(2008) 11 GUJ CK 0054

In the Gujarat High Court

Case No : Special Civil Application No. 3634 of 1998

Medical Director APPELLANT

Vs

State of Gujarat and Others RESPONDENT

Date of Decision : 25-11-2008

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 62

Citation : (2009) 2 GLR 1048

Hon'ble Judges : Akil Kureshi, J

Bench : Single Bench

Advocate : S.N. Soparkar and Amar N. Bhatt, for the Appellant; M.L. Shah, AGP for Respondents 1 - 3, for the Respondent

Judgement

Akil Kureshi, J.—The petitioner herein has challenged an order dated 21.2.1998 passed by the Special Secretary (Appeals), Revenue Department, Government of Gujarat which is produced at Annexure-H to the petition. By the said order, revision of the petitioner came to be partially allowed. In essence, the authority permitted the petitioner trust to retain a maximum of 5000 sq. mtrs. of land allotted to the petitioner by Government on which trust has already made construction including the land required to be kept open as per the rules.

In order to appreciate the nature of order passed by the Secretary and grievance of the petitioner against the said order, the background facts leading to the said order need to be noted at some length.

2.1 The petitioner is a charitable trust involved in charitable activities such as running hospital. The petitioner trust was desirous of setting of a hospital primarily with a facility of open heart surgery. The petitioner therefore, by its letter dated 7.1.1981 approached the State Government requesting for grant of Government land of village Bhat, Taluka Gandhinagar admeasuring about 40,000 to 50000 sq mtrs. for construction of hospital with facilities including Open Heart Surgery. In the said letter, the petitioner also showed willingness to pay reasonable price for the land that the Government may allot.

2.2 Vide resolution dated 12.1.1981 (Annexure-B to the petition), Government approved the proposal to sell the lands bearing survey Nos. 35 and 36 of village Bhat, total admeasuring 40000 sq mtrs. (approx.) to the petitioner trust on new and impartable tenure. 1300 sq mtrs. from survey No. 35 and 38700 sq. mtrs. from survey No. 36 were resolved to be allotted to the petitioner. In the resolution itself it was stated that survey No. 36 admeasuring 36 acres and 30 gunthas is gauchar land, out of which 38700 sq. mtrs of land is deleted from gauchar and added as Government padtar land. Sale of the land was specifically for the purpose of enabling the petitioner to start an open heart surgery hospital there. Sale of land was of-course on payment of assessed market price. Same was however, subject to certain conditions. Conditions relevant for our purpose were as follows:

2. Kanoria Seva Kendra shall have to pay without any protest the market value of this land as may be determined by the Deputy Town Development Officer, Ahmedabad.

6. The construction of the hospital shall be completed within the period of six months to two years from the date of possession of the land

''8. In case of breach of any condition mentioned herein, the land together with the buildings thereon shall revert to the Government without payment of an compensation. The value paid for the land shall not be refunded in such a contingency.''

2.3 Though the petitioner was required to complete the construction within two years from the date of handing over the possession, admittedly the same was not done within the time stipulated. The petitioner sought and was granted two extensions. First extension was granted by order dated 17.2.1984 which was upto 12.1.1985. Second extension was granted by order dated 13.3.1986 upto 31.12.1986. Thereafter, no extension was sought, none granted.

2.4 The Collector, Gandhinagar finding that the petitioner had breached conditions of grant of the land, initiated proceedings for cancellation of grant of land by issuing show cause notice, copy of which is not readily available on record. However, it is not in dispute that the Collector passed his order dated 13.3.1987 cancelling the grant of land. The petitioner challenged the said order before the Revenue Secretary and the Revenue Secretary by his order dated 13/21-1-94 partially allowed the revision application of the petitioner setting aside order passed by the Collector and remanded the proceedings for fresh consideration. In the said order, Secretary observed inter-alia that as per the representation made by the petitioner certain portion of construction is completed and hospital activities are going on. Though open heart surgery division is not started, institution has spent large amount of money on the project and therefore, action of taking away the land does not appear to be reasonable. The Collector was required to take a decision afresh keeping in mind the above observations.

2.5 Upon remand, the Collector, Gandhinagar passed fresh order after issuance of fresh show cause notice. The Collector on 17.5.1994 held that the petitioner has breached several conditions of the order of grant of land and further that purpose for which land was granted has not been served. He therefore, in terms of condition No. 18 of the order cancelled the grant and ordered to take back the land with construction over it without payment of compensation.

