

Jaswantsingh Mathurasingh and Another

Vs

Ahmedabad Municipal Corporation and Others

Civil Appeal No. 1354 of 1977

(CJI Ranganath Misra, K. N. Singh, Kuldip Singh JJ)

01.10.1991

JUDGMENT

K. RAMASWAMY, J. -

1. This appeal by special leave is against the judgment of the Division Bench in L.P.A. No. 114 of 1977 dated May 4, 1977 of the Gujarat High Court. The lone question for decision in this appeal is whether the compliance of sub-rules (3) and (4) of Rule 21 of Bombay Town Planning Rules, 1955 for short 'the Rules' is mandatory and whether the violation thereof invalidates the final town planning scheme. In a suit laid by the appellants, the trial court found as a fact that the appellant, a partnership firm, was continuing in possession of the old premises bearing M.C. No. 352/3 (S) No. 163-A-2 from the year 1940 as a direct tenant of Ahmedabad Panjara Pole, Barartha, a registered trust, the owner of the plot of land of survey No. 163 situated in Ward No. 'C' in front of town hall in Sher Kotda outside Saraspur gate in the city of Ahmedabad. The original plot consists of an area about 500 to 600 square yards in extent wherein certain structures were laid and leased out to the tenants or sub-tenants for business purposes. The Town Planning Scheme was formulated by the municipal corporation in exercise of its power under the Bombay Town Planning Act, 1955 (Act 27 of 1956) for short 'the Act' and reconstituted the final plot Nos. 82 and 83 out of the original plot No. 59 of the Town Planning Scheme No. 16, Sher Kotda Admn. (survey No. 163). The Town Planning Officer did not issue special notice as required under sub-rule (3) and opportunity provided for under sub-rule (4) of Rule 21. The appellants along with others filed civil suits challenging the action. The appellants' suit was decreed declaring that final plot Nos. 82 and 83 upon which the structures were standing with Municipal No. 352/3 and in occupation of the appellants is illegal, invalid and issued a permanent injunction restraining the respondent not to enforce the reconstituted plot Nos. 82 and 83 until due procedure is followed. The learned Single Judge in First Appeal No. 669 of 1976 allowed the appeal along with other bunch of appeals holding that the decision in *Dungarlal Harichand v. State of Gujarat* [(1976) 17 GLR 1152] ratio applies to the facts in this case and the appellants are not entitled to special notice required under sub-rule (3) and opportunity under sub-rule (4) of Rule 21. The failure to comply therewith does not vitiate nor render the draft scheme or the final scheme a nullity. Accordingly the learned Single Judge allowed the appeal, set aside the decree of the trial court and dismissed the suit. On letters patent appeal, the Division Bench confirmed the same. Thus this appeal.

2. Shri Mehta, the learned Senior Counsel for the respondents claimed that special notice required under sub-rule (3) and the opportunity under sub-rule (4) of Rule 21 were not mandatory. Hence they were not complied with. Since sub-rule (3) of Rule 21 is only an additional advantage, it is not indispensable. At any rate it could be waived. The framing of the Town Planning Scheme and its final approval is for the benefit of the residents of the local authority as an amenity provided therein

to the general public i.e. construction of General Post Office. The interest of the general public outweighs the individual interest. Therefore, sub-rule (3) of Rule 21 is not mandatory.

3. A bird's eye view of the statutory scheme and its effect on the right and interest of the owner or tenant would point poignantly that the contention is devoid of substance. The Act as modified and adapted by the Gujarat Adaptation of Laws (State Amendments) Order, 1963 as amended from time to time was to ensure that the town planning schemes are made in a proper manner and execution thereof is made effective. The local authority has to prepare a development plan (Master Plan) for the entire area within its jurisdiction. Section 2(2) defines development plan as a plan for the development and redevelopment or improvement of the entire area within the jurisdiction of a local authority prepared under Section 3. The local authority has been defined under Section 2(4) to mean municipal corporation or municipality etc. Section 2(5) defines owner in an inclusive way saying that any person for the time being receiving or entitled to receive.... the rent or profits of the property in connection with which it is used. Section 2(3) defines "plot" to mean "a continuous portion of land held by one ownership". Section 2(9) defines "reconstituted plot" to mean a plot which is in any way altered by the making of a town planning scheme. Section 2(10) defines "scheme" to include "a plan relating to a town planning scheme". Section 3(1) empowers every local authority to prepare and publish in the prescribed manner a development plan and to submit it to the State Government for sanction otherwise government too is empowered to do so. Under sub-section (1) of Section 4 the local authority is authorised to make a declaration of its intention to prepare a development plan and to despatch a copy thereof to the State Government for publication in the official Gazette. The State Government after inviting suggestions from the public within a period of two months is to publish in the official Gazette the fact of making such declaration or intention as aforesaid. Section 7 prescribes the particulars of the Master Plan.

