

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 13260 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE DR. JUSTICE A. P. THAKER

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

YOGESH SHIVLALBHAI THUMAR
 Versus
 STATE OF GUJARAT

Appearance:

MR N R DESAI(6504) for the Petitioner(s) No. 1,2,3
 MR SP MAJMUDAR(3456) for the Petitioner(s) No. 1,2,3
 MR. MEET THAKKAR, AGP for the Respondent(s) No. 1
 MR KAUSHAL D PANDYA(2905) for the Respondent(s) No. 2
 NOTICE SERVED for the Respondent(s) No. 1,3,4

CORAM:HONOURABLE DR. JUSTICE A. P. THAKER

Date : 21/10/2022

ORAL JUDGMENT

1. By way of present petition under Article 226 of the Constitution of India, the petitioners have prayed for the

following reliefs:

"A. YOUR LORDSHIPS may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions directing the respondent authorities to forthwith implement Town Planning Scheme No.15 (Fulpada), Surat, as far as construction of 12 mtrs road adjacent to Final Plot No.81 is concerned, and further be pleased to direct the respondent – Corporation not to make any variation, which reduces the width of the road from 12 mtrs. To 9 mtrs;

AA. YOUR LORDSHIPS may be please to issue writ of mandamus or a writ in nature of mandamus and/ or any other appropriate writ, order or directions quashing and setting aside then impugned notification dated 30.12.2021 passed by respondent no.1 as the same is contrary to the provisions of the Gujarat Town Planning and Urban Development Act and Rule.

B. YOUR LORDSHIPS may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions, quahing and setting aside the impugned resolution dated 28.02.2019 passed by the respondent No.3 (Surat Municipal Corporation) (at ANNEXURE – hereto) as well as resolution impugned resolution dated 04.06.2019 passed by respondent No.3 (Surat Municipal Corporation) (at ANNEXURE-E hereto);

C. During the pendency and final disposal of the present petition, YOUR LORDSHIPS may be pleased to direct the respondent authorities to forthwith implement Town Planning Scheme No.15 (Fulpada), Surat as far as construction of 12 mtrs. Road adjacent to Final Plot No.81 is concerned, and further be

pleased to direct the respondent- Corporation not to make any variation, which reduces the width of the road from 12 mtrs. to 9 mtrs;

D. Pass any such other and/ or further orders that may be thought just and proper in the facts and circumstances of the present case."

2. The Brief facts of the present case, as emerged from the petition, are as under:
 - 2.1 The preliminary Town Planning Scheme No. 15 (Fulpada), Surat was sanctioned by the State Government vide Notification dated 12.3.1992 and the said Scheme became final on 19.5.1998. It is contended that the said final Scheme is in existence as on the date of filing of the petition and though 22 years have been passed, it was not implemented qua Final Plot No.81. It is contended that the respondent- Surat Municipal Corporation has made a proposal for variance of the part of the scheme. According to the petitioners, in that context, a writ petition was preferred before this Court being Special Civil Application No. 15707/2004 , which came to be allowed by order dated 18.2.2005 wherein also the question was regarding reducing the width of the road.
 - 2.2 According to the petitioners, the competent authority is bound to implement the scheme and though the scheme

has become final, the petitioners were not given benefit of road of 12 mtrs adjoining to Final Plot No.81. It is alleged that in absolutely illegal manner, the intention for the third variation of the Draft Planning Scheme No.15 (Fulpada) was declared on 27.6.2018. It is contended that as per respondent Corporation the said was published in newspaper but since the petitioners were never comprehending that there would be third variation to the Town Planning Scheme, they missed the newspaper. It is contended that however, no notice was issued to the petitioners as required under Rule 17 of the Gujarat Town Planning & Urban Development Rules, 1979. It is contended that thereafter in absolutely illegal manner, a resolution was passed by the respondent No.3 i.e. Surat Municipal Corporation on 28.2.2019 with regard to declaring intention of the third variation. It is contended that without issuing personal notice to the petitioner, who are directly affected by the proposed third variation, the Corporation straight away passed Resolution on 4.6.2019 for sending the proposed Draft Town Planning Scheme to the State Government.

