

SUPREME COURT OF INDIA

M.M.Cooperative Bank Ltd.

Vs.

J.P. Bhimani

C.A.No.4972 of 2009

(S.B. Sinha and Deepak Verma JJ.)

31.07.2009

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. Interpretation and/or application of Section 26 of the Tamil Nadu Highways Act, 2001 (hereinafter referred to for the sake of brevity as 'the said Act') is in question in this appeal. It arises out of a judgment and order dated 21.3.2005 passed by a Division Bench of the High Court of Judicature at Madras in Writ Petition No.6820 of 2005 and Writ Appeal No.410 of 2005.

3. The basic fact involved in this matter is not in dispute. On or about 13.2.1998 The Government of Tamil Nadu issued a Notification bearing GOMs No.32 granting permission for installation of statues and erection of arches. In terms thereof, requisitions, seeking for permission to put up of arches and the like, were submitted to the District Collector, who, on receipt thereof was required to get reports from the Divisional Engineer of the State Highways, District Superintendent of Police etc. On receipt of such reports and on being satisfied therewith, the District Collector could make recommendations so as to enable the Government to grant or refuse to grant the requisite permission. The Legislature of the State enacted the Tamil Nadu Highways Act, 2001 (Tamil Nadu Act 34 of 2002) (hereinafter referred to for the sake of brevity as 'the Act') with a view to provide for declaration of certain highways to be the State Highways. It came into force with effect from 1.12.2002.

In exercise of its powers conferred upon the State Government under Section 3 of the Act, it, on or about 16.12.2003, issued a Notification being GOMs No.250 declaring some of the roads as State Highways, Major District Roads and other District Roads. The roads in question in this appeal are Thuraiyur-Perambalur Road and Thuraimangalam-Bungalow Road. They have been classified as Major District Roads. Both the roads were declared to be highways belonging to the Government. On or about 22.10.2004, one Mr. Ravichandran, President of Tamil Nadu Handloom and Textiles Development Corporation (respondent herein) requisitioned the Perambalur Municipality to issue a 'No Objection Certificate' for the purpose of erecting arches on the occasion of 57th Birthday Celebrations of the Chief Minister at two places outside the boundary line of the abovementioned roads. On or about 23.10.2004, the Executive Officer, Perambalur Municipality issued a No Objection Certificate to construct the arches as per the abovesaid requisition on the condition that there would be no hindrance to the traffic. On or about 24.11.2004, the Municipal Council vide a resolution dated 24.11.2004 granted its approval for grant of No Objection Certificate. Thereafter the requisition and the approval thereof were placed before the District Collector, who, in terms of the guidelines issued in GOMs No.32 called for reports from the Divisional Engineer of Highways, Ariyalur and the District Superintendent of Police. The Divisional Engineer, Highways on 20.12.2004 sent a report to the District Collector stating that arches can be permitted to be put up at the said two places and that putting up of the arches would not cause any hindrance to the traffic being outside the boundary line of the roads. It was also stated in the report that an undertaking was obtained from Mr. Ravinchandran that in case of expansion of roads, he would remove the arches. On or about 14.01.2005, the District Superintendent of Police also sent his report recommending grant of permission for construction of arches.

On receipt of both the reports, the District Collector forwarded a proposal to the Secretary to the Government of Tamil Nadu, State Highways recommending for the required permission. On or about 24.1.2005, the appellant - Ward Councillor of Perambalur Municipality filed a writ petition being WP No.2503 of 2005 before the High Court of Madras praying, inter alia, for issuance of a writ of certiorari quashing the abovesaid No Objection Certificate. A learned Single Judge of the High Court dismissed the said writ petition by its judgment and order dated 14.2.2005 holding that the proposed constructions do not fall within the National Highways limits. An intra court appeal being WA No.410 of 2005 was preferred by the appellant on 18.2.2005. On or about 22.2.2005, the Secretary to Government of Tamil Nadu, State Highways Department, taking into consideration the recommendation made by the District Collector and after satisfying himself that the guidelines stipulated in GOMs No.32 have been complied with granted permission to construct the arches.