2.6 The petitioner once again approached the Revenue Secretary by filing revision application which came to be disposed of by impugned order dated 21.2.1998, operative portion of which reads as under:

ORDER

In view of the above circumstances, the Revision Application of the applicant Trust is partly admitted and the order passed by the Collector, Gandhinagar, dated 17.5.94 is hereby dismissed, and taking into consideration the aforesaid observations, by getting the evidence in connection with the show cause notice and by getting information on how much land the applicant trust has made construction, a maximum acceptable land of 5,000 sq. mtrs., on which the construction is made including the open land to be kept open as per Rule, should be kept with the Trust and direct the collector to order to do the proceedings of taking the remaining possession of land by the Government and with such direction the case is remanded to the Honourable Collector, Gandhinagar.''

2.7 Learned Single Judge of this Court while issuing notice in the present petition on 24.6.98 passed the following order:

Leave to amend.

In response to the suggestion from the Court Mr. N.D. Nanavati, learned Counsel appearing for the petitioner, states that the petitioner institution will come forward with a proposal indicating how much land is actually utilised so far for which project, how much land will be required by the petitioner-institution for its projects in the forceable future with broad particulars and how much land will be returned to the Government, i.e. the land not required by the petitioner-institution and states that necessary detais with a sketch will be placed before this Court on 9.7.1998.

Hence notice to the respondents returnable on 9.7.1998.

In the meantime if the impugned order dated 21.2.1998 of the State Government is not implemented so far, the respondents shall not take over possession of the land in question from the petitioner institution till 9.7.1998.

Direct service is permitted.

Mr. Nanavati requests that the above order may be communicated to the respondents by Fax Message. The office shall do so at the petitioner''s cost.

2.8 In response to the said order dated 24.6.98, though the petitioner has filed affidavit dated August 1998 and April 1999, it is not possible to assess clearly the extent of land the petitioner trust would have required in the near forceable future as envisaged by this Court in the order dated 24.6.98. One more affidavit came to be filed by the petitioner on 24.10.2008 placing on record certain additional details about the nature of activities being carried on presently at the said site.

On the basis of above factual background, it is the case of the petitioner that authorities passed orders adverse to the petitioner which are illegal and unlawful. However, before adverting to the contentions of both sides, I may also note that learned AGP tendered before this Court a copy of order dated 12.1.1981 passed by the Collector converting part of the land of survey No. 36 from Gauchar to Government Padtar land as also another order dated 12.1.81 granting the land to the petitioner on certain terms and conditions. Same are taken on record. The petitioner also produced during the course of hearing a map of the land in question showing existing construction as well as construction which the petitioner proposes to put up in near future at the said place. The same is also taken on record.

Learned senior advocae Shri Soparkar appearing with Shri Amar Bhatt for the petitioner raised following contentions:

1) That the Collector did not grant any hearing to the petitioner. Entire matter was heard ex-parte. The advocate for the petitioner was not permitted to argue. Written representation of the petitioner was not taken on record. Though such representation was sent to the Collector through registered A.D., which was received by the Collector well before the date of passing of the order, the same was also not considered. It was further submitted that the Secretary also did not take into account such written representation of the petitioner. Thus at all stages there was violation of principles of natural justice.

2) The proceedings were remanded to the Collector by the Revenue Secretary in the earlier round and the Collector was required to decide issues afresh bearing in mind the observations made by the Revenue Secretary in his order dated 13/21-1-94. The Collector instead of deciding the issues afresh held in his order that directions given by the Secretary are not in consonance with the provisions of law.

3) The Collector had no power to cancel the sale of land which was granted by the Government.

4) In any case both the authorities failed to appreciate that the petitioner had utilised substantial portion of the land granted and that there were valid reasons for not being able to use the remaining area. In other words, the petitioner also had good case on merits.

Appearing for the Government, learned AGP Ms. M.L. Shah opposed the petition contending that the authorities below have considered all aspects of the matter.

Particularly, Revenue Secretary has shown sufficient indulgence to the petitioner by saving that portion of the land which has already been put to use by the petitioner.