- 2.3 According to the petitioners, they are affected by such proposal of third variation of Town Planning Scheme because even the alignment of the road is being changed and the size of the road is also going to be reduced. It is contended that the alignment of the road is changed in

such a manner that the road of the houses of the petitioners would open straight on the road. It is contended that such proposal is even otherwise in violation of Section 45 of the Gujarat Town Planning & Urban Development Act, 1976. It is contended that such variation is also not in public interest and is not going to benefit anybody and there is no justification in reducing the size of the road and changing the alignment in such a manner that the houses of the petitioners would be affected.

- 2.4 It is also contended that as per the proposal of third variation, two gates of Kshama Society would also be required to be closed. It is contended that there are around 700 houses in the Kshama Society and if the two gates are closed, it would be impossible for the residents to have proper ingress and egress to their houses. According to the petitioners, the third variation is in fact made in order to benefit the members of the Final Final Plot No.40. It is also alleged that the proposed variation and the road adjacent to the houses of the petitioners is likely to be reduced to 7.5 mtrs.
- 2.5 It is contended that the objections have been raised by the petitioners, however nothing has been done. It is also contended that on 22.5.2020, the Secretary, Urban Housing and Urban Development Department wrote to the Chief Town Planner regarding the objections received from the

petitioners and to take appropriate action however, nothing has happened. It is contended that the impugned action is clearly in violation of the provisions of the Gujarat Town Planning & Urban Development Act, 1976. On all these grounds, the petitioners have preferred this petition.

- 2.6 It appears from the record that during the pendency of the petition, the Notification came to be passed by respondent No.1 on 30.12.2021 allowing the variation in the Draft Town Planning Scheme No.15 (Fulpada) (3rd varied) and, therefore by way of amendment the petitioners have also sought for relief of setting aside the same.
3. Affidavit-in reply on behalf of respondent No.3 has been filed at Page 78, wherein, while admitting the facts of the finality of the Scheme in 1998 as well as the fact of 12 mtrs road proposed in final Scheme, it has been contended that the Corporation has received various representations from the persons affected by 12 mtrs road and, therefore, to minimize the loss to the affected persons, the respondent had made proposal for variation to shift the T.P. Road in Society's internal road by changing the width to 12 mtrs road so that Final Plot No.40 and 52 also get approach of T.P. Road. It is also contended that the Town Planning Committee had passed Resolution No.10/18 dated 26.6.2018 and declared the intention as required under Section 41(2) of the Town Planning Act, 1976 to vary the

Town Planning Scheme No.15 (Fulpada) Surat under Section 71 of the Gujarat Town Planning & Urban Development Act, 1976. It is contended that pursuant to the proposal dated 21.2.2019 moved by the Commissioner, the Town Planning Committee passed Resolution No. 11/19 dated 28.2.2019 to publish a Draft Scheme (third) and authorized the Commissioner to initiate further process for variation in the Scheme. It is contended that pursuant to the said Resolution, public notice had been issued and objections were invited from affected persons, and thereafter Draft (3rd varied) Scheme has been prepared and submitted to the State Government for its sanction under Section 48(1) of the Act, 1976.

3.1 It is contended that the petitioners herein have made representation to the State Government against the proposed variation in the Town Planning Scheme. Pursuant to that, the Government has asked report from the Corporation, which has been forwarded by the Corporation vide communication dated 20.10.2020 and 18.6.2021. It is contended that as variation under Section 71 is as much as framing of new scheme, the authority requires to follow entire procedure right from Section 41 of the Act, 1976, and therefore, the petitioners will get ample opportunity to raise objections before the varied Scheme gets sanctioned under Section 65 of the Act. According to it, the present petition is filed at pre-mature stage and not maintainable. It

has prayed to dismiss the present petition.

