sangeeta Pahwa, for Thakkar Assoc. for Petitioner 1, for the Appellant; Government Pleader for Respondent 1 and V.H. Desai, for Respondent 3, for the Respondent

Judgement

M.S. Shah, J.

1 This petition under Article 226 of the Constitution challenges the notice-cum-order dated 01/17.02.2007 (Annexure-A) passed by the Chief Officer of Padra Municipality respondent No. 3 herein seeking to remove the petitioner's cabins situated at Gandhi Chowk, Padra, District Vadodara.

2. The facts leading to filing of this petition, as averred by the petitioner, are as under:

The petitioner and his son are doing the business of selling shoes/footwear in Cabin Nos.107 and 108 which are situated at Gandhi Chowk in Padra, District Vadodara. According to the petitioner, Cabin No. 107 was given to the petitioner on licence basis by Padra Nagar Panchayat, which was thereafter converted into Municipality. Similarly, Cabin No. 108 was given to the petitioner on licence basis by Padra Nagar Panchayat. The petitioner's case is that on account of objection lodged by Bahubal Rasiklal Shah against the licence granted in favour of the petitioner, the Vadodara District Panchayat raised an issue about the ownership

of the land in question. That controversy ultimately reached this Court in Special Civil Application No. 2601 of 1979, which came to be disposed of by judgment dated 11.01.1981 directing the Additional Development Commissioner, Gujarat State to decide the question whether the lands on which the two cabins are situate fall within the category of land recovered by Section 98(1) of the Gujarat Panchayats Act, 1961 and on the basis of that finding, to determine the question whether the Panchayat was entitled to renew the licence without obtaining the prior permission of the competent authority as required by Section 98(1) of the said Act. The Additional Development Commissioner, thereupon, passed order dated 30.10.1982 remanding the matter to the District Panchayat. The District Panchayat thereafter passed the order in June 1986 holding that the appellant and respondents have not produced any evidence in respect of disputed Survey No. 98/1 and that, therefore, the said site is not vested and approval is not necessary. The Appeal Committee, District Panchayat held that further proceedings are required to be taken as per the Rules and the appeal of Bahubal Rasiklal Shah came to be rejected. The notice dated 01/17.02.2007 by the Chief Officer of the Padra Municipality under Sub-section (2) of Section 185 of the Gujarat Municipalities Act, 1963 states that the allotment of temporary cabins to the petitioner on the land in question is to be cancelled and that obstructions on the land in question are required to be removed for the purpose of smooth traffic movement.

3. In the affidavit-in-reply dated 06.07.2007 filed by the Chief Officer of Padra Municipality respondent No. 3 herein, it is stated that the lands on which Cabin Nos.107 and 108 are put up were allotted to the petitioner subject to the condition that the allotment is to be renewed every year. It is further stated that vide Govt. Resolution dated 05.03.2001, the Collector and the Directorate of Municipality were directed that the lands of the Municipality should not be given to the public at large on lease, nor should they be sold. The Directorate of Municipality and the Collector, in turn, instructed the Padra Municipality on 01.02/05.2002 to take back the lands allotted earlier.

4. We have heard Mrs Sangeeta Pahwa, learned advocate for the petitioner, learned Govt. Pleader for the State Govt., Collector, Vadodara and Mr VH Desai for respondent No. 3 Padra Municipality.

5. Mrs Pahwa, learned advocate for the petitioner has submitted that the provisions of Sub-section (1) or Sub-section (2) of Section 185 can be invoked only if the obstruction or encroachment is made after establishment of the Municipality, but the petitioner had put up two cabins when the Nagar Panchayat was in-charge of the affairs of the area covered by two cabins and that, therefore, the Chief Officer had no authority or jurisdiction to issue any notice under Sub-section (2) of Section 185.

6. Section 185 reads as under:

Section 185(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 upon any open drain, gutter, sewer or aqueduct 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.

(3) to (5) ...

