

(2016) 04 GUJ CK 0115

In the Gujarat High Court

Case No : Special Civil Application No. 3406 of 1992

Mustufakhan R. Pathan

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 27-04-2016

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 211
Constitution of India, 1950 — Article 226, 227
Gujarat Co-operative Societies Act, 1961 — Section 106, 152
Gujarat Tenancy and Agricultural Lands Act, 1948 — Section 43(1AA), 63A

Citation : (2016) 2 GCD 1631 : (2016) 3 GLR 2649

Hon'ble Judges : Abhilasha Kumari, J.

Bench : Single Bench

Advocate : Mr. IH Syed for Mr. Yh Motiramani, Advocates, for the Appellant; Ms Asmita Patel, Asst.Government Pleader, Mr. Mukesh A Patel, Advocate, Mr. Zubin F Bharda, Advocate, Mr. Shital R. Patel for Mr. Kishan H. Daiya, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Abhilasha Kumari, J.—;The present petition has been filed under Articles 226 and 227 of the Constitution of India, inter-alia, with a prayer to quash and set aside the order dated 07.08.1991/11.10.1991, passed by the Principal Secretary, Revenue Department, (Respondent No. 1), in Revision Application No. SSRD/AMDREV491, in exercise of power under Section 211 of the Bombay Land Revenue Code, 1879 ("the Code", for short), whereby the order dated 21.12.1984, passed by the Special Recovery Officer, has been set aside.

2. A brief factual background of the case would be necessary in order to understand the issues involved in the petition.

2.1 Land bearing Block/Survey No. 41, admeasuring 36 Acres 25 Gunthas, situated at village Miroli, Taluka Dascroi, District Ahmedabad (the land in question) belonged to respondents Nos. 2 and 5, who were heavily indebted to

respondents Nos. 7 and 8 Cooperative Societies. Proceedings were initiated against respondents Nos. 2 to 5 under the Gujarat Cooperative Societies Act, 1961 ("the Act", for short), decrees were passed and certificates were issued by the Registrar of Cooperative Societies under Section 106 of the Act, in the years 1979 and 1980. Respondents Nos. 2 to 5 failed to make the payments as required by the certificates, therefore, proceedings for the recovery of an amount of Rs.90,000/- were initiated. Notice under Section 152 of the Code was issued to respondents Nos. 2 to 5. As the said respondents did not make the payment of the outstanding dues, the Special Recovery Officer issued a proclamation under the Code on 20.10.1984, regarding the public auction of the land in question, for the recovery of Rs. 90,000/-, as arrears of land revenue, by selling the said land. After following the due procedure and formalities, the auction of the land in question was held on 21.11.1984. Respondents Nos. 2 to 5 were present at the auction. The petitioners made the highest bid, at Rs. 1,01,786/-, which was duly accepted. The petitioners paid the entire amount of Rs. 1,01,786/-, out of which an amount of Rs. 91,235.50ps. was paid to respondents Nos. 7 and 8 Cooperative Societies and the remaining amount of Rs.10,550/- was paid to respondents Nos. 2 to 5 by the Special Recovery Officer. The said respondents accepted the amount. On 21.12.1984, the order of the confirmation of the sale of the land was passed by the Special Recovery Officer. The possession of the land was handed over to the petitioners. The said order is to be found at Annexure-A to the petition. The possession receipt dated 21.12.1984, is also on record at Annexure-B.

2.2 It appears that respondents Nos. 2 to 5 instituted Regular Civil Suit No. 773/1985 against the petitioners, praying for the protection of their possession over the land in question. The petitioners also filed Regular Civil Suit No. 642/1986, with similar prayers. The record reveals that this Court made an attempt to find out the status of the two civil suits. The record of Regular Civil Suit No. 642/1986 filed by the petitioners is not traceable and neither could learned counsel for the petitioners or respondents throw any light on this aspect. As for Regular Civil Suit No. 773/1985, the same was withdrawn after the passing of the impugned order.

2.3 It is the case of the petitioners that they are auction purchasers who have purchased the property after participating in the auction and making the highest bid. There was no grievance from respondents Nos. 2 to 5 during the entire proceedings and even thereafter, respondents Nos. 2 to 5, who were present during the auction proceedings, did not raise any objection. In fact, they accepted the amount of Rs. 10,550/-, being the balance after making the payment of the outstanding dues to respondents Nos. 7 and 8 Cooperative Societies. The petitioners assert that no grievance was raised from any quarter from 1984 to 1991. All of a sudden, the petitioners received a notice regarding the hearing of a Revision Application before respondent No. 1, along with a copy of an application made by respondents Nos. 2 to 5, asking them to appear on 22.07.1991. It is the case of the petitioners that they appeared before

respondent No. 1 on 22.07.1991 and pointed out that they held the status of agriculturists even prior to the auction and requested for time to produce documents in support of this assertion. According to the petitioners, they obtained the papers of the relevant revenue record, such as Village Form No. 7/12, and produced the documents before respondent No. 1, showing that they were agriculturists when the auction took place. The grievance of the petitioners is that, without taking the said documents into consideration or even dealing with them, respondent No. 1 set aside the order dated 21.12.1984, passed by the Special Recovery Officer under Section 155 of the Code, confirming the sale of the land in question in favour of the applicants. By the impugned order dated 07.08.1991/11.10.1991, respondent No. 1 held that the petitioners were not agriculturists and, hence, could not have participated in the auction. Aggrieved thereby, the petitioners have approached this Court.

