

GUNASEKARAN

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v.

THE DIVISIONAL ENGINEER NATIONAL
HIGHWAYS & ORS.

(Civil Appeal No. 4946 of 2021)

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AUGUST 24, 2021

[K. M. JOSEPH AND S. RAVINDRA BHAT, JJ.]

Control of National Highways (Land and Traffic) Act, 2002 – s.26 – Tamil Nadu State Highway Act, 2001 – s.28(2)(iii) – National Highway Act, 1956 – s.5 – Show cause notices issued to the appellants alleging that they have encroached upon the property comprising in the ‘National Highway’ – Appellants filed writ petitions before the High Court contending that the notices were issued u/s. 28(2)(iii) of the State Act 2001 and the authorities did not have jurisdiction under the said Act – High Court did not find any error in the show cause notices and the writ petitions were dismissed – Before the Supreme Court, the State contended that a notification was issued u/s. 5 of the 1956 Act and roads where the said encroachments had taken place were covered by the notification – It was further contended that the State had issued show cause notices under the State Act 2001 and the officer who issued notices had jurisdiction – Held: A perusal of s.26 of the 2002 Act, bearing in mind the object with which the said law was enacted, there is no doubt, as regards power and procedure for the removal of any encroachment at a National highway – The appropriate Act is the Act of 2002 – The show cause notices which were issued u/s.28 of the State Act, 2001 issued under the provisions of the notification issued u/s.5 of the 1956 Act were unauthorised – The authority to action and the law where such action can be taken are all found located in 2002 Act – Therefore, the impugned show cause notices stand set aside – The impugned judgment is set aside and writ petitions are allowed.

Allowing the appeals, the Court

HELD: 1. A perusal of Section 26 of the Control of National Highways (Land and Traffic) Act, 2002, bearing in mind the object with which the said law was enacted, it leaves no manner of doubt,

- A as regards power and procedure for the removal of any encroachment at a National Highway. The appropriate law is the Act of 2002. In other words, the show cause notices which have been issued and impugned in these cases are admittedly issued seeking shelter under Section 5 of the National Highway Act, 1956. Power under Section 5 of the Act of 1956 does not extend as is made clear by the circumstances leading to the Act of 2002 and also the express provisions of the Act of 2002, in particular, Section 26 which provides for the procedure as also the power for causing the removal of encroachment in regard to National Highways. Section 14 of the Act of 2002 confer a right of appeal to the Tribunal. [Para 12][1159-C-E]

2. The upshot of the discussion is that the show cause notices which have, in fact, been issued by the officer clutching the power under Section 28 of the State Act, 2001, and which the State seeks to rest under the provisions of the notification issued

- D under Section 5 of the Act of 1956, are unauthorised. As correctly observed by the High Court, one of the grounds on which show cause notices can be interfered with is the lack of jurisdiction of the authority. This is one such case, where the authority to take action and the law under which such action can be taken are all found located in Act of 2002. To be more specific, the provision of section 26 provides the statutory charter for setting in motion the proceedings to get rid of encroachment over National Highways. [Para 13][1159-E-G]

3. The respondents do not have a case that the authority which has issued the impugned show cause notices in these cases

- F is the authority contemplated under Section 26. The authority contemplated in Section 26 is the Highway Authority constituted under Section 3 or any officer authorised by the Highway Authority. Since no claim is raised based on powers under Section 26, this Court is constrained to interfere in the matter. [Para 14][1159-H; 1160-A-B]

CIVIL APPELLATE JURISDICTION: Civil Appeal No.4946 of 2021.

From the Judgment and Order dated 29.04.2021 of the High Court of Judicature at Madras, Madurai Bench in WP MD No.19322 of 2020.

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GUNASEKARAN v. THE DIVISIONAL ENGINEER NATIONAL 1151
HIGHWAYS & ORS.

With

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Civil Appeal No. 4947, 4948 and 4949 of 2021.

B. Karunakaran, M. Saravanan, Jagdeesha Pandian, Anirudh J, G. Sanjay, Anoop Prakash Awasthi, S. Gowthaman, Advs. for the Appellant.

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V. Krishnamurthy, AAG, Dr. Joseph Aristotle S., Ms. Preeti Singh, Ms. Ripul Swati Kumari, Advs. for the Respondents.

The Judgment of the Court was delivered by

K. M. JOSEPH, J.

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Leave granted.

(1) Dr. Joseph Aristotle, learned counsel, appears and accepts notice on behalf of the respondents in Civil Appeal No. 4948 of 2021 (arising out of SLP (C) No. 12587 of 2021) and Civil Appeal No. 4949 of 2021 (arising out of SLP (C) No. 12947 of 2021).

