(2007) 09 GUJ CK 0015

In the Gujarat High Court

Case No : Special Civil Application No. 24544 of 2007

Kachhiya Patidar Samaj — APPELLANT

Vs

Joint Charity Commissioner and Another — RESPONDENT

Date of Decision : 25-09-2007

Acts Referred:
Bombay Public Trusts Act, 1950 — Section 28A, 36

Citation : (2008) 1 GLR 232

Hon'ble Judges : D.A. Mehta, J

Bench : Single Bench

Advocate : Vishwas K. Shah, for the Appellant;

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—This petition has been filed by a Charitable Trust seeking a writ to quash and set aside order dated 22-1-2007 made by the Joint Charity Commissioner, Surat in Application No. 36/30 of 2005 and order dated 6-8-2007 made by Gujarat Revenue Tribunal in Appeal TEN : AS No. 1 of 2007 where under the order made by the Joint Charity Commissioner has been confirmed by the Tribunal.

2. The petitioner-Trust is in possession of land bearing City Survey Nos. 2180 and 2181 at Bardoli on and from 3-6-1996. It is also an accepted fact that on the date of purchase of the said land, namely, 3-6-1996, a building was already in existence on the said land. It is further stated by the petitioner-Trust that in 2005 there was oral discussion with local land developer Mr. Hemant Joshi of M/s. Soham Developers for development of land belonging to the petitioner-Trust. In Paragraph No. 5.6 of the petition, it is stated that an oral scheme was formulated with the five conditions stated therein:

5.6 Petitioner has no funds for new building constructions, therefore oral scheme was formulated that:

(I) For and on behalf of the Petitioner, building construction permission obtains from the Bardoli Municipality.

(II) Then obtain sanction for sale the said lands from the respondent No. 1 and during procedure for sanction for sale the said lands, for and on behalf of the petitioner, as a Contractor Mr. Hemant Joshi, Soham Developers has to demolish the 100 years old building structures and construct a new building.

(III) After obtaining sanction for sale the said lands and after completing the new building constructions, Petitioner will apply for obtaining sanction from the respondent No. 1 for sale the new building constructions.

(IV) Prior to sanction from the respondent No. 1 there would be no transfer in any manner in favour of any one who is interested to purchase either the said lands or new building constructions except possession would be handed over for the purpose of new building constructions for and on behalf of the petitioner. If possession would be handed over only for demolishing old structures and new construction activities for and on behalf of the petitioner. And such Contractor''s possession i.e., Agent''s possession would be treated as petitioner''s possession.

(V) And in fact till to day petitioner has not transferred the possession, Right and Title of the said lands or building constructions in any manner in favour of the any one.

3. Subsequently, in 2005 permission to put up construction was obtained from Bardoli Municipality. The petitioner-Trust made an application u/s 36 of the Bombay Public Trusts Act, 1950 (the Act), and it is the say of the petitioner that at the time of filing application the old dilapidated building was standing on the land. After moving an application u/s 36 of the Act possession of the land was handed over to Soham Developers, as an agent of the petitioner for demolition of the old building and putting up new construction. Thereafter, in 2006, namely, 11-7-2006 the Joint Charity Commissioner issued direction to stop the construction. Prior thereto a hearing took place on 28-4-2006 before the Joint Charity Commissioner and on 5-5-2006 an order was made for issuance of public notice for which a draft of public notice was prepared by the Office of the Joint Charity Commissioner and handed over to the Trust for publication. It appears that on publication of the notice in all six offers were made, out of which Soham Developers was offerer No. 5. One Dineshbhai Dhirubhai Rudani filed objections in response to the public notice. In the objections, it was submitted that the property in question, though described as land with building, in fact on inspection, was found to be property comprised of land on which fresh construction was undertaken, and hence, the Joint Charity Commissioner found it necessary to initiate inquiry.

4. It has been found that the construction has not been put up by the petitioner-Trust nor has the construction been got done by the petitioner-Trust but the petitioner-Trust has permitted Soham Developers to put up construction. It has further been found that the permission for construction was obtained in May, 2005. The Joint Charity Commissioner has also found that the draft for public

