

(2016) 03 GUJ CK 0100

In the Gujarat High Court

Case No : Letters Patent Appeal No. 87 of 2011 in Special Civil Application No. 12524 of 2010

Cosmos Development Corporation

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 16-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 227
Gujarat Town Planning and Urban Development Act, 1976 — Section 17, Section 2, Section 2 (xvi), Section 2(xvi)(xviii), Section 40, Section 41, Section 42, Section 43, Section 44, Section 4

Citation : (2016) 03 GUJ CK 0100

Hon'ble Judges : Anant S. Dave and R.P. Dholaria, JJ.

Bench : Division Bench

Advocate : Percy Kavina, Sr. Advocate and Vimal M. Patel, Advocate, for the Appellant; Vacha Desai, AGP, for the Respondent

Final Decision : Dismissed

Judgement

Anant S. Dave, J.—1. This Letters Patent Appeal under Clause 15 arises out of the oral order dated 28th October, 2010 passed in Special Civil Application No. 12524 of 2010 by the learned Single Judge, whereby the prayer of the petitioner herein to issue a writ of mandamus or any other appropriate writ or order or direction to set aside the order dated 29.5.2010 passed by the respondent No. 2 upon his representation dated 21.12.2000 came to be rejected. The above representation was made by the petitioner to vary the Town Planning Scheme No. 54 (Isanpur South Extension) by dropping/removing reservation for Economically Weaker Section (EWS) in respect of Original Survey No. 609 situated at Village Isanpur, Taluka: Ahmedabad.

2. Certain facts recorded by learned Single Judge in para 2 of the judgment about executing an agreement to sale on 17.5.1980 by deceased-Mir Saheb Amirmiya Saiyed and supplementary agreement dated 8.2.1990 by legal heirs in favour of the petitioner for the land bearing Survey No. 609 of Village Isanpur,

Taluka/City Ahmedabad, admeasuring 14 Acres and 32 Gunthas, approximately 59899 sq. mtrs., leaving behind legal heirs are not in dispute. Even Civil Suits filed by the legal heirs and the parties inter-se before the Civil court having jurisdiction are also not in arena of any dispute.

3. So far as the grievance raised by the petitioner has genesis in the order dated 17.7.2009 passed in Special Civil Application No. 7248 of 2009, enabling the petitioner to move the authority in terms of requirement of provisions of Section 70 and 71 of the Gujarat Town Planning and Urban Development Act, 1976 (Town Planning Act for short). The petition came to be disposed of as withdrawn.

4. On 25.8.2009, the petitioner made a detailed representation with regard to variation of Town Planning Scheme No. 54 (Isanpur south Extension) under Section 70 of the Town Planning Act, in respect of land bearing Survey No. 609 situated at Village Isanpur, Taluka Ahmedabad, admeasuring 14 Acres and 32 Gunthas, approximately 59899 sq. mtrs. on the basis of grounds set out in the representation and further written submissions filed on 21.12.2009, whereby grounds for variation stated in representation came to be filed with certain additional grounds including powers and duty conferred upon the authorities under the Act, namely, Sections 46, 47, 65, the consequences following thereupon and Sections 70 and 71 of the Town Planning Act.

5. Above representation came to be rejected as per the order dispatched on 29.5.2010 by concerned Authority, wherein it is stated that the Town Planning Scheme No. 54 of the subject representation is sanctioned as a preliminary scheme by the State Government on 19.12.2003 and thus, Revenue Survey No. 609 has no significance with regard to ownership of Revenue Survey No. 609 Civil Suits were pending before the Civil Court and pursuant to Town Planning Scheme, question of ownerships of the land is not decided. The representation made by the petitioner with regard to any error, irregularity or illegality in the TP scheme is, therefore, not accepted.

5.1. It is also stated that thus, so far as the final plot No. 34 of the Town Planning Scheme is concerned, it was vested before the competent authority for the purpose of housing for economical weaker Section and no necessity to follow any provision under the Land Acquisition Act.

6. The above rejection was subject matter of challenge before the learned Single Judge, who after adverting to factual aspects in para Nos. 3,4 and 5, has observed:

"From the above narration of facts, I am of the view that the present petitioner is claiming right as one of the purchasers for which there are several settlements and for which several litigations are pending. The authority has acted on the basis of the revenue record and has passed an appropriate order. Counsel for the respondent has rightly pointed out that the petitioner is not in possession of the land in question nor any established right is shown by him before the Civil Court. The Court receiver is appointed.

