

(2004) 06 GUJ CK 0030

In the Gujarat High Court

Case No : Special Civil Application No. 5446 of 1987

Nagarbhai Gordhanbhai

APPELLANT

Vs

Servanjanik Vidyarthi Gruha Dhandhuka

RESPONDENT

Date of Decision : 30-06-2004

Acts Referred:

Central Excise and Customs Laws (Amendment) Act, 1991 — Section 2 , 3, 4, 5, 6
Central Excises and Salt Act, 1944 — Section 11B, 11B(2), 11B(3)
Constitution of India, 1950 — Article 226
Land Acquisition Act, 1961 — Section 11, 12, 16, 3, 4

Citation : (2004) 06 GUJ CK 0030

Hon'ble Judges : K.M. Mehta, J;D.K. Trivedi, J

Bench : Division Bench

Advocate : Ketty A. Mehta, for the Appellant; Suresh M. Shah and Mehul S. Shah for Respondent No. 1, Hasurkar, Ld. AGP for Respondent Nos. 2-3 and P.J. Vyas, for Respondent Nos. 4-6, for the Respondent

Judgement

K.M. Mehta, J.—Shri Nagarbhai Gordhanbhai, petitioner, has filed this petition under Article 226 of the Constitution of India with a prayer for a writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction that this Court may declare that the acquisition proceedings taken for the land Survey No.498A, parts 1, 2 and 3 of Village Dhandhuka by award dated 10th December, 1961, at Annexure "A" to the petition is illegal, ultra vires and bad in law. The petitioner further prayed that this Court may direct the State of Gujarat respondent no.2 to take possession of the land which is stated above from respondent No.1 i.e. the Sarvajanic Vidyarthi Gruha, Dhandhuka, and put the petitioner in possession of the said land immediately.

2. The aforesaid petition was filed somewhere in October, 1987. When the matter was placed for hearing, this Court has issued notice on 13.10.87 and also granted interim relief restraining Sub-Registrar of Documents, Dhandhuka, from registering any sale deed pertaining to Survey No.498A, Parts 1, 2 and 3 of village Dhandhuka in favour of any person of the sale deed is produced by

respondent No.1 the vendor of the land. Thereafter the matter was admitted on 9.1.1991 and ultimately this matter was placed for final hearing before this Court.

3. The facts giving rise to this petition are as under:-

3.1 It is a case of the petitioner that petitioner's father Gordhanbhai Ramabhai, his uncle's widow Dholiben Ogadbhai and uncle's son Chikubhai Kesubhai were owners of land at Survey No.498A, Parts 1, 2 and 3 of village Dhanduka admeasuring 2 Acres and 38 Gunthas (hereinafter referred to as "the land in question"). The said land was an agricultural land situated behind Railway Station of Dhanduka Village. As the petitioner's father Shri Gordhanbhai and aunt Dholiben and uncle's son Chikubhai are all dead and so petitioner is heir and legal representative of the said persons. That is how the present petition is filed by present petitioner.

3.2 It is a case of the petitioner that the State of Gujarat decided to acquire the land in question for public purpose namely construction of Lodging and Boarding by Sarvajanik Vidyarthi Graha. For the said purpose, the Government had issued a notification u/s 4 of the Land Acquisition Act (hereinafter referred to as "the said Act") on 4th February, 1961. Ultimately proceedings under land acquisition initiated and award was passed on 13.12.61 by the Land Acquisition Officer determining the amount of compensation to be paid to the petitioner at about Rs.678.50.

3.3 It is a case of the petitioner that after the said award, the possession of the land was handed over to the respondent No.1 Sarvajanik Vidyarthi Gruha and the said Gruha never used the said land for the public purpose for which it was acquired though the power of acquisition was specifically exercised by the State of Gujarat for the said purpose.

3.4 It is a case of the petitioner that the respondent No.1 got converted the said land to Non-Agricultural use. However, the respondent No.1 has not used the said land for the purpose for which the said land was acquired. It is a case of the petitioner that the respondent No.1 thereafter decided to sell the said land by way of private sale jointly to the persons namely (1) Lakhmanbhai Thakarshibhai, (2) Virjibhai Thakarshibhai, (3) Jamnadas Thakarshibhai, (4) Baldevbhai Thakarshibhai and Laxmanbhai Kanjibhai Dabhi (respondents No.4, 5 & 6 herein). For the said purpose, an agreement was entered into between respondent No.1, and the aforesaid five persons for private sale of the land in question and the sale deed is also entered into between the parties. The said sale deed is executed on 8.10.87 for the price of Rs.1,47,900/-.

3.5 In view of this aforesaid sale-deed, the petitioner has filed the present petition before this Court somewhere in October 1987 and obtained the interim relief as stated above from this Court.

