

(2013) 10 GUJ CK 0010

In the Gujarat High Court

Case No : Special Civil Application No. 14885 of 2013

Chaudhari Visabhai Karmsibhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 24-10-2013

Acts Referred:

Citation : (2014) 1 GLH 698

Hon'ble Judges : C.L. Soni, J

Bench : Single Bench

Final Decision : Allowed

Judgement

C.L. Soni, J.—RULE. Learned Assistant Government Pleader Mr. Neeraj Ashar waives service of Rule for respondent Nos. 1 to 3. Though notice was served to the Market Committee-respondent No. 4, nobody appeared and since it is a formal party, Rule was not issued to it. With the consent of the learned Advocates for the parties, the petition was taken up for final disposal. In this petition filed under Article 226 of the Constitution of India, the petitioners, who are elected members of the Agricultural Produce Market Committee, Harij-respondent No. 4, have challenged the order dated 10.9.2013 passed by respondent No. 1-State of Gujarat through its Joint Secretary (Appeal), Agricultural and Co-operation Department, u/s 46 of the Agricultural Produce Markets Act, 1963 ("the Act" for short) removing the office bearers of the Market Committee-the petitioners and appointing the District Registrar, Patan as Administrator of the Market Committee.

2. The case of the petitioners is that the election of the Market Committee was held on 24.3.2011 and they were elected in such election for which a notification under Rule 27 of the Gujarat Agricultural Produce Markets Rules, 1965 ("the Rules" for short) was issued. It is alleged in the petition that one Shri Samirbhai Bhupendrabhai Thakkar lost in the said election and he as also one Shri Karmsibhai Mevabhai had preferred election petitions, being Appeal Nos. 110 of 2011 and 111 of 2011 and the said appeals were allowed and the election of the

petitioners was set aside. Such orders passed in the appeals were challenged by the petitioners before this Court and this Court set aside the orders passed in appeals by observing that the election of the returned candidates could not have been set aside without recording the reasons required for setting aside the election. The petitioners have further alleged that the State Authorities then initiated inquiry u/s 44 of the Act at the behest of said Samirbhai and the District Registrar without considering the stand of the Market Committee gave one sided report, based on which, the Director-respondent No. 2 sent proposal dated 16.8.2012 for initiating proceedings u/s 46 of the Act.

3. The petitioners have averred that show cause notice u/s 46 of the Act was issued to them, to which the petitioners clarified each and every grounds stated in the show cause notice. However, respondent No. 1 passed the impugned order on frivolous and baseless grounds.

4. The petition is opposed by affidavit-in-reply filed on behalf of respondent No. 1 stating that the petitioners being elected members of the Market Committee have miserably failed in protecting the financial interest of the Market Committee and thereby caused losses to the Market Committee and therefore, the impugned action taken vide order dated 10.9.2013 is just and proper.

5. I have heard learned Advocates for the parties.

6. Learned senior Advocate Mr. Mihir Joshi appearing with learned Advocate Mr. Dipen Desai for the petitioners submitted that the impugned order is not bonafide exercise of the powers u/s 46 of the Act. Mr. Joshi submitted that the allegations of the show cause notice which are taken as grounds for passing the impugned order do not satisfy the prerequisites to reach an opinion that the Market Committee was either not competent to perform or persistently make default in performing the duties imposed on it under the Act or abuses its power. Mr. Joshi submitted that the action of respondent No. 1 in resorting to proceedings u/s 46 of the Act is not independent but is under the political pressure at the instance of Shri Samirbhai who lost in general election of the Market Committee. Mr. Joshi submitted that the grounds stated in the impugned order are otherwise not germane to taking of action u/s 46 of the Act against the petitioners.

6.1. Learned senior Advocate Mr. Joshi submitted that the first ground as regards making of construction for parking facility without N.A. permission is not available for taking action u/s 46 of the Act because the Market Committee being local Authority was not required to take any permission from Collector to make construction for parking facility on the plot of the Market Committee.

6.2. Learned senior Advocate Mr. Joshi submitted that second ground about giving of advertisement for new construction providing for 11 days time instead of 15 days time could neither be termed as incompetency or abuse of the power of the Market Committee or in anyway could be said to be persistent default of the Market Committee and therefore, such could never have been made the

basis for invoking the drastic action u/s 46 of the Act.