5.1 She further contended that the actual order granting the land to the petitioner was passed by the Collector and he therefore in terms of provisions contained in Section 62 of the Bombay Land Revenue code he would have the authority to cancel the sale in case of breach of any of the conditions.

5.2 She further contended that for years, the petitioner has not been able to utilise the major portion of the land alloted. No further indulgence is therefore, required.

Having thus heard learned advocates for the parties, before the adverting to the contentions of the petitioner on legal technicalities, I would like to examine the matter on the basis of facts emerging on record.

From the record it is clear that approximately 40,000 sq. mtrs. of land between Ahmedabad and Gandhinagar was granted to the petitioner by the Government on its application dated 7.1.1981 stating that the petitioner is desirous of setting up of hospital, particularly with a facility of Open Heart Surgery. The Government passed resolution on 12.1.81 deciding to grant the land to the petitioner at market value but subject to certain terms and conditions. As pointed out by learned AGP, actual order of grant was passed by the Collector also on 12.1.81 before which the Collector passed another order also on 12.1.81 converting 38700 sq. mtrs. of land of survey No. 36 of village Bhat from gauchar land to Government padtar land.

Three main conditions on which the land was alloted to the petitioner were:

a) that the petitioner shall pay the market value of the land as may be determined.

b) that the construction of the hospital shall be completed within a period of six months to two years from the date of possession being given.

c) that in case of breach of any condition, the land together with building thereon would revert to the Government without payment of compensation and value paid for the land shall also be forfeited.

Admittedly, the petitioner did not complete construction as envisaged in the order dated 12.1.81 i.e. within two years from the date of handing over possession of the land or even for several years thereafter. The petitioner sought and was granted two extensions. First extension was granted by order dated 17.2.1984 which was upto 12.1.1985. Second extension was granted by order dated 13.3.1986 which was upto 31.12.1986. Despite such extensions the petitioner did not complete the construction nor did it start Open Heart Surgery unit. It is however, true that the petitioner had carried out part of the construction and started certain activities of running a general hospital and certain other related activities. Eventually therefore, the Collector after issuing show cause notice cancelled the grant of land by his order dated 13.3.87. Upon revision, Secretary remanded the proceedings for fresh hearing. This was done in the year 1994. The Collector therefore, issued show cause notice on 28.2.94 and passed his fresh order on 17.5.94. The petitioner thereupon approached the Secretary once again who by his impugned order dated 2.2.1998 though permitted the petitioner to retain part of the land on which the construction was already completed, subject to a ceiling of 5000 sq. mtrs. of land, ordered confiscation of the remaining land.

Admittedly, even presently the petitioner has not started the Open Heart Surgery unit nor has utilised the entire land by putting up the construction over the entire area as per the permissible rules.

As stated by the petitioner presently, a general hospital is operating. The petitioner is also running a de-addiction centre and a nursing college is also operational.

As noted vide order dated 24.6.98, Learned Single Judge of this Court had permitted the petitioner to place on record details about how much land will be required for its project in forceable future with broad particulars thereof and how much land will be returned to the Government. As noted in response to the said order, though the petitioner filed two affidavits, details supplied therein are sketchy and even in the latest affidavit dated 23.10.2008, the petitioner has not come out with any definite statement in this regard.

The combined effect that emerges from the record is that the petitioner though was put in possession of 40000 sq. mtrs of land way back in the year 1981 has used only a small portion thereof for its activities. Admittedly, the Open Heart Surgery unit which was supposed to be prime project for which land was granted has so far not been set up. Right from the year 1981, for some reason or the other, petitioner has not been able to put the land to its full use. Even after this Court passed order in June 1998 permitting the petitioner to place before the Court details about its future plans, materials placed by the petitioner shows half hearted attempt on its part.

It can thus be seen that at all the stages, the petitioner has not been able to show any level of seriousness or ability in being able to utilise the land granted to it by the Government. Nearly 28 years after the land was granted to the petitioner till date the petitioner has not been able to utilise the same fully or even substantially.

Even in the map produced by the petitioner showing the area already covered under the construction and the future expansion plans few significant aspects emerge. Presently the construction already put up by the petitioner includes partly which has been carried out after obtaining proper permission and partly which has been carried out without any permission at all. Even the proposed expansion plan indicates that the petitioner would not cover the entire land granted. Thus nearly 28 years after the land was granted to the petitioner even now the petitioner is unable to show any genuine use for the entire land and even after the proposed expansion, the petitioner is unable to demonstrate before the Court that it requires the full area granted.

