HIGH COURT OF GUJARAT *(F.B.)*

DUNGARLAL HARICHAND
V/S
STATE OF GUJARAT

(Overruled by:JASWANTSINGH MATHURASINGH
V/S
AHMEDABAD MUNICIPAL CORPORATION - 1991 LawSuit(SC) 500)

Date of Decision: 04 August 1976

Citation: 1976 LawSuit(Guj) 69

Hon'ble Judges: S Obul Reddi, J B Mehta, B K Mehta

Eq. Citations: 1977 AIR(Guj) 23, 1976 GLR 1152

Case Type: Special Civil Application

Case No: 1663 of 1970

Subject: Constitution

Acts Referred:

Constitution Of India Art 226

Bombay Town Planning Act, 1954 Sec 32, Sec 51

Bombay Town Planning Rules, 1955 R 21(3), R 21, R 21(2)

Final Decision: Petition dismissed

Advocates: K S Nanavati, I M Nanavati, J R Nanavati, Purnanand & Co, S B Vakil

Reference Cases:

Cases Cited in (+): **13**

Cases Referred in (+): **10**

Judgement Text:-

S Obul Reddi, C J

[1] This Special Civil Application has been referred to a Full Bench by a Division Bench consisting of P. N. Bhagwati, C. J., (as he then was) and M. U. Shah J., as in their opinion the two decisions rendered by this Court in Kaushikprasad v. Ahmedabad Municipal Corporation, (1970) 11 G.L.R. 993 and Mohanlal Jesingbhai v. P. J. Patel, (1970) 11 G.L.R. 1035 to which one of them (Bhagwati, C. J.) Was a party required reconsideration as the attention of the Court was not drawn to certain provisions and particularly Sec. 56 of the Bombay Town Planning Act which seemed to suggest that the view taken by them may not be correct.

[2] The relevant facts leading to the filing of this petition may briefly be stated the Ahmedabad Municipal Corporation by a notification dated July 19,1951 declared its intention to make a Town Planning Scheme under sub-sec. (1) of Sec. 9 of Bombay Town Planning Act, 1915, in respect of the area of land shown in plan no. 40 marked and verged blue dated July 12, 1951. By this notification the corporation invited objections or suggestions from any person likely to be affected by the scheme with respect to the declaration. One month's time was given to enable persons likely to be affected to file their objections before the Municipal Commissioner. Subsequent to that notification, the Government of Bombay by resolution of March 9,1953 sanctioned making of the Town Planning Scheme to be called the Town Planning Scheme Ahmedabad No. 16 in respect of the area of land shown in blue verge on the Plan No. 40 dated July 12, 1951, which was sent to the Government and which was open to the inspection of the public during of fice hours of the Corporation.

> In this resolution it was also pointed out by the Government that no objections or suggestions to the making of the said scheme have been received by the Government from any person likely to be affected by the said scheme. The Government in exercise of its powers conferred by sub-sec. (6) of Sec. 9 of the Act was pleased to sanction the making of such scheme subject to the condition that the lands situated within the red line verge on the said plan should be excluded from the said scheme. The draft scheme,

was notified on December 2, 1954 by the Ahmedabad Municipal Corporation and it recited that the draft Town Planning Scheme, Ahmedabad No. 16 was prepared and published for inspection. In this publication too, the Municipal Commissioner invited objections to the draft scheme from any person affected by such scheme, for consideration of the local authority. The draft scheme was approved by the Government of Bombay by its resolution of November 8, 1956 and the arbitrator was appointed by notification of February 20, 1957. Finally, the Government of Gujarat, the successor Government to the Government of Bombay, published the notification dated June 10, 1970 under the Bombay Town Planning Act, 1954 (hereinafter referred to as 'the new Act'). The Government of Gujarat, in exercise of the powers conferred by Sec. 51 of the new Act, sanctioned the final scheme subject to the modifications enumerated in the schedule appended thereto. The scheme was directed to be kept open for inspection by the public at the of fice of the municipal corporation for the City of Ahmedabad during of fice hours on all working days. The Government also fixed the first day of September 1970 as the date on which all the liabilities created by the scheme shall take effect and the final scheme shall come into force. As a result of the publication of the final scheme by the Government, the corporation informed the Saraspur Mills, the owner of the premises, Bearing Municipal Census No. 365/9 to handover possession of the same. That led to the Saraspur Mills Limited writing to the petitioner, its tenant, informing him of the notice issued by the Municipal Corporation and requiring him to vacate the premises so as to enable the Municipal Corporation to take possession. It is this letter of the owner of the premises that led to the filing of this writ petition by the petitioner.

[3] The petitioner challenged the final scheme published by the Government on several grounds including the one that Sec. 54 of the new Act is unconstitutional and ultra vires articles 14 and 19(1)(f) of the constitution. This challenge has since been given up by the petitioner in view of the decisions of the Supreme Court upholding the constitutional validity of the new Act and also in view of the presidential order suspending a citizen's right to move the court for enforcement of the rights under articles 14, 19 and 21. The challenge is now confined only to the petitioner's right to an individual notice under sub-rule (3) of rule 21 of the rules framed under the new Act. In support of the stand taken up by the petitioner, Mr. K S. Nanavati appearing for the petitioner, invited our attention

to the two earlier decisions of this court referred to above and also to the relevant provisions of the Act and the rules. Before we refer to the above two decisions relied upon by the learned Counsel, we propose to read the relevant provisions of the new Act and the Rules to ascertain the scheme and object of the Act.