6.3. Learned senior Advocate Mr. Joshi submitted that third ground about not giving wide publicity for inviting tenders and not placing on record the evidence of publishing the advertisement on the notice board of the Market Committee in presence of panchas/witnesses is far from truth inasmuch as there is no dispute that the advertisement was placed on the notice board of the committee and the advertisement was given in Jan Satta daily newspaper having circulation in the entire State of Gujarat and 1,56,945 copies of newspaper were sold containing the advertisement. Even out of the State of Gujarat, 358 copies were also sold. Mr. Joshi submitted that no person has made any grievance as regards the public notice for the advertisement. Mr. Joshi submitted that if there was any illegality in the process of tender, it was always open to any person to challenge it before any Court or even before the Director to take action in connection with the tender process. Mr. Joshi submitted that the fact that no complaint is made on the ground of less publicity of the tender, such could not be the basis for action u/s 46 of the Act.

6.4. As regards ground No. 4 about giving of contract at higher price, learned senior Advocate Mr. Joshi submitted that after wide publicity, when three tenders were received, the Committee accepted the lowest amongst three tenders of one Uday Construction Company and thereby the committee has taken due care to see that there may not be any financial loss to the Committee in giving public contract. Mr. Joshi submitted that if there was any illegality in giving of contract to Uday Construction, it was always open to the Director to take action but neither at the time of inquiry u/s 44 of the Act nor by any independent action, the Director questioned legality or otherwise of the action of the Market Committee in awarding the contract in favour of Uday Construction.

6.5. Learned senior Advocate Mr. Joshi submitted that in respect of making of construction for parking facility on the plot of the Market Committee or as regards the tender process, if the Director thought it fit not to issue any direction to the Market Committee pursuant to inquiry u/s 44 of the Act, it is not open to respondent No. 1 to initiate proceedings u/s 46 of the Act on the same grounds.

6.6. Learned senior Advocate Mr. Joshi submitted that none of the grounds for which the action is taken u/s 46 of the Act could be said to be either an act of incompetency of the Market Committee or an abuse of the powers of the Market Committee or a persistent default of the Market Committee and therefore, the respondent No. 1 was not justified to pass the impugned order. Mr. Joshi submitted that the action u/s 46 of the Act has divested the elected members of the Committee to function and such harsh action cannot be taken on solitary grounds, like constructing the parking facility without permission of the Collector or like not following the due process for inviting tender. He thus urged to allow the petition.

6.7. Learned senior Advocate Mr. Joshi has relied upon the following decisions in

support of his submissions:--

(1) In the case of Sharda Kailash Mittal v. State of M.P. and others reported in 2010(1) GLH 744,

(2) In the case of Tarlochan Dev Sharma Vs. State of Punjab and Others, ,

(3) In the case of State of M.P. and Others Vs. Sanjay Nagayach and Others, .

7. As against the above arguments, learned Assistant Government Pleader Mr. Neeraj Ashar appearing for respondent Nos. 1 to 3 submitted that the petitioners being elected members of the Market Committee were required to see that the tenders for the work contract were given to the lowest bidder. However, the petitioners failed to properly discharge their duties in awarding the tender to the bidder who is not the lowest one. Mr. Ashar has drawn the attention of the Court to the affidavit-in-reply wherein, it is stated that the tender is awarded to party who is not the lowest bidder and thereby the petitioners have caused financial loss to the Market Committee.

7.1. Learned Assistant Government Pleader Mr. Ashar submitted that the petitioners are also responsible to allow the construction of parking facility on the plot of the Market Committee without taking prior approval of the appropriate Authority and thereby have committed violation of the land laws. Mr. Ashar submitted that the above act of the petitioners in making the construction of the parking facility on the plot of the Market Committee was thus in abuse of their powers. Mr. Ashar submitted that the petitioners also failed to follow the guidelines issued by the State Government vide resolution dated 17.3.2007 by not giving 15 days clear time to the tenders for filling up the tenders. Mr. Ashar submitted that the advertisement gave only 11 days time to the tenderers and thus only 3 tenders could be received by Market Committee. It was therefore, the case of re-tendering so as to avoid causing financial loss to the Market Committee. Mr. Ashar submitted that the petitioners have also miserably failed to see that the advertisement for inviting tenders is given wide publication. Mr. Ashar submitted that the public notice given for such tender was given only in such a newspaper which had no wide publicity, which resulted into getting of only three tenders and out of three tenders, tender awarded to one of the parties was also at the higher price. Mr. Ashar submitted that such act of the petitioners caused financial loss to the Market Committee. Mr. Ashar submitted that for the above acts on the part of the petitioners, the respondent No. 1 has rightly taken action u/s 46 of the Act. He thus urged to dismiss the petition.