Significantly, nearly 38000 sq. mtrs. out of 40000 sq. mtrs. of land allotted to the petitioner earlier formed gauchar land. Such gauchar land was converted to Government Padtar land on the very dame date on which the same was allotted to the petitioner. Thus more than 38000 sq. mtrs of land which from the year 1981 would have been used by village people for pasture remained idle for nearly 28 years.

It is true that the land was granted to the petitioner upon payment of full market price. The same was however, subject to certain conditions. Firstly it was required to be used fully within two years. Entire purpose was to enable the petitioner to set up an Open Heart Surgery unit thereon. It was for this purpose that perhaps the Government converted the gauchar land into Government Kharaba and granted the same to the petitioner. It is unfortunate that said purpose was never fulfilled. The petitioner having accepted the grant of land on terms and conditions mentioned therein, cannot now turn around and contend that against requirement of putting the land to use in two years even if the petitioner did not do so for 28 years, no adverse order can be passed against the petitioner.

All legal contentions of the petitioner shall have to be examined in light of the above admitted factual background. Before adverting to the contentions one more aspect of the matter needs to be noted. Counsel for the petitioner had argued that once the allotment of land was cancelled it was thereafter, difficult for the petitioner to obtain permission from the authorities to put up further construction. From the map produced by the petitioner however, it can be seen that even without proper permission, the petitioner has carried out certain construction. Counsel for the petitioner had therefore, argued that order passed by Secretary confining retention of land covered by construction with permission should be at-least modified as to save the construction which is existing which may have been carried out with or without permission. It can thus be seen that difficulty in obtaining permission from the authority for carrying out construction did not prevent the petitioner from putting up further construction. The contention therefore, that no further development could take place on account of cancellation of the grant by the authorities therefore, cannot be accepted. In any case, when this Court itself had permitted the petitioner to put before the Court its future expansion plans, way back in June 1998, the petitioner could have placed sufficient material on record and could also have prayed for permission to carry out such further construction. Same was however, not done. At all stages, therefore, the petitioner has exhibited unwillingness or inability to fully utilise the land.

Though the Collector had as already noted cancelled the grant of entire land and confiscated the same in the Government, the Revenue Secretary by his impugned order saved that part of the land on which the petitioner had already put up construction. This however, was subject to two conditions, that the construction should be as per rules and same was subject to ceiling of maximum of 5000 sq. mtrs. To the above mentioned two conditions imposed by the Revenue Secretary, I would advert to at a slightly later stage. However, so far as his approach to the entire problem is concerned, I find that same was balanced.

As noted, the petitioner though desired to start Open Heart Surgery unit has not done so till now. However, the petitioner has started certain activities such as running a hospital and educational course and a de-addiction centre. For the said purpose, the petitioner has already carried out certain construction. Revenue Secretary therefore, while upholding the order of the Collector found it appropriate to save such construction. I do not find that the petitioner has made out any case for being permitted to retain the entire land much of it originally was gauchar land which was granted to the petitioner for a specific purpose on certain terms and conditions.

Learned Counsel relied on following decisions in support of his contention that a fair hearing ought to have been given to the petitioner before the authority passed adverse orders:

1) Tin Box Company Vs. Commissioner of Income Tax,

2) Institute of Chartered Accountants of India Vs. L.K. Ratna and Others, .

It is by now well settled that principles of natural justice cannot be rigidly applied without due regard to the fact situation.

22.1 In case of Canara Bank Vs. V.K. Awasthy, the Apex Court observed that unless a failure of justice is occasioned or that it would not be in public interest to do so in a particular case, the Court may refuse to grant interim relief. Court relied on the decision in case of Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.,

22.2 In case of Divisional Manager, Plantation Division, Andaman and Nicobar Islands Vs. Munnu Barrick and Others, the Apex Court observed that principles of natural justice cannot be put to straitjacket formula. It must be viewed with flexibility. In a given case, where a deviation takes place as regards compliance with the principles of natural justice, the Court may insist upon proof of prejudice before setting aside order impugned before it.

22.3 In case of Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, , once again the Apex Court observed that the principles of natural justice may not be applicable in a given case unless prejudice is shown and same may not be applied where it wold be a futile exercise.