[4] "Scheme" has been defined to include a plan relating to a Town Planning Scheme. "Development Plan" is defined to mean a plan for the development or redevelopment or improvement of the entire area within the jurisdiction of a local authority prepared under Sec. 3. "Local authority" is a Municipal Corporation constituted under the Bombay Provincial Municipal Corporations Act., 1949, or a municipality constituted or deemed to be constituted under the Gujarat Municipalities Act, 1973. "Land" is defined to include benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. "Reconstituted plot" means a plot which is in any way altered by the making of a town planning scheme. Another definition which requires to be noticed is "owner", which subject to context includes any person for the time being receiving or entitled to receive, whether on his own account or as agent, trustee, guardian, manager or receiver for another person or for any religious or charitable purpose, the rents or profits of the property in connection with which it is used. Then chapter II deals with "Development Plan". Chapter III provides for making of Town Planning Scheme. Sec. 18, to the extent relevant for our purpose, provides-

> "18. Subject to the provisions of this Act, or any other law for the time being in force,-
>
> (1) a local authority may make one or more Town Planning Schemes for the area within its jurisdiction or any part thereof, regard being had to the proposals in the final development plan, if any:
>
> (2) such Town Planning Scheme may make provisions for any of the following matters :
>
> (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, schools, markets, green belts and dairies, transport facilities and public purposes of all kinds."

Under the final scheme published, the premises occupied by the petitioner as tenant are reserved for laying a garden. Chapter IV deals with declaration of intention to make a scheme and making of a draft scheme. Under Sec. 21, a Town Planning Scheme may be made in accordance with the provisions of the Act in respect of any land which is likely to be used for building purposes, or already built upon. Secs. 22 and 23 are two of the important provisions in this chapter. They read-

"22. (1) A local authority having jurisdiction over any such land as is referred to

in Sec. 21 may by resolution declare its intention to make a town planning scheme in

respect of the whole or any part of such land.

(2) Within twenty-one days from the date of such declaration (hereinafter referred to as the declaration of intention to make a scheme), the local authority shall publish it in the prescribed manner and shall despatch a copy thereof to the State Government.

(3) The local authority shall send a plan showing the area which it proposes to include in the Town Planning Scheme to the State Government.

(4) A copy of the plan shall be open to the inspection of the public at all reasonable hours at the head of fice of the local authority.

21. (1) Within 12 months from the date of the declaration of intention to make a scheme the local authority shall make in consultation with the consulting surveyor a draft scheme for the area in respect of which the declaration has

been made and publish the same in the prescribed manner :

Provided that on application by the local authority in that behalf, the State Government may from time to time, by a notification in the of ficial Gazette, extend the aforesaid period by such period as may be specified not exceeding six months in all.

(2) If the draft scheme is not made and published by the local authority within the period specified in sub-Sec. (1) or within the period so extended under that sub-sec, the State Government or an of ficer authorised by the State Government in this behalf may make and publish in the prescribed manner a draft scheme for the area in respect of which the declaration of intention to make a scheme has been made by the local authority within a further period of nine months from the date of the expiry of the extended period.

(3) If such publication is not made by the State Government within the further period specified in sub-Sec. (2), the declaration of intention to make such scheme shall lapse, and until a period of three years has elapsed from the date of such declaration it shall not be competent to the local authority to declare its intention to make any town planning scheme for the same area or for any part of it."

Sec. 24 empowers the State Government to require local authority to make scheme. Sec. 25 details various particulars that the draft scheme should contain. Sec. 26 deals with reconstituted plot. Under this section, in the draft scheme the size and shape of every reconstituted plot shall be determined, so far as may be, to render it suitable for building purposes and where the plot is already built upon, to ensure that the building as far as possible complies with the provisions of the scheme as regards open spaces. This section also provides for mentioning certain proposals. One of the important features of Sec. 26 is that it enables any owner dispossessed of land to get another plot allotted in lieu of that. It also provides for the transfer of ownership of a plot from one person to another. Sec. 27 entities, within on? Month from the date of publication of the draft scheme, any person affected by such scheme, to communicate in writing to the local authority any

objection relating to such scheme and it is obligatory upon the local authority to consider such objection before it submits the draft scheme to the State Government. Section 28 empowers the State Government to sanction the draft scheme. Sec. 31 says that within one month from the date on which the sanction of the State Government to the draft scheme is published in the of ficial Gazette, the State Government shall appoint a Town Planning of ficer, with sufficient establishment whose duties shall be as thereinafter provided. Sec. 32 prescribes the duties of Town Planning of ficer.

Sec. 32 may be quoted in extenso :-

"32. (1) In accordance with the prescribed procedure the Town Planning of ficer shall,-(i) after notice given by him in the prescribed manner, define and demarcate the areas allotted to, or reserved, for a public purpose or purpose of the local authority and the reconstituted plots ;

(ii) after notice given by him in the prescribed manner, determine, in the case in which a reconstituted plot is to be allotted to persons in ownership in common, the shares of such persons ;

(iii) fix the difference between the total of values of the original plots and the total of the values of the plots included in the final scheme, in accordance with the provisions contained in clause (f) of sub-sec. 1 of Sec. 64 ;

(iv) determine whether the areas used, allotted or reserved for a public purpose or purpose of the local authority are beneficial wholly or partly to the owners or residents within the area of the scheme ;

(v) estimate the portion of the sums payable as compensation on each plot

used, allotted or reserved for a public purpose or purpose of the local au

thority which is beneficial partly to the owners or residents within the

area of the scheme and partly to the general public, which shall be in

eluded in the costs of the scheme ;

(vi) calculate the contribution to be levied on each plot used, allotted or re served for a public purpose or purpose of the local authority which is benefi cial partly to the owners or residents within the area of the scheme and partly to the general public ;

(vii) determine the amount of exemption, if any, from the payment of the contribution that may be granted in respect of plots exclusively occupied for the religious or charitable purposes ;

(viii) estimate the increment to accrue in respect of each plot included in the final scheme in accordance with the provisions contained in Sec. 65 ;

(ix) calculate the proportion in which the increment of the plots included in the final scheme shall be liable to contribution to the costs of the scheme in accordance with the provisions contained in Sec. 66 ;.