One Mr. N.G. Karunakaran, claiming himself to be the Secretary of the District Consumer Council, Perambalur, filed a writ petition being WP No.6820 of 2005 praying for issuance of a writ of mandamus forbearing the respondents from putting up of permanent arches. The Division Bench of the High Court by reason of the impugned judgment dismissed both the Writ Appeal No.410 of 2005 as well as the Writ Petition No.6820 of 2005.

4. The appellants are, thus, before us.

5. Assailing the judgment of the High Court, Mr. T.L.V. Iyer, learned senior counsel appearing on behalf of the appellant, would urge that the High Court committed a serious error in holding that Section 26 of the Act does not deal with a permanent structure and the same comes within the purview of GOMs No.32. Sub-section (1) of Section 26 of the Act being clearly applicable, it was

contended, that no sanction could be granted by the State in terms of GOMs No.32 or otherwise. It was furthermore urged that, in a case of this nature, doctrine of public trust would be applicable.

6. Learned counsel for the Municipal Corporation has drawn our attention to a resolution dated 10.6.2008 passed by it in terms whereof the lands in question are sought to be acquired.

7. Learned counsel appearing on behalf of the National Highways contended that a project of making the State Highway or four lane road had been taken up and the same has been completed.

8. Learned counsel for the State Highways adopted the submission of the learned counsel.

9. Mr. C.S. Vaidhyanathan, learned senior counsel appearing on behalf of Respondent Nos.1 and 6, on the other hand, would contend: i) Assuming that constructions of permanent structures would attract the provisions of sub-section (1) of Section 26, the same deserves strict construction and as permission had been granted by the State, the constructions made by way of arches cannot be construed to be an encroachment within the meaning of the provisions of the said Act.

ii. If a literal meaning to sub-section (1) of Section 26 is assigned, no over-bridge can also be constructed for the pedestrians nor any signboard can be put up for the benefit of the public. The constructions having been made far away from the tar road, the impugned judgment should be upheld.

iii. Appellant having not challenged the validity of the order passed by the State Government granting permission to put up the arches in the writ petition, this Court may not interfere therewith in exercise of its jurisdiction under Article 136 of the Constitution of India.

iv. The appellant No.2 has wrongly described himself as a member of the District Consumer Council as the said Council has been wound up long back.

v. The appellants being belonging to the rival political parties, the writ petitions have been filed mala fide.

10. The preamble of the said Act reads as under: An Act to provide for the declaration of certain highways to be State highways, restriction of ribbon development along such highways, prevention and removal of encroachment thereon, construction maintenance and development of highways, and levy of betterment charges and for matters connected therewith or incidental thereto. Indisputably, the said legislation seeks to regulate the roads in the State other than the National highways. It was enacted with a view to fix building and control lines of such roads, to declare such roads as State Highways, Major District Roads and Village Roads, to prevent any encroachment on such State Highways, to acquire required lands for formation and development of the State Highways. It was also considered necessary that the State Highways Authorities are vested with statutory powers to undertake such measures in the public interest. Section 2(8) of the said Act defines 'encroachment' to mean : (8) encroachment means any unauthorised occupation of any highway or Land where the construction of a highway is undertaken or proposed to be undertaken or part thereof, and includes any unauthorised

(a) erection of a building or any other structure, balcony, porch or projection on or over or overhanging the highways or part thereof; or (b) occupation of such highway of such land, after the

expiry of the period for which permission was granted for any temporary use under this Act; or

(c) excavation of embankments of any sort made or extended on such highways or part thereof or underneath such highway or part thereof.

Section 2(12) defines 'highway' as under: (12) highway means any road, way or land which is declared to be a highway under section 3 and includes--

(a) all land appurtenant thereto, whether demarcated or not;

(b) the slope, berm, burrow pits, foot paths, pavement, whether surfaced or unsurfaced;

(c) all bridges, culverts, causeways, carriageways or other structures built on or across such road or way;

(d) the foot-way attached to any road, public bridge or cause way;

(e) the drains attached to any such street, public bridge or cause way and the land, whether covered or not by any pavement, varanda or other structure, which lies on either side of the roadway up to the boundaries of the adjacent property, whether that property is private or property belonging to the Central Government or any State Government ; and (f) all fences, trees, posts and boundaries, hectometer and kilometer stones and other highway accessories and materials stacked on such road or public bridge or causeway, but does not include a National Highway declared as such by or under the National Highways Act, 1956.

