N. NANALAL KIKLAWALA AND ANR. A

v.

STATE OF GUJARAT AND ORS.

NOVEMBER 7, 2005

[ARIJIT PASAYAT AND C.K. THAKKER, JJ.] B

Gujarat Town Planning and Urban Development Act, 1976—Section 71—Gujarat Town Planning and Urban Development Rules, 1979—Town Planning Scheme—Writ Petition seeking implementation of the Scheme—Application of Nagarpalika for variation of the Scheme, pending before State Government—Direction by Single Judge of High Court to implement the Scheme—In appeal Division Bench of High Court holding that Single Judge could not have given direction when proposal for variation was pending—Subsequently variation of the Scheme rejected by State Government—Rejection of variation challenged in Writ Petition—On appeal, held: In view of rejection of the proposal for variation, statutory consequences to be worked out—However, it would be subject to the decision in the Writ Petition. C D

A town planning scheme was sanctioned effecting the properties of the appellants, a trust and the tenants therein. Appellants filed Writ Petition seeking implementation and execution of the sanctioned scheme. Two other petitions were filed by the tenant and the trust. Petition of the appellant was allowed by Single Judge of the High Court and the Nagarpalika was directed to implement the scheme in accordance with the provisions contained in Gujarat Town Planning and Urban Development Act, 1976 and Gujarat Town Planning and Urban Development Rules, 1979. The other two petitions were dismissed. The orders were challenged before Division Bench. Nagarpalika took the plea that in view of Section 71 of the Act, High Court could not have given the directions, as it had applied for variation of the scheme. Division Bench accepted the plea of Nagarpalika. E F

In appeal to this Court, appellants contended that the State Government had rejected the prayer for variation of the scheme. G

Nagarpalika contended that refusal to vary the scheme was pending under challenge before High Court.

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A **Functionaries of the Trust contended that subsequent to the rejection, State Government had again approved the variation. They further contended that everything was not clean and transparent as was evident from various correspondences made by various authorities of the concerned department.**

B **Partly allowing the appeal, the Court**

HELD: 1. In view of the rejection of the proposal of the Nagarpalika for variation, the statutory consequences which flow are to be worked out. This, however, would be subject to the decision, if any, in the writ petition. [11-B]

C *The Municipal Corporation for Greater Bombay and Anr.* v. *The Advance Builders (India) Pvt. Ltd. and Ors.,* **[1971] 3 SCC 381, referred to.**

2. It is correct that everything is not clean and transparent in the concerned department as is evident from the various correspondences made by various authorities of the concerned department. The views in the various
D **communications made by various officials are not consistent. This does not speak well of the concerned department. [5-D]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2972 of 2001.

From the Judgment and Order dated 6.7.99 of the Gujarat High Court in
E L.P.A. No. 316 of 1999 in S.C. Application No. 9468 of 1996.

D.A. Dave, Kalpesh Parikh and Mrs. Nandini Gore for the Appellants.

Mahendra Anand, Mrs. Hemantika Wahi, Maulik Nanavati, Abhijat P. Medh, Rajiv Mehta, B. Aggarwala and A. Henry for the Respondents.

F The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Challenge in this appeal is to the legality of the judgment rendered by a Division Bench of the Gujarat High Court in a Letters Patent Appeal which was filed by Dahod Nagarpalika (in short 'Nagarpalika'),
G the respondent No. 2 in this appeal. In the Letters Patent Appeal challenge was to the judgment rendered by a learned Single Judge in a writ petition filed by the present appellant for a direction to implement and execute a scheme sanctioned under the provisions of the Gujarat Town Planning and Urban Development Act, 1976 (in short the 'Act').

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The learned Single Judge had directed to implement the Town Planning Scheme in question in accordance with the provisions of the Act and the Gujarat Town Planning and Urban Development Rules, 1979 (in short the 'Rules'). A time limit for carrying out the directions was fixed and the last date was indicated to be 30th June, 1999. The Division Bench allowed the appeal and set aside the judgment rendered by learned Single Judge.