(x) calculate the contribution to be levied on each plot included in the final scheme ;

(xi) determine the amount to be deducted from, or added to, as the case may be, the contribution leviable from a person in accordance with the provi sions contained in Sec. 67 ;

(xii) provide 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 origi nal plot , in accordance with the provisions contained in Sec. 68 ;

(xiii) estimate in reference to claims made before him, after the notice given by him in the prescribed manner, the compensation to be paid to the owner of any property or right injuriously affected by the making of a town-planning scheme in accordance with the provisions contained in Sec. 69 ;

(xiv) draw in the prescribed form the final scheme in accordance with the draft scheme;

Provided that-

(a) he may make variation from the draft scheme;

(b) any variation estimated by him to involve an increase of 10 per centum in the costs of the scheme as is described in Sec. 64 or rupees one lakh, whichever is lower, shall require the sanction of the State Government;

Provided further that the Town Planning of ficer shall make no substantial variation without the consent of the local authority and without hearing any objections which may be raised by the owners concerned.

(2) if there is any difference of opinion between the Town Planning of ficer and local authority whether variation made by the Town Planning of ficer is substantial or not, the matter shall be referred by the local authority to the State Government whose decision shall be final and conclusive.

(3} the Town Planning of ficer appointed for any draft scheme shall decide all matters referred to in sub-Sec. (1) within a period of twelve months from the date of his appointment ;

Provided that the State Government may from trme to time by order in writing d the said period by such further period as may be specified in the order, and any such order extending the period may he ixiade so as to have retrospective effect."

Under Sec. 33, except in matters arising out of clauses (v), (vi), (viii), (ix), (x) and (xiii) of sub-sec. (1) of Sec. 32, every decision of the Town Planning of fice shall be final and conclusive and binding on all persons. Sec. 34 provides for an appeal by an aggrieved party to the appellate authority. Another important section which requires to be quoted is Sec. 51. That section reads...

"51. (1) the State Government may, within a period of three months from the date of receipt of the final scheme under Sec. 43 from the Town Planning of ficer, by notification in the of ficial Gazette, sanction the scheme or refuse to give such sanction, provided that in sanctioning the scheme the State Government may make such modifications as may in its opinion be necessary for the purposes of correcting an error, irregularity or informality.

(2) if the State Government sanctions such scheme it shall state the notification-(a) the place at which the final scheme is vept open to inspection by the public ; (c) a date (which shall not be earlier than one month after the date of the publication

of the notification) on which all the liabilities created by the scheme shall take effect and the final scheme shall come into force : provided that the State Government may from time to time postpone such date, by notification in the of ficial Gazette, by such period not exceeding three months at a time, as it thinks fit.

(3) on and after the date fixed in such notification a Town Planning Scheme shall have effected as if it were enacted in this Act."

Sec. 52 enables the State Government to withdraw a scheme before the final scheme is forwarded by the Town Planning of ficer to the State Government, provided a majority of the owners in the area make such a request for the withdrawal of the scheme. The State Government, on such representation by majority of the owners, may make an inquiry and direct

that the scheme shall be withdrawn. Sec. 53 deals with the consequences of the publication of the final scheme :-

"53. On the day on which the final scheme comes into force,-

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

(b) all rights in the original plots which have been re-constituted shall deter mine and the reconstituted plots shall become subject to the rights settled by the Town Planning of ficer."

Sec. 54 empowers the local authority to evict summarily, on and after the day on which the scheme comes into force any person continuing to occupy any land which he is not entitled to occupy under the final scheme. Sec. 55 provides the procedure for the eviction of persons in occupation after the final scheme comes into force. The State Government is empowered under Sec. 56 to vary scheme on ground of error, irregularity or informality. That could be done on the local authority bringing to the notice of the Government the defects in the scheme. Sec. 57 empowers the State Government, notwithstanding anything contained in Sec. 56, to vary or revoke a Town Planning Scheme by a subsequent scheme made, published and sanctioned in accordance with the Act. Sec. 58 provides for compensation when final scheme is varied or revoked. Sec. 68 deals with transfer of right from original to reconstituted plot or extinction of such right. Sec. 69 provides for compensation to owners of any property or right which is injuriously affected by the making of a town planning scheme provided he makes a claim before the town planning of ficer within the prescribed time. By Sec. 90 the Bombay Town Planning Act, 1915, is repealed. Notwithstanding the repeal, any declaration of intention to make a scheme, any application made to the State Government for sanction of the making of the scheme, any draft scheme published by a local authority, any sanction given by the State Government to the draft scheme and other matters enumerated therein are all saved. The above provisions outline the Broad Scheme of the Act.

[5] Rules have been framed under the Act and the rules provide for publication of declaration under Sec. 4, rule 3 enables a local authority by a resolution to declare its intention to prepare a development plan for the entire area within its jurisdiction. A map of the area shall accompany the declaration. Within fifteen days of the date of such declaration it shall despatch a copy of such declaration together with a copy of such map to the State Government for publication in the of ficial gazette. It shall also publish the declaration by means of an advertisement in one or more newspapers published in the regional language and circulating within jurisdiction of the local authority and by posting copies of the advertisement at the head of fice of the local authority and at other prominent places in the area proposed to be included in the development plan. Rule 4 provides for publication of development plan. Rule 12 provides for publication of declaration under Sec. 22. This rule says-

> "12. Publication of declaration under Sec. 22 : (1) a local authority shall publish in the of ficial Gazette a declaration of its intention to make a Town Planning Scheme under Sec. 22 and shall also publish the same by means of an advertisement in one or more newspapers published in the regional language and circulating within the jurisdiction of the local authority. The local authority shall cause copies of such advertisement to be posted in prominent places in or near the area included in the scheme and at the head of fice of the local authority.
>
> (2) every advertisement published under sub-rule (1) shall contain the resolution of the local authority in respect of the declaration under Sec. 22 and shall announce that a copy of the plan of the area proposed to be included in the Town Planning Scheme and the surrounding lands is kept open to the inspection of the public at the head of fice of the local authority during of fice hours."