4. Chapter III prescribes the making and the contents of the Town Planning Scheme. Section 18 provides that a local authority may make one or more town planning schemes for the area within its jurisdiction or in part thereof, regard being had to the proposal in the final development plan. Sub-section (2) provides that such town planning scheme "may make provisions" for any of the following matters :

- (a) "the laying out" or "relaying out of land", either vacant or "already built upon";
- (b)..... (omitted being irrelevant);
- (c) layout of new streets or roads, constructions diversion, extension, alteration, improvement and stopping up of streets, roads and communications;
- (d) the construction, "alteration" and "removal of buildings", bridges and other structures;
- (e) "the allotment" or "reservation" of land for roads, open spaces, gardens, recreation grounds, school, market, green belts and dairies, transport facilities and public purposes of all kinds;
- (f) drainage inclusive of sewerage, surface or sub-soil drainage and sewage disposal;
- (g) lighting;
- (h) water supply;

(i) omitted;

(j) "imposes" sub-section (2) "conditions and restrictions" in regard to the "open space to be maintained about buildings", the percentage of building area for a plot, the number, size, height and character of buildings allowed in specified areas, the purposes to which buildings or specified areas may or not be appropriated, "the subdivision of plots", the discontinuance of objectionable users of land in any area in reasonable periods, parking space and loading and unloading space for any building or the sizes of projections and advertisements signs;

(k) and (l) omitted.

5. In Chapter IV under sub-section (1) of Section 22, the local authority may by a resolution declare its intention to make a town planning scheme in respect of the whole or any part of the land which is in the course of development or likely to be used for building purposes or already build upon. Within 21 days from the date of such declaration it shall publish it in the prescribed manner (the details are not relevant here) and shall despatch a copy thereof to the State Government. Under sub-section (1) of Section 23, within 12 months from the date of such declaration or extended period not exceeding six months, the draft scheme for the area in respect of which the declaration has been made by a notification in the official Gazette, shall be approved. Section 25 envisages specification of the particulars in the draft scheme. Clause (a) "specifies the area", "ownership" and "tenure of each original plot"; (b) the land allotted or reserved under sub-clause (a) of clause (2) of Section 18; (c) "the extent" to which it is "proposed to alter the boundaries of original plots" etc. Under Section 26 "the size and shape of every reconstituted plot" shall be determined, so as to render it suitable for building purposes etc. with further particulars enumerated in sub-sections (2) and (3) thereof. Section 27 gives an opportunity to any person affected by such scheme to submit objections, if any, within six months from the date of publication of the draft scheme. The local authority shall consider such objections; it is empowered to modify such scheme as it thinks fit in the light of the objection and then to submit it to the State Government within four months from the date of its publication in the official Gazette as required under Section 28(1). The State Government within six months from the date of the submission of the draft scheme by the local authority original or with modification shall sanction such scheme with or without any further modification and publish the same in the official Gazette with such conditions as it may think fit. Such scheme shall be open to the inspection of the public under Section 28(3).

6. Under Section 31(1), within one month from the date of the publication of the draft sanctioned town planning scheme, the State Government shall appoint a Town Planning Officer who is to make final scheme while performing the duties imposed on him under Section 32 in accordance with the procedure prescribed in Section 32 and the Rules. Under Section 32 after notice given in the manner, it defines and demarcates the areas allotted to, or reserved for, a public purposes or purpose of the local authority and the reconstituted plots; indicate the person to be allotted of ownership in reconstituted plot in common and the shares of such persons, etc. He has also to fix the difference between the total of the value of the original plot and the total of the plots included in the final scheme etc. He has also to calculate or to estimate the compensation payable on each plot used; the contribution to be levied on each plot used, allotted or reserved for a public purpose; of use partly to the owner and partly to the public; to determine the amount of exemption, if any, from payment of the contribution of the lands occupies by religious and charitable purposes. The contribution of the costs in the final scheme is also enjoined to be calculated and to determine the liabilities etc. as indicated in clauses (vi) to (xi). Clause (xii) provides for the total or partial transfer of any right in

an original plot to a reconstituted plot or provide for the extinction of any right in an original plot in accordance with the provisions contained in Section 68 and then has to draw plan as provided under clause (xiv) in the final scheme in accordance with the draft scheme. Under the proviso it is empowered to make variation from the draft scheme the details of which are not necessary but suffice to state that under the proviso no substantial variation shall be made by the Town Planning Officer without the consent of the local authority and without hearing any objections which may be raised by the owner concerned. Thereafter, the decision of the Town Planning Officer subject to an appeal, if any, the State Government under Section 34, shall make it final and binds the parties. The final scheme shall be published after following the procedure in Rule 21(1) to (8), as per sub-rule (9). Section 54 provides that on and after the day on which the final scheme comes into force any person continuing to occupy any land which he is not entitled to occupy under the final scheme shall be ejected summarily as per the prescribed procedure and local authority shall also be entitled to remove, pull down or alter any building or other work in the area included in the scheme under Section 55 after giving notice in the prescribed manner and in accordance with the procedure of the scheme. Section 56 gives power to the State Government to vary scheme on grounds of irregularity or infirmity in making the scheme. Under Section 60 every party to any proceeding before the Town Planning Officer shall be entitled to appear either in person or by his recognised agent.