The factual position in a nutshell is as follows:

Several parties are involved in the dispute. They are Navinchandra Nanalal Kikawala and another, the tenant Pachubhai Matrubhai Pathak, another tenant Hasanjibhai K. Bhewala and a trust, known as "Abdulhassain Rasulbhai Kagawala Trust", and Dahod Nagarpalika. The dispute centered around the town planning scheme, which was sanctioned on June 2, 1977 and was published on April 30, 1981. The dispute relates to the original plots of Kiklawalas and the Kagalwala Trust and the final plots were reconstituted from the original plots. The land belonging to Kiklawalas was bearing Revenue Survey No.3/E. Later on, at the time of City Survey Settlement, the same was numbered as City Survey No.453/E. The above-said land was admeasuring 2156 sq. mtrs. The Kagalwala Trust had the original plot, which was registered as Revenue Survey No.2/A and was admeasuring about 2059 sq. mtrs. According to the scheme, which became final, the original plots, both of Kiklawalas and Kagalwala Trust came to be reconstituted. Some portion of the land belonging to the Kagalwala Trust was to be given to Kiklawalas, and a portion of the land of Kiklawalas was required to be hived off and was to be utilized for the purposes of garden and open air theatre. By this process, a reconstituted final plot, bearing No.19, was to be given to Kiklawalas to admeasure about 1670.25 sq. mtrs. Final Plot No. 20 was to go to Kagalwala Trust admeasuring 1142 sq. mtrs. The land being given to Kiklawalas from the Kagalwala Trust had construction and tenant also. In the same way, some portion of the land, which Kiklawalas would get under the reconstituted plot, was also having tenants of their own.

Therefore, the main petition registered as Special Civil Application No.9468 of 1996 was filed by Kiklawalas, praying for a writ of mandamus for the implementation and execution of the sanctioned scheme. Two other petitions, viz., Special Civil Application No.7895 of 1997 and Special Civil Application No.2462 of 1998 were filed by the tenant and the Kagalwala Trust. By a common judgment, the three Writ petitions were disposed of. The main petition was allowed and the Dahod Nagarpalika was directed to implement

A the town planning scheme in question. It was held that this should be done in accordance with the provisions contained in the Act and the rules framed thereunder. The further directions were that action was to be taken "at the earliest possible time without any further loss of time and in no case later than 30th June, 1999". The other two petitions were dismissed. These orders were challenged before the Division Bench.

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Before the High Court the Nagarpalika took the stand that it had applied for variation of the schemes. In view of the provisions contained in Section 71 of the Act, the direction as given by learned Single Judge could not have been given. Learned Single Judge had observed that mere possibility of C variation in town planning scheme by subsequent scheme does not authorize the Nagarpalika to avoid implementation of scheme. The High Court accepted the plea of the Nagarpalika that when proposal for variation is pending the direction should not have been given. It was observed that the parties were to act in accordance with the scheme, if any scheme emerges as a consequence of the variation of the sanctioned scheme. Opportunity was given to the D aggrieved party to question correctness of the scheme before the appropriate forum.

Learned counsel for the appellant submitted that the State Government has rejected the prayer for variation of the scheme and though the Division Bench had considered the effect of variation, the said question has become E academic in view of the subsequent events.

Learned counsel for the Nagarpalika submitted that the State Government's refusal to vary the scheme is presently under challenge and is the subject matter of challenge in Special Civil Application No.9839 of 2001. F Learned counsel for the respondents 3 and 4 who claimed to be functionaries of Kagalwala Trust submitted that subsequent to the rejection the State Government has again approved the variation. Reference was made to copy of a letter No.NRY/322001/1746/L dated 13-5/6/2005 purported to have been written by one Rupabhai Lakhabhai Charel, Section Officer of the Urban Development and Urban Housing Department, Sachivalaya, Gandhinagar. G Serious disputes were raised about the authenticity of the letter and the authority to write such a letter.

What has transpired is really shocking. In the affidavit filed by the Principal Secretary in the Urban Housing Development, Government of Gujarat, it has been categorically stated that there is no record about the issuance of H such letter by the Department. In fact, it has been stated that the Town

Planning Scheme No.1, Dahod (II Varied) has not been sanctioned by the Government and has been rejected by notification dated 9.8.2001 and there is no subsequent change in the decision. In the affidavit filed by aforesaid Rupabhai Lakhabhai Charel he has stated that he has issued letter and the subject of the letter pertained to giving approval to the Dahod Town Planning Scheme No.1, (II Varied) and the same has been issued from the Department for the purpose of getting varied proposal of the scheme in question and for taking further action at the end of the Department.