3.6 In view of the aforesaid facts and circumstances of the case, Mrs.Ketty Mehta, the learned counsel for the petitioner has made following submissions:

3.7 It is a case of the petitioner that in this case the State of Gujarat has not changed the public purpose for which the acquisition was made. However, respondent No. 1 by private sale sold the lands to respondent Nos. 4, 5 & 6 which is illegal, ultra vires and bad in law. Respondent No.1 herein is bound to use the said land for the public purpose for which it was acquired and possession was given to them. It is a case of the petitioner that, once the respondent No.1 has sold the said land in favour of respondents No.4, 5 and 6, the whole land acquisition proceedings are vitiated. Therefore, the land should be return back to the petitioner inasmuch as the basis of the acquisition, namely, the public purpose does not exist and/or the land in question is not used for the public purpose.

3.8 It is a case of the petitioner that the State of Gujarat had exercised its power of eminent domain for the acquisition of land for the public purpose, however, if the said public purpose is frustrated and the party in whose favour the power was exercised has misused the same, respondent No.2, state of Gujarat, is bound to recover the said land to the petitioner as no public purpose exists. There is no jurisdiction, power or authority under which the acquisition can stand in law. Dictated on 1.7.2004.

3.9 The learned counsel for the petitioner submitted that it is no doubt true that petitioner had accepted the amount of compensation and also accepted the legality of the acquisition proceedings on the specific ground that his village will acquire the facility of a Lodging and Boarding house for the students who are studying in the high school. However, it has been submitted that the whole basis does not exist and, therefore, respondent No.1 cannot be allowed to continue with possession of the land. The learned counsel for the petitioner therefore submitted that the whole exercise of power being vitiated and, therefore, the petitioner is entitled to the reliefs claimed hereinafter.

3.10 The learned counsel for the petitioner further submitted that the Government cannot justify the power of acquisition in law inasmuch as the public purpose does not exist in view of Secs.4 and 12 of the said Act. It is submitted that the whole process of public purpose is frustrated and the same cannot be allowed to continue. Furthermore, the whole exercise of power being a nullity, the whole acquisition proceedings are deemed not to exist in law and, therefore, the petitioner is entitled to claim the relief as stated in this behalf.

3.10A The learned counsel for the petitioner has invited our attention to certain provisions of the Land Acquisition Act, particularly, Sec.3(e) provides the expression "Company", Sec.3(e)(iii) provides " a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State, other than a co-operative society referred to in clause (cc)."

3.11 The learned counsel for the petitioner has also referred to the definition of public purpose under sec.3(f) of the said Act. The learned counsel submitted that the entire proceedings under Land Acquisition Act started with issuance of

notification under sec.4 of the Act which provides publication of preliminary notification and powers of officers thereupon till passing of the award under sec.11 have been completed in this case.

3.12 The learned counsel therefore submitted that under sec.16 of the Act, the Government has power to take possession and thereafter the possession of the land is also taken and thereafter the land is absolutely vested in the Government free from all encumbrances. The learned counsel submitted that accordingly lands have been vested in the Government.

3.13 The learned counsel further submitted that, once the land has been vested in the Government, as the said acquisition was of co-operative society, there was some arrangement between the Government and the society as per sec.41 of the said Act. The lands have been handed over to respondent No.1 by the State as per provisions of Sec.41 particularly sec.41(3) which provides the terms on which the land shall be held by the Co-operative Society namely the respondent No.1 herein.

3.13A The learned counsel further submitted that Sec.44A provides restriction of transfer. The said section provides that no company for which any lands are required under this part shall be entitled to transfer the said lands or any part thereof by sale, mortgage, gift, lease or otherwise except with the previous sanction of the appropriate Government. As respondent No. 1 has sold the land to respondent Nos. 4,5 and 6 without obtaining prior permission of the Government, the said sale is contrary to and inconsistent with Section 44A of the Act and therefore the same is bad in law.

3.13B The learned counsel submitted that the object of Sec.44A and Sec.44B which provides that land not to be acquired under this part except for certain purposes for private companies other than Government Companies, appears to be safeguard the interest of public. The learned advocate for the petitioner submitted that in this case acquisition of the land for setting up of a construction of Lodging and Boarding by Sarvajanik Vidyarthi Gruha. The said lodging and boarding of Sarvajanik Vidyarthi Gruha decided to sell the whole of land. The learned advocate submitted that in view of the same the acquisition is liable to be quashed and land owners are entitled to refund the compensation already recovered by them and land should be return to them.