8. Having heard learned Advocates for the parties and having perused the record of the petition, it appears that after the petitioners succeeded before this Court in Special Civil Application Nos. 16244 of 2011 and 16245 of 2011, which were filed against the orders passed by the State Authorities in appeals filed by Shri Samirbhai Thakkar and Shri Karamsibhai Desai challenging the election of the petitioners, an inquiry u/s 44 of the Act against the Market Committee followed. Sub-Section (4) of Section 44 of the Act gives power to the Director to require

the Market Committee to do a thing or to abstain from doing a thing as a result of inquiry which the Director considers necessary for the purpose of the Act and to send a written reply to him within a reasonable time stating whether the requisition is complied and if not complied, state reason for non-compliance. However, it appears that the Director did not think it fit to send requisition to the Market Committee for doing anything as regards the work of construction of the parking facility or the tender process. The report of such inquiry was sent to the respondent No. 1, based on which the impugned action is taken.

9. It is stated in the impugned order at Annexure-A that the irregularities were found in the affairs of the Market Committee and the proposal was made for removal of the petitioners u/s 46 of the Act. By the impugned order, the petitioners are removed from their position as office bearers of the Market Committee in exercise of the powers u/s 46 of the Act on the ground that it is established that the Market Committee has committed irregularities as stated in the grounds of the order and thus, the present elected Committee has failed to perform its duties under the Act.

10. In the show cause notice at Annexure-H, it is stated that in the inquiry u/s 44 of the Act, it is found that the Market Committee has made illegal change in its parking zone and has acted in such a manner so as to cause financial loss and damage to the interest of the Market Committee.

11. Section 10 of the Act provides that the Market Committee shall be deemed to be a local Authority within the meaning of clause (26) of Section 3 of the Bombay General Clauses Act. The petitioners have placed on record copy of an order dated 9.5.2003 passed by the Collector, Banaskantha District under the provisions of the Gujarat Town Planning Act in the matter between Deesa Agricultural Produce Market Committee and Deesa Municipality, wherein the Collector has held that the Market Committee being local Authority is exempted from taking permission for construction on its own land. Therefore, for making construction for parking facility, no permission was required by the Market Committee or even no permission was required from the competent Authority. Even if the construction of parking facility amounted to change in the layout plan and if there was any breach in making such change for construction of parking facility, it was for the concerned Authority to take appropriate action or even for the Director to send requisition u/s 44 of the Act to abstain from making such construction but such ground of making construction for parking facility cannot be made the basis for taking harsh action u/s 46 of the Act. Similarly, for any alleged irregularities in the tender procedure, appropriate action could have been taken by the Director calling upon the Market Committee to take necessary action in this regard. Not only this but no person has made any complaint about not giving of wide publicity or about alleged illegal procedure followed by the Market Committee in the matter of tender for the work to be carried out for the Market Committee. There is no dispute about the fact that the party to whom the tender was awarded was the lowest tenderer. Therefore, it is not correct to say

that the tender was not awarded to the lowest bidder.

12. The petitioners have stated in the reply before the respondent No. 1 in response to the show cause notice that 1,56,945 copies of Jan Satta daily newspaper for tender publicity were sold in the State of Gujarat. This is not disputed. Thus, there appears to be no reason to term the publicity as insufficient publicity. Time of 11 days for submitting tender also could not be said to be insufficient. However, even if the same was taken as insufficient publicity or insufficient time for submitting tender, such could never be termed either as incompetence of the Market Committee or abuse of the powers of the Market Committee or even persistent default in performing its duties under the Act. Even otherwise, two alleged acts of the Market Committee, viz. change of parking facility and not properly following the tender process, could be said to be just solitary acts and can never be branded as either incompetence of the Market Committee in performing its duties or even said to be an abuse of power much less to say that it is in anyway default of the Market Committee leaving question of persisting such default for imagination. Therefore, it appears that the impugned order is passed for reasons not germane to taking of action u/s 46 of the Act. For the grounds stated in the impugned order, in no circumstances, harsh action u/s 46 of the Act was called for.

13. In the case of Sharda Kailash Mittal (supra), the Hon''ble Supreme Court in the context of the provisions of Madhya Pradesh Municipalities Act, 1961 has held and observed in para 17.1, 17.2 and 18 as under:-

17.1. In Paragraph 11 this Court observed as under:-

A singular or casual aberration or failure in exercise of power is not enough; a course of conduct or plurality of aberration or failure in exercise of power and that too involving, dishonesty of intention is...The legislature could not have intended the occupant of an elective office, seated by popular verdict, to be shown exit for a single innocuous action or error of decision.