4. The petitioners have filed affidavit-in-rejoinder wherein they have reiterated their contentions raised in the petition and have stated that the Corporation has not given any justification for not implementing the original final scheme. It is contended that the petition deserves to be allowed and as impugned action of the authority is not in consonance with the provisions of the law, same be set-aside and quashed.
5. Heard Mr. S.P. Majmudar, learned advocate for the petitioners, Mr. Meet Thakkar, learned AGP for the respondent State and Mr. K.D. Pandya, learned advocate for the respondent No.2 at length. Perused the material placed on record and the decisions cited at bar.
6. Mr. Majmudar, learned advocate for the petitioners, while referring to the contention raised in the petition and the documents produced with the matter, submitted that the final scheme was already sanctioned in the year 1998 wherein 12 mtrs width road was sanctioned. He has submitted that in the year 2004 also some variation was proposed whereupon a petition came to be filed before thei Court being Special Civil Application No. 15707/2004 wherein this Court on 18.2.2005 has allowed the petition and has specifically observed that Scheme No.15 has

become final and the respondents were restrained from reducing the width of the road from 12 mtrs to 9 mtrs, which is on western side of Plot No. 81. He has submitted that this order was of the year 2005 and thereafter, third variation has been initiated in the year 2018. He has submitted that for more than 13 years period, no proposal was made for variation of the road and, therefore, the observation of this Court in the said petition has become final and it is bounden duty of the authority to implement the original final scheme without any variation.

- 6.1 Mr. Majmudar, learned advocate has also submitted that the proposed action by the Corporation for third variation in the final scheme No.15 by which alignment of the road is changed and width of the road is going to be changed to 7.5 mtrs near the house of the petitioners, is nothing but colourable exercise of power. He has submitted that though the petitioners have raised various contention before the authority, their grievance has not been properly appreciated. He has also submitted that by reducing the width of the road, no public purpose is likely to be served. He has submitted that when this petition was pending, the Government has issued impugned Notification, which is also nothing but colourable exercise of power. He has submitted that by the impugned Notification Draft Scheme for variation is notified. He has submitted that the proposed variation in Draft Scheme is illegal and it is fraud on statute

and malice in law and in facts.

6.2 Mr. Majmudar has also submitted that earlier twice such variation was rejected by the State Government for the same road and now after 20 years, third time, the State Government has proposed variation in the road and that too without any benefit purpose or public purpose. He has submitted that the variation in reducing the width of the road would adversely affect the public at large. While referring to Section 70 and 71 of the Town Planning Act, Mr. Majmudar has submitted that before variation could be sanctioned, the conditions enumerated therein needs to be fulfilled. However, there is no such condition fulfilled in the present matter and the objections of the petitioners are not considered at all. He has submitted that pre-requisite application of Section 70 is lacking as in earlier Scheme, there was no error, or irregularity. He has also submitted that Section 70A would not apply in the present case and even Section 71 will not be applicable as no new Town Planning Scheme is declared.

6.3 Mr. Majmidar has also submitted that the initiation of variation itself was illegal and hence, the petitioners cannot be relegated to file objection under Section 70 of the T.P. Act to the government. He has also submitted that earlier order of this has not been implemented and there was no stay against the implementation of the original scheme. He

has prayed to allow the present petition and has relied upon the following decisions:

1. N. Nanalal Kiklawala v. State of Gujarat, reported in 2005 (12) SCC 649;
2. Municipal Corporation of Greater Bombay v. Advance Builders (India) Pvt. Limited, reported in (1971) 3 SCC 389;
3. Greater Noida Industrial Development Authority v. Devendra Kumar and Others, reported in (2011) 12 SCC 375;
7. Per contra, learned AGP Mr. Meet Thakkar for respondent No.1 State has submitted that now the government has sanctioned the variation in the Scheme. He has submitted that under Section 71 of the Act, ample power is vested in the government. He has submitted that in the present case, Section 70 of the Act would not be applicable. He has submitted that while issuing the Notification by the government, entire legal procedure has been followed. He has also submitted that since the government has sanctioned the proposed variation, the petitioners would have an opportunity for raising objections before appropriate competent authority. He has also submitted that as observed in the decision of the Coordinate Bench dated 10.12.2014 passed in Special Civil Application No. 7836/2014 in the case of Pathan Yusufkhan Sikandarkhan v.

State of Gujarat & 4, the petition may be disposed of being pre-mature. He has prayed to dismiss the petition at this stage.