Here, it is pertinent to note that several civil suits came to be filed by the petitioner as well as the children of the deceased claiming right of title and/or possession of the property in question. The petitioner-Company has also filed civil suit against the respondents before the competent Court for declaration and permanent injunction with respect to the property in question. The fact remains and it is also a matter of record that civil suits filed by different parties, viz. the petitioner as also the legal heirs of the deceased, are pending adjudication by the competent Civil Court.

In that view of the matter and in view of the order passed at Annexure "B", it will not be appropriate to variate the scheme. No case is made out by the petitioner. It is clarified that it will be open for the petitioner to move before the Civil Court to get appropriate orders against the original owner or appropriate direction to the receiver to make an application to the competent authority. The Special Civil Application stands disposed of accordingly. Notice discharged."

7. Mr. Percy Kavina, learned Senior advocate with Mr. Vimal Patel, learned advocate appearing for petitioner would contend that order passed by the learned Single Judge lacks reasoning and does not deal with contentions raised on facts as well as on law. It is submitted that the fact about pending civil litigation with regard to the disputes amongst legal heirs inter-se or with the parties may have some bearing on the subject matter, but fact about necessity to varying the Town Planning in exercise of powers under Sections 70 and 71 of the Town Planning Act, on merits was not dealt with and injustice emanated from the order of rejection of representation by the authority continued as such in the order passed by the learned Single Judge in exercise of powers under Article 226 of the Constitution of India.

8. Learned Senior counsel has taken this Court to the map/sketch at page 220 of the writ petition in support of his contention that initially two Revenue Survey Nos. 607 and 609 belonging to two different owners and Revenue Survey No. 607 was inhabited by residents by constructing houses and upon reconstitution of original plots of 109 of Survey No. 609, final plots 131 and 134 were reconstituted in respect of which final plot No. 134 was reserved for Economical Weaker Section of the Society for construction of houses.

9. It is further contended that if provisions of the Town Planning Act, 1976 specially Sections 40, 44, 45 and 46 of the Act, in the context of definition of Section 2 (xvi) "occupier" and (xviii) "owner" are perused the petitioner was entitled to receive notice at every stage namely, declaration of intention to make a scheme, and subsequent stages, though concerned authority was conscious about the fact that the original owner has expired and from time to time notice dated 26.2.1992, 10.5.1994, 12.9.1995 and 7.1.1999 were served upon legal heirs of the owner, societies and later on notice dated 7.9.2007 and 10.9.2007 upon the vendors and Court receivers, but at no point of time, the petitioner was given any notice.

10. At the cost of repetition, Mr. Percy Kavina, learned Senior counsel would contend that finality or sanction received by the preliminary scheme at the end of the State Government would not take away inherent right vested in favour of the petitioner by virtue of execution of agreement to sale and in case, if decree is passed in favour of the petitioner in the Civil Suit which is pending he would be deprived of benefits from out come of such judicial order. It is submitted that when representation was made by raising various contentions and grounds of facts as well as law, the authority is duty bound to consider the same in proper perspective and cryptic unreasoned reply received reflects non application of mind.

11. Mr. Percy Kavina, learned senior counsel has relied on decision in the case of Kartik Mohanbhai Patel v. State of Gujarat reported in , 2011 (4) GLR 3028, in respect of his argument that on the ground of preliminary scheme receiving sanction an aggrieved person cannot be non suited and further order passed by the authority on representation based on notes on the file containing no reason need to be interfered by the High Court in exercise of powers under Article 226 of the Constitution of India.

