

**(2004) 04 GUJ CK 0099**

**In the Gujarat High Court**

**Case No : Special Civil Application No. 7023 Of 1993**

Muljibhai Legherbai

APPELLANT

Vs

State of Gujarat

RESPONDENT

**Date of Decision : 09-04-2004**

**Acts Referred:**

Constitution of India, 1950 — Article 227

**Citation : (2004) 04 GUJ CK 0099**

**Hon'ble Judges : Mukesh R. Shah, J**

**Bench : Single Bench**

**Advocate : Ketty A Mehta, for the Appellant; K.T Dave, AGP, for the Respondent**

## **Judgement**

M.R. Shah, J.—The petitioners residents of Dhanduka had preferred the present Special Civil Application under Article 227 of the Constitution of India for an appropriate writ, direction or order and for quashing and setting aside the judgment and order passed by the learned Special Secretary(Appeals), Revenue Department, State of Gujarat dated 4.6.1993 in Revision Application No. 6/91 in dismissing the same and confirming the order passed by the Collector, dated 3.1.1990 in modifying its earlier order dated 22.11.1978 by which Part of land bearing Survey No. 1371 was directed to be used for the purpose of KHALWAD under the provisions of Section 38 of the Bombay Land Revenue Code (hereinafter referred to as "the Code").

2. That the land bearing Survey No. 1363/A Paiki admeasuring 7993 sq. mtrs. situate at Dhanduka and the land bearing Survey No. 1371 Paiki admeasuring 23573 sq. mtrs. was belonging to and in the name of Dhanduka Gram Panchayat. That as the aforesaid lands were needed by the State Government for public purpose, aforesaid two survey numbers were regranted while passing a resolution for using it for public purpose of cremation and Charmakund under the provisions of Section 96 of the Gujarat Panchayats Act.

That as representations were made by the village people, more particularly the

persons belonging to scheduled caste community as they wanted to use the land for Charmakund and also for cremation the Collector, Ahmedabad by his order dated 22.11.1988 passed an order u/s 38 of the Code to the effect that the land Survey No. 1363/A Paiki admeasuring 7993 sq. mtrs. of land will be used for Charmakund and the land bearing Survey No. 1371 Paiki admeasuring 23573 sq. mtrs of land will be used for cremation for scheduled caste community people. That it seems that subsequently other Muslim community people requested that they also need some land for the purpose of use of "Khalwad" which is also public purpose and it appears that the Collector, Ahmedabad, considering the need for Khalwad passed another order dated 3.1.1990 modifying his earlier order dated 22.11.1988 by which he had passed an order that the land bearing Survey No. 1371 Paiki of 1 acre will be used by the scheduled caste community people for cremation and the rest of the land from land Survey No. 1371/Paiki would be used for Khalwad.

3. That being aggrieved and dissatisfied with the aforesaid order dated 3.1.1990 passed by the Collector, Ahmedabad, modifying its earlier order dated 22.11.1988 passed u/s 38 of the Code with regard to use of the land in question, the petitioner preferred an appeal/revision before the State Government, i.e., Special Secretary (Appeals), Revenue Department, Gujarat State, Ahmedabad, which was numbered as Revision Application No. SRD 6/1991 and the learned Special Secretary (Appeals), Revenue Department, by his judgment and order dated 3rd June 1993 dismissed the said revision by holding that the order passed by the Collector, Ahmedabad dated 3.1.1990 was not illegal and the said order was passed considering the public purpose and by passing the impugned order dated 3.1.1990 the Collector has tried to give benefit of the said land to the persons belonging to other community also and has tried to satisfy the demand for public purpose of the persons belonging to other community.

4. Being aggrieved and dissatisfied with the judgment and order dated 3rd June 1993 passed by the learned Special Secretary (Appeals), Revenue Department, in Revision Application No. SRD 6/1991 in dismissing the same and confirming the order passed by the Collector, Ahmedabad dated 3.1.1990 the petitioners had preferred the present Special Civil Application under Article 227 of the Constitution of India.

5. Ms. Kettyben A. Mehta, Id. advocate appearing on behalf of the petitioners had challenged the order dated 3.1.1990 mainly on 3 grounds; (1) that the Collector has no jurisdiction to revise his own order passed u/s 38 of the Code, unless the same is cancelled and/or revised by superior authority exercising the power u/s 211 of the Code; (2) that before passing the impugned order dated 3.1.1990 the petitioners were not given an opportunity of being heard; and (3) as the land in question was granted by the Panchayat for a particular public purpose it is not open for the Collector to pass an order for using the said land for any other public purpose.

6. Shri K.T. Dave, learned AGP, on the other hand, has supported the order

passed by the Collector as well as the learned Special Secretary (Appeals). He has submitted that there is no grant in favour of the petitioners and therefore there is no question of hearing the petitioners. The land can be permitted to be used for any other public purpose and the Collector has jurisdiction to revise and/or pass another order u/s 38 of the Code considering the need of the village people, and therefore requested to reject the present Special Civil Application.

