(2009) 03 GUJ CK 0094

In the Gujarat High Court

Case No : Special Civil Application No. 1628 of 2009

Ghanshyam Jashwantlal Raval APPELLANT

Vs

State of Gujarat and Another RESPONDENT

Date of Decision : 20-03-2009

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 135B, 135B(2), 135C, 135D, 135D(1)
Constitution of India, 1950 — Article 226, 227
Registration Act, 1908 — Section 18
Transfer of Property Act, 1882 — Section 100, 52, 52(2)

Citation : (2009) 2 GLR 1743

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Mahesh Bhavsar, for the Appellant; Trusha Patel, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The petitioner has filed this petition under Article 226 of the Constitution of India praying for quashing and setting aside the impugned order dated 31st August, 2008 passed by the Mamlatdar on or after 30th September, 2008. The petitioner has also prayed for a direction to the Mamlatdar to certify the Entry No. 21389 registered in the revenue record. The case of the petitioner is that the petitioner with ten other persons filed a Civil Suit No. 3 of 2008 before the Court of learned Principal Civil Judge, Sanand for declaration and injunction against one Arvindbhai Harilal Raval and five other persons. In the said suit the plaintiffs and the defendants are the legal heirs of Jivanbhai Lallubhai Raval. Since, there was some family dispute regarding the land of Khata Nos. 731, 1439 and 1440 situated in the sim of Sanand village, Taluka, Sanand, the above suit was filed.

2. The complete details of the dispute between the parties in the Civil Suit are given in the "lis pendens" No. 2206 dated 24th March, 2008 which was produced before the Talati, to post appropriate entry in the revenue record and to bring it

on revenue record. That Regular Civil Suit No. 3 of 2008 is pending before the Civil Court, Sanand for the land in dispute. Therefore, Kacha entry No. 21389 was posted in the revenue record. A copy of the said entry was issued on 30th September, 2008 from the office of the Deputy Mamlatdar, Sanand. It is, therefore, presumed that the Revenue record shows the said Kacha entry till 30th September, 2008. However, to the shock and surprise of the petitioner, the Mamlatdar, Sanand passed an order and cancelled the said entry after 30th September, 2008, but posted the date of the order of cancellation of the entry as 31st August, 2008.

3. It is therefore, the case of the petitioner that the Mamlatdar created bogus record only with a view to protect some third party''s interest i.e. interest of one Prabhudas Ishwardas Patel and one Ajitbhai Thakorbhai Desai, who have purchased some of the disputed land of Khata No. 731 by registered sale-deed No. 5896 executed on 11th September, 2008 from one Arvind Harilal Raval and one Mrs. Padmaben Harilal Raval. This was done only with a view to show that the said purchasers are the bona fide purchasers of the land in question and on the day on which they have purchased the said property there was no entry regarding lis pendens.

4. It is this order of the Mamlatdar which is under challenge in the present petition.

5. Mr. Mahesh Bhavsar learned Advocate appearing for the petitioner has submitted that the action of the Mamlatdar is contrary to the provisions of law. It is further submitted that lis pendens is registered u/s 18 of the Registration Act. Thereafter, the said ''lis pendens'' was given to the revenue authority to enter the said registered document in the revenue record. Once, the registered document is there pertaining to the property in question, it is obligatory on the part of the Mamlatdar to enter the same in the revenue record. It is further submitted that the record itself shows that the Mamlatdar passed the backdated order with a view to give illegal benefit to some third party. He has further submitted that the order of cancellation of entry regarding ''lis pendens'' passed by the Mamlatdar is contrary to decision of this Court in the case of Dipakbhai Manilal Patel and Another Vs. State of Gujarat and Another, wherein it is held that if the provisions of Section 52 read with amendment for Gujarat State are considered, the principles of lis pendens would apply to a transaction if entered after institution of suit only, if such notice of lis pendens is registered under the Registration Act, 1908 and as per the provisions of the amendment, the notice of pendency of the suit should contain the details as per Sub-section (2) of the amendment in Section 52, which is applicable to the Gujarat State. The essential purpose of the aforesaid amendment is to see that any person who may be interested to purchase the property when undertakes the title search of the property with the sub-registrar, the person concerned would be put to notice that a particular suit is pending before the competent Court. It is further held that the stand of the Mamlatdar that such documents are not as per the provisions of the Transfer of

Property Act is not correct and once a registered document is there, pertaining to the property in question, it is required of the Mamlatdar to enter the same in the revenue record of the Government. Of course, after undertaking the procedure, as may be required under the Bombay Land Revenue Code or other relevant law of giving notice to the affected party, and thereafter, to mutate the entry. Mr. Bhavsar has therefore, submitted that in view of the binding decision of this Court, it is not open for the Mamlatdar to cancel the entry in question. He has therefore, submitted that the petition is required to be admitted and the order of the Mamlatdar is required to be stayed.