8. Mr. Pandya, learned advocate for the Corporation – respondent No.2 has vehemently submitted that the petition itself is a pre-mature and the variation scheme has been proposed by the Corporation considering the various representations received by it and it is for the public interest. Mr. Pandya, while referring to the documentary evidence on record, has submitted that in view of the communication received from the State Government, the Corporation has already provided explanation by way of letter dated 20.10.2020 as well as 20.11.2020 and now the Government has sanctioned the Draft Scheme (varied) as per Page-77A and 77C. He has submitted that as per Section 71 of the T.P. Act, power is vested in the concerned authority for variation of the Scheme. He has submitted that such power is in addition to Section 70 of the Act. He has also submitted that since the State Government has already sanctioned the Draft Scheme, the petitioners will have an opportunity to submit their grievance before the Town Planning Officer and, therefore, the present Petition is premature. He has submitted that there is no question of any malafide on the part of the Corporation. He has stated that respondent No.2 is ready to implement the Scheme of variation. He has submitted to dismiss the petition.

8.1 Regarding the decision in case of N. Nanalal Kiklawala v. State of Gujarat (Supra), it is submitted by Mr. Pandya for the respondent No.2 that the facts of the said decision is different from the present one as in that case the Government has rejected the proposal, whereas, in the present case, variation is sanctioned by the Government. He has relied upon the following decisions for his submission to reject the petition.

- (1) Ahmedabad Municipal Corporation v. Ahmedabad Green Belt Khedut Mandal & Others, reported in (2014) 7 SCC 357;
- (2) M.M.P. Charitable Trust Thr' its Managing Trustee v. State of Gujarat , reported in (2005) 4 G.L.R 3340
- (3) Order dated 8.10.2008 passed in LPA No. 1090 / 2006 in the case of M.M.P. Charitable Trust through its Managing Trustee v. State of Gujarat Thr' Secretary & 2.

9. In rejoinder, Mr. Majmudar learned advocate for the petitioners has submitted that the various representations made by the petitioners are not taken into consideration by the authority and there is no reply given by the Authority to the petitioners. While referring to the Maps produced, he

has submitted that due to such variations, there would be hardship to the petitioners and other public at large. He has submitted that by the communication at page-93, by the Corporation, it has tried to over-reach the pending proceedings before this High Court. He has submitted that in the present case the initiation of variation itself is challenged and, therefore, the decisions relied upon by the other side would not be applicable in the present case. He has prayed to allow the present petition.

10. In the case of *N. Nanalal Kiklawala v. State of Gujarat* (Supra), it is observed in Paras- 7, 9 and 10 as under:

"7. 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:

"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 -

(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 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 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:

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 scheme or the final scheme, as the case may be, shall have effect as if it were enacted in this Act."

9. *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 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 planning scheme may be varied*

by a subsequent scheme which is made published and sanctioned in accordance with provisions of the Act.

10. *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 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 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 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 discretion."

11. In the case of Municipal Corporation of Greater Bombay v. Advance Builders (India) Pvt. Limited (Supra),

"12. It is clear, therefore, on a consideration of the provisions of the Bombay Town Planning Act, 1954 and especially the sections of that Act referred to above, that the Corporation is exclusively

entrusted with the duty of framing and implementation of the Planning Scheme and, to that end, has been invested with almost plenary powers. Since development and planning is primarily for the benefit of the public, the, Corporation is under an obligation to perform its duty in accordance with the provisions of the Act. It has, been long held that, where a statute imposes a duty the performance or non-performance of which is not a matter of discretion, a mandamus may be granted ordering that to be done which the statute requires to be done".

12. In the case of Greater Noida Industrial Development Authority v. Devendra Kumar and Others (Supra), it is observed in Paras-42 and 43 as under:

"42. One could appreciate that the Authority had proposed change of land use and modification of the Development Plan after it fould that no one had come forward to avail the offer of allotment of land for setting up industries or kanor chunk of land could not be used for industrial purpose despite sincere efforts made in that regard. But, the facts brought on record unmistakably show that the whole exercise of acquisition was designed to serve the interest of the builders and the veil of public purpose was under to mislead the people in believing that land was being acquired for a public purpose i.e. planned industrial development. This is the reason why even before the issue of notification under Section 6(1), the process for change of land use was initiated and completed with unusual haste and without waiting for the Government's approval to the modification of the Development Plan, the Authority offered and allotted the acquired land to the builders for construction of multi-storeyed complexed. This was nothing but a colourable

exercise of power by the State Government under the 1894 Act and in our considered view, the High Court did not commit any error by recording a conclusion to that effect.

