

(2001) 01 GUJ CK 0088

In the Gujarat High Court

Case No : Special Civil Application No. 9900 of 2003

Harikrushnadas Chhaganlal Nanalal and Ishwardas Mohanlal
(Seva Samaj Trust)

APPELLANT

Vs

Vinodchandra G. Vaghela and Another

RESPONDENT

Date of Decision : 11-01-2001

Acts Referred:

Gujarat Co-operative Societies Act, 1961 — Section 73, 96, 99(3)(c)

Citation : (2010) 1 GLH 710

Hon'ble Judges : Jayant M. Patel, J

Bench : Single Bench

Advocate : Prakash K. Jani for Petitioner 1, for the Appellant; Pankaj K. Soni for Respondent 1 and Mr. A.J. Memon for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

Jayant Patel, J.—The short facts of the case appear to be that the petitioner is the trustee of one Harikrushnadas Chhaganlal, Nanalal Hargovinddas and Ishwarlal Mohanlal Seva Samaj Trust. As per the petitioner, respondent No. 2 - Maruti Cooperative Housing Society Ltd. (hereinafter referred to as "the Society") was holding the land admeasuring about 400 sq yards, of the common plot. It appears that the society passed the resolution for sale of the land to the so- called trust and based on the said resolution, on 26.05.1993, vide No. 11820, the land of common plot has been sold by the society against the consideration of Rs. 80,001/- in favour of the trust through its trustees. It appears that the suit came to be filed by respondent No. 1 in capacity as the member of the society being Lavad Suit No. 2256 of 1994. At a stage where the petitioner was to make the construction over the said land, the learned Nominee, on 29.09.1994, had issued the interim injunction restraining the society as well as the petitioner herein from making any construction over the land. Inspite of the same, the petitioner continued with the construction and it appears that pending the suit the construction was already over. The respondent No. 1 who is plaintiff in the

suit had also filed an application for disobedience of the injunction granted by the learned Nominee. The learned Nominee ultimately tried the suit and the evidence was also recorded before the learned Nominee including on the aspect of the Panchnama drawn for showing the position of the land at the time when the injunction was granted and making of further construction thereafter. The learned Nominee after hearing both the sides ultimately passed the award whereby he granted the suit and declared that the society has no right to undertake any transaction for transfer of common plot admeasuring 400 sq.yards except for common purposes of the society and the resolution passed by the society for sale of the plot to defendant No. 2 -petitioner herein as well as the subsequent actions based on the same are declared as illegal and are set aside. The petitioner had carried the matter in appeal before the Gujarat State Cooperative Tribunal being Appeal No. 265 of 1999 and the Tribunal, in the appeal, after hearing both the sides, found that the petitioner has acquired rights through the society and the Chairman of the society was the trustee of the trust and the Tribunal also found that the common plot has been sold without any prior permission of the Competent Authority and the construction is made in breach of the injunction, therefore ultimately dismissed the appeal. It is under these circumstances, the present petition before this Court.

2. Heard Mr. Pravin Panchal with Mr. Jani for the petitioner and Mr. Soni for respondent No. 1 - original plaintiff. Respondent No. 2 society is served but nobody has appeared. However, it may be recorded that the society has not resisted the suit before the learned Nominee also. It is the allegation of the original plaintiff that inspite of the injunction served, no steps are taken by the society for prohibiting the construction or otherwise.

3. It is an admitted fact that the society has sold the land of the common plot to the petitioner. It can hardly be disputed that the land of the common plot in any residential society is meant for common use and common purposes of all members of the society, and all members of the society, so far as common plot and common facilities and common area are concerned, they are holding joint and common interest in such portion. It is not the case of the respondent society that the land has been permitted to be used for creating of any common facilities for the members of the society. The resolution of the society goes to show that upon the application of the trustees of the trust, the society has resolved for sale of the land of common plot admeasuring 400 sq.yards to the trust at Rs. 200/- per sq. yard and against the total consideration of Rs. 80,001/-.

4. The contention raised on behalf of the petitioner by the learned Counsel is that when the society had unanimously resolved for sale of the property, the petitioner in capacity as the member of the society, could not have objected to such sale nor the Nominee could entertain such grievance of the petitioner as against the majority will of the members of the society.

5. Had it been a case where the society had resolved for the sale of its land over which there is no common interest of all the members, it may stand on different