12. Per contra, Mr. Prashant Desai, learned senior counsel appearing for respondent Nos. 2 and 3 would contend that the record of the case before the authority while considering representation made by the petitioner for variation of the scheme as prayed for under the provisions of Sections 70 and 71 of the Town Planning Act, averments made in the writ petition under Article 227 of the Constitution of India before the learned Single Judge and decisions taken in this regard by the authority including that on the representation made by the petitioner and procedure followed at every stage of the Act, 1976, would reveal that neither illegality nor any irregularity is committed by the competent authority at any stage. Taking the Court to the scheme of the Act, 1976, specially to provisions of Section 40 of chapter (v), pertaining to Town Planning Scheme and making contents of a Town Planning Scheme, Section 42 making and publication of draft scheme, Section 43 and 44 about power of State Government to require appropriate authority to make a scheme and contents of drafting scheme, Section 45 reconstitution of plots and Section 46 disputed ownerships and objections to drafting scheme to be considered under Section 47 and 48, power of State Government to sanction drafting scheme and subsequently inserted provision under Section 48 (A) vesting land in appropriate authority which is akin to provisions of Sections 68 and 69 of the Gujarat Town Planning and Urban Development Act, 1976 and finally to Section 50 about appointment of Town Planning Officer, duty cast upon such Officer, namely, Rule 16 about publication of declaration under Section 41 read with Rule 17. Rule 18 of draft scheme and elaborate procedure to be followed by Town Planning Officer under Rule 26 while dealing with objection and forward the same to the Government that at no stage, any objection about clubbing of Revenue Survey Nos. 609 and 607 was raised by the petitioner.

13. It is submitted that in absence of any legal right accruing in favour of the petitioner, the very representation for varying scheme was out of the context of the scheme of the Act, 1976. It is submitted that procedure followed by the authority under the Act, 1976 of issuing notices to which reference is already made by the learned counsel for the petitioner, to all concerned, whose names were appearing in the revenue record or the authority could find out from other official record. From 1993 to 2000, various opportunities at different stages were given to those who were entitled to receive notices to which no objection was raised. In addition to above, it is submitted that when the authority concerned issued notice under provisions of the Act, 1976, at no stage any reply was received to notice by the affected parties. Even a public notice is issued in widely circulated vernacular newspaper and thereafter, also no objection was received. According to Mr. Prashant Desai, learned senior counsel for the respondents while dealing with the representation submitted by the petitioner pursuant to opportunity granted by the Court in the order dated 17.7.2009 passed in Special Civil Application No. 7248 of 2009, after recording contentions raised by the petitioner in representation and referring to provisions of Section 70 of the Act, 1976, reasons are assigned which include pending disputes about title, ownerships and even possession of the subject land. It is further submitted that in the above scenario, rejection of the representation of the petitioner was not only on the ground of pending civil disputes or litigation before appropriate civil suit but also other reasons or grounds contained therein.

14. Mr. Prashant Desai, learned senior counsel referred to decision in the case of Babulal Badriprasad Varma v. Surat Municipal Corporation and Ors. reported in , 2008 (3) GLH 137, in which, the apex Court in the context of contentions raised by aggrieved persons interested in keeping continuous possession over the property and/or part of amount of compensation held that such person has to lay his claim before the appropriate authority at appropriate stage and referring to law on "waiver" and reliance was placed on observations in para 31 of the above decision that in a dispute between the landlord and tenant, the State was not to decide the dispute. Thus, subject to the contentions that no public interest is involved, a right can be waived by the parties for whose benefit legislation is enacted.

15. With regard to the specific contentions raised by learned counsel for the petitioner based on Section 46 of the Act, 1976, it is submitted that inquiry is to be held by the authority only in case of disputed entries mutated in the revenue record if a specific grievance in this regard is raised by the aggrieved person, which is not the case here and accordingly it is submitted that in the facts and circumstances of the case Section 46 would not apply to the facts of the present case.

16. Further reliance is placed on the decision in the case of Kashiben Wd/o Pitamber Devchand and anr. v. State of Gujarat and anr. reported in , GLR 1989 (2) 1177, to contend that once a final scheme is prepared, it must be deemed to

be part of Act and that original owner loses all rights over the land and he is liable to be evicted and having no locus to even file a writ petition. Another decision relied in the case of N. Nanalal Kiklawala and anr. v. State of Gujarat reported in , AIR 2006 Supreme Court 1, in support of his submissions that statutory consequences would ordinarily follow and no stay can be granted when scheme received sanction in exercise of power under Section 65 of the Act. Thus, according to Mr. Prashant Desai, learned senior counsel appearing for the respondents in absence of any legal right of the petitioner to seek variation and fair and transparent procedure followed in exercise of statutory as well as executive power by the authority at every stage of preparing Town Planning scheme, in absence of merit, no interference is called for in this appeal filed by the petitioner-appellant.