Learned counsel appearing for the State has placed before us the relevant file which shows that at one place the aforesaid Rupabhai Lakhabhai Charel has accepted that it does not appear from the records that such letter was issued. In view of the specific stand of the State Government, the letter referred to above is really of no consequence. The authority under which the letter was issued has not been explained by the aforesaid Rupabhai Lakhabhai Charel. Learned counsel appearing for the respondents 3 and 4 (functionaries of the Trust) submitted that everything is not clean and transparent in the concerned department as is evident from the various correspondences made by various authorities of the concerned department. Reference has been made to various documents in this connection. We find substance in this plea. The views in the various communications made by various officials are not consistent. This does not speak well of the concerned department. What is baffling is that after having noticed that the aforesaid Rupabhai Lakhabhai Charel has written a letter without any authority to do so, he has been merely transferred to another department. Learned counsel for the State of Gujarat stated that the police have also been asked to conduct an inquiry in the matter. Learned counsel appearing for the State could not explain as to what role the police has to play after the author of the letter has admitted lack of authority and authorship of the letter. We are at loss to understand the logic in what way the State Government has done. What is still more baffling is the soft-pedalling by the State Government in such a serious matter. Learned counsel appearing for the State failed to explain as to how the various officers of the same department could write letters containing diametrically opposite views. Be that as it may, the definite stand of the State Government as stated in the affidavit of the Principal Secretary is that the State Government has rejected the proposal for variation. The correctness of the decision is being tested in the writ petition. But there is, in fact, no order of stay. So far as the decision is concerned till the order is set aside, the consequences which statutorily flow in terms of Section 65 have to be given effect. The said provision reads as follows:

A "*Section 65. Power of Government to sanction or refuse to sanction the scheme and effect of sanction.*

(1) On receipt of the preliminary scheme or, as the case may be, the final scheme, the State Government may -

B (a) in the case of a preliminary scheme, within a period of two months from the date of its receipt, and

(b) in the case of a final scheme, within a period of three months from the date of its receipt.

by notification, sanction the preliminary scheme or the final scheme C or refuse to give sanction, provided that in sanctioning any such scheme, the State Government may make such modifications as may, in its opinion, be necessary for the purpose of correcting an error, irregularity or informality.

(2) Where the State Government sanctions the preliminary scheme or D the final scheme, it shall state in the notification -

(a) the place at which the scheme shall be kept open for inspection by the public, and

(b) a date in which all the liabilities created by the scheme shall come into force:

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Provided that the State Government may from time to time such date, by notification, by such period, not exceeding three months at a time, as it thinks fit.

(3) On and after the date fixed in such notification, the preliminary F scheme or the final scheme, as the case may be, shall have effect as if it were enacted in this Act."

Few other provisions i.e. Sections 66 to 71 which have relevance need to be noted. They read as follows:

G *Section 66. Withdrawal of scheme:*

(1) If at any time before the preliminary scheme is forwarded by the Town Planning Officer to the State Government, a representation is made to the Town Planning Officer by the appropriate authority and a majority of the owners in the area, that the scheme should be

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withdrawn, the Town Planning Officer shall, after inviting from all persons interested in the scheme objections to such representation, forward such representation together with the objections, if any, to the State Government.

(2) The State Government, after making such inquiry as it may deem fit, may, if it is of the opinion that it is necessary or expedient so to do, by notification, direct that the scheme shall be withdrawn and upon such withdrawal no further proceedings shall be taken in regard to such scheme.

Section 67. Effect of preliminary scheme.

On the day on which the preliminary scheme comes into force -

(a) all lands required by the appropriate authority shall, unless it is otherwise determined in such scheme, vest absolutely in the appropriate authority free from all encumbrances;

(b) all rights in the original plots which have been re-constituted into final plots shall determine and the final plots shall become subject to the rights settled by the Town Planning Officer.

Section 68. Power of appropriate authority to evict summarily.

On and after the date on which a preliminary scheme comes into force, any person continuing to occupy any land which he is not entitled to occupy under the preliminary scheme shall, in accordance with the prescribed procedure, be summarily evicted by the appropriate authority.

Section 69. Power to enforce scheme.

(1) On and after the date on which a preliminary scheme comes into force, the appropriate authority shall, after giving the prescribed notice and in accordance with the provisions of the scheme.

(a) remove, pull down, or alter any building or other work in the area included in the scheme which is such as contravenes the scheme or in the erection or carrying out of which any provision of the scheme has been complied with;

(b) execute any work which it is the duty of any person to execute under the scheme in any case where it appears to the

A appropriate authority that delay in the execution of the work would prejudice the efficient operation of the scheme.

(2) any expenses incurred by the appropriate authority under this section shall be recovered from the person in default or from the owner of the plot in the manner provided for the recovery of sums due B to the appropriate authority under the provisions of this Act.

(3) if any question arises as to whether any building or work contravenes a town planning scheme or whether any provision of a town planning scheme is not complied with in the erection or carrying out of any such building or work, it shall be referred to the State C Government and the decision of the State Government shall be final and binding on all persons.

(4) No person shall be entitled to compensation in respect of any damage, loss or injury resulting from any action taken by the appropriate authority under the provisions of this section except in respect of the D building or work begun before the date referred to in sub-section (1) and only in so far as such building or work has proceeded under that date;

Provided that any claim to compensation, which is not barred by this sub-section shall be subject to the condition of any agreement E entered into between the claimant and the appropriate authority.