notice, which was prepared by the office of the Joint Charity Commissioner and handed over to the Trust for publication, contained description of the property as land having dilapidated building, but in fact, when the advertisement came to be published in the form of public notice, the word ''dilapidated'' was found to be missing and only the word ''building'' was there in the public notice. The Joint Charity Commissioner, therefore, called upon the Trust to produce the draft of the public notice which was handed over by his office to the Trust but despite the requisition, the Trust failed to produce such a draft. It has further been recorded by the Joint Charity Commissioner that on inquiry, it was found that the construction had commenced from January, 2006 while the hearing of the application moved by the petitioner had taken place on 28-4-2006 and the order for publication of public notice was only made on 5-5-2006. That the submission made on the day of hearing, namely, 28-4-2006, by the Trust that the property comprised of land and dilapidated building was factually incorrect considering the date of commencement of construction. It is in this context that the contention of the Trust that the public notice was as per the draft public notice provided by the office of the Joint Charity Commissioner has been found to be incorrect and false by the authority. The Joint Charity Commissioner has thereafter recorded that in the written explanation given by the Trust, it has been accepted by the Trust that on the date the public notice was published existence of dilapidated building was not there. The Joint Charity Commissioner has therefore, held that the Trust could have placed this fact before the Joint Charity Commissioner at the earlier hearing but the trustees deliberately refrained from making the said declaration. It has further been found from the permission of Bardoli Nagarpalika that the construction pertains to 17 shuttered shops on the ground floor with open parking space and 10 flats on the first floor while only slab has been put up on the second floor and this is the position obtaining on 25-7-2006 as per site inspection during the course of inquiry. The Joint Charity Commissioner, has therefore, found that such extensive construction could not have been put up within a month and five days and the trustees could have made this position clear on 11-7-2006, namely, the day when the offers were opened in the Office of the Joint Charity Commissioner, but the trustees chose not to come clean on this aspect of the matter. The Joint Charity Commissioner has further found that even if the construction of the flats and the remaining construction could be treated as for the purposes of the Trust the construction of 17 shops cannot be for the object of the Trust and this aspect has not been verified by the relevant official of the Bardoli Nagarpalika before granting permission to the petitioner-Trust for putting up the construction.

5. In light of the aforesaid findings of fact recorded by the authority the contention that the Trust was not required to obtain permission for construction because the Trust was not incurring any expenses towards construction has been negatived by the authority. The authority has also found that even during the course of proceedings u/s 36 of the Act the trustees have handed over possession of the property for putting up construction and such possession had

been handed over prior to any decision being taken by the Joint Charity Commissioner. It has also been found by the Joint Charity Commissioner that obtaining of permission from the local authority for construction by the Trust during the pendency of proceedings u/s 36 of the Act cannot be treated to be a mere co-incidence and there is a definite collusion between the trustees and Soham Developers; that even the objector who sought to withdraw the objections subsequently has been found to be colluding with the trustees and Soham Developers.

6. The Joint Charity Commissioner has further recorded that the draft of public notice has been obtained by suppression of material facts and there is a variation in the description of the property which indicates a conscious and deliberate act on part of the trustees amounting to misdemeanour/misconduct which cannot be ascribed to oversight or lack of knowledge of law. Accordingly, on 21-1-2007 the application u/s 36 of the Act has been rejected with direction to return the earnest money draft attached with the offer by M/s. Soham Developers; the trustees have been directed to bear the expenses of publication of public notice out of their own pockets and not debit the said expense to the account of the trust. A further direction has been issued to the Trust to restore the property to its original position, and only thereafter, the petitioner-Trust would be entitled to apply afresh u/s 36 of the Act. The Deputy Charity Commissioner, Surat has also been directed to ensure surprise visits and inspection of the property in question to ensure compliance with the directions made by the Joint Charity Commissioner and initiate appropriate action in accordance with law, in the event any violation of the directions is found.

7. The petitioner carried the matter in appeal before the Tribunal. The Tribunal found that the appeal was barred by limitation but considering the period of delay is 11 days, the appeal has been heard on merits and maintainability. It has been found by the Tribunal that whether it is in the interest of the Trust to sell the property, and whether there is a compelling necessity for selling the property by the Trust, are issues which have to be yet decided by the Charity Commissioner. That the Charity Commissioner has rejected the application u/s 36 of the Act because the intention of the trustees while seeking permission u/s 36 of the Act for disposing of the property has not been found to be bona fide considering the fact that a third party had been put in possession of the property and also permitted to put up construction before obtaining permission u/s 36 of the Act. The Tribunal has further recorded that no prejudice has been caused to the Trust as the Charity Commissioner has reserved liberty to the Trust to apply afresh u/s 36 of the Act. Hence, the Tribunal has found that in the facts and circumstances of the case, the order of the Charity Commissioner is perfectly justified and the appeal has been dismissed confirming the order made by the Charity Commissioner.

8. Learned Advocate for the petitioner has vehemently contended that both the Joint Charity Commissioner and the Tribunal have failed to appreciate that

possession of the property was with the petitioner-Trust at the time when application u/s 36 of the Act was moved and Soham Developers had been put in possession only after the application had been filed. That in law, the possession of the property as well as right, title and interest remained with the petitioner-Trust and Soham Developers was only permitted to put up construction on behalf of the petitioner-Trust. That the petitioner-Trust had obtained permission from local authority for construction as per sanctioned plan and the construction was being put up by the petitioner-Trust through Soham Developers. That both the authorities have incorrectly recorded that no prejudice was caused to the petitioner-Trust because the petitioner-Trust would be required to make payment to the developers for the construction already put up, and further the petitioner would have to incur expenses for removal of the supers tructure before applying afresh u/s 36 of the Act. Moreover, it was contended, that the condition imposed by the Joint Charity Commissioner that the property must be restored to its original state was an impossible condition because even if the super structure was removed, it was not possible to bring i into existence the dilapidated building which had already been demolished, and hence, liberty to make a fresh application was a futile or an academic liberty. In support of the submissions made reliance has been placed on a judgment of this Court rendered in case of Kishan Construction v. Dara M. Mistri on 18-4-2006 in Special Civil Application No. 17131 of 2004 wherein in Paragraph No. 11 various directions have been issued by the Court to the Charity Commissioner and the parties to contend that similar directions can be issued in the present case to protect the interest of the Trust. Referring to provisions of Section 36 of the Act, it was submitted that neither the said Section nor any other provisions of the Act prohibit a Trust from putting up construction on the land belonging to the petitioner and thus the entire approach of the authorities was vitiated. It was further submitted that the authorities had failed to appreciate the consequences of the orders made and such consequences are:

