(2008) 04 GUJ CK 0068

In the Gujarat High Court

Case No : Company Application No. 531 of 2007 in Company Petition No. 263 of 1998

Nilesh Savjibhai Patel APPELLANT

Vs

O.L. of Sardar Cement Ltd. and Others RESPONDENT

Date of Decision : 22-04-2008

Acts Referred:

Citation : (2008) 04 GUJ CK 0068

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : S.N. Shelat and J.S. Sadhwani, for the Appellant; J.S. Yadav, for Respondent 1, Ashok L. Shah and Pavan S. Godiawala for Respondent 2, Parikh, Assistant Government Pleader for Respondent 3 and R.A. Mishra, for Respondent 5, for the Respondent

Judgement

K.A. Puj, J.—The applicant has taken out this Judges Summons praying for the direction to the District Inspector of Land Records, Rajkot to carry out measurement of Survey No. 255 upon which M/s. Sardar Cement Ltd., (in liquidation) is situated, at the cost of the applicant.

2. An affidavit is filed by the applicant in support of the Judges Summons.

3. It is the case of the applicant that the applicant had filed Company Application No. 380 of 2007 and was permitted by this Court to participate in the auction for 17098 sq.mtrs., of land bearing Revenue Survey No. 255/part situated at Village Shapar, Taluka and District Rajkot, of M/s. Sardar Cement Ltd., in liquidation upon deposit of EMD with late entry charges. The auction was held before this Court and being adjudged the highest bidder, the offer of the applicant of Rs. 1.45 crores was accepted by this Court. The total area of land bearing Revenue Survey No. 255 is 27215 sq.mtrs., out of which 10,117 sq.mtrs. of land was sold earlier in the year 2003 by the Official Liquidator to Parshwanath Cement Company - respondent No. 2 herein and rest of the 17098 sq.mtrs. of land was sold to the applicant on 20.09.2007. There was no division or earmarked

boundary line in the land in question for separating two parts of the land bearing Revenue Survey No. 255. The respondent No. 2 being legally in possession of land only to the extent of 10117 sq.mtrs., appeared to have made an encroachment upon the land sold in auction to the applicant and hence the applicant has moved Company Application No. 458 of 2007 to this Court wherein this Court has passed an order dated 10.10.2007 permitting the applicant to approach the Official Liquidator for getting the land measured through DILR at the cost of the applicant. The applicant, thereafter, approached the Official Liquidator vide his letter dated 15.10.2007 requesting him to get the measurement done through DILR, Rajkot. Prior to this the applicant has carried out the private measurement and he found that there is an encroachment to the extent of 945 sq.mtrs., of land. The applicant has also paid the necessary fees for carrying out the measurement by DILR, Rajkot. On 17.11.2007 when the survey was to be carried out the respondent No. 2 refused to permit the measurement of the land in question, by raising an issue that this Court has directed the measurement of land sold to the applicant. The DILR was also of the view that it would not be feasible to measure only one part and the entire Survey No. 255 will have to be measured for dividing it into two parts. The respondent No. 2 had earlier taken over the entire land and after the order of this Court, the possession of the 17098 sq.mtrs., land has been taken back on paper and no demarcation / identification was made. The respondent No. 2 has encroached upon the land by constructing the factory shed and worker''s units. The applicant has sought for the direction of this Court to the DILR, Rajkot to carry out measurement of the entire land of Survey No. 255 and for structure standing thereon and divide them into two parts i.e. first part of 10,117 sq.mtrs. of respondent No. 2 and second part of 17098 sq.mtrs., sold to the applicant. The applicant has also sought for the direction to the Official Liquidator to take back the vacant and peaceful possession of 17098 sq.mtrs. from the respondent No. 2 and to divide/identify/earmark the said land after removing encroachment, if any, made by the respondent No. 2.

4. This Court has issued notice on 28.11.2007 and directed the Official Liquidator to carry out the measurement of Survey No. 255 consisting of land sold to the respondent No. 2 earlier as well as the applicant thereafter, with the help of DILR, Rajkot and demarcate separately the land admeasuring 10,117 sq.mtrs., sold to the respondent No. 2 as well as land admeasuring 17098 sq.mtrs., sold to the applicant. The Court has also directed that while taking out the measurement the Official Liquidator''s representative alongwith the applicant as well as respondent No. 2 should remain present after intimating them in advance. The Court has also made it very clear that if there is any resistance from anybody, the Official Liquidator should take the help from the concerned police station. The Court has directed to place the report of the DILR alongwith the report of the Official Liquidator. The Official Liquidator was further directed to ascertain as to whether the respondent No. 2 has made any encroachment on the land sold to the applicant and he would ascertain as to whether any limestones were thrown

by the respondent No. 2 on the land sold to the applicant.