17. Having heard learned counsel appearing for the parties and on perusal of record of the case including the order under challenge and provisions of the TP and UD Act, 1976 and Rules framed thereunder, indisputably, certain factual aspects with regard to the pending litigation of civil in nature before the competent Court between the legal heirs of the deceased-land owner inter-se and also with the petitioner-appellant and other parties are pending.

18. That on the strength of an agreement to sale dated 17.5.1980 between the deceased-Mir Saheb Amirmiya Saiyed and the petitioner and further supplementary agreement dated 8.2.1990 by legal heirs of the deceased-Mir Saheb Amirmiya Saiyed in favour of the petitioner confirming earlier agreement with regard to subject land, representation is made by the petitioner before the competent authority under the Act, 1976.

19. In the context as above reliance placed by Mr. Percy Kavina, learned Senior advocate appearing for the petitioner-appellant on various provisions of the Act are considered and reproduced herein below:

"Section-2: Definition.

In this Act, unless the context otherwise requires,-

(i) "agriculture" includes--

(a) horticulture;

(b) farming;

(c) raising of crops, fruits, vegetables, grass, fodder, trees or any other kind of cultivation;

(d) breeding and keeping live stock, including horses, donkeys, mules, pigs, fish, poultry and bees; and

(e) the use of land for any purpose which is ancillary to its cultivation or to any other agricultural purpose.

(xviii) "owner" in relation to any property, includes any person who is, for the

time being receiving or entitled to receive, whether on his own account or on account of or behalf of, or for the benefit of, any other person or as an agent, trustee, guardian, manager or receiver for any other person or for any religious or charitable institution, the rents or profits of the property; and also includes a mortgagee in possession thereof;

Section-40: Making and contents of a town planning scheme.

Section-41: Power of appropriate authority to resolve on declaration of intention to make scheme.

Section-42.: Making and publication of draft scheme.

Section-43: Owner of State Government to require appropriate authority to make scheme.

Section-44: Contents of draft scheme. Section-45: Reconstitution of plots.

(1) In the draft scheme referred to in Section 44, the size and shape of every plot shall be determined, so far as may be, to render it suitable for building purposes and where the plot as already built upon, to ensure that the building, as far as possible, complies with the provisions of the scheme as regards open spaces.

(2) for the purpose of sub-section (1), the draft scheme may contain proposals.

(a) to form a final plot by the reconstitution of an original plot by the alteration of its boundaries, if necessary;

(b) to form a final plot from an original plot by the transfer of any adjoint lands;

(c) to provide with the consent of the owners that two or more original plots which are owned by several persons or owned by persons jointly be held in ownership in common as a final plot, with or without alteration of boundaries;

(d) to allot a final plot to any owner dispossessed of land in furtherance of the scheme; and

(e) to transfer the ownership of a plot from one person to another.

(3) Whereunder clause (k) of sub-section 93) of section 40, the purpose to which buildings or specified areas may not be appropriated have been specified, the buildings shall cease to be used for a purpose other than the purposes specified in the scheme within such time as may be specified in the final scheme and the person affected by the provision shall be entitled to compensation from the appropriate authority in the manner and according to the method prescribed:

Provided that in ascertaining such compensation the time within which the person affected was permitted to change the use shall be taken into consideration.

Section-46: Disputed ownership.

(1) Where there is a disputed claim to the ownership of any place of land included in an area in respect of which a declaration of intention to make a scheme has been made and any entry in record of rights or mutation relevant to such disputed claim is inaccurate or inconclusive, an inquiry may be held on an application being made by the appropriate authority or the Town Planning Officer at any time prior to the date of which the Town Planning Officer draws up the preliminary scheme under section 51 by such officer as the State government may appoint for the purpose of deciding as to who shall be deemed to be the owner for the purpose of this Act.

(2) Such decision shall not be subject to appeal but it shall not operate as a bar to a regular suit in a court of competent jurisdiction.

(3) Such decision shall, in the event of a Civil Court passing a decree which is inconsistent therewith, be corrected, modified or rescinded in accordance with such decree as soon as practicable after such decree has been brought to the notice of the appropriate authority by the person affected by such decree.

Section-47: Objections to draft scheme to be considered.

Section-48: Power of State Government to sanction draft scheme.

(1) The appropriate authority shall, within [three] months from the date of the publication of the draft scheme in the Official Gazette, submit the draft scheme with any modifications that may have been made therein under section 47 together with the objections which may have been communicated to it, to the State Government.