43. *In this context, it will be useful to notice the observations made in State of Punjab v. Gurdial Singh. In that case, while pronouncing upon the correctness of the order passed by the Punjab and Haryana High Court which had quashed the acquisition of the respondents' land on the ground of mala fide exercise of power, this Court observed:*

"9. Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Bad faith which invalidates the exercise of power-sometimes called colourable exercise or fraud on power and often times overlaps motives, passions, and satisfactions-is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfillment of a legal object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested, the court calls it a colourable exercise and is undeceived by illusion.

In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated:

"I repeat that all power is a trust – that we are accountable for its exercise – that, from the people, and for the people, all springs, all must exist.

4. Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to effect some object which is beyond the purpose and intent of the power, whether this be malice-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power vitiates the acquisition or other official act".

13. In the case of M.M.P. Charitable Trust Thr' its Managing Trustee v. State of Gujarat (Supra), this Court has observed that,

" It is required to be noted that it is ultimately the Town Planning Authorities who are the best persons having technical knowledge to propose a road in the Scheme and it is not for the Court to decide as to whether the road should be proposed in the Town Planning Scheme. This Court is not sitting as an Appellate Authority against the said decision taken by the Apex body under the T.P. Act"

Further in Para-7, it has been observed that,

".....Even otherwise, considering proposal for variation, no hearing is required to be given. Under the Act, the powers

are vested in the Corporation to propose the Scheme and even the State Government also cannot, without the proposal from the Corporation and / or the Area Development Authority, vary a Scheme. When a conscious decision has, therefore, been taken by the Corporation not to vary the Scheme after considering so many other factors which are hereinabove stated, no direction can be granted directing the Corporation to go contrary to the Act....."

14. Having considered the submissions made on behalf of both the sides coupled with the material placed on record and the decisions cited at bar, it appears that there is no dispute regarding the fact that the initial Town Planning Scheme No.15 (Fulpada), Surat was finalised in the year 1998. It is admitted fact that thereafter variation proposed by the concerned Authority was challenged by way of filing SCA No. 15707/2004 wherein, this Court, on 18.2.2005, has observed in Paras-4 and 5 as under:

"4. Heard the learned advocates appearing on behalf of the parties. It is an admitted position that under the Town Planning Scheme No. 15 which has become final, there is a 12 metres road on the Western side of Final Plot No. 81. Earlier, Resolution No. 20/2003 of the Town Planning Committee, Surat Municipal Corporation and Resolution No. 43 dated 27.10.1993 came to be passed to send a proposal for variation of the scheme by reducing the width of the road in question from 12 metres to 9 metres. But the efforts on the part of the Surat Municipal Corporation for getting the scheme varied by getting the width of the road reduced from 12 metres to 9 metres came to be rejected by the

State Government.

5. Under the circumstances, the respondents are directed to implement the Town Planning Scheme No. 15 which has become final and they are restrained from reducing the width of the road from 12 metres to 9 metres which is on the Western side of Final Plot No. 81, unless it is varies under the T.P. Scheme by the State Government and subject to the ultimate decision that may be taken by the State Government on the proposal that may be sent by the Municipal Corporation pursuant to the Resolution No. 25/2004 dated 7.12.2004. It is ultimate for the State Government to consider the proposal that may be submitted by the Surat Municipal Corporation for variation of the scheme pursuant to the Resolution No. 25/2004 dated 7.12.2004 in accordance with law and on merits. However, until then, the respondents cannot reduce the width of the road from 12 metres to 9 metres".