(5) the provisions of this section shall not apply to any operational construction undertaken by the Central Government or a State Government.

F *Section 70. Power to vary scheme on ground of error, irregularity or informality.*

(1) If after the preliminary scheme or the final scheme has come into force, the appropriate authority considers, that the scheme is defective on account of an error, irregularity or informality, the appropriate G authority may apply in writing to the State Government for the variation of the scheme.

(2) If on receiving such application or otherwise, the State Government is satisfied that the variation required is not substantial, the State Government shall publish a draft on such variation in the prescribed H manner.

(3) The draft variation published under sub-section (2) shall state every variation proposed to be made in the scheme and if any such variation relates to a matter specified in any of the clauses (a) to (h)of sub-section (3) of section 40, the draft variation shall also contain such other particulars as may be prescribed. A

(4) the draft variation shall be open to the inspection of the public at the head office of the appropriate authority during office hours. B

(5) Within one month of the date of publication of the draft variation, any person affected thereby may communicate in writing his objections to such variation to the State Government through the Collector and send a copy thereof to the appropriate authority. C

(6) After receiving the objections under sub-section (5), the State Government may, after consulting the appropriate authority and after making such inquiry as it may think fit, by notification.

(a) appoint a Town Planning Officer and thereupon the provisions of this Chapter shall, so far as may be, apply to such draft variation as if it were a draft scheme sanctioned by the State Government, or D

(b) make the variation with or without modification, or

(c) refuse to make the variation. E

(7) From the date of the notification making the variation, with or without modification, such variation shall take effect as if it were incorporated in the scheme.

Section 70 A. Variation of Town Planning Scheme for land allotted for public purpose. F

If at any time after the final town planning scheme comes into force, the appropriate authority is of the opinion that the purpose for which any land is allotted in such scheme under any of the paragraphs (ii) and (iii) of sub-clause (a) of clause (ii) of sub-section (3) of Section 40 requires to be changed to any other purpose specified in any of the said paragraphs, the appropriate authority may make such change after following the procedure relating to amendment of regulations specified in Section 72 as is such change were an amendment of regulations. G

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A *Section 71. Variation of town planning scheme by another scheme.*

Notwithstanding anything contained in section 70, a town planning scheme may at any time be varied a subsequent scheme made, published and sanctioned in accordance with the provisions of this Act.

B The provisions relate to different stages and situations. Section 66 deals with withdrawal of a scheme. Section 70 on which the Division Bench placed reliance deals with power to vary scheme on ground of error, irregularity or informality. As noted in sub-section (1), liberty is granted to the appropriate authority (as defined in Section 2(iii)) to apply in writing to the State Government for variation of the scheme if according to it the final scheme C which has come into force, is defective on account of an error, irregularity or informality. Only if variation is made, in terms of sub-section (7) of Section 70, it takes effect from the date of notification of the variation as if it were incorporated in the scheme. Section 71 is also an important provision which provides that notwithstanding anything contained in Section 70, a town D planning scheme may be varied by a subsequent scheme which is made published and sanctioned in accordance with provisions of the Act.

At this juncture, it would be proper to refer to take note of the decision of this Court in *The Municipal Corporation for Greater Bombay and Anr.* v. *The Advance Builders (India) Pvt. Ltd. and Ors.*, [1971] 3 SCC 381. The said E case related to almost *pari materia* provisions in the Bombay Town Planning Act, 1954. In para 13, it was noted as follows:

> "13. It was however, contended by the learned Attorney General that after all a writ of mandamus is not a writ of course or a writ of right but is, as a rule, a matter for the discretion of the court. That is F undoubtedly the case. It is pointed out by Lord Hatherley in *The Queen* v. *The Church Wardens of All Saints, Wigan and Ors.* (1875-76) 1 AC 611 that upon a prerogative writ there may arise many matters of discretion which may induce the Judges to withhold the grant of it —matters connected with delay, or possibly with the G conduct of the parties; but, as further pointed out by His Lordship, when the Judges have exercised their discretion in directing that which is in itself lawful to be done, no other Court can question that discretion in so directing. In the present case, the High Court has exercised its discretion in directing the issue of the writ and this Court, in an appeal by special leave, will not ordinarily question that

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discretion." A

In the circumstances, we set aside the order of the High Court and direct that in view of the rejection of the proposal of the Nagarpalika for variation, the statutory consequences which flow are to be worked out. This, however, would be subject to the decision, if any, in the writ petition. We make it clear that we have not expressed any opinion on the legality or otherwise of the order refusing to accept the prayer for variation. B

The appeal is allowed to the aforesaid extent without any order as to costs.

K.K.T. Appeal partly allowed. C