(2) If the State Government sanctions such scheme, it shall in such may think fit, the State Government may, within [three] months from the date of its receipt, such notification, sanction such scheme with or without modifications or subject to such conditions as it may think fit to impose or refuse to sanction it.

(3) If the State Government sanctions such scheme, it shall in such notification state at what place and time the draft scheme shall be open for the inspection of the public.

Section-48-A: Vesting of land in appropriate authority.

Section-50: Appointment of Town Planning Officer.

Section-51: Duties of Town Planning Officer.

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 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 (xxxx) in which all the liabilities created by the scheme shall come into force:

(xxxx) Dated by Guj. Act No. 11 of 2002 the words "(Which shall not be early than one month after the date of publication of the notification)"

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.

Section-67: Effect of preliminary scheme.

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

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

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

Section-70: Power to vary scheme on ground of error, irregularity or informality.

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

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

(3) The draft variation published under sub-section (2) shall stage 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 ere of to the appropriate authority.

(6) After receiving the objections under sub-section (5), the Stage 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 Stage 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 if it were incorporated in the scheme.

Section-71: Variation of town planning scheme by another scheme.

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

Rule-16: Publication of declaration under section 41.

(1) The declaration under sub-section (1) of section 41 shall be published in the Official Gazette and shall also be published by means of an advertisement in one or more Gujarati newspapers circulating within the jurisdiction of the appropriate authority. The appropriate authority shall cause copies of such advertisement to be pasted in the prominent places in or near the area included in the scheme and at the head office of the appropriate authority.

(2) Every advertisement published under sub-rule (1) shall contain the resolution of the appropriate authority in respect of the declaration under section 41 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 for inspection of the public at the head office of the appropriate authority during office hours.

Rule-17: Meeting of owners and framing of tentative proposals.

For the purpose of making the draft scheme under section 42 the appropriate authority shall call a meeting or meetings of the owners of the lands included in a town planning scheme by a public notice as well as by individual notice to every owner whose address is known to the appropriate authority and explain in such meeting the tentative proposals of the draft scheme for eliciting public opinion and suggestions on the said proposals. The appropriate authority may take into consideration all such suggestions made and objections raised on the proposals for making the draft scheme under section 42.

Rule-18: Publication of draft scheme under section 42.

(1) The draft scheme under section 42 shall be published by means of an advertisement in the Official Gazette and shall also be published in one or more Gujarati newspapers circulating within the area of the appropriate authority. The appropriate authority shall also cause copies of such advertisement to be pasted at the head office of the appropriate authority and at other prominent places in or near the area included in the draft scheme. The advertisement shall state that a copy of the scheme is open for public inspection at the head office of the appropriate authority during office hours.

(2) Every advertisement published under sub-rule (1) shall announce that if within one month from the date of publication of the draft scheme in the Official Gazette any person affected by such scheme communicate in writing to the appropriate authority any objection relating to such scheme, the appropriate authority shall consider such objections before submitting the draft scheme to State Government under section 48.

Rule-26: Procedure to be followed by Town Planning officer under section 51 and under sub-section (1) of section 52.

(1) For the purpose of preparing the preliminary scheme and final scheme the Town Planning Officer shall give notice in Form H of the date on which he will commence his duties and shall state therein the time, as provided in Rule 37 within which the owner of any property or right which is injuriously affected by the making of a Town Planning Scheme shall be entitled under section 82 to make a claim before him. Such notice shall be published in the Official Gazette and in one or more Gujarati newspapers circulating within the area of the appropriate authority and shall be pasted in prominent places at or near the areas comprised in the scheme and at the office of the Town Planning Officer.

(2) The Town Planning Officer 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.

(3) The Town Planning Officer shall, before proceeding to deal with the matters specified in section 52, publish a notice in Form H in the Official Gazette and in one or more Gujarati newspapers circulating within the area of the appropriate authority. Such notice shall specify the matters which are proposed to be decided

by the Town Planning Officer and State that all persons who are interested in the plots or are affected by any of the matters specified in the notice shall communicate in writing their objections to the Town Planning Officer within a period of (fifteen days in the cases provided in the proviso to sub-rule(2) of Rule 18 of the said rules) from the publication of notice in the Official Gazette. Such notice shall also be pasted at the office of the Town Planning Officer and of the appropriate authority and the substance of such notice shall be pasted at convenient places in the said locality.