15. Admittedly, order of this Court has not been challenged by either of the parties. Now, the concerned authority i.e. Municipal Corporation has proposed variation in the final Scheme and now Draft Scheme, same is approved by the Government vide Notification dated 3012.2021, which is based under Section 41(1) of the Town Planning Act, 1976 and same is at page-77 of the Paper-book. The Government has also directed the Town Planning Officer to take necessary action to incorporate the changes . Now, admittedly as per Section 41(1) power is vested under the Authority to resolve on declaration of intention to make Scheme. Thus, the proposed action of the Government

would be subject to the various provisions of the T.P. Act. Before finalisation of the said Scheme, the entire procedure as enumerated in the Town Planning Act as well as the Rule made thereunder has to be followed by the concerned Town Planning Officer and the Government. As per Section 48, power is vested in the Government to sanction Draft Scheme and on such Draft Scheme being sanctioned, Town Planning Officer has to be appointed by the Government and as per the provisions contained in Rule 51 and 52 of the Rules, 1979, it is the duty of the Town Planning Officer to give Notice regarding proposed Draft Scheme and has also to consider the objection, if any, raised by the person concerned. At this juncture, it is worthwhile to refer to Rule 26(4) of the Gujarat Town Planning & Urban Development Rules, 1979, which reads as under:

"26: Procedure to be followed by Town Planning Officer under Section 51 and under sub-section (1) of Section 52-

- (1) xxx xxx xxx
- (2) xxx xxx xxx
- (3) xxx xxx xxx
- (4) The Town Planning Officer shall give every person interested in any land 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.

15.1 Thus, this very provision contains the mechanism for redressal of the every person interested in any land affected by any particular of the Scheme. Admittedly, in the present case, the Town Planning Officer has been appointed by the Government for the proposed Draft Scheme (3rd Varied).

15.2 It is also worthwhile to refer to Section 70, 70A and 71 of the Town Planning Act, which read as under:

"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 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 of such variation in the prescribed 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.

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

(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.

(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

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

(c) refuse to make the variation.

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

Section 70-A. Variation of Town Planning Scheme for land allotted for public purpose.- 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 (jj) 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 if such changes were an amendment of regulations.

Section 71. Notwithstanding anything contained in Section 70, a town planning scheme at any time be varied by a subsequent scheme made, published and sanctioned in accordance with the provisions of this

Act.

16. It is the contention of the petitioner that since there was no error or irregularities or informalities in the previously final Scheme, the Government has no authority to pass the impugned Notification. It is pertinent to note that as per Section 71 of the Act, referred to hereinabove, which starts with "notwithstanding clause", clearly over-rides the provision of Section 70 including 70A. Since the power has been vested in the Government for making variation for amendment in any Scheme, this Court cannot sit as Appellate Authority over such administrative decision, as the petitioners have ample opportunities of placing their grievance before the Town Planning Officer and it is bounden duty of the Town Planning Officer to consider all those objections before finalizing Draft Scheme. Of course, the said Notification has been issued by the Government pending the present Petition. But that fact does not affect the power of the Government to make variation of Town Planning Scheme by another Scheme. At this juncture, it is pertinent to note that in the previous Special Civil Application No. 15707/2004, this Court has clearly made observation that it is ultimate for the State to consider the proposal that may be sanctioned by the Surat Municipal Corporation and until then, the Authority cannot reduce the width of road from 12 mtrs to 9 mtrs. Thus, this Court has also endorsed the proposition of law that the Government

has authority to make variation in the Town Planning Scheme.

17. Considering the overall facts and circumstances of the case, as there was no stay operating against the State regarding the proposal sent by the Municipal Corporation in variation with the Town Planning Scheme No.15, and therefore the exercise of power by the government under Section 41(1) of the Town Planning Act by issuing the impugned Notification dated 30.12.2021, cannot be said to be a power exercised in malice. The petitioners will have ample opportunities to raise their objections before the Town Planning Officer.
18. In view of the above, if the following order is passed, it would serve the ends of justice:
"The Town Planning Officer appointed by the Government by the impugned Notification dated 30.12.2021 is hereby directed to consider the objections/ representation, if already filed or which may be filed by the petitioner herein and others against the Draft Town Planning Scheme No. 15 (Fulpada) (Third varied), in accordance with law."

With this observation, the petition is hereby disposed of. Direct Service is permitted. No order as to costs.

(DR. A. P. THAKER, J)

SAJ GEORGE