3. Mr. I.H. Syed, learned counsel appearing for Mr. Y.H. Motiramani, learned advocate for the petitioners, has submitted that there is a gross delay of almost seven years in exercising suo motu powers of revision by respondent No. 1. Such a long delay is not a reasonable one. The power under Section 211 of the Code has to be exercised within a reasonable period of time, as has been held by the Supreme Court and this Court in a catena of judgments.

3.1 In support of this submission, reliance has been placed upon a judgment of the Supreme Court in the case of State of Gujarat v. Patel Raghav Natha and others, reported in 1969 GLR 992.

3.2 The relevant extract of the said judgment is reproduced here-in-below :

"12. The question arises whether the Commissioner can revise an order made under section 65 at any time. It is true that there is no period of limitation prescribed under section 211, but it seems to us plain that this power must be exercised in reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order which is being revised.

13. It seems to us that section 65 itself indicates the length of the reasonable time within which the Commissioner act under section 211. Under section 65 of the Code if the Collector does not inform the applicant of his decision on the application within a period of three months the permission applied for shall be deemed to have been granted. This section shows that a period of three months is considered ample for the Collector to make up his mind and beyond that the legislature thinks that the matter is so urgent that permission shall be deemed to have been granted. Reading sections 211 and 65 together it seems to us that the Commissioner must exercise his revisional powers within a few months of the order of the Collector. This is reasonable time because after the grant of the permission for building purposes the occupant is likely to spend money on starting building operations at least within a few months from the date of the permission. In this case the Commissioner set aside the order of the Collector on

October 12, 1961, i.e., more than a year after the order, and it seems to us that this order was passed too late.

14. We are also of the opinion that the order of the Commissioner should be quashed on the ground that he did not give any reasons for his conclusions. We have already extracted the passage above which shows that after reciting the various contentions he badly stated his conclusions without disclosing his reasons. In a matter of this kind the Commissioner should indicate his reasons, however briefly, so that an aggrieved party may carry the matter further if so advised."

3.3 Another judgment relied upon is that in the case of Janardan D. Patel v. State of Gujarat, reported in 1997 (1) GLR 50. The relevant paragraphs are as below :

"8. It cannot be gainsaid that revisional powers under the relevant provisions contained in Rule 108(6) of the Rules are akin to those contained in Section 211 of the Code. What applies to Section 211 of the Code would apply with equal force to Rule 108(6) of the Rules.

9. In each petition the revisional powers have been exercised by the Deputy Collector beyond one year after the concerned mutation entry was made and certified by the concerned Mamlatdar. This he could not have done in view of the aforesaid binding ruling of the Supreme Court in the case of Patel Raghav Natha (supra) and the aforesaid Division Bench ruling of this Court in the case of Bhagwanji Bawanji Patel (supra). In that view of the matter, the impugned order at Annexure D to each petition cannot be sustained in law. An order affirming an illegal and invalid order is of no consequence. In that view of the matter, the impugned orders at Annexures E and F to each petition affirming impugned order at Annexure D to each petition cannot be sustained in law."

3.4 It is submitted that, in the present case, revisional powers have been exercised after a gross delay of almost seven years which is a highly unreasonable period of time, and that too without any reasons being indicated in the impugned order.

3.5 It is next submitted by learned counsel for the petitioners that the petitioners are, in fact, agriculturists and possessed that status even prior to the date of the auction. The petitioners hold land in Village Kolat, Taluka Sanand and were entitled to purchase the land in question in the auction. The petitioners had satisfied the Special Recovery Officer in this regard and this fact was known to all concerned. It is submitted that pursuant to the order confirming the sale in favour of the petitioners, they were put into possession of the land and their names were mutated in the revenue records. No objections were raised by any person at that point of time.

3.6 It is contended that respondent No. 1 gave a very short period of time to the petitioners in order to enable them to produce documents evidencing their status as agriculturists. These documents were produced on 23.08.1991, before the

impugned order was passed, but find no mention in the said order. The order bears two dates, that of 07.08.1991 and 11.10.1991. It is evident that the documents were produced before the order was signed and released on 11.10.1991, but they have not even been mentioned in the impugned order.

3.7 Learned counsel for the petitioners further submits that even otherwise, a transaction of the sale of land in a public auction would not be hit by the provisions of Section 63A of the Gujarat Tenancy and Agricultural Lands Act ("the Tenancy Act", for short), in view of the retrospective amendment nullifying the condition of holding agricultural land within a radius of 8 kilometers. It is submitted that Section 43 (1AA) of the Tenancy Act would override the provisions of Section 63A and, hence, the sale, even if made in favour of a non-agriculturist (which is not the case here) cannot be set aside. However, the petitioners do hold agricultural land at village Kolat. The auction purchase would not be hit by Section 63 of the Tenancy Act, in view of the Amending Act of 2001, whereby the condition of holding agricultural land within a radius of 8 Kilometers has been deleted, with retrospective effect. The contention of respondent No. 1 that the petitioners did not hold agricultural land within the said radius, which is the only reason for setting aside the sale, is, therefore, untenable.

3.8 It is strenuously argued by learned counsel that, when the public auction was held by the Special Recovery Officer, no condition was imposed that only an agriculturist could participate in the auction. Even if it is presumed, though not admitted, that the petitioners are not agriculturists, the auction proceedings could not have been set aside due to the retrospective amendment to the Tenancy Act.