The term 'Highway Authority' is defined under Section 2(13) of the said Act to mean the officer appointed under sub-section (2) of section 5 thereof. Section 2(14) defines 'highway boundary' to mean the highways boundary as may be fixed under section 8. Section 2(18) defines 'middle of a highway' to mean : (18) middle of a highway means the point half way between the boundaries of the highway in relation to any highway for the improvement of which plans have been prepared by the Highways authority, the middle of the highway as proposed to be improved in accordance with the plans or the point half way between the boundaries of the highway

In terms of Section 2(19), an 'occupier' includes : (a) any person who for the time being is paying or is liable to pay to the owner rent or any portion of the rent of the premises in respect of which such rent is paid or is payable; or (b) a owner living in or otherwise using his premises; or

(c) a rent free tenant; or (d) a licensee in occupation of any premises; or (e) any person who is liable to pay to the owner damages for the use and occupation of any premises.

Section 3 empowers the State Government to declare any road, way or line to be a highway and classify it as any of the following : (i) A State Highway;

(ii) A major district road;

(iii) Other district road; or

(iv) A village road. on the recommendations made by the state Highway Authorities. Chapter III of the Act provides for the restriction of ribbon development. The Highway authority of any division is

empowered to issue a notification in relation to any highway or any area in that division where the construction or development of highway is undertaken or proposed to be undertaken, fixing:

(a) the highway boundary, building line, or control line; or

(b) the highway boundary and the building line; and (c) the building line and the control line. Section 9 provides for restriction on building. Chapter V of the said Act provides for prevention of unauthorized occupation of and encroachment on a Highway and removal of encroachment in the following terms : 26. Prevention of unauthorized occupation of highway.--(1) No person shall occupy or encroach on any highway within the highway boundaries. (2) Notwithstanding anything contained in sub-section (1), the Highways authority may, with the concurrence of the Collector and with due regard to the safety and convenience of traffic and subject to such conditions, and on payment of such rent or other charges as may be prescribed, grant permission, of a temporary nature, to any person-- (a) to make any temporary use of any highway in front of any building owned or occupied by him or make a temporary structure overhanging the highway; or

(b) to put up a temporary owning or tent, pandal or other similar erection or a temporary stall or scaffolding on any highway; or

(c) to deposit or cause to be deposited building materials, goods for sale or other articles on any highway for a specified period; or

(d) to make a temporary excavation on any highway for carrying out any repairs or improvements to building on lands adjoining such highway:

Provided that no such permission shall be deemed to be valid beyond a period of one year, unless it is expressly renewed by the Highways authority.

(3) The permission granted under sub-section (2) shall clearly specify the date upto which and the purpose for which the occupation of the highway is authorised and the exact portion of the highway so permitted to be occupied, and shall also be accompanied by a plan or sketch of that portion of the highway. A copy of such permission shall be communicated to the Collector for the purpose of record.

(4) The person in whose favour such permission has been given shall produce the permit for inspection whenever called upon to do so by the Highways authority, or any officer authorised by it in that behalf and shall, at the end of the period specified in the permit, vacate the portion of the highway occupied by him, after restoring it to the same state as it originally stood before the occupation by him.

(5) The Highways authority shall maintain a complete record of all such permissions granted, and shall also cause an inspection to be made in every case at the expiration of the period upto which such occupation has been permitted, to ensure that the portion of the highway has actually been vacated.

(6) The permission granted under sub-section (2) shall be in such form and subject to such conditions as may be prescribed.

Section 49 of the said Act provides for a penalty, stating

49. Unauthorised occupation of highway.-- Whoever ❖

(a) occupies or makes any encroachment on any highway in contravention of the provisions of section 26: or

(b) Fails to comply with the notice served on him under clause (ii) of sub-section (2) of section 28, shall on conviction, be punishable--

(i) for the first offence with fine which may extend to two hundred rupees; and

(ii) for any subsequent offence in relation to the same encroachment, with fine which may extend to five hundred rupees plus a further fine not exceeding fifty rupees per day on which such occupation of the highway or encroachment continues.