The relevant rule is Rule 21 and the rule to the extent material for purpose of our discussion is as under-

> "21. Procedure to be followed by Town Planning of ficer : (1) the Town Planning of ficer shall give notice of 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 right which is injuriously affected by the making of the town planning scheme shall be entitled under Sec. 69 to make a claim before him. Such notice 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 of fice of the Town Planning of ficer.

(2) The Town Planning of ficer 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."

The old sub-rule (3) and the new sub-rule (i) substituted on May 13, 1974 may be read in juxtaposition-

Old sub-rule (3) New sub-rule (3)

Special Notice of At Least Three Clear Days Shall Be Served Upon The Persons Interested In Any Plot Or In Any Particular Comprised In The Scheme, Before The Town Planning of ficer Proceeds To Deal In Detail With The Portion of The Scheme Relating Thereto. Such Special Notice Shall Be Given In The Cases Mentioned In Clauses (I), (Ii) And (Xm) of Sub-Sec. (1) of Sec. 32 And In Any Other Cases Where Any Persons Have Not Been Sufficiently Informed That Any Matter Affecting Them Is To Be Considered. The Town Planning of ficer Shall Before Proceeding To Deal With The Matters Specified In Clauses (I), (Ii) And (Xih) of Sub-Sec. (I) of Sec. 32 Publish A Notice In The of ficial Gazette And In One Or More Newspapers Circulating Within The Jurisdiction of The Local Authority. Such Notice Shall Specify The Matters Which Are Proposed To Be Dealt With By The Town Planning of ficer And State That All Persons Who Are Affected By Any of The Matters Specified In The Notice Shall Communicate In Writing Their Objections To The Town Planning of ficer Within A Period of Fifteen Days From The Publication of The Notice In The of ficial Gazette. Such Notice Shall Also Be Posted At The of fice of The Town Planning of ficer And of The

Local Authority And The Substance of Such Notice Shall Be Posted At Convenient Places In The Said Locality "

The old sub-rule (3) has been invoked by Mr. K. S. Nanavati in aid of his challenge to the final notification published by the Government.

[6] Sub-rule (4) reads-

"(4) the Town Planning of ficer 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."

Sub-rule (9) of Rule 21 reads :-

"(9) the Town Planning of ficer shall publish the final scheme drawn up by him by a notification in the of ficial Gazette and by means of an advertisement in the local newspapers announcing that the final scheme shall be open for the inspection of the public during of fice hours at his of fice and communicate forth-with the decisions taken by him in respect of each plot to the owner or person interested, by the issue of the requisite extract from the final scheme. The Town Planning of ficer shall also inform the president of the board of appeal about the publication of the final scheme."

Rule 27 runs as follows:-

"27. Procedure for eviction under Sec. 54 :-(l) For eviction under Sec. 54, the local authority shall follow the following procedure, namely :-

(a) the local authority shall in the first instance serve a notice upon the person to be evicted requiring him, within such reasonable time as may be specified in the notice, to vacate the land.

(b) if the person to be evicted fails to comply with the requirement of the notice the local authority shall depute any of ficer or servant to remove him.

(c) if the person to be evicted resists or obstructs the of ficer or servant, deputed under clause (b) or if he re-occupies the land after eviction, the local authority shall prosecute him under sec 188 of the Indian Penal Code"

Rule 30 runs as follows:-

"30. Time limit for claiming compensation :-the time within which the owner of any property or right which is injuriously affected by the making of a town planning scheme may make a claim under Sec. 69 shall be three months from the date fixed in the notice given under sub-rule (1) of Rule 21 or the date of hearing of his case before the Town Planning of ficer, whichever is later."

That in substance is what is required to be done under the rules before a scheme finally emerges.

[7] The contentions of Mr. K. S. Nanavati are these:-

(1) The petitioner is a tenant and a person interested in the land and also affected by the scheme. Rule 21 enjoins upon the Town Planning of ficer to issue a notice to all persons whose rights in or over the land are affected and no such notice as contemplated under old sub-rule (3) was served upon the petitioner. According to him the requirements of sub-rule (3) are mandatory in respect of matters pertaining to clauses (i), (ii) and (xiii) of Sec. 32 and when there is a breach of the mandatory requirements, the final scheme sanctioned by the Government to the extent it relates to the petitioner is null and void and Sec. 51 (3) cannot save such a scheme.

(2) Another argument of his stemming from the main argument is that even if there is no variation to the draft scheme published, the Town Planning of ficer is bound to give individual notices under sub-rule (3) (old) to the

persons affected and the failure to do so vitiates the scheme so as to render it null and void.

[8] On the other hand it was contended by Mr. J. R. Nanavati, learned assistant Government pleader appearing on behalf of the state and Mr. S. B. Vakil appearing for respondents Nos. 2 to 4, that Sec. 51(3) which gave effect to the finally sanctioned scheme as if enacted in the Act made it an Act of the legislature so as to make it immune from challenge on the ground of procedural defects which did not amount to exceeding the limits of jurisdiction under the Act to frame a Town Planning Scheme under the Act. It is also contended by them that a distinction between a mere irregularity and nullity should be borne in mind and an irregularity in procedure does not render the scheme a nullity. Therefore, the main question that falls for consideration is as to the effect of Sec. 51 (3) in respect of a final scheme sanctioned by the Government in the context of the requirements of old sub-rule (3) of Rule 21.

[9] The Act has been enacted to ensure that Town Planning Schemes are made in proper manner and their execution is made effective and for that a local authority is empowered to prepare a development scheme for the entire area or a part within its jurisdiction. For proper framing of schemes and implementing them, the individual rights are made subordinate to the wider social interests of the society and civic amenities. The individual interests are not allowed to outweigh and prevail over the wider social interests so as to thwart or torpedo salutary social schemes of Town Planning for the benefit of the public as a whole. Schemes such as the one with which we are concerned ought not to be allowed to suffer and individual interests have to be subordinated so as to subserve public good as they are to be expeditiously implemented in accordance with the true legislative intention of the Act. An elaborate procedure is prescribed under the Act and the rules to achieve the desired objective.