17.2. The same consideration must be taken into account while interpreting Section 41-A of the Act. The President under the M.P. Municipalities Act, 1961 is a democratically elected officer, and the removal of such an officer is an extreme step which must be resorted to only in grave and exceptional circumstances.

18. For taking action u/s 41-A for removal of President, Vice-President or Chairman of any Committee, power is conferred on the State Government with no provision of any appeal. The action of removal casts a serious stigma on the personal and public life of the concerned office bearer and may result in his/her disqualification to hold such office for the next term. The exercise of power, therefore, has serious civil consequences on the status of an office bearer. There are no sufficient guidelines in the provisions of Section 41-A as to the manner in which the power has to be exercised, except that it requires that reasonable opportunity of hearing has to be afforded to the office bearer proceeded against. Keeping in view the nature of the power and the consequences that flows on its

exercise it has to be held that such power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for minor irregularities in discharge of duties by the holder of the elected post. The provision has to be construed in strict manner because the holder of office occupies it by election and he/she is deprived of the office by an executive order in which the electorate has no chance of participation.

14. In the case of Tarlochan Dev Sharma (supra), the Hon"ble Supreme Court has held and observed in para 7 and 11 as under:--

7. In a democracy governed by rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law. That a returned candidate must hold and enjoy the office and discharge the duties related therewith during the term specified by the relevant enactment is a valuable statutory right not only of the returned candidate but also of the constituency or the electoral college which he represents. Removal from such an office is a serious matter. It curtails the statutory term of the holder of the office. A stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held. Therefore, a case of availability of a ground squarely falling within S. 22 of the Act must be clearly made out. A President may be removed from office by the State Government, within the meaning of S. 22, on the ground of "abuse of his powers" (of President), inter alia. This is the phrase with which we are concerned in the present case.

11. The expression "abuse of powers" in the context and setting in which it has been used cannot mean use of power which may appear to be simply unreasonable or inappropriate. It implies a wilful abuse or an intentional wrong. An honest though erroneous exercise of power or an indecision is not an abuse of power. A decision, action or instruction may be inconvenient or unpalatable to the person affected but it would not be an abuse of power. It must be such an abuse of power which would render a Councillor unworthy of holding the office of President. Inasmuch as an abuse of power would entail adverse civil consequences, the expression has to be narrowly construed. Yet again, the expression employed in S. 22 is "abuse of his powers or habitual failure to perform his duties." The use of plural powers, and the setting of the expression in the framing of S. 22 is not without significance. It is suggestive of legislative intent. The phrase "abuse of powers" must take colour from the next following expression "or habitual failure to perform duties." A singular or casual aberration or failure in exercise of power is not enough; a course of conduct or plurality of aberration or failure in exercise of power and that too involving, dishonesty of intention is "abuse of powers" within the meaning of S. 22 of the Act. The legislature could not have intended the occupant of an elective office, seated by popular verdict, to be shown exit for a single innocuous action or error of decision.

15. In the case of Sanjay Nagayach (supra), Hon''ble Supreme Court has held and observed in para 36 and 37 as under:-

36. Statutory functionaries like Registrar/Joint Registrar of Cooperative Societies functioning under the respective Cooperative Act must be above suspicion and function independently without external pressure. When an Authority invested with the power purports to act on its own but in substance the power is exercised by external guidance or pressure, it would amount to non-exercise of power, statutorily vested. Large number of cases are coming up before this Court and the High Courts in the country challenging the orders of supersession and many of them are being passed by the statutory functionaries due to external influence ignoring the fact that they are ousting a democratically elected Board, the consequence of which is also grave because the members of the Board of Directors would also stand disqualified in standing for the succeeding election as well.

37. The Registrar/Joint Registrar, while exercising powers of supersession has to form an opinion and that opinion must be based on some objective criteria, which has nexus with the final decision. A statutory Authority shall not act with pre-conceived notion and shall not speak his masters'' voice, because the formation of opinion must be his own, not somebody else in power, to achieve some ulterior motive. There may be situations where the Registrar/Joint Registrar are expected to act in the best interest of the society and its members, but in such situations, they have to act bona fide and within the four corners of the Statute. In our view, the impugned order will not fall in that category.

In light of the above and for the reasons stated above, the petition is allowed. Impugned order/notification dated 10.9.2013 at Annexure-A is quashed and set aside. Rule is made absolute accordingly.