...(1) for and on behalf of petitioner new major building constructions done by the Soham Developers between 18-8-2005 to 11-7-2006 so they are entitled to claim costs of constructions from the petitioner, and if not paid then as petitioner heard that they will claim ownership on such new major constructed building and Trust has to face litigations. (2) Trust has no funds to pay costs of constructions.

9. Having heard the learned Advocate for the petitioner-Trust it is apparent that the petition is not required to be entertained. The position in law is well-settled that while exercising jurisdiction under Articles 226 and 227 of the Constitution, the Court is only required to go into the validity of the decision-making process and not the decision per se. If the decision recorded by authority is a possible decision on the facts and in the circumstances of the case, merely because another view of the matter is possible on the same set of facts, circumstances and evidence on record that by itself is not sufficient to permit the Court to entertain the petition. Even re-appreciation of evidence is not permissible. The only other ground on which the Court can intervene is perversity.

10. Applying the aforesaid test to the facts noted hereinbefore, it cannot be stated that the impugned order of the Tribunal or the order made by the Joint Charity Commissioner suffer from any perversity. In fact, in light of the facts, circumstances and evidence available on record the only logical orders that could have been made are the orders made by the Joint Charity Commissioner and the Tribunal. The contention that possession of the property in question has not been parted with by the petitioner in favour of Soham Developers is required to be stated only to be rejected. Nature of possession varies from case to case and even if the legal possession remains vested in the Trust, it is apparent that de facto, i.e., physical possession has been handed over to Soham Developers. As found by the Joint Charity Commissioner even if the construction is being put up by the Trust through the agency of Soham Developers, nothing has been brought on record to establish that construction of shops was in the interest of the Trust and was guided by a compelling necessity. Even if, for the sake of argument, one accepts that the shops were being constructed by the Trust the alienation thereof has to be for the purposes of and objects of the Trust. In the first instance, in the present case, the compelling necessity to put up such construction and then alienate such construction with land are inter-linked and the Trust cannot be heard to state that till the point of time, the Trust puts up the construction the Trust cannot be questioned. The Charity Commissioner is the custodian of the properties of the Public Trust which are within public domain and cannot be treated by the trustees as their private properties so as to deal with them in any manner that the trustees feel inclined to. It is required to be stated that the dispute herein is not a dispute between the private parties, is not a dispute in relation to any private property, is not a dispute in relation to any personal rights, but is a dispute wherein public property and public interest are involved. The alienation of any property has to be in accordance with the norms laid down regarding disposal of properties by Public Trust and no person can be even put in constructive possession without following the due process of law. The facts in the present case reveal that even before the application u/s 36 of the Act was processed and an order made, Soham Developers had already entered the property in question, demolished the existing super structure and put up a new super structure. However, till the point of time the bid of Soham Developers was finally accepted and the sale concluded in favour of Soham Developers there could be no occasion for Soham Developers to enter the property.

11. Furthermore, the contention that it was only the Trust which has put up construction also does not merit acceptance for the simple reason that if any change was required qua the immovable property as registered u/s 28A of the Act, the Trust was required to obtain permission in this regard in accordance with law and this exercise is not shown to have been carried out by the Trust. The property which is registered u/s 28A of the Act is the land in question with the existing building, and therefore, any change thereof had to be after prior permission in accordance with law.

12. The powers available to the authorities u/s 36 of the Act have come up

before this Court from time to time, and in the case of Saurashtra Rachanatmak Samiti Vs. State of Gujarat and Others, the Court has reiterated the principles laid down by this Court in an earlier decision in case of Thakorebhai Gangaram v. Ramanlal Maganlal Reshamwala 1993 (1) GLH 473 where under it is stated:

4. xxx xxx xxx It is very obvious that before Charity Commissioner sanctions alienation of trust property, he has to apply his mind to following material questions, namely : (i) whether there is a compelling necessity to justify the alienation in question? (ii) whether the proposed alienation is fair and just? (iii) whether the proposed alienation, in any way, adversely affects the interest of the trust?

13. Applying the aforesaid three tests to the facts of the case it is apparent that : (i) the Trust has yet to establish a compelling necessity to justify the alienation in question, (ii) the Trust has failed to show that the proposed alienation is fair and just, and (iii) as the facts stand today the proposed alienation adversely affects the interest of the Trust. Therefore, in light of the aforesaid position in law, the action of the respondent authorities cannot be faulted with.

In the result, the petition does not merit acceptance on any of the grounds pleaded or otherwise, and is accordingly summarily rejected.