11. Sub-section (1) of section 26 having been couched in negative language must be construed to be imperative in character. The mandatory nature of the said provision is also evident from the penal provisions contained in Section 49 of the Act.

The High Court, however, in its impugned judgment, upon taking into consideration the provisions of the Act as also the Rules framed thereunder, opined:

51. However, in the instant case, neither permission is sought for either for putting up a structure of temporary nature in any highway or overhanging the highway nor permission is sought for a particular period under Form 'A' or any rate has been fixed under Rule 8. In other words, there are no provisions under the Act or the Rules framed under the Act, to deal with statues or arches, which are to be installed or put up in the highways, as a permanent structure.

52. As a matter of fact, the petitioner N.G. Karunakaran, in W.P. No.6820 of 2005, himself, in his prayer, would seek for a mandamus, forbearing the respondents from permitting/putting up of permanent arches at the four road junction of Perambalur and the three road junction of Thuraimangalam. As such, it is nobody's case that the putting up of arches in the said two places is either of a temporary nature or to make any temporary use of any highway or make a temporary structure overhanging the highway.

53. Since the construction of arches sought to be put up is of a permanent nature, we are of the view that G.O.Ms. No.32, Highways Department, dated 13.02.1998, alone would be applicable, as it would deal with statues and arches exclusively. The High Court, however, noticed that permission had been granted to put up arches at both the places, giving the specific measurement, allowing for putting up middle pillars in the middle of the roads finding that although putting up of arches would not prevent the free flow of traffic but putting up of middle pillars in both the arches would certainly cover the middle space of tar road portion in which event there may not be free flow of traffic to pass or repass. In view of the aforementioned finding, it issued, inter alia, the following direction :

57. Therefore, we direct the Government to allow the arches to be put up at both the places without middle pillars, by giving sufficient strength to the either side pillars, to have a grip over the arches,

overhanging the highways. The High Court summed up its judgment as under : (1) The prayers sought for in W.P. No.6820 of 2005 and w.A. No.410 of 2005 are not sustainable. (2) In view of G.O.Ms. No.250, Highways (NH2), dated 16.12.2003, declaring the roads in question as Highways belonging to the State Government, the provisions of Sections 180, 180- A, 181 and 182 of the Tamil Nadu District Municipalities Act, 1920, are not applicable. (3) The Tamil Nadu Highways Act, 2001, is not applicable with reference to the permission for installation of arches, in view of G.O.Ms. No.32, Highways Department, dated 13.02.1998, which would exclusively govern the same.

(4) Permission, granted by the Secretary to Government of Tamil Nadu, Highways Department, on the basis of the recommendation of the Divisional Engineer of the said Division and the District Collector, is perfectly valid. (5) State Government is directed to allow the arches to be put up of both the places without middle pillars, by giving sufficient strength to the either side pillars, to have a grip over the arches, overhanging the highways, so that the public use the entire portion of the tar road, to pass and repass.

12. We, with respect, are not in a position to persuade ourselves to agree with the opinion of the Hon'ble High Court.

13. Sub-section (1) of Section 26, as noticed hereinbefore, is mandatory in character. Sub-section (2) of Section 26 is an exception to Sub-section (1) of Section 26.

The provisions of Section 26 with a view to prevent unauthorized occupation of highway or encroachment thereof would, however, apply to third parties and not to the Highway authorities. The power to grant permission for erecting any arch or any other constructions strictly lies with the Highway authority.

The State, after coming into force of the said Act, is denuded of its power in the matter of grant of any permission. The High Court, in our opinion, thus, committed a manifest error in holding that the State would exercise its jurisdiction of in terms of GOMs No.32.