7. Ms. Kettyben Mehta, learned advocate appearing for the petitioners had submitted that as the lands in question were granted in favour of the petitioners and the persons belonging to the scheduled caste community for the use of cremation, before passing the impugned order the Collector should have given an opportunity of being heard to the petitioners or the persons belonging to the scheduled caste community. It is pertinent to note that as such there is no order of granting the land in favour of a particular community as contended on behalf of the petitioners. There is no order passed by the State Government and/or Collector granting the land in question in favour of scheduled caste community. The order is passed u/s 38 of the Code, which deals with user of the land in question. Section 38 of the Code reads as under;

"38. Lands may be assigned for special purposes, and when assigned shall not be otherwise used without sanction of the Collector.\_\_\_\_ Subject to the general orders of the State Government it shall be lawful for survey officers whilst survey operations are proceeding under Chapter VIII and at any other for the Collector to set apart lands the property of the State Government and not in the lawful occupation of any person or aggregate of persons, in unalienated villages or unalienated portions of villages, for free pasturage for the village cattle, for forest reserves, or for any other public or municipal purpose; and lands assigned specially for any such purpose shall not be otherwise used without the sanction of the Collector; and in the disposal of land u/s 37 due regard shall be had to all such special assignments."

Under Section 38 of the Code, the Collector has jurisdiction and/or power to set apart the lands, the property of the State Government to be used for any public purpose and he has jurisdiction to demarcate the land to be used for a particular public purpose, and further that the land assigned specially for any such purpose shall not be otherwise used without sanction of the Collector. Thus, any order passed u/s 38 of the Code would be with regard to user of the land and it cannot be said that by passing the order u/s 38 of the Code the land is granted in favour of a particular community. Therefore the contention of the petitioners, that by passing the order dated 22.11.1988 u/s 38 of the Code by the Collector by which the land bearing Survey No. 1371 admeasuring 23573 sq. mtrs. of land for use of cremation by the scheduled caste community people the land is granted in their favour, is devoid of any merits. By passing the order u/s 38 no right is created in favour of a particular community. If ultimately the Collector on the basis of a subsequent representation finds that the land in question is also required to be set apart for another use which is also for a public purpose, the

Collector can modify his earlier order and can pass an order that certain portion of the land will be used for a particular public purpose. Therefore, there is no question of giving any opportunity of being heard to the petitioners, when there is no right in favour of the petitioners with regard to the lands in question while passing the order u/s 38 of the Code. When on the basis of subsequent representation by the other village people with regard to the need of the land for "Khalwad" which is also a public purpose, and when the Collector thought it fit to set apart the certain portion of land for use of "Khalwad", it cannot be said that the Collector has committed any illegality and/or irregularity. The contention of the petitioners that the Collector has no jurisdiction to revise his own orders passed u/s 38 is also having no merits. When the Collector has passed an order demarcating and setting apart the land to be used for a particular purpose and subsequently if it is found by the Collector on the basis of the material available before him that a part of the land which is set apart for use of a particular public purpose is also required to be used for another public purpose, then certainly the Collector can pass a subsequent another order demarcating and setting apart the land for another use. There is no question of revising the earlier order, but it can be said to be an another order passed by the Collector u/s 38 of the Code. u/s 38 of the Code, there is no ban to set apart the land for use of a particular public purpose once the land is already set apart for use for a particular public purpose. Nothing is mentioned u/s 38 of the Code that once the land is set apart to be used for a particular public purpose the same cannot be changed and/or modified subsequently for setting apart the said land for any other purpose. In absence of such a ban, it cannot be said that the order passed by the Collector, Ahmedabad dated 3.1.1990 is in any way illegal and/or contrary to the provisions of Section 38 of the Code and therefore the contention of the petitioners that once the order is passed u/s 38 of the Code setting apart the land to be used for cremation he cannot modify the same order and pass an order u/s 38 for setting apart the land for use of "Khalwad", has no substance.

8. The third contention of the petitioners is that once the land is assigned for a specific purpose by the Panchayat, i.e., for use of cremation it was not open for the Collector to pass an order u/s 38 to set apart the said land for any other public purpose. The said argument is also required to be rejected. Firstly the Panchayat, which has assigned the land for a specific purpose, i.e., for use of cremation for scheduled caste community, has not challenged the decision of the Collector dated 3.1.1990. The petitioners cannot hold the brief of Panchayat for that purpose. Secondly, using the land for "Khalwad" is also for a public purpose. Once the land is regranted by the Panchayat, the land ceases to be that of Panchayat and the property/land belongs to the State Government and the State Government can pass an order to use the land for any other public purposes also. Merely because the land has been directed to be used for one public purpose, it cannot be said that the said land cannot be used for any other public purpose. As held by this Court in the case of Okhaji Girdharji Patel vs. Collector, Banaskantha, reported in 1999 (2) G.L.R. 1693, the change of user is

permissible.

9. For the reasons stated hereinabove, there is no substance in the present Special Civil Application. It cannot be said that the order passed by the Collector, Ahmedabad dated 3.1.1990 passing an order u/s 38 of the Code or using part of the land bearing Survey No. 1371 for the use of "Khalwad" cannot be said to be in any way illegal which requires interference of this Court exercising the power under Article 227 of the Constitution of India. The revisional authority also, while confirming the order passed by the Collector, Ahmedabad dated 3.1.1990 has held that the Collector has passed the order dated 3.1.1990 in the public interest, and considering the need of village people of other community and had passed an order to use the said land for another public purpose. Considering the aforesaid finding and considering the facts and circumstances of the case, the present Special Civil Application is required to be dismissed and is dismissed. Rule is discharged. Ad-interim relief stands vacated.

10. At this stage, the learned advocate appearing for the petitioners requested to continue the order of status-quo for a period of 4 weeks to enable her to take appropriate steps before the higher forum. Considering the facts and circumstances of the case, the ad-interim relief granted earlier by this Court while admitting the present Special Civil Application is ordered to be continued for a period of four weeks from today.