6. Ms. Trusha Patel learned Assistant Government Pleader appearing for the State Government, on advance copy being served to the Government Pleader''s office has submitted that what is challenged under the present petition is the order passed by the Mamlatdar. The petitioner has straightaway challenged the said order before this Court. Under the administrative hierarchy, the order in question should be challenged first before the Deputy Collector, and thereafter, before the Secretary, Revenue Department. It is only against the order of the Secretary, Revenue Department a writ petition under Articles 226 or 227 can be filed before this Court. If any alternative remedy is available to the petitioner, this Court should not exercise its extraordinary writ jurisdiction under Articles 226 and 227 of the Constitution of India.

7. She has further submitted that the allegations regarding the back-dated entry cannot be gone into by this Court in exercise of its writ jurisdiction which requires factual investigation which can be done only in the appeal and/or revision that may lie to the concerned authorities. She has further submitted that the decision of this Court relied upon by the petitioner does not lay down any law and it is simply a direction issued to the Mamlatdar, looking to the facts of the particular case especially when the Mamlatdar has expressed the opinion that the documents are not as per the provisions of the Transfer of Property Act. She has further submitted that the relevant provisions contained in Sections 135B, C and D of Bombay Land Revenue Code, 1879 were not brought to the notice of this Court nor any argument on that issue was canvassed, and hence, it cannot be said that this Court has laid down any law with regard to the recording of an entry of lis pendens. She has, therefore, submitted that Mamlatdar''s order of cancellation of the entry on the ground that there is no legal provision to record such entry, does not call any interference by this Court.

8. Ms. Trusha Patel further submitted that Section 52 of the Transfer of Property Act read with amendment applicable to State of Gujarat merely lays does procedure for registration of notice of lis pendens. It does not confer any rights on the persons seeking such registration. Sections 135B and 135C of the Code and keeps record of rights, interests etc. of only those persons who are either tenants, holders, occupants, owners or mortgages of the land of assignees of the rent or revenue thereof. She has, therefore, submitted that the procedure for enforcing a right is no portion of that right nor does it alter or affect it. In

support of this submission, she relied on the decision of Full Bench of Allahabad High Court in the case of Ganga Sahai v. Kishen Sahai ILR 1884 All. 262 (FB) and decision of Calcutta High Court in the case of Bhobo Sudan Debi v. Rakhal Chunder Bose ILR 1886 Cal. 583.

9. Having heard the learned Advocates appearing for the parties and having considered the rival submissions in light of the earlier decision of this Court in the case of Dipak Manilal Patel (supra), the Court is of the view that Ms. Patel the learned Assistant Government Pleader is right to an extent that the challenge to the entry generally cannot be entertained by this Court, as there is adequate alternative, and efficacious remedy is available to the petitioner. However, in the present case, the petitioner has taken a stand that the order of the Mamlatdar is contrary to the binding decision of this Court, and hence, the petitioner has directly approached this Court. The Court, therefore, instead of dismissing the petition on the ground of alternative remedy being available to the petitioner considers the submission made on behalf of the petitioner as to whether the order passed by the Mamlatdar is in contravention of the decision of this Court. It is true that before this Court, the order cancelling the entry of the registered document for lis pendens was under challenge and after considering the provisions of Section 52 of the Transfer of Property Act read with amendment for Gujarat State, the Court observed that once the registration is there pertaining to the property in question it is required of the Mamlatdar to enter the same in the revenue record of the Government. The Court, was however, not called upon to decide as to whether such registered document is required to be entered into in the revenue record keeping in mind the provisions of Sections 135B, 135C and 135D of the Bombay Land Revenue Code.

10. Section 135B deals with the record of rights. It reads as under:

A record of rights shall be maintained in every village and such record shall include the following particulars :- (a) the names of all persons other than tenants who are holders, occupants, owners or mortgagees of the land of assignees of the rent or revenue thereof; (b) the nature and extent of the respective interests of such persons and the conditions or liabilities (if any) attaching thereto; (c) the rent of revenue (if any) payable by or to any of such persons; (d) such other particulars as the State Government may prescribe by rules made in this behalf. (2) Provided that the said particulars shall be entered in the record of rights with respect to perpetual tenancies, and also with respect to tenancies of any other classes to which the State Government may, by notification in the (Official Gazette), direct that the provisions of this Section shall apply in any local area or generally.