14. Mr. Vaidyanathan would contend that no encroachment has been caused having regard to the fact that the width of the road being 14 meters and the recommendations having been given to construct the arches as mentioned in the sketch map, i.e. 9.25 meters away from the Taar Salai on both the sides and the height of the same should not be less than 6.60 meters to be supported by a pillar, the same would not come within the purview of the term 'encroachment' as defined in the said Act. The State in its order contained in GOMs No.A6/13173/2004 noticed that both the arches are to be maintained by Perambalur District Kuzhagam. It furthermore noticed that the respondent himself has given an undertaking that if any hindrance is caused to the concerned Department during the course of the widening of the road, he shall be responsible for the removal thereof.

15. We would assume that having regard to the definition of encroachment as contained in Section 2(8) of the Act, any construction made with permission would not come within the purview thereof. We would also assume that the provisions of Section 2(8), Section 8 and Section 26 of the Act are required to be construed harmoniously. Notice may also be taken of the fact that the State of Tamil Nadu had granted permission for erection of such arches throughout the State. Such permissions, inter alia, are being granted for construction of arches in honour of its leaders or God or for depicting the name of the place.

16. Before us, the details of such arches and/or the photographs thereof have also been produced. We, however, fail to understand as to why the State shall grant permission to erect such arches at the instance of a private party. The State, being the principal protector of the rights of its citizens, keeping in view the doctrine of public trust as adumbrated by this Court in a large number of decisions, including Ors. [(1997) 1 SCC 388]; Ors. [(1999) 6 SCC 464] and Ors. [2006 (2) SCALE 494], should not have granted such permission. In any event, with the coming into force of the said Act, GOMs 32 must be held to have been repealed. The State Government, therefore, had no jurisdiction to pass the order impugned in the writ application.

17. In a public interest litigation of this nature, it is not necessary for the Court to abide by the strict rules of pleadings and even if it is found that the petitioners are busy bodies, the courts while discharging them, could proceed to deal with the public interest litigation suo motu. Ors. [(2009) 1 SCC 441], this Court held :

The High Court while entertaining the writ petition formed a prima facie opinion as regards the systematic commission of fraud. While dismissing the writ petition filed by the selected candidates, it initiated a suo motu public interest litigation. It was entitled to do so. The nature of jurisdiction exercised by the High Court, as is well known, in a private interest litigation and in a public interest litigation is different. Whereas in the latter it is inquisitorial in nature, in the former it is adversarial. In a public interest litigation, the court need not strictly follow the ordinary procedure. It may not only appoint committees but also issue directions upon the State from time to time. (See Indian Bank v. Godhara Nagrik Coop. Credit Society Ltd. and Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar).

{See also Anr. [(2008) 12 SCC 541] and Ors. [(2008) 9 SCC 54]}

18. When questioned that even assuming that encroachment is not made on the surface of the building line but may be in the air in view of well settled principle of law that he who possesses the land possesses also having regard to the maxim *cedificatum solo solo cedi*; Our attention was drawn by Mr. Vaidyanathan to the following passage from Broom's Legal Maxim:

It may be noticed, in conclusion, that the maxim under consideration does not apply in favour of local authorities, in whom streets are vested by virtue of the Public Health Act, 1875, Section 149, or any similar enactment. Such enactments vest in the authority such property only as is necessary for the control, protection and maintenance of the streets as highways for public use, and confer no general proprietary rights in the air above or the ground below the streets. [Tunbridge wells v. Baird [(1896) AC 434].

The English Law with regard to the limited right vested in the local authorities under the Public Health Act, 1875 is not applicable in India. The authorities acquired the land in terms of the provisions of the Act. The roads vest in the authorities in terms of the provisions of the Land Acquisition Act or the provisions of the State Highways Act or similar other statutes free from all encumbrances. It is just not a case where a limited right is vested by the State as a Local Authority.

However, there cannot be any doubt or dispute whatsoever that the authorities in the interest of general public and pedestrians and others, in particular, may grant permission to construct such buildings even if it be permanent in character as it may seem fit or carry out such construction itself

as it may seem necessary. What is, however, important is public interest in carrying out such construction and not any private interest or interest of a political party. The doctrine of good governance, in our opinion, requires the Government to rise above their political interest and act only in public interest and for welfare of its people.

19. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeals are allowed with costs payable by the Respondent Nos. 1 and 6. Counsel's fee assessed at Rs.50,000/- (Rupees Fifty thousand only)