

(2013) 04 GUJ CK 0092
In the Gujarat High Court

Case No : Letters Patent Appeal No. 285 of 2012 in Special Civil Application No. 2054 of 2010 with Civil Application No. 2262 of 2012 in Letters Patent Appeal No. 285 of 2012

Dharmadev Infrastructure Pvt. Ltd.

APPELLANT

Vs

Dharmendra Kumar Dahyabhai Patel and 1

RESPONDENT

Date of Decision : 10-04-2013

Acts Referred:

Gujarat Town Planning and Urban Development Act, 1976 — Section 29

Citation : (2013) 04 GUJ CK 0092

Hon'ble Judges : V.M. Sahai, J;S.G. Shah, J

Bench : Division Bench

Advocate : Mihir Joshi with Shital R. Patel, s No. 1, for the Appellant; Adil. R. Mirza, Advocate for the Respondent No. 2 and Mr. Kaushal D. Pandya, Advocate for the Respondent No. 1, for the Respondent

Judgement

S.G. Shah, J.—The judgment and order dated 15/3/2011 delivered by the Ld. Single Judge in Special Civil Application No. 2054/2010 is under challenge in this appeal, which is filed in the month of February 2012. Initially notice was issued and thereafter, till date matter has been dragged on admission stage only. In between, parties have complied with the provisions of Chapter 4 Rule 53 of the High Court Rules, which was not complied with at the time of filing of the appeal. Considering the above fact, though the matter is listed for admission, Ld. Counsel appearing for the parties have requested to take up the matter for final hearing and to decide it finally. Hence, appeal is admitted. Ld. Counsel Mr. Kaushal D. Pandya waives service of notice of admission for respondent no. 1 and Mr. Adil R. Mirza, Ld. Counsel waives service of notice of admission for respondent no. 2.

2. Heard Ld. Counsel Mr. Mihir Joshi assisted by Ld. Advocate Mr. Shital R. Patel for the appellant, Ld. Counsel Mr. Kaushal D. Pandya for respondent no. 1 and Mr. Adil R. Mirza, Ld. Counsel for respondent no. 2 - authority.

3. By impugned judgment and order, the Ld. Single Judge has allowed the writ petition in favour of the present respondent no. 1 and thereby quashed and set aside the development permission dated 1/7/2009 u/s 29 of The Gujarat Town Planning and Urban Development Act, 1976 [hereinafter referred to as "the Town Planning Act"] issued by the respondent no. 2 herein in favour of present appellant, mainly on the ground that pending the Draft Town Planning Scheme and/or in anticipation of sanction of Draft T.P. Scheme by the State Government, the concerned authority should not grant the development permission in favour of the proposed allottees, as their rights are yet to be crystallized and the proposed allottees do not become absolute owners of the land till the Town Planning Scheme is sanctioned by the Government under the provisions of the Town Planning Act. Considering such settled legal position; for which the Ld. Single Judge has relied upon the decision of this Court in the case of Modinagar Cooperative Housing Society Ltd. v/s. State of Gujarat reported in 2006 (3) GLR 2020, held that the development permission granted by present respondent no. 2 in favour of present appellant pending the Draft Town Planning Scheme is absolutely illegal and against the provisions of the Town Planning Act. In Modinagar Cooperative Housing Society Ltd. [supra] it was categorically held that "when the Draft Town Planning Scheme was not sanctioned and it is pending before the State Government and when there is objection regarding some plot, the developer cannot be permitted to put up the construction. In such reported case, therefore, prayer of the applicant society to continue with their construction was dismissed. It is certain that the respondent no. 2 being party to such litigation is bound to follow such decision.

4. The Ld. Single Judge has categorically observed against the present respondent no. 2 -authority in para 6.5 of the impugned judgment, but on the request of the Ld. Sr. counsel appearing for such authority, the Ld. Single Judge has restrained himself from taking further action against the authority and/or its officers for granting development permission despite the decision of this Court in the case of Modinagar Cooperative Housing Society Ltd. [supra] wherein also the present respondent no. 2 authority was a party. It is categorically observed by the Ld. Single Judge that such permission pending the Draft Town Planning Scheme is nothing but flouting the judgment and order passed by this Court in the case of Modinagar Cooperative Housing Society Ltd. [supra] and it amounts to contempt of Court.

5. With above background, if we consider the rival contentions of both the parties, the Ld. Sr. counsel Mr. Mihir Joshi has submitted about factual aspect of the issue by referring the site map, contending that major part of the land of the respondent no. 1/original applicant goes in the road; whereas only small triangle, as can be seen from the map at page 19, falls within the scheme of the present appellant and for the dispute of such small piece of land being only 60 sq. mtrs., the entire development of the scheme of the appellant has been disturbed and stopped due to present litigation. However, in second breath, it is submitted and argued that scheme is almost completed and several blocks have been

developed, but only because of such litigation, the scheme could not be over.