7. Though the challenge in the appeal is confined to a limited point, as will presently appear, we have given the conspectus of the statutory scheme to bring out the fact that the Town Planning Officer before making the final scheme and submitting it to the local authority is required to follow the procedure prescribed by the Act and the Rules. He is entitled to alter the plots; make reconstitution of plots, determine the persons entitled to allotment on reconstitution; to reserve the area for public purpose; determine the compensation; liability of the owner to contribute the amount; to provide amenities etc. At the relevant stages, he is required to issue notice to the affected person.

8. The question is whether the tenant or a sub-tenant is a person interested and is entitled to notice. It is obvious that under Section 105 of Transfer of Property Act, a lease creates right or an interest in enjoyment of the demised property and a tenant or a sub-tenant is entitled to remain in possession of the demised property until the lease is duly terminated and eviction takes place in accordance with law. Therefore, a tenant or a sub-tenant in possession of a tenement in the Town Planning Scheme is a person interested within the meaning of Rules 21(3) and (4) of the Rules. But he must be in possession of the property on the crucial date i.e. when the Town Planning Scheme is notified in the official Gazette. Every owner or tenant or a sub-tenant, in possession on that date alone shall be entitled to a notice and opportunity.

9. Undoubtedly the Town Planning Scheme was published on July 1, 1951. There was inordinate delay in implementation of the scheme for 30 long years. Though Shri Parekh, learned counsel for the appellants, contended that a better scheme could be formulated for construction of a post office upon the reconstituted plot No. 82 by leaving out the shops in question; we are not inclined to embark upon an enquiry in that regard. The Act gives power to the local authority to have the matter investigated into and to formulate its town planning scheme; its approval is by the State Government; an expert officer, namely, Town Planning Officer, thereafter, is appointed to finalise the scheme with all local assistance. He, being an expert on the site, is entitled to look into all relevant aspects and to finalise the scheme for reconstitution of the plot or alteration of the boundaries etc.

10. Appellants are entitled to notice under sub-rule (3) and a reasonable opportunity under sub-rule

(4) thereof. Rule 21(1) to (8) lay down the procedure to be followed by the Town Planning Officer and it reads thus :

"21. Procedure to be followed by Town Planning Officer. - (1) The Town Planning Officer shall give notice to the date on which he will commence his duties and shall state therein the time, as provided in Rule 30, within which the owner of any property or rights which is injuriously affected by the making of the town planning scheme shall be advertised in one or more newspapers published in the regional language and circulating within the jurisdiction of the local authority and shall be posted in prominent places at or near the area comprised in the scheme and at the office of the Town Planning Officer.

(2) The Town Planning Officer, shall, after the date fixed in the notice given under sub-rule (1), continue to carry on his duties as far as possible on working days and during working hours.

(3) Special notice of at least three clear days shall be served upon the person interested in any plot or in any particular (sic) comprised in the scheme, before the Town Planning Officer, proceeds to deal in detail with the portion of the scheme relating thereto. Such special notice shall also be posted at the office of the Town Planning Officer. Such notice shall be given in the cases mentioned in clauses (i), (ii) and (iii) of sub-section (1) of Section 32 and in any other cases where any persons have not been sufficiently informed that any matter affecting them is to be considered.

(4) The Town Planning Officer shall give all persons affected by any particular of the scheme sufficient opportunity of stating their views and shall not give any decision till he has duly considered their representations, if any.

(5) If during the proceedings, it appears to the Town Planning Officer that there are conflicting claims or any difference of opinion with regard to any part of the scheme, the Town Planning Officer shall record a brief minute in his own hand setting out the points at issue and the necessary particulars, and shall give a decision with the reasons thereof. All such minutes shall be appended to the scheme.

(6) The Town Planning Officer shall record and enter in the scheme every decision given by him under clauses (i), (ii), (iii), (vii), (x) and (xii) of sub-section (1) of Section 32. The calculations and estimates required by clauses (iv), (v), (vi), (vii), (ix), (x) and (xiii) of sub-section (1) of Section 32 shall be set out and recorded.

(7) The final scheme drawn up by the Town Planning Officer shall include the particulars specified in Rule 17.

(8) The component parts of the scheme shall be so arranged that they may be readily referred to in connection with the map and plans.