[10] In the context of the scheme of the Act and the rules, let us first examine the correctness of the view expressed in the two cases reported in (1970) 11 G. L. R. 993 and (1970) 11 G. L. R. 1035. One of the two questions which came up for consideration in Kamhikprasad v. Ahmedabad Municipal Corporation (supra) was whether the decision of the Town Planning of ficer to lay out a new road in a particular final plot and to reconstitute final plots is invalid and ineffective since it was in contravention of the second proviso to Sec. 32 sub-sec. (1) or, at any rate, in breach of rule 21 clause (4) of the rules. Precisely the same question is raised by Mr. K. S. Nanavati here. Dealing with the question raised, Bhagwati C. J. As he then was, in paragraph 5 observed-

"What variation can be regarded as substantial for the purpose of attracting the applicability of the second proviso is not capable of precise definition nor is it possible to lay down any mechanical formula for the purpose of determining what is a substantial variation. Whether a particular variation is substantial or not must ultimately depend on the nature of the variation in its relation to the draft scheme and it must be determined with reference to facts of each case. Here there is no material before us on the basis of which we can say that the variation made by the second respondent was a substantial variation in the context of the draft scheme."

The learned Chief Justice then dealing with clause (4) of Rule 21 observed-

"The rule enacted in clause (4) of Rule 21 is a salutary rule intended to safeguard the property rights of citizens who are affected by the making of the town planning scheme. The reason of the rule obviously is that if property rights of any person are going to be affected, he must have sufficient opportunity of stating his views so that he can bring before the Town Planning of ficer any material facts and draw his attention to relevant aspects of the question. This provision is in line with Sec. 27 and Sec. 56 sub-sec. (5) and merely carries forward the idea embodied in these two sections by introducing it also at the stage when the Town Planning of ficer examines the scheme in the discharge of his functions under Sec. 32 and the construction we are placing upon it also accords with Rule 21 clause (5). Moreover, this view which we are taking is also fair and just...we are, therefore, of the view that before reaching the decision to lay out a new road in final plot no. 189 and reconstituting final plots nos. 189-A and 189-B, the second respondent was bound to give to the first petitioner sufficient opportunity of stating his views and since that was admittedly not done in the present case, the decision of the second respondent must be held to be invalid as being in contravention of the mandatory requirement of Rule 21 clause (4)."

[11] To the same effect is the other decision rendered by the same Division Bench, (see Mohanlal Jesingbhai v. P. J. Patel, (1970) 11 G. L. R 1035). While in the earlier case a

grievance was made by an owner affected by the scheme, in the latter case the complaint was by a tenant the words "persons interested" and "persons affected" were construed in the latter case the learned Judges construing the expressions, opined that-

> "The words 'persons interested' and 'persons affected' are not used by the rulemaking authority in Rule 21 clauses (3) and (4) to denote owner of the land but are used in their plain natural sense to take in all persons, besides owners who are interested or affected by any particular of the scheme. The object of Rule 21 clause (4) clearly is that all persons who are affected by any particular of the scheme must have opportunity of stating their views and making their representation before a decision is taken by the town planning of ficer affecting them. A tenant of the land to be acquired is a person affected within the meaning of clause (4) of Rule 21."

[12] We may straightway point out that in the two cases referred to above, the scope of the applicability of Sec. 51(3) of the Act was not raised and sub-rule (3) of Rule 21 was not construed in the context of Sec. 51(3) with the result that the learned Judges did not consider the effect of Sec. 51(3) to a scheme which received the final sanction of the Government. They were only concerned with the question as to whether old sub-rule (3) of Rule 21 which provided for giving individual notices to the persons affected was mandatory so as to vitiate a scheme. They did not also examine the question whether failure to give a hearing to individuals concerned in any manner whittles down the minimum principles of natural justice embodied in Rule 21 (3) in view of the procedure prescribed in sub-rule (1) of Rule 21. In other words, the learned Judges did not consider whether the scheme finally sanctioned by the Government could be open to attack because of noncompliance in respect of every mandatory requirement or defect, whether essential or non-essential in procedure. The specific case of Mr. J. R. Nanavati, learned Assistant Government Pleader, is that the scheme finally sanctioned by the Government would be open to attack only if there is non-compliance with the minimum essential requirements of the Act and it is not every omission or defect in the procedure that vitiates the final scheme sanctioned by the Government.

[13] In support of the proposition, the learned assistant Government pleader invited our attention to the decision of the house of lords in Minister of Health v. The King (On the Prosecution of Yaffe), (1931) A. C. 494. That was a case where the corporation of liverpool submitted to the Minister of Health for confirmation a document under the common seal purporting to be an improvement scheme under Sec. 35 of the housing

Act, 1925, in respect of an unhealthy area within the city. The first part of this document, after defining the area proposed to be dealt with, by clause 5, empowered the corporation in general terms to make and widen and stop up or deviate any street in the area, and directed them to appropriate other parts of the land to the erection of dwelling houses for the working classes, and provided that any lands not required for these purposes might be disposed of as the corporation might think fit. The second part contained estimates of the cost of acquiring the land and of the lay-out, and stated that there were no surplus lands. The Minister, after holding a public local inquiry, made an order modifying the scheme by providing inter alia in lieu of clause 5, that the whole of the lands in the area should, subject to the provision of any necessary streets and approaches, be used for the purposes of rehousing, and confirming the scheme as so modified. The order of the Minister was challenged by owners of two houses, which were proposed to be acquired compulsorily under the scheme. Viscount dunedin endorsed the opinion expressed by Herschell L. C. In Institute of Patent Agents v. Lockwood, (1894) A. C. 347 at p. 360, who said :-

> "No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment, in that case, probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it."