(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.

(5) If during the proceedings, it appears to the Town Planning Officer that there are conflicting claims or any difference of opinion with regard to any part of the scheme, the town Planning Officer shall record a brief minute in his own hand setting out the points at issue and the necessary particulars, and shall give a decision with the reasons therefore. All such minutes shall be appended to the scheme.

(6) The Town Planning Officer shall record and enter in the scheme every decision given by him. The calculations and estimates shall be set out and recorded in Form F, Form G and in other statements as may be prepared by the Town Planning Officer.

(7) The scheme as drawn up by the town Planning Officer shall include particulars specified in rule 21 read with section 52.

(8) The component parts of the scheme shall be so arranged that they may be readily referred to in connection with the map and plans.

(9) The Town Planning Officer shall publish the scheme drawn up by him by notification in the Official Gazette in Form I and also by means of an advertisement in one or more local newspapers announcing that the scheme shall be open for the inspection of the public during office hours at his office and communicate forthwith 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 scheme in Form J and Form K as the case may be. The Town Planning Officer shall also inform the [State Government] about the publication of final scheme."

20. We have heard learned senior counsel for the respective parties and taken into consideration the submissions made by learned senior counsel for the petitioner about not affording any opportunity of hearing to the petitioner, we find that as per available official record, at every stage, the competent authority under the Act, 1976 has issued notices to those whose names were found in revenue or official record and such notices dated 26.2.1992, 10.5.1994, 12.9.1995, 7.1.1999 and later on notices dated 7.9.2007 and 10.9.2007, were

issued to legal heirs of the original owners, societies, vendors, even Court receiver and the concerned District Collector, but as nowhere name of holder of agreement to sale was reflected in any official record and no notice was issued, thus, it cannot be said that the petitioner was either eligible or entitled to receive such notices. Even if definition of Section 2(xvi)(xviii) with regard to "occupier" and "owner" are broadly considered and interpreted, no right accrues to holder of agreement to sale the subject land, to complain about irregularity or any error or informality in the Town Planning Scheme and particularly in the facts of this case the very fact about title "ownership" "Possession", etc. was in dispute in a pending civil litigation. We find neither on the ground of merit namely, any error irregularity or informality nor on the aspect of pending civil disputes between the parties, the authority has erred in rejecting the representation.

21. There is a force in the arguments canvassed by Mr. Prashant Desai, learned senior counsel appearing for the competent authority of the Act, 1976 that not only individual notices were issued to affected persons, but public notices in vernacular daily newspaper were published and at no point of time any objection was lodged, though the span of taking decision by Town Planning Authority under Section 50 of the Act, 1976 relate to 1992 to 2007. So far as dispute to be decided by the authority under Section 46 is concerned, it would not detain us any longer since simple language of the provision referred to a disputed claim to the ownership in the place of land included an area for which a Town Planning Scheme is to be made is only with regard to entry of right or mutation relevant to such disputed claim is either inaccurate or inconclusive and upon application being made by the party. The enquiry may be held on an application made by the appropriate authority. The State of Gujarat appointed the officer for the purpose of deciding such dispute, etc. and so is not the case as revenue records clearly revealed the name of original landlords and legal heirs and other occupiers. It may not be out of place to mention that by virtue of Section 48(A) about vesting of land in appropriate authority, it is clear that when a draft scheme has been sanctioned by the State Government under sub Section (2) of Section 48, all lands required by the appropriate authority for the purpose specified in clause (c), (f), (g) and (h) of sub Section (3) of Section 40 shall vest absolutely in the appropriate authority free from all encumbrances and sub Section (3) of Section 48(A) further makes it clear that the provisions of Sections 68 and 69 shall mutatis mutandis apply to the sanctioned draft scheme, as if sanctioned draft scheme were a preliminary scheme.

22. In the fact of this case and on perusal of the record, we find that the Town Planning Officer, appointed under Section 50 of the Act, has followed procedure laid down in Rule 26 of the Rules 1979 and after giving notices and considering some objections on the part of the legal heirs of the original land lord has taken a decision which has attained finality under Section 65 and consequences thereto under Section 67 have followed.