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(2) The appellants in these cases filed writ petitions wherein they mounted challenge to the show cause notices issued by the respondents. The High Court, by the impugned judgment, did not interfere with the impugned notices noting that the appellants have not attributed any malafides and their writ petitions were accordingly, dismissed.

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However, in paragraph 15 it held as follows:

“15. However, it is open to the petitioners to offer their explanation to the impugned show cause notices to the respondents, within a period of ten days from the date of receipt of copy of this order and if any explanation is offered by the petitioners, the 2nd respondent shall consider the same and pass orders within a period of two weeks from the date of receipt of their explanation and thereafter, shall proceed further. No costs. Consequently, connected miscellaneous petitions are also dismissed.”

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The dispute lies essentially in a narrow compass. The allegation raised in the show cause notices is to the effect that the appellants have encroached upon the property comprising in the ‘National Highway’ in question. The case set up by the appellants before the High Court was that the notices have been issued, purporting to be under Section 28(2)(ii) of the Tamil Nadu State Highway Act, 2001 (hereinafter referred to as State Act, 2001, for brevity). It was contended that the said enactment

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- A had become void in view of the enactment of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. It was expatiated and is contended that the authority under the State Act, 2001, did not have the jurisdiction in the matter of dealing with the alleged encroachments over the National Highway.
- B The High Court notices that though the road actually belongs to the National Highways Department, the construction and maintenance of the road was under the supervision and control of the officer of the National Highways Wing, Highways Department, Government of Tamil Nadu. Noticing that since the subject matter of the road is under the maintenance and supervision of the National Highways Wing, Highways Department, Government of Tamil Nadu, the Court did not find any error in the impugned notices. It is further noted that there were 326 encroachers in the said Highway and such encroachments were identified after survey and notices were issued. It was further observed that the impugned notices are only show cause notices, which are normally not interfered with, except for lack of jurisdiction of the authority or if malafides is attributed. Accordingly the writ petitions were dismissed as noticed.

(3) We have heard Shri B. Karunakaran, learned counsel for the appellants, and Shri V. Krishnamurthy, learned Additional Advocate General for the State.

(4) In the appeals, the appellants persisted with the complaint that the notices have been issued under the State Act, 2001. It is the case of the appellants that the officer who issued the notices, could not possibly have seized at, power to purport to remove the alleged encroachment in the National Highway.

(5) The contention on the other hand of the State as articulated by Shri V. Krishnamurthy, learned Additional Advocate General for the State of Tamil Nadu, is that notification has been issued under Section 5 of the National Highways Act, 1956 (hereinafter referred to as 'Act of 1956' for brevity) and the roads in question where the encroachments have taken place are covered by the notification. It is the contention of the respondents that the officer, therefore, who has issued notices purportedly under the State Act, did have jurisdiction, as correctly found by the High Court.

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(6) If we notice the statutory framework of the Act of 1956, this A
Act provides in Section 5 as follows:

5. Responsibility for development and maintenance of national highways.—It shall be the responsibility of the Central Government to develop and maintain in proper repair all national highways; but the Central Government may, by notification in the Official Gazette, direct that any function in relation to the development or maintenance of any national highway shall, subject to such conditions, if any, as may be specified in the notification, also be exercisable by the Government of the State within which the national highway is situated or by any officer or authority subordinate to the Central Government or to the State Government. B
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There is undoubtedly a notification issued under Section 5 in this case. D

(7) If matters stood thus, perhaps it could be contended that the power comprised in the section has been delegated to the author of the notices in these cases and which extended to the removal of encroachments over the National Highway. We must further notice that in fact, Section 5 speaks about the responsibility of the Central Government to develop and maintain in proper repair the National Highways. It also provides, undoubtedly, that any function in relation to the development and maintenance of any National Highway shall, subject to such conditions, as may be specified in the notification, also be exercisable by the Government of the State within which the national highway is situated or by any officer or authority subordinate to the Central Government or to the State Government. It is in terms of this power that the notification relied upon by the respondent-State has been issued viz., it provides for the functions relating to development or maintenance of the National Highway. The legislature however, has not stood still. In the year 2002, new legislation was churned out viz., The Control of National Highways (Land and Traffic) Act, 2002 (hereinafter referred to as 'Act of 2002' for brevity). The following is the statement of objects and reasons: E
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"1. At present, the National Highways are governed by the National Highways Act, 1956 and the National Highways Authority of India Act, 1988. These enactments contain provisions for declaration of the National Highways and for the constitution of the National Highways Authority of India for the development, maintenance H

A and management of the National Highways and the matters connected therewith. However, these enactments do not give powers to the Central Government to prevent or remove encroachments on land under the National Highways/or to restrict access to them from the adjacent land, or to regulate traffic movement of any category of vehicles or animals on the National Highways. The provisions in the existing law and in the Code of Civil Procedure, 1908 have not proved effective in view of dilatory tactics adopted by the private parties to defeat the purposes of these Acts. In order to deal effectively with these problems, it is imperative to vest the Central Government with necessary powers through the Highway Administration.