After quoting the above passage, viscount denuding summed up the position thus :-

> "What that comes to is this: the confirmation makes the scheme speak as if it was contained in an Act of parliament, but the Act of parliament in which it is contained is the Act which provides for framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it. It would be otherwise if the scheme had been, per se, embodied in a subsequent Act for then the maxim to be applied would have been 'posteriori

derogant prioribus'. But as it is, if one can find that the scheme is inconsistent with the provision of the Act which authorizes the scheme, the scheme will be bad, and that only can be gone into by way of proceedings in certiorari."

Lord Thankerton concurring with the majority, expressed his view in these words :-

"I am therefore of opinion that the court has jurisdiction in the present case to consider and decide whether the statutory formalities have been complied with and whether the scheme contains the minimum statutory essentials. On these questions I have had the advantage of considering the opinion delivered by my noble and learned friend Lord Tomlin and I concur in its reasoning arid conclusions."

[14] The Supreme Court referred to the ratio of the above two cases in Chief Inspector of Mines v. K. C. Thapar, A. I. R. 1961 S. C. 838 and observed :-

"The true position appears to be that the rules and regulations do not lose their characters as rules and regulations, even though they are to be of the same effect as if contained in the Act. They continue to be rules subordinate to the Act, and, though for certain purposes, including the purpose of construction, they are to be treated as if contained in the Act, their true nature as subordinate rule is not lost."

Therefore, so far as the validity of such legislative measure is concerned, as laid down in Yaffe's case the validity can be gone into even in writ jurisdiction only to the limited extent whether there is any transgression of jurisdiction of the authorities concerned and whether the scheme as finally emerged is totally inconsistent with the Act. It is only the fundamental breaches, that is, where minimum statutory essentials are not complied with, which result in a total lack of jurisdiction and not other procedural errors of defects that would render a scheme, which had become a legislative measure and a part of the Act, liable to attack or challenge in a court on the ground that it is null and void. It is significant that in yaffe 's case the law lords refused to invalidate an

improvement scheme on the score of procedural defects because such defects were curable.

[15] It is, however, contended by Mr. K. S. Nanavati that Rule 21 (3) and (4) were mandatory though they related to procedure and any defect in procedure which was mandatory vitiates the ultimate scheme sanctioned by the Government. This takes us to the question whether sub-rule (3) as it stood before the present sub-rule (3) was substituted, was mandatory or directory. Even assuming sub-rule (3) as it stood was mandatory, the question would still remain whether the defect is curable or will nullify the validity of the final scheme sanctioned by the Government. Sec. 32 sub-section (1) lays down that the town planning of ficer shall follow the procedure prescribed. The procedure prescribed is laid down in Rule 21. Sub-rule (1) of Rule 21 lays down the procedure with regard to the commencement of the duties of the Town Planning of ficer. Sub-rule (3) prescribes the procedure to be followed in matters specified in clauses (i), (ii) and (xiii) of sub-Sec. (1) of Sec. 32. It is not in dispute that the procedure as prescribed in sub-rule (1) has been followed and there is no controversy regarding what has been done by the town planning of ficer in accordance with the requirements of sub-rule (1). Sub-rule (1) only speaks of a general notice to owners of any property or right which is injuriously affected by the making of the town planning scheme. The requirement of the rule is that the notice shall be advertised in one or more newspapers published in the regional language and circulating within the jurisdiction of the local authority. The Town Planning of ficer has also to post the notice in prominent place at or near the area comprised in the scheme and his of fice. This rule does not contemplate any sort of individual notice to the persons interested or persons to be affected of the property or any right in or over the property. It is only when he complies with the requirements of Rule 21 (1) by causing such publication as is specified therein, that he can proceed to take further steps in formulation of a draft town planning scheme. The requirement under sub-rule (1) of Rule 21 is an essential requirement and the requirement is mandatory for the Town Planning of ficer has to define or demarcate the areas allotted or reserved for a public purpose or purpose of the local authority in the reconstituted plots, (see Sec. 32 sub-sec. (1)). The next step to be taken by him is stated in clause (ii) of sub-sec. (1) of sec. 32. After giving notice in the manner provided in Rule 21 (1), he proceeds to determine, the allotment of reconstituted plots and also determines the shares of the owners. He cannot take up the question of reconstitution or demarcate the areas as required by Sec. 32(1) (i) unless he causes publication in the manner provided in clause (1) of Rule 21. It is a general notice intended to give notice to

every owner and every person who has some kind of right or other which right is injuriously affected. What Mr. K. S nanavati contends is that after following the procedure laid down in sub-rule (1) of Rule 21, the town planning of ficer has to give individual notices under old sub-rule (3) to all persons affected. Old sub-rule (3), no doubt, prescribed service of notice of at least three clear days upon the person interested in any plot or in any particular comprised in the scheme relating thereto. It is true that this provision, that is, sub-rule (3) as it stood then, was mandatory but the question is, whether the non-observance of that rule or non-compliance with that rule had the effect of nullifying or invalidating the scheme which eventually received the final sanction of the Government. Such an individual notice could always be waived by a person.

[16] Subba Rao, J., as he then was, in Dhirendra Nath v. Sudhir Chandra. A. I. R. 1964 S. C 1300 laid down the test to determine what is an irregularity and what is a nullity. In the words of the Learned Judge-

> "The safest rule to determine what is an irregularity and what is nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity, a waiver is an intentional relinquishment of a known right but obviously an objection to jurisdiction cannot be waived for consent cannot give a Court jurisdiction where there is none. Where such jurisdiction is not wanting a directory provision can be waived. But a mandatory provision can only be waived if it is not conceived in the public interest but in the interest of the party that waives it."

> In that case the learned judge approved what Mookerjee, J., said in Ashutosh Sikdar v. Bebari Lal Kirtania, I. L. R. 35 Cal. 61 p. 72 and Justice Coleridge said in Holmes v. Russell, (1841) 9 Dowl. 487. Mookerjee, J., in Ashutosh Sikdar's case observed-

> ".....No hard and fast line can be drawn between a nullity and an irregularity ; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated."