3.9 In support of this submission reliance has been placed upon a judgment of a Division Bench of this Court dated 23.11.2010, passed in Letters Patent Appeal No. 1527/2010, in the case of State of Gujarat v. Hasmukhlal Ishvarlal Gandhi, wherein it is held as below :

"4. From the documents on record, it becomes clear that land in question was sold through public auction by the Special Recovery Officer of the Land Development Bank since original owner was unable to pay bank dues. Necessary permission in this regard was also obtained from the Collector. It is not in dispute that the Special Recovery Officer was vested with all powers of the Collector by delegation under the Bombay Land Revenue Code for recovery of all bank dues, except for Section 157 and 159 of the Code. At the time of auction, no objection with respect to status of the purchasers was raised. Their offer being highest was accepted. Upon payment of full consideration, sale was also confirmed.

5. Since the show cause notice leading to the order passed by the Collector is not on record, it is not clear what exactly was the notice issued by the Collector to the land purchasers. However, it does appear that the proceedings arose out of mutation entry with respect to said land upon its sale to the respondents herein. If that be so, question of reopening the order of Special Recovery Officer dated

24.6.1985 confirming the sale in favour of respondents herein in said proceedings would not arise. As already noted, Special Recovery Officer was exercising delegated powers of the Collector under the Bombay Land Revenue Code. While considering the question of certification of mutation entry, validity of auction sale could not have been gone into. In other words, from the record it appears that issue was placed before the Collector in view of the objection by the Circle Inspector to certification of mutation entry in favour of the purchasers. While examining these aspects, Collector could not have invalidated the auction sale by setting aside order of confirmation passed by the Special Recovery Officer. It is not clear under which provision, Collector was exercising such powers. If at all, order should have been taken in revision by the competent authority in accordance with law after issuance of appropriate proceedings. This was not done."

(emphasis supplied)

3.10 In support of the contention that the provisions of Section 43 (1AA) of the Tenancy Act would override Section 63A of the said Act and, therefore, the purchaser would not be required to comply with any of the conditions in Section 63A, learned counsel for the petitioner has relied upon a judgment of this Court in the case of Dahyabhai Dayalbhai Rohit and another v. State of Gujarat and others, reported in 2007 (3) GLR 1974. The said judgment shall be discussed at the stage below.

3.11 It is submitted that the provisions of Section 43 (1AA) also apply to a loan advanced by a Cooperative Society, therefore, the auction of the land in question, for default in the payment of the loan advanced by respondents Nos. 7 and 8 Cooperative Societies could not have been set aside.

3.12 On the basis of the above submissions it is urged, on behalf of the petitioners, that the petition be allowed and the impugned order passed by respondent No. 1, be quashed and set aside.

4. The petition has been opposed by Ms. Asmita Patel, learned Assistant Government Pleader, who has supported the impugned order and submitted that, after the confirmation of the sale of the land in question by the Special Recovery Officer, there was a proposal from the Office of the Assistant Collector, Viramgam, to cancel the auction sale which, according to him, was irregular and illegal. There was also a request from respondent No. 2 to cancel the sale on the ground that the petitioners were not agriculturists when the sale took place and could not have participated in the auction. Learned Assistant Government Pleader submits that for the above reasons, respondent No. 1 exercised power under Section 211 of the Code and cancelled the sale, by the impugned order dated 11.10.1991. Learned Assistant Government Pleader has further contended that at the relevant point of time it was the requirement of law that a person desirous of purchasing agricultural land must hold agricultural land located within a radius of 8 Kilometers from the land proposed to be purchased. The petitioners

did not fulfil this requirement. Though this condition has now been deleted by an amendment, it was applicable when the auction purchase took place. Learned Assistant Government Pleader has further submitted that no time period has been prescribed in the Code for the exercise of power under Section 211, therefore, it cannot be said there has been a delay on the part of respondent No. 1.

5. Mr. Zubin F. Bharda, learned advocate has appeared for respondent No. 4 (one of the original owners of the land) and made detailed submissions to the effect that the original land owners (respondents Nos. 2 to 5), were not affluent persons. They had taken loans from respondents Nos. 7 and 8 Cooperative Societies, which they were unable to repay. Scarcity conditions were prevailing at the relevant period of time and they could not make two ends meet. It is submitted that their inability to repay the amount to respondents Nos. 7 and 8 led to the auction of their land. As a result, the original landowners have been rendered landless.

5.1 It is contended that the petitioners could not have participated in the auction as they were not agriculturists at the relevant point of time. They did not produce any record of their being agriculturists when proceedings were going on before respondent No. 1. This has been noted in the impugned order. That, though the petitioners did submit some revenue record by way of an application on 23.08.1991, however, that is after the date of hearing which took place on 29.07.1991, as is reflected in the impugned order. Till the conclusion of the hearing on 29.07.1991, no record was produced by the petitioners. The order was ready on 07.08.1991 and signed on 11.10.1991. As no documents were produced while the hearing was going on, respondent No. 1 had no opportunity to examine them.

5.2 It is contended that though, on merits, the petition deserves to be rejected, however, if the Court is desirous of considering the arguments advanced on behalf of the petitioners, at best, the petition can be remanded for the examination and verification of the revenue record produced by the petitioners, in support of their claim of being agriculturists when the auction took place.