7. Having gone through the provisions of Section 185 and particularly Sub-sections (1) and (2) of Section 185 of the Gujarat Municipalities Act, in our view, for the reasons that follow, the power of the Chief Officer under Sub-section (2) of Section 185 to remove obstruction or encroachment is not confined to obstruction or encroachment made after establishment of the Municipality:

(i) Sub-section (1) of Section 185 contains penal provisions for prosecuting, convicting and punishing the person who has put up any obstruction or any encroachment in any municipal area. Hence, the power to prosecute a person for putting up any obstruction or encroachment cannot be conferred on the Chief Officer for any obstruction put up or encroachment made prior to the establishment of the Municipality. As per the settled legal position and also the constitutional provision, no person can be prosecuted, convicted or punished for an act which was not an offence on the date of commission of that act. It is in consonance with the said principle that Sub-section (1) provides that a person may be convicted or fined for putting up any encroachment or obstruction in any area after it has become a Municipal borough (Municipality).

On the other hand, the power to remove obstruction or encroachment conferred by Sub-section (2) is an administrative power and therefore, there was no question of confining such power to obstructions or encroachments made after establishment of the Municipality.

(ii) While the penal power under Sub-section (1) is to be exercised qua a person

Whoever has put up any obstruction or made any encroachment, the administrative power under Sub-section (2) is to be exercised in respect of the obstruction or encroachment itself without making it necessary to investigate as to who made such obstruction or encroachment. The emphasis in Sub-section (1) is, therefore, on removal of obstruction and encroachment and not on punishment of any person as such.

(iii) The words such obstruction or encroachment in Sub-section (2) of Section 185 are only a compendious expression for any wall, or any fence, rail, post, stall, verandah, platform, plinth, step or any projecting structure or thing or other encroachment or obstruction used in Clause (a) of Sub-section (1), and, any box, bale, package or merchandise, or any other thing used in Clause (b) of Sub-section (1) of Section 185.

(iv) The power of removal conferred on the Chief Officer under Sub-section (2) is not only in respect of obstruction and encroachment in any public place or public street, but also on any open space not being private property, whether such place is vested in the Municipality or not. If the contention of the learned Counsel for the petitioner were to be accepted, the Chief Officer would have the power to remove any unauthorised obstruction or encroachment, put up before or after the establishment of the Municipality, in any open space not being private property, but such power of removal of unauthorised obstruction or encroachment would not be available where it is in any public place or street or in or upon any open drain, gutter, sewer or aqueduct in such place or street. There is nothing in the provisions of Sub-section (2) of Section 185 to indicate that the power of the Chief Officer to remove obstruction or encroachment would be available only in cases of obstruction or encroachment made after establishment of the Municipality.

(v) In short, the words such obstruction or encroachment in Sub-section (2) of Section 185 are only a compendious expression for various kinds of obstructions and encroachments and the legislature did not make any reference to any time frame for the obstructions and encroachments covered by Sub-section (2) of Section 185.

8. The petitioner's own case is that the land in question belongs to the Municipality; the predecessor of the Municipality i.e. Padra Nagar Panchayat had allotted two parcels of land for putting up the cabins in question on annual basis and that the Municipality thereafter continued the allotment on annual basis.

9. The learned advocate for the petitioner, however, submits that the impugned notices were issued in February 2007 to the petitioner and many others in the area. However, although the others have not moved any Court, the Municipality has not taken any action against the others and that, therefore, the Municipality may not take any action against the petitioner, if no action is required to be taken by the Municipality.

10. Having heard the learned advocates for the parties, we are of the view that

since one year is over after issuance of the notices by the Municipality, it would be in the fitness of things if the Municipality assesses the requirement afresh and thereafter, takes a fresh decision in the matter. The impugned notices shall, therefore, be treated as kept in abeyance till the Municipality takes a fresh decision, if at all the Municipality is inclined to take any decision.

11. Subject to the above observations, the petition is disposed of after deciding the scope of Sub-sections (1) and (2) of Section 185 of the Gujarat Municipalities Act, 1963 in terms of para 7 hereinabove.

Ad-interim relief granted earlier stands vacated.