22.4 In case of P.D. Agrawal v. State bank of India and Ors. reported in (2006)8 SCC 776, with reference to the question of legality of departmental inquiry, the

Apex Court observed that nonobservance of principles of natural justice vitiates the order only when some real prejudice is caused to he complainant by such omission. The principles are to be applied having regard to the fact situation in each case.

In the present case, the petitioner is substantially correct in pointing out that the Collector did not grant a fair hearing and did not take into account the representation of the petitioner. Even if certain disputed factual aspects are ignored, the fact remains that representation of the petitioner was before the collector sent through Registered A.D. long before the Collector passed his order. At-least, such representation should have been taken into account. However, in present factual background to my mind, this lapse would not be fatal. The Revisional Authority i.e. Secretary though did not advert to this representation of the petitioner observing that no fresh material can be taken on record in revision, in reality went much beyond and examined the actual position at the site at the time of hearing of the revision application and permitted the petitioner to hold that part of the land which was covered by construction. He in fact in his order has further directed that such exercise shall be conducted by the Collector before taking over the possession of the remaining land. Thus on one hand considering the undisputed and admitted facts and on the other hand the ultimate conclusion of the Revenue Secretary, to my mind, no prejudice has been caused to the petitioner even if there was a lapse here or there committed by the authorities below, particularly, the Collector. For the same reason though I find that Collector committed serious error in holding that Secretary''s directions were contrary to law, in the ultimate analysis by virtue of order passed by the Revenue Secretary which is impugned in the present petition and in which order of the Collector has now merged, the entire action cannot be set aside.

As noted the ultimate order of grant was passed by the Collector. Upon finding that there was serious breach of conditions, Collector exercised powers u/s 62 of the Bombay Land Revenue Code, confiscating the lands.

I therefore, agree with learned AGP that Collector did not lack authority to pass order. Even otherwise, the petitioner at this stage cannot raise such an issue because in the earlier round of proceedings, Revenue Secretary by his order dated 13/21-1-94 remanded the proceedings to the Collector for fresh consideration and disposal bearing in mind the observations made in the order. The petitioner accepted the same and proceeded further before the Collector. Thus the petitioner having taken benefit of the order of the Revenue Secretary passed in January 1994, remanding the proceedings before the Collector for fresh consideration, without murmur cannot now turn around and claim that the Collector had no authority to pass fresh order.

In the ultimate result, subject to ironing out certain creases, I find that the order passed by the Revenue Secretary was just and proper. In the fact and circumstances of the case and in the interest of justice, however, it would be appropriate to remove the two conditions imposed by the Revenue Secretary namely that construction should be according to the rules and secondly that total land to be retained by the petitioner should be subject to a ceiling of 5000 sq. mtrs.

As stated by the Counsel for the petitioner, the petitioner has put up certain construction without permission from the authorities. Such construction will also be taken into account along with the land required to be kept open as per rules for permitting the petitioner to retain the land as long as such construction is permissible as per rules and does not breach any of the requirements and further that the petitioner should obtain necessary regularisation from the authority within the reasonable time. The ceiling of 5000 sq. mtrs. imposed by the Revenue Secretary in the operative portion of the order is not in consonance with the main body of the order nor is backed by any logic or reason. Such fixation therefore, also should be deleted.

In the result order passed by the Revenue Secretary is modified by providing that the petitioner shall be allowed to retain that part of the land which is already covered under construction including the additional land required to be kept open as per the building rules. Ceiling of maximum of 5000 sq. mtrs. of land introduced by the Revenue Secretary is deleted. The petitioner shall have to obtain necessary regularisation from the Competent Authority for the construction put up by the petitioner without permission. The same shall be done within six months from today. The petitioner shall not put up any further construction hereafter.

Subject to above modifications, order passed by the Revenue Secretary is upheld. Authorities shall proceed further as provided in the said order.

Request of the petitioner to retain further land for future expansion cannot be accepted. Conduct of the petitioner all through out does not inspire confidence. For whatever reasons, justifiable or otherwise, the petitioner has not been able to utilise the land granted way back in the year 1981. No further indulgence may be granted.

The petition is disposed of in above terms. Rule made absolute to the above limited extent.

At the request of learned advocate for the petitioner, this order shall stand stayed till 31.12.2008.