23. So far as the contention raised with regard to non application of mind to the

representations submitted by the petitioner and order is passed without assigning reasons is concerned, we find that concerned authority, while deciding representation has reproduced main arguments and submissions made by the petitioner about not affording opportunity of hearing by Town Planning Officer and no notice was served and that Court receiver was not given any notice though the possession of the land was with Court receiver since 2008 and non service of individual notice to the petitioner and reliance placed on Sections 17, 46 and 52 of the Act, 1976.

24. Having regard to the above contentions, the concerned authority also noticed that separate ownership by Revenue Survey No. 607 and 609 for which one original plot and final plot was allotted and requirement of separating original plot as per Revenue Survey and variation to be made on the land bearing final plot No. 134 part of which reserved for EWS Housing and that such purpose would have been achieved by acquiring the land under the Land Acquisition Act, after quoting and considering Section 70, reasons are assigned, which reads as under:

"In view of preliminary Town Planning Scheme No. 54(Isanpur South area) being sanctioned by the Hon"ble State government on 19.12.2003 and come into force, the Revenue Survey Number does not have any status in the said Town Planning Scheme. Suits are pending before the Hon"ble Court with regard to ownership of Revenue Survey No. 609 of the said Town Planning Scheme. Over and above the Revenue Authority is having competent and final power. The ownership of the land does not declared by the T.P. Scheme. The request by you cannot be accepted regarding the submissions made for error, irregularity or informality in the said Town Scheme.

The Final Plot No. 134 under the said Town Planning Scheme has been vested in the Development Authority for EWS Housing under Section 67 of the Gujarat Town Planning and Urban Development Act, 1976, no proceedings is required to be undertaken under the provisions of the Land Acquisition Act.

The request made by you is not accepted."

25. Thus, it is clear that order passed by the competent authority has not only assigned the reasons for not accepting representation of the petitioner but also recorded all main and relevant contentions in the representation. We find no illegality in the above order passed by the authority in rejecting the representation and therefore, decision relied on by learned senior counsel for the petitioner in the case of Kartik Patel (supra) will have no applicability in the facts of this case. More so, while rejecting the petition, the learned Single Judge has not closed the rights in case if the petitioner is desirous to move the Civil Court to get appropriate order against the original owner or direction to the receiver to make an application to the competent authority.

26. The perusal of Sections 70 and 71 of the Act, 1976 to which reference is made in earlier paragraph makes it clear that the power is no doubt conferred

upon the appropriate authority of the State Government to vary scheme on three grounds namely, error, irregularity or informality. However, conditions prescribed in the Section for invocation of such powers to be exercised by the State Government upon preliminary scheme will come into force only when the appropriate authority considers that scheme is defective on the above three grounds, an application to be preferred to the State Government for variation of the scheme. In the present case no application whatsoever was made by appropriate authority in writing to the State Government for variation of the scheme. So far as the Section 70-A is concerned, it is only for the land allotted for public purpose and therefore, the same is not applicable. However, at no point of time any such contention was raised and that in exceptional circumstances when a Town Planning Scheme may be varied at any time by subsequent scheme was published and sanctioned in accordance with the provisions of the Act, the appropriate Government upon large public interest can look into it. However, such variation cannot be claimed as a matter of right. In this regard decision relied on by Mr. Desai, learned senior counsel for the respondents in the case of Babulal Badriprasad Varma (supra) and Kashiben (supra) are applicable.

27. Looking to the definition of Section 2 (xvi) "occupier" and (xviii) "owner", the appellant who holds only an agreement to sale of which no sale deed is executed and for which disputes of civil nature are pending in the Civil Court, has no locus or right to seek variation under Sections 70 and 71 of the Act, 1976.

28. Thus, the authority under the Act 1976 has followed the procedure in accordance with the provisions of the Act. 1976 and Rules 1979 at every stage of declaration of the scheme, preparation of draft scheme, sanctioning of the preliminary scheme and no error, irregularity or informality exists and further as stated earlier, in absence of any legal right under the Act, 1976 of the petitioner to request for variation in the scheme already sanctioned cannot be entertained. We find no merit in appeal and is hereby dismissed.

28.1. Learned advocate for the appellant-petitioner requests to extend the status quo which was in force during the pendency of this appeal, is opposed by Mr. Prashant Desai, learned senior counsel for the respondents and we find no such ground or reason to continue status quo qua the subject land and the request is rejected. Appeal stands dismissed with no cost.