5.3 It is further submitted by Mr. Bharda, learned advocate, that the delay in the exercise of power by respondent No. 1, ought not to be considered as an impediment to the case of the original landowners. In an attempt to distinguish the judgment in the case of Patel Raghav Natha and Janardan D. Patel (Supra.), on the aspect of delay in exercising revisional jurisdiction under Section 211 of the Code, it is contended that the present case stands on a different footing where, if the original landowners were to succeed, the land would revert back to them and would not vest in the State Government. According to learned counsel, for this reason, the delay ought not to be strictly construed as ultimately, poor farmers would be the beneficiaries. It is submitted that the landowners had represented to respondent No. 1 that they were left with no land, which was the cause for the initiation of proceedings under Section 211 of the Code.

5.4 Learned counsel for respondent No. 4 has further submitted that one would normally understand that an agriculturist is a person who is born as such or has been declared as a tenant, in accordance with law. However, the revenue record produced by the petitioners indicates that they became agriculturists on account of land being gifted to them on the occasion of marriage. This is another reason why, at the most, the case can be remanded to respondent No. 1 for the verification of the revenue record.

5.5 It is contended that the fact that the amendment in the Tenancy Act that took place in the year 2001, whereby the condition of owning agricultural land within a radius of 8 Kilometers has been deleted with retrospective effect, would not be applicable in the present case as the requirement of being agriculturists was prevalent at the relevant point of time. The auction has been rightly cancelled by respondent No. 1 and the impugned order requires no interference by this Court.

5.6 It is further contended that, though this Court has granted interim relief in favour of the petitioners, however, such relief has not operated continuously as, on a few occasions the petition was dismissed for non-prosecution, even though it was restored later on.

5.7 In support of his submissions, learned counsel has relied upon a judgment of this Court in the case of Shivalik (Aambali) Cooperative Housing Society and others v. State of Gujarat and others, reported in 2008 (5) GLR 4476, wherein the Court has observed as below :

"21.2 The Court restrains itself from going into the question as to whether the land could have been purchased in the name of the proposed society at the relevant time. Assuming for the sake of argument that it could have been purchased, the society could have purchased only such rights which the "vendor" had. If the entire edifice is built on a fraud, a person cannot be heard complaining that revisional authority exercised power beyond "reasonable" time. In the present case the revisional power is exercised with much promptness, which normally does not happen in the matter of an "impersonal" Government authority. In the present case, order impugned was passed on 19.04.2005; a show cause notice was issued on 30.06.2006; the matter was heard and the order was passed on 03.05.2007."

6. Mr. Shital R. Patel, learned advocate, has appeared for respondents Nos. 3.1, 5.1 and 5.4 (the heirs of some of the original landowners) and has submitted that, an impression is sought to be given to the Court that after the auction sale was confirmed, an entry in favour of the petitioners was mutated in the revenue records. However, the fact is that the said entry was cancelled later on and the names of the original landowners were mutated in the record, which still stand. The cancellation of the entry in the names of the petitioners has attained finality.

6.1 It is submitted that the suit filed by the original landowners against the petitioners was withdrawn after respondent No. 1 passed the impugned order.

However, in the plaint of that suit it is mentioned that no notice of auction was given to the original landowners.

6.2 Reiterating the submissions advanced on behalf of respondent No. 4, Mr. Patel has further submitted that the record in support of the petitioners claim of being agriculturists was not produced while the hearing of the revision proceedings was going on before respondent No. 1, but has been produced by way of an additional affidavit, in this petition. At best, the matter can be remanded.

7. In rejoinder, it is submitted on behalf of the petitioners that a revenue entry cannot be the proof of title but can only be used for fiscal purposes. The possession of the land in question has been duly handed over to the petitioners after the confirmation of the sale in their favour and on 21.01.1985, and an entry was posted recording the auction.

7.1 It is reiterated that the record to show that the petitioners were agriculturists was produced before respondent No. 1 on 23.08.1991, before the judgment was delivered on 11.10.1991, as the petitioners were orally informed to submit it as soon as possible. The averments to this effect made on oath, in paragraphs 9 and 10 of the petition have not been denied or controverted by respondent No. 1. In spite of the production of the relevant documents by the petitioners showing that they were agriculturists prior to the auction proceedings, respondent No. 1 has not dealt with them at all in the impugned order.

8. In the background of the above legal and factual submissions, this Court has heard learned counsel for the respective parties, perused the averments made in the petition and the documents produced on record.

9. The State Government is the only respondent to have filed an affidavit-in-reply, affirmed on 10.03.2014 to the petition filed in the year 1992. That too, after the Court directed it to do so. The original landowners have not filed any pleadings and respondents Nos. 7 and 8 Cooperative Societies have not appeared, in spite of service of notice of Rule.

10. This Court issued Rule in the petition on 19.05.1992 and granted interim relief in favour of the petitioners. Though it does appear from the record that the petition was dismissed for non-prosecution on a number of occasions, however, it has been restored to its original status on file, each time. The interim relief in favour of the petitioners is still operating.

11. In order to get a clear perspective on the legal aspects arising in the petition, it would be apposite to refer to certain relevant provisions of law in the Tenancy Act of 1948.