Justice Coleridge in Holmes v. Russell, put it very clearly :-

"It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection, if he can waive it, it amounts, to an irregularity, if he cannot, it is a nullity."

It is thus clear that whether breach of a mandatory provision is an irregularity or nullity depends upon the facts of each case and no hard and fast line can be drawn between a nullity and an irregularity.

[17] Mr. K. S. Nanavati, however, invited our attention to East India Co. v. of ficial Liquidator, Raj RatnaMills, (1970) 11 G.L.R. 457. In that case, Bhagwati C. J., as he then was of this Court, after referring to the opinion of Justice Coleridge observed-

"Now this test, as pointed out by the Supreme Court itself, is merely a workable test and it would not he correct to regard it is an infallible test applicable in, all circumstances. This test cannot be invoked for dispatching the overwhelming weight of judicial authority which has consistently taken the view that breach of audi alteram partem renders the decision a nullity. Besides, audi alteram partem does not require that the Court or Tribunal must give to the person an opportunity to be heard even if he does not want it and is prepared, to waive it. The principle of waiver ought to be implied as part and parcel of audi alteram partem rule. Where there is waiver on the part of the person concerned, there is really no breach of audi alteram partem. It is only where the person concerned has not waived observance of audi alteram partem that it can be said that non-observance constitutes breach of the rule rendering the decision a nullity,"

The learned Chief Justice later proceeded to observe :-

"A nullity may be capable of waiver : it would be, where the rule violated is one laid down in the interest of the parties but not, where it is laid down in the interest of public policy. The circumstance that breach of audi alteram

partem is capable of being waived cannot therefore deflect us from the view we are taking. To hold that breach of audi alteram partem is a mere irregularity like any other defect in procedure, rendering an order or decision merely voidable by the court in a properly constituted proceeding would be to ignore the great importance and sanctity which is attached to this principle. Such an attempt to pull down this vital and basic principle from the high pedestal which several generations 'of English Judges have assigned to it cannot meet with our approval and we must refuse to give our assent to it."

The learned Chief Justice in the East India Company's case was not considering a development scheme like the one with which we are now concerned. That was a case where direction was given to the liquidator to sell property under Section 457(1) of the companies Act. No such direction could be given unless summons for directions was taken out by him and notice of the summons was given to the petitioning creditor as required by Rule 139 of the Companies (Court) Rules 1959. Because of the power conferred by Sec. 457 it was observed that:-

"...The Court has no power to give such directions unless the of ficial liquidator takes out a summons for directions, notice of the summons is given to the petitioning creditor and if the petitioning creditor appears, he is heard on the summons. The giving of notice of the summons for directions to the petitioning creditor and avoiding him an opportunity to be heard are matters of substance and not mere matters of form;"

It is in that view that the learned Chief Justice held that there was breach of the principle of audi alteram partem. The provision of giving notice of summons for directions to the petitioning creditor so as to afford him an opportunity of being heard was in public interest.

[18] In the present case, however, it was open to a person affected to waive individual special notice specified in sub-rule (3), which was only as an additional safeguard for the individual concerned. Therefore, that could never constitute the minimum essential of the scheme or such a basic requirement that its noncompliance would have any nullifying consequence.

[19] Here we are concerned with a development scheme which had become final after it received the sanction or assent of the Government and became a part and parcel of the Act itself. It should not be forgotten that the town planning of ficer strictly complied with the requirements of sub-rule (1) of Rule 21 as that constituted an essential requirement before the publication of the draft scheme. That publication had to be made under sub-rule (1) of Rule 21 in public interest. It is for that reason that publication in one or more newspapers published in the regional language and circulating within the jurisdiction of the local authority is prescribed. There is a further requirement of posting the notice in prominent places at or near the area comprised in the scheme and also at the of fice of the Town Planning of ficer. The underlying object in causing such wide publicity is to see that every owner of any property or right which is injuriously affected may make representation or raise objections before the Town Planning of ficer. The public notice contemplated under sub-rule (3) is only at the stage of the draft scheme publication. The persons affected or persons interested have already been notified by the publication made in accordance with the requirements of sub-rule (1) of Rule 21 individual notices were contemplated under the old sub-rule (3) for the reason that at the stage of draft scheme, the Town Planning of ficer would have come to know about persons affected or persons interested persons interested or persons affected are entitled to put in their claims under Sec. 69 for compensation. It is for the reason that claims would have to be put in by individuals in response to the publication made in accordance with Rule 21(1) that the provision for special notice under sub-rule (3) (Old) was contemplated. It cannot, therefore, be said that failure to serve a special notice upon persons interested or persons affected constitutes an essential element or factor which would nullify a scheme finally approved by the Government or render it void. So we have to distinguish a minimum essential element or factor or feature from the others. The mere fact of failure on the part of the town planning of ficer to comply with such other comparatively non-essential requirements cannot render his decision as one rendered without jurisdiction lacking in jurisdiction. Whether the variations effected by the publication of the draft scheme are of material consequence or essential in nature would depend upon the facts of each case and they have to be resolved before the scheme becomes law or becomes part of the Act itself. Admittedly the petitioner had not challenged the reconstitution or adjustment of the boundaries at any stage before the scheme was finally approved or sanctioned by the Government.

[20] The provisions of Rule 21(1) lay down the minimum essentials for protecting public interest after the town planning of ficer commences his work. That sub-rule is introduced

in accordance with the principles of audi alter am par tern. Special individual notices under old sub-rule (3) cannot, therefore, be regarded as an essential minimum safeguard as in the case of sub-rule (1) so as to have the consequence of nullifying the final scheme.

[21] The whole scheme of these four relevant clauses in Sec. 32(l)(i), (ii), (xii) and (xiii) which alone are relied upon by the tenants in this context shows that the legislature has given a right of appeal to the board only qua Sec. 32(l)(xiii) and in other cases the decision of the Town Planning of ficer is made final. Even if Sec. 32(l)(xiii) is read with Sec. 69 and Rule 30, it is clear that right of compensation of person injuriously affected is governed by three months' limitation from the date specified in the general notice under Rule 21(i) and so, that alone would be the minimum essential as per the principles of natural justice.