11. A plain reading of Section 135B makes it clear that a record of rights shall be maintained in every village and such record shall include certain particulars. The particulars are given in Sub-clauses (a) to (d) of Section 135B. Sub-clause (a) talks of names of persons other than tenants who are holders, occupants, owners or mortgages of the land of assignees of the rent or revenue thereof. The

petitioner or the other plaintiffs in the suit cannot be said to be either holders, occupants, owners or mortgagees of the land. When they are not the persons falling under Sub-clause (a) there is no question of making an entry with regard to the nature and extent of the respective interests of such persons and the conditions or liabilities (if any) attaching thereto as required in Sub-clause (b). Similarly, Sub-clause (c) is not applicable as the rent of revenue (if any) payable by or to any of such persons is required to be recorded. The petitioner''s case does not fall in Sub-clause (d) as the State Government has not prescribed by rules to record the particulars regarding lis pendens in the record of right. Provisions of Sub-section (2) of 135B are also not applicable to the facts of the present case.

12. Section 135C talks about the acquisition of rights to be reported. It reads as under:

Any person acquiring by succession, survivorship, inheritance, partition, purchase, mortgage, gift, lease or otherwise, any right as holder, occupant, owner, mortagagee, landlaord or tenant of the land or assignee of the rent or revenue thereof (shall report in writing) his acquisition of such right to the village accountant within three months from the date of such acquisition, and the said village accountant shall at once give a written acknowledgment of the receipt of such report to the person making it:

Provided that where the person acquiring the right is a minor or otherwise disqualified, his guardian or other person acquiring the right is a minor or otherwise disqualified, his guardian or other person having charge of his property shall make the report to the village accountant:

Provided further that any person acquiring a right by virtue of a registered document shall be exempted from the obligation to report to the village accountant.

Explanation (i) The rights mentioned above include a mortgage without possession, but do not include an easement or a charge not amounting to a mortgage of the kind specified in Section 100 of the Transfer of Property Act, 1882.

Explanation (ii) A person in whose favour a mortgage is discharged or extinguished, or lease determines, acquires a right within the meaning of this Section.

13. If one looks at the provisions contained in Section 135C of the Code, it cannot be said that the petitioner has acquired any right by succession, survivorship, inheritance, partition, purchase, mortgage, gift, lease or otherwise as holder, occupants, owner, mortgagee, landlord or tenant of the land or assignee of the rent thereof. He is therefore, not supposed to report to the village accountant the registration of the lis pendens, nor the village accountant is under any obligation to make any entry in this regard. As a matter fact simply

by filing the suit in the Civil Court and by getting the said lis pendens registered, the petitioner is not acquiring any right which is required to be recorded in the revenue record of the village maintained by the village accountant.

14. The petitioner''s case also does not fall within the purview of Section 135D(1) of the Bombay Land Revenue Code. Section 135D(1) reads as under:

The village accountant shall enter in a register of mutations every report made to him u/s 135C or any intimation of acquisition or transfer of any right of the kind mentioned in Section 135C received from the Mamlatdar or a Court of law.

This Section requires the village accountant to enter in a register of mutations only the reports made to him u/s 135C or any intimation of acquisition or transfer of any right of the kind mentioned in Section 135C received from the Mamlatdar or a Court of law. The Civil Court has not given any intimation to record the lis pendens. Mere registration of the notice of lis pendens would not make the petitioner entitled to get such entry registered. The decision of this Court holds the field only to the extent that u/s 52 of the Transfer of Property Act read with amendment for Gujarat State enables the persons to get such lis pendens registered. It is therefore, rightly said that the essential purpose of this provision is to see that any person who may be interested to purchase the property when undertakes the title search of the property with the sub-registrar, the person concerned would be put to notice that particular suit is pending before the competent Court. This observation made by this Court in the above judgment, however, would not automatically entitle the petitioner to get entered the notice of lis pendens in the revenue record. For that purpose, the petitioner has to satisfy the conditions laid down in Sections 135B, 135C and 135D(1), of the Bombay Land Revenue Code.

15. The Court finds substance in the submissions of Ms. Patel and merely because some procedure is prescribed in any particular statute, that would not partake the character of right. In Ganga Sahai''s case (supra), the Court held that their rights and liabilities under their contract and the relief they are entitled to in respect of such rights and liabilities are different things from the procedure necessary to enforce such rights, liabilities and relief. Although, the procedure for redemption and for closure of mortgage by conditional sale has been altered, it can scarcely be said that the mortgagor has been injuriously affected by the change. Similarly, in Bhobi Sunder Debt''s case (supra), the Court held that there is a clear distinction between relief and the mode or procedure for obtaining such relief. The relief remains unaffected by the mortgagor and mortgagee and the relief in respect of such rights and liabilities are the same under the Transfer of Property Act as they were before. A different procedure for enforcing such rights and obtaining such relief has, however, been adopted.

16. Considering this legal position, the Court holds that the Mamlatdar was justified in cancelling the entry after observing that there is no provision in Bombay Land Revenue Code to enter such entry of lis pendens in the revenue

record. The Court, therefore, does not find any infirmity in the order passed by the Mamlatdar. Hence, the petition is dismissed at the threshold.