12. Section-2(2) defines "agriculturist" to mean "a person who cultivates land personally". As per Section-2(6) "to cultivate personally" means to cultivate land on one's own account (i) by one's own labour, or (ii) by the labour of any member of one's family, or (iii) under the personal supervision of oneself or any member of one's family, by hired labour or by servants on wages payable in cash

or kind but not in crop share, being land, the entire area of which - (a) is situated within the limits of a single village, or (b) is so situated that no piece of land is separated from another by a distance of more than five miles; or (c) forms one compact block;

Explanation IA widow or a minor, or a person is subject to physical or mental disability, or a serving member of the armed forces shall be deemed to cultivate the land personally if such land is cultivated by servants, or by hired labour, or through tenants.

Explanation III-n the case of a joint family, the land shall be deemed to have been cultivated personally, if it is cultivated by any member of such family, (and in the case of a family other than a joint family, a person, other than the husband, or as the case may be, wife of the person concerned or any of his lineal descendants dependent on him, shall not be deemed to be a member of the family.)

Provided that, for the purpose of this Explanation, it shall not be necessary for a person to so reside in such village or place if a certificate is granted by the Collector to such person that owing to the smallness of his holding, limited income from agriculture or any other reason as may be prescribed, it is not possible for him to so reside at such village or place, without detriment to his means of livelihood, and such certificate is in force.)

13. Section 63 of the Tenancy Act reads thus :

"Section 63 Transfers to non-agriculturists barred: (1) Save as provided in this Act,-

(a) no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue), gift, exchange or lease of any land or interest therein, or

(b) no mortgage of any land or interest therein, in which the possession of the mortgaged property is delivered to the mortgagee, [or]

(c) no agreement made by an instrument in writing for the sale, gift, exchange, lease or mortgage of any land or interest therein] shall be valid in favour of person who is not an agriculturist [or who being an agriculturist cultivates personally land not less than the ceiling area whether as an owner or tenant or partly as owner and partly as tenant or who is not an agricultural labourer]

Provided that the Collector or an officer authorised by the [State] Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage [or for such agreement] on such conditions as may be prescribed.

[Provided further that, no such permission shall be granted, where land is being sold to a person who is not an agriculturist for agricultural purpose, if the annual income of such person from other sources exceeds five thousand rupees.]

(2) Nothing in this section shall be deemed to [prohibit the sale, gift, exchange or lease, or the agreement for sale, gift, exchange or lease of] a dwelling house or the site thereof or any land appurtenant to it in the favour of an agricultural labourer or an artisan [or a person carrying on any allied pursuit].

[(3) Nothing in this section shall apply or be deemed to have applied to a mortgage of any land or interest therein effected in favour of a cooperative society as security for the loan advanced by such society [or any transfer declared to be a mortgage by a court under Section 24 of the Bombay Agricultural Debtors' Relief Act, 1947. (Bom. XXVIII of 1947)]

[(4) Nothing in section 63A shall apply to any sale made under subsection (1).]"

14. By way of an amendment by the Gujarat Act No. 4 of 1995, it was provided that :

2. In the Bombay Tenancy and Agricultural Lands Act, 1948, in Section 2, in subsection (6):

(1) for the portion beginning with the words "being land, the entire area" and ending with the words "one compact block" shall be deleted.

(2) The explanation III shall be deleted.

15. The Tenancy Act was further amended by the Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Amending Act, 2001. Section 2 of the Gujarat Act No. 4 of 1995 was amended as below :

"2. In the Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1995 (hereinafter referred to as "the amending Act"), in section 2, for the words "shall be deleted" occurring at two places, the words "shall be and shall be deemed always to have been deleted" shall be substituted."

(emphasis supplied)

16. From a careful perusal of the above amending provisions of 2001, it is clear that the limitation of holding agricultural land within a radius of 8 Kilometers has been deleted with retrospective effect, as though it had never been there in the statute, from the very beginning. "It shall be deemed always to have been deleted." The amending Act of 2001 provides for the abatement of all legal proceedings relating to any order made or purported to be made under Section 84(C) of the Tenancy Act, in contravention of the provisions of Section 63, so far as it relates to the breach of subsection (6) of Section 2 of the Provincial Act, pending before any Court, Tribunal or other authority or any such proceedings initiated by any such authority on or after the commencement of the amending Act, which has become final.

17. The saving clause saves the proceedings that have attained finality before the date of the commencement of the amending Act, but provides that the amendment shall apply to pending proceedings.

18. In the explanation to Section 4 of the amending Act of 2001, the word "final" has been defined to mean where no appeal, revision or any other proceeding is pending before any Court, Tribunal or other authority against any such order on the date of the commencement of the amending Act.

19. In the factual scenario of the present case, the impugned order has been passed on 07.08.1991/11.10.1991. The proceedings had not attained finality when the amendment of 2001 was introduced, as the present petition, challenging the impugned order, was pending when the amendment came into force. By the operation of the above amendment of 2001, all pending proceedings that have not attained finality, stand abated due to the retrospective effect given in the amendment regarding the breach of the provisions of Section 63 as they then stood, containing the requirement of holding agricultural land within a radius of 8 Kilometers from the land proposed to be purchased.