footing. But, in a case where a common plot is reserved for common facilities and common purposes of all members of the society, even a single member who is having right for utilization of the common plot can raise the grievance against any illegal action of the members of the Managing Committee of the society or may be of the General Board of the society for sale of such property and the reason being that he has the interest for utilization of the common plot together with the other members of the society. Further in any residential area or when the land is converted into N.A. for residential purposes, there is requirement to provide common plot for common facilities of the residents of the area and excluding the common plot and the roads the other area may be available to the original owner for utilization for residential purpose by himself or by selling the same to some third party. Therefore, if the common plot is earmarked for common use and common facility of a residential colony, which in the present case is the society, the majority of the members of the society, even if the contention of the learned Counsel for the petitioner is considered for the sake of examination, cannot take away the right to use the common plot for common facilities of other members who may be in minority. If such an approach is permitted in cooperative societies, it would result into encouraging the oppression over minority members by the majority members and thereby the majority members would be in a position to nullify the rights for common use of the common plot which would run counter to the Cooperative Principles and would also frustrate the purpose for which the common plot is earmarked in any residential colony. The aforesaid is coupled with the circumstance that no common plot which is earmarked at the time of N.A. can be converted for any exclusive use of any member or any person without prior permission of the competent authority under the Bombay Land Revenue Code read with the rules. It is not the case of the society that there was alteration in the N.A. plan which was approved by the competent authority under the Bombay Land Revenue Code read with the rules and the common plot had ceased to be common plot. But, it appears from the resolution of the society that the common plot has continued as the common plot and the very area of common plot is resolved to be sold to the trustees of the petitioner trust. It may be recorded that even if Section 73 of the Gujarat Cooperative Societies Act is read in its liberal interpretation so as to vest the final authority of the society in the General Body of the members, such powers are subject to the provisions of the Act and the Rules. There is no power under the Act contemplated or vested with the General Body to take away the interest created in favour of the member over the common plot for common use. Further, such powers cannot be read to commit illegality of converting the land for exclusive view of any member in contravention to the provisions of the Bombay Land Revenue Code read with the Rules. Therefore, under these circumstances, merely because the General Board had passed the resolution for sale of the common plot is not valid ground to deny the entertainment of the grievance by one member of the society who had common interest for common use of the common plot of the society. Therefore, the contention of the learned Counsel for the petitioner cannot be accepted.

6. The learned Counsel for the petitioner next contended that the petitioner was not the member of the society and therefore the Nominee will have no jurisdiction to entertain the suit. It was submitted that both the lower Forums have committed error of jurisdiction.

7. The perusal of the order passed by the learned Nominee shows that the learned Nominee has found that the dispute falls u/s 96 of the Cooperative Societies Act. The Tribunal has recorded the finding on fact at para 8 that defendant No. 2 has acquired rights through society and therefore would be covered u/s 99(3)(c). The same is coupled with the findings recorded by the Tribunal that the trustee of the petitioner trust was also Chairman of the society. One could not be Chairman of the society unless he is the member of the society. Under these circumstances, when there is already a finding of fact by the Tribunal on the aspect of acquiring rights through the society by the petitioner, coupled with the finding recorded by the Tribunal that the trustee of the trust is also Chairman of the society, it is not possible for this Court to accept the contention that the trustees of the trust were not the members of the society or that the trustees had not acquired the rights through the society. Therefore the Nominee had no jurisdiction. Hence, the said contention deserves to be rejected.

8. It was next contended on behalf of the petitioner that the construction is completed and in support of the contention, the learned Counsel relied upon the photographs which are produced on page 46 and it was also submitted that the Satsang Hall which is constructed is also being used by the members, therefore this Court may interfere with the order passed by the Nominee and its confirmation thereof by the Tribunal.

9. Had it been a case where on the date when the suit was filed or when the injunction was granted the construction was completed, it might stand on different consideration. However, in the present case, the learned Nominee as well as the Tribunal both have, upon the consideration of the Panchnama at the time when the ex parte injunction came to be granted for the first time in the year 1994, found that after the receipt of the injunction the construction has been continued in defiance to the interim injunction granted by the learned Nominee and the society has not taken care to prohibit the construction. The Tribunal has further found that the trustee of the trust was also the Chairman of the society, therefore the trust had continued the construction with the open eyes in breach of the injunction. Under these circumstances, when any litigant has defied the orders passed by the competent Forum, it hardly lies on the mouth of such litigant to contend that as the construction is now over, interference may be made so as to protect the construction. At this stage, it would be profitable to extract certain observations of this Court in case of *Dhirajlal Vithaldas Kavaiya v. Rasiklal Chandulal Patel*, reported at 1993(1) G.L.R. P.206 and more particularly the observations made by this Court at para 14 the relevant of which reads as under:

"It seems clear to me that the orders passed by the Courts below must be

allowed to operate. The possession of the plaintiff during the pendency and final disposal of the suit requires to be protected. If the defendant will be allowed to remain in possession, it would be permitting the defendant to take undue advantage of his own wrong. That situation cannot be allowed to operate."

The Court further observed thus:-

"As per the law, if a party is dispossessed after an order of interim relief is granted in his favour by a competent Court, the chapter cannot be said to be closed. If a person is dispossessed by willfully and intentionally violating the order of injunction, it is not only the right but the duty of the Court to undo wrong done to the party in whose favour it has passed such order. The exercise of inherent powers u/s 151 of the Code are based on doctrine that no party can be allowed to take undue advantage of his own wrong. A party who has committed illegality cannot be allowed to reap fruits of his unlawful action and the Court must intervene by preventing him from doing so as also by protecting an innocent party and by safeguarding his interests. The provisions of Order 39 Rule 2A of the Code are not an answer in such cases to deprive a party to legitimate benefits to which he is otherwise entitled. The person who has violated the order of the Court may also be held liable for disobedience of such order and may be punished but that will not be a ground to deny an appropriate relief to the party to whom injustice is done. If the Court does not exercise inherent powers in such cases and remains a silent spectator, it would undermine the very basis of the Rule of Law. In my judgment, such a situation must be dealt with seriously and sternly by directing the party who has committed breach or violation of the order to comply with the order forthwith."

In view of the aforesaid, the petition is merit less, hence dismissed. I.R. Vacated.