5.1 Ld. Sr. counsel has also argued that practically the appellant has agreed to allot alternative piece of land of 60 sq. mtrs., but respondent no. 1 does not agree and continued the litigation. It is also submitted that in fact in first round of litigation, when respondent no. 1 has preferred Special Civil Application No. 7384/2009, they have given an undertaking that they will not dispossess the respondent no. 1 in respect of the portion of original plot area i.e. plot no. 66-B or shall not claim any right, title or interest qua that portion of original plot area, which is proposed to be allotted in final plot area, till Town Planning Scheme is approved and/or becomes final. Oral judgment dated 30/12/2009 in Special Civil Application No. 7384/2009 is on record at Annexure-E pages 22 to 24. Bare perusal of such order makes it clear that the Town Planning Scheme was not finalized on that date and therefore, to continue their development, present appellant has no option but to submit such undertaking so as to get rid-of the prohibitory orders of the Court. Considering such undertaking and the fact that Town Planning Scheme was not finalized, the Ld. Single Judge has allowed the respondent no. 1 to let go such petition making it clear that the Court has not expressed any opinion with respect to the legality and validity of the development permission granted by respondent no. 2 - AUDA in favour of respondent no. 3 i.e. present appellant.

6. It seems that even thereafter, though Town Planning Scheme was not sanctioned by the State Government, the respondent no. 2 - AUDA has granted development permission in favour of the appellant and, therefore, respondent no. 1 has preferred Special Civil Application No. 2054/2010 seeking appropriate writ of mandamus to quash and set aside the development permission dated 1/7/2009 and as interim relief, stay of such permission as well as work in progress in pursuance of such development permission. It has been pointed out that since Ld. Single Judge has relied upon the undertaking filed by the present appellant in previous litigation and observed that the interest qua 60 sq. mtrs., of the land is protected, interim relief was refused. The respondent no. 1 herein has, therefore, preferred Letters Patent Appeal for above referred interim relief wherein initially the Division Bench comprising of Hon"ble the Chief Justice Mr. S.J. Mukhopadhyaya, as he then was and Hon"ble Mr. Justice K.M. Thaker, confirmed the interim order passed on 12/5/2010, which reads as under:

During the pendency of the case, the 2nd respondent will not make any further construction over the land of the appellant as shown before this Court pursuant to the permission granted by the AUDA."

Such interim relief is, therefore, continued till disposal of the Special Civil Application No. 2054/2010, which is allowed by the impugned order dated 15/3/2011, whereby the development permission dated 1/7/2009 is quashed and set aside, as discussed hereinabove.

7. As against that, Ld. Counsel Mr. Kaushal D. Pandya for respondent no. 1 has

vehemently argued that in fact, respondent no. 1 is holding land admeasuring 2428 sq. mtrs., as per Village Form No. 7/12, which is produced on record at page 15 and, therefore, unless Town Planning Scheme is approved and unless rights of respondent no. 1 are crystallized in accordance with law by allotment of appropriate land, the respondent cannot be allowed to continue the development of the scheme only based upon the undertaking furnished by the appellant that they would not construct on the piece of land admeasuring 60 sq. mtrs., as shown in the map at page 19.

8. Ld. Sr. counsel Mr. Joshi has disclosed that they desire to keep a plot admeasuring 1457 sq. mtrs., vacant i.e. without construction, considering the prayer by the respondent no. 1 in Special Civil Application No. 7384/2009, which is reflected in Annexure-E.

9. However, we are not inclined to enter into such factual controversy or aspect relating to site or measurement of land in question or entitlement of respondent no. 1 and all other such factual details in view of the reason that the settled legal position is clear, which is followed by the Ld. Single Judge, after the decision in the case of Modinagar Cooperative Housing Society Ltd. [supra], that development permission cannot be granted without finalization of the Town Planning Scheme. It is certain and clear that in the present case, the development permission was granted before the approval of the Town Planning Scheme by the Competent Authority and, therefore, such permission is illegal, null and void ab-initio and hence irrespective of other factual details and difficulty of present appellant, the same cannot be allowed to remain in existence. It is obvious and settled legal position that no-one can be deprived with his rights and properties without following due process of law, hence if rights of the respondent no. 1 qua the compulsory acquisition of plot no. 66-B is yet not finalized in absence of sanction/ approval of the Town Planning Scheme, no-one is allowed to jeopardize his rights over such property only in anticipation of approval of the Town Planning Scheme.

10. This being intra-Court appeal and when during two rounds before the Ld. Single Judge, appellant could not make out its case in its favour and more particularly when Ld. Single Judge has not committed any error of law, it would be difficult to re-assess the factual details in such appeal and, therefore, we could not find any illegality or arbitrariness in the order of the Ld. Single Judge so as to interfere with it in such appeal. In the result, the appeal deserves to be dismissed and it is hereby dismissed.

Civil Application does not survive and stands disposed of accordingly.