20. The legal implications of the amendment of 2001 are that the requirement of holding agricultural land within a radius of 8 Kilometers stood deleted with retrospective effect, as though it had never been enacted in the statute. All pending proceedings arising out of a breach of this requirement, that had not attained finality, stood abated. Applying this legal position to the factual matrix of the present case, it is clear that the proceedings have not yet attained finality. It is clear that even though there may have existed a requirement that the petitioners hold agricultural land within a radius of 8 Kilometers from the land purchased by them in the auction, this requirement has now been wiped out. The retrospective nature of the amendment and the words "shall be deemed always to have been deleted" make it clear that the argument of the learned Assistant Government Pleader and learned counsel for the other respondents, that the petitioners were bound to fulfil this condition on the date of the auction, stands defeated.

21. There can be no two views regarding the fact that the impugned order has not attained finality by virtue of the pendency of the petition before this Court when then amending Act of 2001 came into force. The petitioners were protected by the grant of interim relief. They are, therefore, entitled to get the legal benefit of the amendment and by operation of law, the requirement of their holding land within a radius of 8 Kilometers would not come in their way.

22. This brings us to the question regarding the documents produced by the petitioners before respondent No. 1, showing their status as agriculturists. The record of the proceedings before respondent No. 1 has been produced by Mr. Zubin F. Bharda, learned advocate for respondent No. 4. It is, in fact, a copy of the record of the State Government. It is clear therefrom, and is not disputed by learned counsel for any party, including the learned Assistant Government Pleader, that the petitioners submitted the said documents to respondent No. 1 on 23.08.1991, along with an application. The documents are copies of the revenue record. The impugned order mentions that on 29.07.1991 when the hearing took place, the petitioners had not produced any documentary evidence

in support of their claim of being agriculturists. It is further clear from the impugned order that, though the hearing took place on 29.07.1991, respondent No. 1 did not pronounce the final order on that date. Peculiarly, the impugned order bears two dates. One is 07.08.1991 and the other is 11.10.1991. The former could be indicative of the date when the order was prepared and the latter when it was pronounced. Nothing can be said with certainty in this regard. What is certain, however, is the fact that the order was not pronounced before 11.10.1991. Therefore, if the petitioners had submitted the documents on 23.08.1991, respondent No. 1 had plenty of time to scrutinise and verify them between 29.07.1991 (the date of hearing) and 11.10.1991, when the order was pronounced. The documents along with the accompanying application, remain on the record of respondent No. 1. The hearing may have taken place on 29.07.1991 but the order was not pronounced on that date. There appears to be no valid excuse for not taking into consideration the documents produced by the petitioners while passing the impugned order, especially after they were duly received after the date of hearing but before the pronouncement of the order, and taken on record. It was the duty of respondent No. 1 to have dealt with the documents that form a part of the record before the order was pronounced and released. However, respondent No. 1 failed to consider the said documents for reasons best known to him. The documents have also been produced on the record of the present petition by the petitioners, by way of an additional affidavit. This Court does not propose to enter into the exercise of the verification of the said documents or form any conclusion regarding whether, at the relevant point of time, the petitioners were agriculturists, or not. That was for respondent No. 1 to do, which he has not done. There is no requirement for this Court to venture into this exercise which would now be fruitless, due to the amendment in the Tenancy Act, doing away with the limitation of holding agricultural land within 8 Kilometers. As has already been stated earlier, the petitioners cannot be denied the benefit of the amending Act by which this requirement has been deleted with retrospective effect, as though it had not been enacted in the first place. The amendment further provides that pending proceedings in relation to a breach of Section 63 shall stand abated.

23. Law has to take its own course and, therefore, by legal implication, there is no requirement, as of today, to examine the documents produced by the petitioners in support of their status of agriculturists at the relevant period of time. The contention of the respondents that the matter be remanded to respondent No. 1 has no force as such an exercise would now be an empty formality, not to mention legally untenable.

24. As for the delay in the initiation of the revision proceedings, the law laid down by the Supreme Court in the case of *State of Gujarat v. Patel Raghav Natha* (Supra) and *Janardan D. Patel v. State of Gujarat* (Supra) would be squarely applicable to the present case. There has been a delay of almost seven years in the exercise of revisional powers under Section 211 of the Code by respondent No. 1, which is undoubtedly an unreasonable period of time. No mitigating

circumstances or explanation is to be found in the impugned order. For this reason as well, the impugned order is legally unsustainable.

25. The judgment in the case of Shivalik (Aambali) Cooperative Housing Society and others v. State of Gujarat and others (Supra), cited by learned counsel for respondent No. 4 would not apply to the facts and circumstances of the present case as it is rendered on totally different facts.

26. Another important aspect that would be required to be noticed is the one pertaining to Section 43 (1AA) of the Tenancy Act, read in juxtaposition with the provisions of Section 63(1)(a). Section 43 of the Tenancy Act contains a restriction on the transfer of land purchased or sold under the said Act.

27. Section 43(1AA) reads thus:

"Section 43(1AA) Notwithstanding anything contained in subsection (1), it shall be lawful for such tenant or a person to mortgage or create a charge on his interests in the land in favour of the State Government in consideration of a loan advanced to him by the State Government under the Land Improvement Loans Act, 1883 (XIX of 1983), the Agriculturists' Loan Act, 1884 (XII of 1983), or the Bombay Non-Agriculturists' Loans Act, 1928 (Bom. III of 1928), as in force in the State of Gujarat, or in favour of a bank or cooperative society, and without prejudice to any other remedy open to the State Government, bank or cooperative society, as the case may be, in the event of his making default in payment of such loan in accordance with the terms, on which such loan was granted, it shall be lawful for the State Government, bank or cooperative society, as the case may be, to cause his interest in the land to be attached and sold and the proceeds to be applied in payment of such loan."