3.14 The learned counsel then submitted that there is fraud on statute. In support of the same, the learned advocate for the petitioner has relied upon the judgment of Hon''ble Supreme Court in the case of H.D. Vora Vs. State of Maharashtra and Others, particularly para 6 on page 341 where the court has observed like this:

" If the public purpose for which the premises are required is of a perennial or permanent character from the very inception, no order can be passed requisitioning the premises and in such a case the order of requisition, if passed, would be a fraud upon the statute, for the Government would be requisitioning

the premises when really speaking they want the premises for acquisition, the object of taking the premises being not transitory but permanent in character.

3.14A The said view has been reiterated by the Hon'ble Supreme Court in the case of Welfare Asscn. A.R.P., Maharashtra and Another Vs. Ranjit P. Gohil and Others, particularly para 4 on page 1271.

3.14B The learned advocate further submitted that when the acquiring body got the land and had to pay amount of compensation by the award passed therein only Rs.600/-, whereas when they sold the land to respondents No.4 to 6, the consideration was Rs.1,47,877/-. The learned advocate submitted that in view of the same the respondent No.1 got "unjust enrichment" in this behalf.

3.15 In view of the same, learned counsel for the petitioner submitted that once the respondent No.1 has obtained the land through acquisition proceedings, it is not open for the respondent No.1 to sale the land to respondents No.4, 5 & 6 that is completely a fraud in this behalf. The learned counsel for the petitioner therefore submitted that in view of the same, there was not only fraud by respondent No. 1 but it is a fraud on statute. The learned counsel further submitted that the land was acquired as per the award the price of the land was contemplated at about Rs.600/- whereas respondent No.1 has sold the land to respondents No.4, 5 & 6 at the rate of Rs.1,47,877/-. It amounts to unjust enrichment as far as respondent No.1 is concerned because he has paid the price for the said land at about Rs.600/whereas he has sold the said land for Rs.1,47,877/- in this behalf.

4. Mr.Mehul Shah, learned counsel has appeared on behalf of the respondent No.1. He has relied upon the affidavit-in-reply filed by respondent No.1. He has stated that in this case the acquisition of the land in question is of 1961, whereas petitioner has filed present petition in 1987 and, therefore, the petition is barred by delay, laches and acquiescence. In the affidavit, it has been submitted that it is a case of the respondent No.1 that after the land was given to respondent No.1, the financial position of the respondent No.1 was weak and it was decided to sell the land in question and to utilise the proceeds realised therefrom for the welfare of the children of the respondent No.1 school and the respondent No.1 accordingly passed resolution on 21st April, 1990. It has been further stated that originally the respondent No.1 was not aware of the fact that permission of the Government has to be obtained, however subsequently the respondent No.1 has filed an application to the Minister of Revenue on 21.4.90 seeking post facto permission regarding sale of the lands to the respondents No.4 to 6. The respondent No.1 has admitted that the lands have been sold by registered sale deed on 8th October, 1987, and the resolution of respondent No.1 was also passed. It is a case of the respondent No.1 that possession was handed over to respondent No.1 and entry to that effect was also made by Mamlatdar on 22.12.1961 and therefore also present petition is also not maintainable as the same has been filed after unreasonable period.

5. It may be noted that respondent No.5 has filed one affidavit on 8th December, 1987, and another affidavit on 17th July, 2002. Mr.P.J.Vyas, learned advocate appeared on behalf of respondent No.5. The respondent No.5 has also submitted that on 8th October, 1987, a regular sale deed was executed by respondent No.1 in favour of the respondents No.4 to 6 through their Secretary Ishwarbhai Jivarajbhai Patel. The said sale deed is duly registered and the possession has been handed over to respondents No.4 to 6 and a sum of Rs.1,47,877/- have been paid to respondent No.1. It has been submitted that in view of this the petitioner cannot challenge the said sale deed in present petition. A copy of sale deed is also annexed with the said affidavit in this behalf.

5.1 It has been further submitted that if respondent No.1 has committed any breach, the matter is between the Government and the acquiring body. However, once the lands are transferred to respondents No.4 to 6 by registered sale deed, the respondent No.1 has to apply post facto permission from the Government. The learned counsel therefore submitted that even if the post facto permission is granted by the Government on certain terms and conditions, the respondents No. 4 to 6 shall abide by the same. In view of the affidavit filed by respondent No.1 which we have noted it has been further submitted that the sale deed executed by respondent No.1 deserves to be regularised in favour of respondent Nos. 4 to 6 on such terms and conditions the Government may be pleased to prescribe.

5.2 The respondent No.5 further submitted that if the acquired land is not used for the purpose for which it was acquired, the same may also be used for any other public purpose as the Government may think proper. It has been further submitted that the petition is not maintainable as the petitioner has received the compensation and there is no title resting with the petitioner. It has been further submitted that since the possession is taken over on paying the compensation, the title to the land of the original owner comes to an end. In view of the same, it has been submitted that the petitioner has no right, title or interest in the land in question.