[22] The tenant had only limited rights specified in clauses (i), (ii) and (xiii) of Sec. 32(1). Therefore, looking at the limited nature of the tenant's rights in the process of reconstitution of plots, it cannot be said that failure to serve a special notice under old sub-rule (3) of Rule 21 would nullify the final scheme. For grievance, if any, the tenant should have moved the authorities at the stage of the finalisation of the draft scheme and not thereafter.

[23] That apart, the Town Planning of ficer is injuncted under the second proviso to Sec. 32(1) from making any substantial variation without the consent of the local authority and without hearing any objections which may be raised by the owners concerned. No doubt Bhagwati C. J., in (1970) 11 G.L.R. 933 harmonised Sec. 32(l)(i), (ii) and (xiii) which mention the words "after notice given by the town planning of ficer in the prescribed manner" and the second proviso where only a substantial variation required a hearing of objections, holding that for any variation such individual notice was mandatory. But the question still remains as to whether it could have per force nullifying consequences when the legislature in the second proviso makes it clear that only substantial variations would necessitate hearing of such objections. Further it is to be noticed that even after the scheme becomes a part of the Act under Sec. 51 (3) remedies are provided for variations or revocation in Secs. 56 and 57 by the Act. Therefore, in the light of the entire scheme of the Act and the rules prescribing procedure, the right to individual notice under old sub-rule (3) cannot be held to be a minimum essential requirement touching the jurisdiction of the Town Planning of ficer so as to nullify the final scheme in spite of the protective legislative device in Sec. 51(3).

[24] The language of new sub-rule (3) of Rule 21 does not require any special notice to be issued. It only enjoins that the Town Planning of ficer shall publish a notice in the of ficial Gazette in respect of matters specified in clauses (i), (ii) and (xiii) of sub-sec. (1) of Sec. 32. The town planning of ficer is also required under this sub-rule to publish in one or more newspapers circulating within the jurisdiction of the local authority a notice specifying the matters which are proposed to be dealt with by him. The notice must also specify that all persons who are affected by any of the matters specified in the notice shall communicate in writing their objections to the Town Planning of ficer within a period of fifteen days from the publication of the notice in the of ficial Gazette. Wide publicity is given to the notice by posting it at the of fice of the town planning of ficer and of the local authority. The substance of the notice is also required to be posted at convenient places in the said locality. The substituted rule has done away with the requirement of service of personal notice which was contemplated in the old rule.

[25] The question again arises whether this substituted sub-rule is mandatory or directory. In this connection it is contended by Mr. J. R. Nanavati and Mr. S. B. Vakil appearing for the respondents that the substituted sub-rule is only directory and breach of this sub-rule does not render the decision of the town planning of ficer invalid. The substituted sub-rule (3), like the old sub-rule, prescribes the procedure to be followed at the stage of the publication of the draft scheme. The object of this sub-rule is to notify all persons who are affected by the matters specified in the sub-rule to raise objections so that the town planning of ficer may consider the objections put in by them in writing. This is a second opportunity provided to owners of property or right in or over the property. The intention of the rule-making authority in specifying the mode of publication in the substituted sub-rule (3) is to afford to all persons affected another opportunity of making representations. It is for that reason that the notice specifies such of the matters which affect the interests of owners of property or rights and calls upon them to file their objections in writing. The rule-making authority is conscious of the fact that before a decision is rendered by the Town Planning of ficer, persons who are going to be affected must have their say if any; regarding the draft scheme.

[26] For understanding the true scope and effect of substituted sub-rule (3) of Rule 21, we must also read sub-rule (4) of Rule 21 which makes it obligatory on the part of the Town Planning of ficer to give all persons affected by any particular of the scheme sufficient opportunity of stating their views and not to give any decision till he has duly considered their representations, if any. A combined reading of sub-rules (3) and (4) makes it clear that such of the persons who communicate their objections in writing

under sub-rule (3) are to be afforded sufficient opportunity of stating their views and that no decision shall be given until the representations made by or objections raised by the persons affected are duly and properly considered by the Town Planning of ficer. It is only an additional opportunity prescribed to ensure a proper and fair hearing being given to the persons affected at the stage of the consideration of the draft scheme. Sub-rule (3) is only in the nature of an additional safeguard or additional opportunity of being heard to persons who are affected. Failure to comply with this obligation will not amount to breach of the doctrine of audi alterant partem so as to render the draft scheme a nullity.

[27] We must, therefore, hold that the two decisions referred to in 11 G. L. R. 993 and 1035 were wrongly decided only to the extent that a right to individual notice under Rule 21(3) and (4) is held to be so mandatory as to have a nullifying consequence. We hold that old sub-rule (3) and sub-rule (4) are merely additional procedural safeguards and not the essential minimum requirements. Violation of essential minimum procedural requirements would result in the authority exceeding or transgressing its jurisdictional limits which will render the scheme null and void. But a breach of additional procedural safeguards which are not in the nature of essential minimum requirements will not render the scheme null and void so as to entitle a party to challenge it under Article 226 or in any Court after it becomes a part of the Act under Sec. 51(3).

[28] For the above reasons, the petition fails and is accordingly dismissed with costs. Rule discharged. When the petitioner, without any right after this finally sanctioned scheme under which all his rights are extinguished, remains in occupation all these years only because of our stay order, we cannot further continue the relief any longer as requested by Mr. K. S. Nanavati and the interim relief is, therefore, forthwith vacated.

[29] Mr. K. S. Nanavati has made an oral application for leave to appeal to the Supreme Court under Article 133(1) of the Constitution. We are unable to certify that any substantial question of law of general importance which, in our opinion, requires to be decided by the Supreme Court, arises in this petition. Oral application rejected.

Petition dismissed : leave to appeal refused.