28. This provision also mentions a cooperative society. It is clear from the above that if a mortgage of the land is created in favour of a cooperative society, as has been done in the present case by respondents Nos. 2 to 5 in favour of respondents Nos. 7 and 8, the cooperative society can cause its interest in the land, to be attached or sold and the proceeds applied in payment of such loan in the case of default. In the case in hand, respondents Nos. 2 to 5 took loans from respondents Nos. 7 and 8 Cooperative Societies and did not repay the amount. Respondents Nos. 7 and 8, therefore, were legally entitled to realise their dues by the auction of the land of respondents Nos. 2 to 5, as provided in Section 43(1AA) of the Tenancy Act.

29. In this regard, it would be fruitful to advert to the judgment of this Court in Dahyabhai Dayalbhai Rohit and another v. State of Gujarat and others (Supra), wherein this Court (Coram: Mr. R.S. Garg, J.) has held as below:

"8. It is further to be seen that Section 43(1AA) of the Bombay Tenancy and Agricultural Lands Act, 1948 provides that notwithstanding anything contained in Sub-section (1), it shall be lawful for such tenant or a person to mortgage or create a charge on his interest in the land in favour of the State Government

under particular Acts or in favour of the Banks etc. The word "Bank" has been defined in the Explanation appended to Section 43. Clause (b) of the Explanation includes any subsidiary Bank as defined in Clause (k) of Section 2 of the State Bank of India (Subsidiary Banks) 1959. Undisputedly, Bank of Baroda is subsidiary Bank of the State Bank of India. It is not in dispute before me that the land was mortgaged by the judgment debtors with the Bank and the mortgage under the common law had a right to obtain decree for sale of the property. Once the provisions of Section 43(1) are not applicable in view of Section 43(1AA) of the Act, then, mortgage would be legal mortgage.

9. Shri Pujari, learned A.G.P. for the State submits that present is a case where Section 63 would apply with its full force, according to him, under the Bombay Tenancy and Agricultural Lands Act, 1948, transfers to non-agriculturists are barred and as the present petitioners are non-agriculturists, no sale could be effected in their favour. It is submitted that no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenues or for sums recoverable as arrears of land revenue), gift, exchange or lease or any land or interest therein, shall be valid in favour of a person who is not an agriculturist. Language of Section 63 undisputedly puts ban on such transfer, but if Section 63 is read with Section 43(1AA), it will be clear that mortgage in favour of a Bank would be valid. If a mortgage would be valid, then, provisions of Section 43(1AA) would override the provisions of Section 63(1)(a) because Section 63 came in the statute book in the year 1948, while Section 43(1AA) was introduced vide Gujarat Act No. 16 of 1960 and was renumbered by President Act No. 37 of 1976 and Gujarat Act No. 30 of 1977. When the legislature being fully aware of the legal implications of the amendment introduces an amendment in the body of the Act, then, intention of the Government is to be understood in view of the attending circumstances.

10. It cannot be gainsaid that the mortgage does create an interest in the land. If Section 63(1)(a) bars creation of interest in the land, then, Section 43(1AA) would become nugatory and intention of the Government would fall. For harmonious construction, one has to understand the law after reading two provisions in juxtaposition. Section 43(1AA) and Section 63(1) (a) are not mutually destructive, these can be read together to survive. Section 63(1)(a) though puts an absolute bar even against a Court or against authorities for sale etc. of the property or for gift, exchange or lease or creation of interest, but Section 43(1AA) carves out an exception and permits an agriculturist/tenant to mortgage or create a charge or his interest in the land in favour of the State Bank or a Bank. If such procedure is permissible, then, it cannot be argued that Section 63(1)(a) shall supersede subsequent provisions which were brought in the statute book to protect interest of the agriculturists/tenants from the land grabbers. The Government, in fact, wanted to confer an authority upon the landowners that instead of selling their land for small money, they may mortgage land or create an interest of a Bank in the land and with the time pay back the amount and get their land redeemed. Intention of the Government can never be

to make an amendment which would be nugatory because of the existing provision or runs in conflict with the existing provisions.

11. In my opinion, Section 63 and Section 43 can stand together as there is no conflict in the said provisions.

12. Once, it is held that Section 63(1)(a), in view of Section 43(1AA) would not apply to a mortgage, then, provisions of civil law would authorise a Bank to file a suit either for recovery of money, sale of the property or for foreclosure. If during final decree proceedings, decretal amount is not paid, then, under the authority of the Court, Bank would be entitled to sell the property. Once Bank sells the property through the agency of the Court, then, one cannot be allowed to say that sale was in breach of Section 63(1)(a) of the Bombay Tenancy and Agricultural Lands Act, 1948. I must hold that Section 43(1AA), in fact, would protect rights of the Bank, and consequently, the rights which accrued in favour of the petitioners. The authorities have not properly appreciated the legal position and erred in granting application made by the respondent No. 4."

(emphasis supplied)

30. In the above view of the matter, as well, the sale of the land in question by way of auction cannot be rendered nugatory.