(9) Omitted."

11. A reading of Section 32 read with Rule 21(3) makes it abundantly clear that the Town Planning Officer is to give notice of at least 3 days in the prescribed manner to the affected persons to submit

objections or views; are to be given adequate opportunity under Rule 21(4) to respond and thereafter the officer is to demarcate the area allotted to or reserved for public purposes or for purpose of the local authority and the reconstituted plots to be allotted to persons in ownership with the shares of such persons in common plot etc. He is also entitled to alter the boundaries, allocate certain lands for public purposes, reduce the size of the existing plots or re-distribute the plots to the owners etc. in the reconstituted plot. The second stage is the calculation of the contribution and apportionment thereof among the persons liable to make contribution. Thus the owner, tenant or a sub-tenant, as the case may be, is entitled to a notice and an adequate opportunity to place on record, if he so chooses, his objections or views and the same shall be considered and action taken thereafter. It is settled law that before depriving a person of his property or imposing any further liability, the principles of natural justice require prior notice and reasonable opportunity to him to put forth his claim or objections. Rule 21(3) speaks of special notice of at least three days duration. It is in consonance with and in compliance of the principles of natural justice. The legislature thus made a distinction between the general notice envisaged in sub-rule (1) of Rule 21 and special notice under sub-rule (3) of Rule 21, which was in addition to the former.

12. The purposes of clauses (3) and (4) of Rule 21 are obvious and the consequences that would ensue are self-evident. These sub-rules sub-serve the principles of natural justice to avoid arbitrariness offending Article 14 and to be just and fair procedures satisfying the mandate of Article 21. Non-observance otherwise would render the scheme illegal. No provision of a statute or rule would be rendered surplusage or otiose. The construction of the rules by the Full Bench would, however, result in rendering sub-rules (3) and (4) surplusage and otiose. Sub-rule (4) postulates that Town Planning Officer shall give to a person affected by the scheme sufficient opportunity to state his views and shall not give any decision till he duly considers the representation, if any. The issuance of notice under sub-rule (3) and giving of sufficient opportunity under sub-rule (4) are self-evident to subserve the basic concept of fair and just procedure. Accordingly we hold that issuance of special notice of at least three clear days duration and giving sufficient opportunity to the person affected to put forth his views of the scheme are mandatory and non-compliance thereof vitiates the validity of the final scheme.

13. The use of 'shall' in the given circumstances may be construed to be directory but not mandatory as contended by Shri Mehta. The appearance of 'shall' is not conclusive, nor per se connotes its mandatory contour. Its meaning must be ascertained in the light of the legislative intent in its employment, the context in which it was couched, the consequences it produces the result it effected and above all the purpose it seeks to serve, would all be kept in view. From the fact situation the courts are to cull out the intention whether the construction to be put up would subserve the purpose of the legislative intent or tend to defeat it. Public interest, is always, a paramount consideration. Since the non-compliance with issuance of notice and giving of sufficient opportunity contemplated under sub-rules (3) and (4) of Rule 21 injuriously affects the right to property of the owner or interest of the tenant or sub-tenant, as the case may be, it shall be construed to be mandatory and not directory. In this view it is redundant to burden the judgment with all the decisions cited by either counsel.

14. The principle of waiver connotes issuance of notice and non-response thereto. Everyone has a right to waive an advantage or protection which law seeks to give him/her. Undoubtedly, if a notice is issued and no representation was made by either the owner, tenant or a sub-tenant, it would amount to waive the opportunity and such person cannot be permitted to turn round, after the scheme reaches finality, to say that there is non-compliance of sub-rules (3) and (4) of Rule 21. It would amount to putting premium on dilatory and dishonest conduct.

15. Accordingly, we are of the considered view that the judgments in Kaushikprasad Chandulal Mahadevia v. Ahmedabad Municipal Corporation [(1970) 11 GLR 993] and Mohanlal Jesingbhai v. P.J. Patel, Town Development Officer, Ahmedabad Municipal Corporation [(1970) 11 GLR 1035] 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 requirements of sub-rules (3) and (4) of Rule 21 does not vitiate the scheme is not sound in law.

16. It is seen that the appellant has been in possession as tenant for well over half a century and, therefore, it is injuriously affected by the scheme which has the effect of terminating his possession and this adversely affects its business in the demised premises. Since it is a running business over the years, the respondent is directed to provide an alternative premises by allotting a suitable shop within the city to the appellant; to put it in possession thereof and until then allow its occupation of demised shop. In case the appellant does not vacate or creates any obstruction in any form in the matter of possession, it would be open to the respondent to have the appellant ejected summarily. In this view we decline to interfere with the scheme. The appeal is accordingly allowed to the above extent and in other respects the decree of the courts below is upheld. But in the circumstances parties are directed to bear their own costs.

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