5.3 The learned advocate for the respondent No.5 has also relied upon the judgment of Hon"ble Apex Court in the case of Gulam Mustafa and Others Vs. The State of Maharashtra and Others,

6. Mr.Hasurkar, learned AGP has appeared on behalf of the State. He submitted that the action of the Government acquiring the land in question is legal and valid in this behalf. He submitted that under the provisions of Land Acquisition Act the acquired land having vested in the State Government and compensation paid to the claimants and thereafter the claimants are not entitled to get any relief in this behalf. He submitted that it is no doubt true that Section 44A of the Land Acquisition Act provides restriction on transfer. However, in the present case, respondent No. 1 has filed an application before the Secretary, Revenue Department, with a prayer that the authority may grant post facto permission for registered sale deed dated 8.10.1987 executed by the applicant in favour of respondent Nos. 4, 5 and 6 u/s 44A of the Land Acquisition Act.

6.1 In our view Section 44A prohibits transfer of land. Section 44B of the Land Acquisition Act provides for land not to be acquired under this Part except for certain purposes for private companies other than Government Companies. Sections 44A and 44B of the Land Acquisition Act are inserted by the Land Acquisition (Amendment) Act, 1962. The amendments are intended to safeguard the public interest. Therefore, Sections 44A and 44B of the Land Acquisition Act are intended to safeguard the public interest. Section 44A accordingly puts an interdict to transfer by sale, gift or lease or otherwise any acquired land without permission of the appropriate Government. "Transfer" means passage of a right from one to another. Transfer may take place in three different ways. It may be by virtue of an act done by a transferor with an intention, as in the case of a conveyance or a gift or; secondly, it may be by operation of law as in the case of forfeiture, bankruptcy, intestacy or thirdly, it may be an involuntary transfer effected through court, as in execution of a decree for either enforcing a mortgage or for recovery of money due under a simple money decree. In view of the words, "sale, gift or lease", it seems the statute contemplates a transfer inter vivos.

6.2 We have considered Sub-section (3) of Section 11B of the Central Excises and Salt Act, 194 as amended by the Central Excises and Customs Laws (Amendment) Act, 1991 (40 of 1991). The said Section provides that notwithstanding anything to the contrary contained in any judgement, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2). The learned counsel submitted that the aforesaid amendment gives statutory recognition to the doctrine of "unjust enrichment". The learned counsel has referred to Sections 2 to 8 of the Amendment of Central Excise Act. The learned counsel further submitted that the said concept of "unjust enrichment" has been recognised by the Hon"ble Supreme Court in 9 Bench Judgement in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, where the Hon"ble Supreme Court has considered Section 11B(3) of the Act.

6.3 We have also considered the judgement of the Apex Court in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, particularly part IV para 108 on page 633 where the Hon"ble Supreme Court has observed thus:

"The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

6.4 We have also considered what is meant by "unjust enrichment".

"The underlying principle of the law of restitution is that a person who has been unjustly enriched at the expense of another is required to restore the value of the benefit received to the other (compare: Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts, American Law Institute (1937), 1). In respect of the branch of the subject which concerns restitution in response to wrongdoing, a second principle underlies recovery, namely that a person is not permitted to profit by his own wrong at the expense of another (compare Reinstatement, 3). These principles clearly have their roots in moral philosophy."

(Re: The Modern Law of Unjust Enrichment and Restitution by Gerard McMeel - Chapter 2, page 25, paragraph 2.1)

7. We have also considered the rival submissions i.e. the contentions of the learned counsel for the petitioner and the contentions of the learned counsel for the respondents. However, without expressing anything on merits of the matter, we are of the view that if the following direction is given to the State Government i.e. respondent No. 2, the same will be in the interest of justice.

(i) Respondent No. 2 will decide the application of respondent No. 1 dated 21.11.1992 in accordance with law.

(ii) Respondent No. 2 will give an opportunity of being heard to the petitioner and the respondents before passing the order.

(iii) It will be open for the petitioner and the respondents to raise all factual and legal contentions before respondent No. 2.

(iv) Respondent No. 2 will pass a short but speaking order in this behalf.

(v) Respondent No. 2 shall decide the application within four months from today. If for any reason the matter is not decided within the stipulated period, the respondent will file an application for extension of time.

8. It may be noted that, when the aforesaid matter was presented before this Court, this Court passed the order on 13th October, 1987, which we have referred earlier in this behalf. The said injunction is still continued and till the Government decides the said application, the said injunction will continue in this behalf.

9. In view of the aforesaid observations and directions, this petition is disposed of accordingly with no order as to costs. Rule is discharged.