31. While effecting the sale of the land in question the required procedure under Chapter XI of the Code titled "Of The Realization of The Land Revenue and Other Revenue Demands" has been followed. Under Section 155 of the Code, power is vested in the Collector to cause the right, title and interest of the defaulter in any immovable property other than the land on which the arrears are due, to be sold. Section 165 provides for the procedure to be followed and the issuance of a proclamation of sale. Section 179 provides that on the expiration of thirty days from the date of the sale, if no application, as contemplated in Section 178, is made to set aside the sale on the ground of some material irregularity, mistake or fraud, or if such application was made and rejected, the Collector shall make an order confirming the sale. The proviso to this section vests power in the Collector to set aside the sale for reasons to be recorded in writing, even if no such application has been made.

32. In the present case, as is mentioned in the petition, one Shri Imamkhan Pathan made an application on 12.12.1984, contending that he had paid some amount to the debtors (respondents Nos. 2 to 5) over the land in question. However, the said application was rejected. It is an undisputed position that the original landowners/debtors, respondents Nos. 2 to 5 herein, did not make any application for setting aside the auction sale in favour of the petitioners within 30 days from the sale, as provided under Section 128 of the Code. Therefore, the sale was confirmed in favour of the petitioners by virtue of the provisions of Section 179 of the Code and the possession of the land was handed over to them. Respondents Nos. 2 to 5 were present at the auction, as is clear from the order dated 21.12.1984, passed by the Special Recovery Officer under Section

155 of the Code. The signatures of respondents Nos. 2 to 5 were also taken during the proceedings. The said order mentions that prior notices were issued to respondents Nos. 2 to 5 under Section 152 of the Code. It is clear that respondent Nos. 2 to 5 debtors, participated in the auction proceedings and were present throughout. The contention raised by Mr. Shital R. Patel, learned advocate that they were not aware of the auction proceedings, is baseless.

33. At this juncture, reference may be made to the judgment dated 23.11.2010, passed by the Division Bench of this Court in Letters Patent Appeal No. 1527/2010, in the case of State of Gujarat v. Hasmukhlal Ishvarlal Gandhi, the relevant extract of which has been reproduced earlier.

34. In the present case, the order of the Special Recovery Officer confirming the sale was passed after following due procedure as required under law. An entry mutating the names of the petitioners pursuant to the auction was made in the revenue record. It has been contended by Mr. Shital R. Patel, that this entry was later on removed. It could be possible that this was due to the effect of the impugned order. However, when this Court is seized of the legal issue regarding the amendment in the Tenancy Act and the implications of the amendment, as already discussed herein above, the mutation of entries, or their cancellation, would not decide the legal rights of parties flowing from the statute, as amended. The issue regarding mutation or cancellation of entries in favour, or against, either of the parties can have no significance in the present context as nothing would turn upon it.

35. The contention on behalf of the respondents that the interim relief granted by this Court in favour of the petitioners has not been continuous by virtue of the dismissal of the petition for non prosecution on a number of occasions, can have no relevance in the face of the fact that every time that the petition was dismissed for non prosecution, it was subsequently restored to its original status. The interim relief still continues to operate by virtue of the restoration of the petition. No advantage can be derived by the respondents from this aspect, as the dismissal of a petition for non prosecution and its subsequent restoration to file, is a matter between the Court and the petitioner, in which the respondents have no say.

36. The contention raised on behalf of respondent No. 4 that the present case be viewed in light of the submissions that the land is being claimed by the landowners who were rendered landless and, if the petition were to be rejected the land would revert to the original landowners and not the State Government, has no legal basis. This contention has been put forth in order to counter the argument of the petitioners regarding unreasonable delay in the exercise of revisional jurisdiction by respondent No. 1. It may be unfortunate for the original landowners to have lost their land but it cannot be ignored that it was due to their own default in repaying the amount of loans advanced by respondents Nos. 7 and 8 Cooperative Societies. Respondents Nos. 2 to 5 were well aware of the legal implications of their default and did not repay the amounts even after the

issuance of notices to them. The due procedure, as prescribed under the Code has been followed and the auction has taken place in their presence. No objections were raised by them at any point of time within the prescribed period.

37. As is clear from the judgment of the Supreme Court in the case of Patel Raghav Natha and of this Court in the case of Janardan D. Patel (Supra), revisional powers under Section 211 were exercised by respondent No. 1 after an inordinate and unreasonable delay. The reason for initiation of proceedings may be the report of the Assistant Collector or the application made by respondents Nos. 2 to 5. However, that does not take the impugned order out of the ambit of the law laid down in the judgments discussed herein above. Moreover, the impugned order has been passed without examining the documents submitted by the petitioners much before the order was pronounced, even after those documents were taken on record. As has been discussed earlier, due to the legal implications of the amending Act of 2001, the requirement of being an agriculturist stands deleted with retrospective effect and the amendment would apply to pending proceedings that have not attained finality, and which stand abated. The petitioners are entitled to receive the benefit of the legal position flowing from the amending Act of 2001 and the question whether they were agriculturists at the time of the auction, now pales into insignificance.

38. As a consequence of the above discussion, after examining the matter from all possible angles and perspectives and for reasons stated herein above, this Court is of the considered view that the impugned order dated 07.08.1991/11.10.1991, passed by respondent No. 1 deserves to be quashed and set aside. It is, accordingly, quashed and set aside. As a result, the land in question shall revert back to the petitioners. The State Government shall take necessary steps in this regard as expeditiously as possible.

39. The petition is allowed, in the above terms. Rule is made absolute, accordingly. Parties to bear their own costs.