2. National Highways are rapidly getting congested and choked by undesirable roadside developments and encroachments. In fact, encroachments make further widening of the existing roads in response to growing traffic, very difficult and costly, and often, impossible. The result is that the main traffic on the National Highways is subjected to a lot of hardship and there is widespread criticism about the deteriorating level of service.

3. The absence of legislation empowering the competent authority to remove encroachments on the National Highways has resulted in shops, hotels, tea stalls, repair shops, petrol pumps, weigh bridge, residences and commercial establishments extending their activities right on the National Highways land.

4. Highway authorities do not have either power to regulate traffic coming on the National Highways or to control the number of access roads joining the highways. All this leads to failure of roads and bridges caused by overloading, increased congestion, waste of fuel, reduced speed, high incidents of accidents, increased vehicle operating costs and unhealthy and unhygienic conditions. It has been also observed that highways are frequently dug up by utility organisations which put the traffic on highways in danger. The highway authorities have no adequate legal authority to prevent such nuisances.”

(8) Section 3 provides for the establishment of Highways Administration. It reads as follows:

3. Establishment of Highway Administrations.—(1) The Central Government shall, by notification in the Official Gazette,—

(a) establish, for the purposes of this Act, a body or authority consisting of one or more officers of the Central Government or the State Government to be known as Highway Administration to exercise powers and discharge functions conferred on it under this Act; and A

(b) define the limits of the Highway within which, or the length of Highway on which, a Highway Administration shall have jurisdiction: B

Provided that the Central Government may, in the notification issued under this sub-section or by any general or special order, impose any condition or limitation subject to which a Highway Administration shall exercise powers and discharge functions conferred on it under this Act. C

(2) The Central Government may establish one or more Highway Administrations for a State or Union territory or for a Highway under sub-section (1). D

(3) Subject to the provisions of this Act, the Highway Administration shall exercise powers and discharge functions conferred on it under this Act in such manner as may be prescribed.

(9) Section 4 provides for powers and functions of Highway Administration: E

4. Powers and functions of Highway Administration.—A Highway Administration shall exercise powers and discharge functions throughout its jurisdiction specified under this Act subject to such conditions or limitations as may be imposed by the notification issued under sub-section (1) of section 3 and by any general or special order made in this behalf by the Central Government. F

(10) Chapter III deals with prevention of unauthorised occupation of Highway land and under Section 23, the Highway land is deemed to be the property of the Central Government. G

Section 24 inter alia provides for prevention of occupation of any person of any Highway land or discharge of any material through drain on such land without obtaining prior permission, for such purpose in writing, of the Highway Administration or any officer authorised by such administration. H

A (11) Section 26 dealing with the removal of unauthorised occupation, reads as follows:

26. Removal of unauthorised occupation.—(1) Where the Highway Administration or the officer authorised by such Administration in this behalf is of the opinion that it is necessary in the interest of

B traffic safety or convenience to cancel any permit issued under sub-section (2) of section 24, it may, after recording the reasons in writing for doing so, cancel such permit and, thereupon, the person to whom the permission was granted shall, within the period specified by an order made by the Highway Administration or such officer restore the portion of the Highway specified in the permit in such condition as it was immediately before the issuing of such permit and deliver the possession of such portion to the Highway Administration and in case such person fails to deliver such possession within such period, he shall be deemed to be in unauthorised occupation of highway land for the purposes of this section and section 27.

(2) When, as a result of the periodical inspection of highway land or otherwise, the Highway Administration or the officer authorised by such Administration in this behalf is satisfied that any unauthorised occupation has taken place on highway land, the

E Highway Administration or the officer so authorised shall serve a notice in a prescribed form on the person causing or responsible for such unauthorised occupation requiring him to remove such unauthorised occupation and to restore such highway land in its original condition as before the unauthorised occupation within the period specified in the notice.

F (3) The notice under sub-section (2) shall specify therein the highway land in respect of which such notice is issued, the period within which the unauthorised occupation on such land is required to be removed, the place and time of hearing any representation, if any, which the person to whom the notice is addressed may

G make within the time specified in the notice and that failure to comply with such notice shall render the person specified in the notice liable to penalty, and summary eviction from the highway land in respect of which such notice is issued, under sub-section (6).

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(4) The service of the notice under sub-section (2) shall be made by delivering a copy thereof to the person to whom such notice is addressed or to his agent or other person on his behalf or by registered post addressed to the person to whom such notice is addressed and an acknowledgment purporting to be signed by such person or his agent or other person on his behalf or an endorsement by a postal employee that such person or his agent or such other person on his behalf has refused to take delivery may be deemed to be *prima facie* proof of service. A

(5) Where the service of the notice is not made in the manner provided under sub-section (4), the contents of the notice shall be advertised in a local newspaper for the knowledge of the person to whom the notice is addressed and such advertisement shall be deemed to be the service of such notice on such person. B

(6) Where the service of notice under sub-section (2) has been made under sub-section (4) or sub-section (5) and the unauthorised occupation on the highway land in respect of which such notice is served has not been removed within the time specified in the notice for such purpose and no reasonable cause has been shown before the Highway Administration or the officer authorised by such Administration in this behalf for not so removing unauthorised occupation, the Highway Administration or such officer, as the case may be, shall cause such unauthorised occupation to be removed at the expenses of the Central Government or the State Government, as the case may be, and impose penalty on the person to whom the notice is addressed which shall be five hundred rupees per square metre of the land so unauthorisedly occupied and where the penalty so imposed is less than the cost of such land, the penalty may be extended equal to such cost. C

(7) Notwithstanding anything contained in this section, the Highway Administration or the officer authorised by such Administration in this behalf shall have power without issuing any notice under this section to remove the unauthorised occupation on the highway land, if such unauthorised occupation is in the nature of— D

(a) exposing any goods or article— E

(i) in open air; or F

- A (ii) through temporary stall, kiosk, booth or any other shop of temporary nature,
- (b) construction or erection, whether temporary or permanent, or
- B (c) trespass or other unauthorised occupation which can be removed easily without use of any machine or other device,
- C and in removing such occupation, the Highway Administration or such officer may take assistance of the police, if necessary, to remove such occupation by use of the reasonable force necessary for such removal.
- D (8) Notwithstanding anything contained in this section, if the Highway Administration or the officer authorised by such Administration in this behalf is of the opinion that any unauthorised occupation on the highway land is of such a nature that the immediate removal of which is necessary in the interest of—
 - (a) the safety of traffic on the Highway; or
 - (b) the safety of any structure forming part of the Highway, and no notice can be served on the person responsible for such unauthorised occupation under this section without undue delay owing to his absence or for any other reason, the Highway Administration or the officer authorised by such Administration may make such construction including alteration of any construction as may be feasible at the prescribed cost necessary for the safety referred to in clause (a) or clause (b) or have such unauthorised occupation removed in the manner specified in sub-section (7).
- G (9) The Highway Administration or an officer authorised by such Administration in this behalf shall, for the purposes of this section or section 27, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:—
 - (a) summoning and enforcing the attendance of any person and examining him on oath;
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(b) requiring the discovery and production of documents; A
(c) issuing commissions for the examination of witnesses; and
(d) any other matter which may be prescribed,

and any proceeding before such Administration or officer shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860) and the Administration or the officer shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)."

(12) A perusal of Section 26, bearing in mind the object with which the said law was enacted, leaves us in no manner of doubt, as regards power and procedure for the removal of any encroachment at a National Highway. The appropriate law is the Act of 2002. In other words, the show cause notices which have been issued and impugned in these cases are admittedly issued seeking shelter under Section 5 of the Act of 1956. Power under Section 5 of the Act of 1956 does not extend as is made clear by the circumstances leading to the Act of 2002 and also the express provisions of the Act of 2002, in particular, Section 26 which provides for the procedure as also the power for causing the removal of encroachment in regard to National Highways. Section 14 of the Act of 2002 confer a right of appeal to the Tribunal.

(13) The upshot of the above discussion is that the show cause notices which have, in fact, been issued by the officer clutching the power under Section 28 of the State Act, 2001, and which the learned senior counsel for the State seeks to rest under the provisions of the notification issued under Section 5 of the Act of 1956, are unauthorised. As correctly observed by the High Court, one of the grounds on which show cause notices can be interfered with is the lack of jurisdiction of the authority. This is one such case, where the authority to take action and the law under which such action can be taken are all found located in Act of 2002. To be more specific, the provision of section 26 provides the statutory charter for setting in motion the proceedings to get rid of encroachment over National Highways.

(14) The respondents do not have a case before us that the authority which has issued the impugned show cause notices in these cases is the authority contemplated under Section 26. The authority contemplated in

A Section 26 is the Highway Authority constituted under Section 3 or any officer authorised by the Highway Authority.

Since no claim is raised based on powers under Section 26, we are constrained to interfere in the matter.

B Accordingly, the impugned judgment is set aside. The writ petitions are allowed. The impugned show cause notices will stand set aside. However, we make it crystal clear that this will be without prejudice to the competent authority under Section 26 to take appropriate action as advised in law.

C The appeals are allowed as above.
No orders as to costs.

Ankit Gyan

Appeals allowed.