5. Pursuant to the said order, the Official Liquidator has filed his report on 15.12.2007 alongwith the report of DILR dated 13.12.2007. It was revealed from the said report that the respondent No. 2 has encroached on the land sold to the applicant. However, the land which falls in Survey No. 255 was not shown in DILR report. The Official Liquidator has further observed in his report that the limestones on the land sold to the applicant were found and the work of removal of the said limestones was in progress from the land in question.

6. Based on this report the Court has passed further order on 11.1.2008 directing the Official Liquidator to seek clarification from DILR with regard to exact measurement of land which falls in Survey No. 255. By this time the respondent No. 2 has also filed its affidavit on 8.1.2008, wherein it is inter alia, stated that the respondent No. 2 at no point of time encroached upon the land as averred. The respondent No. 2 is in possession of piece of land where the shed is situated and the factory is in operation. The Court, however, found that the respondent No. 2 has nowhere stated in the affidavit that the respondent No. 2 is in possession of the land admeasuring 10117 sq.mtrs. only. The Official Liquidator was, therefore, directed to seek clarification from the DILR on the specific issue as to whether the respondent No. 2 is in actual possession of land admeasuring 10117 sq.mtrs. or more and if the respondent No. 2 is in possession of any excess land the measurement should separately be shown by drawing a line on the site itself. From the DILR report it appears that the respondent No. 2 has made some encroachment on Government land which is about 965 sq.mtrs. The Court, therefore, issued notice to the Collector, Rajkot with a direction that he has to look into the matter and file his report as to whether encroachment is made on the government land and if it is so what steps were taken for removal of such encroachment. The secured creditors were also directed to be joined as party respondent. Accordingly, Collector - Rajkot, Manager, Rajkot Nagrik Sahkari Bank Ltd., and Oriental Bank of Commerce were joined as party respondent Nos. 3, 4 and 5 respectively.

7. Pursuant to the order passed by this Court on 11.1.2008 the Official Liquidator filed his report on 31.1.2008 alongwith detailed report with map and DILR report. On the basis of the said report of DILR, Mr. J.S. Yadav, learned advocate appearing for the Official Liquidator has submitted that as per the revenue record and the land record the total land which falls in the Revenue Survey No. 255 of Shapar is 27215 sq.mtrs. The DILR had divided the said land into two parts by demarcating the boundary line on the site i.e. one part of the land admeasuring about 10,117 sq.mtrs., sold to the respondent No. 2 and 17098 sq.mtrs. land sold to the applicant. The report further indicated that the respondent No. 2 is in excess illegal possession of land admeasuring about 2596 sq.mtrs., out of which, encroachment was made on the land admeasuring about 1715 sq.mtrs., sold to the applicant and 881 sq.mtrs., land of Revenue Survey No. 298 belonging to the State Government. The report further revealed that some part of the land was

encroached by way of extending factory shed and servant quarters on 1715 sq.mtrs., of land sold to the applicant. He has further submitted that the applicant has paid the entire sale consideration of the land and submitted a draft sale deed for 17098 sq.mtrs., land for execution in his favour. He has, however, suggested that in view of the pendency of the present application it was not possible for the Official Liquidator to execute the sale deed in favour of the applicant.

8. Being aggrieved and dissatisfied with the stand taken by the applicant, the DILR and the Official Liquidator the respondent No. 2 has filed further affidavit on 11.2.2008. Mr. Ashok L. Shah, learned advocate for respondent No. 2 submitted that as per the information available, the applicant has indulged in profiteering before the title is transferred. The applicant has sold his interest in the land and the present application is moved on behalf of such other persons in whose favour the interest is transferred. The applicant has, therefore, not come with clean hands before this Court. He has further submitted that before confirmation of sale in favour of the applicant, he has already taken the measurement through private persons, who are having business unit opposite to the respondent No. 2. He has further submitted that the DILR exceeded his authority and without sufficient evidence has made averments and allegations pertaining to encroachment. The Official Liquidator has not correctly placed the facts before this Court in his report. Originally possession of the entire property including the composite unit was given to the respondent No. 2 and pursuant to the order of this Court the possession of excess land was taken back from the respondent No. 2 by the Official Liquidator in the presence of the secured creditors. In the minutes drawn at the time of taking possession, exact measurement was not taken. The properties were demarcated by way of ''khut'' and hence there is no encroachment. He has further submitted that the respondent No. 2 has purchased the composite unit including the factory shed which were in existence and there is no extension after taking over possession of the factory. There is a statutory requirement to keep the margin of 6 mtrs. from the last structure. This was maintained from the very beginning when the Company in liquidation was a going concern. He has further submitted that the factory premises includes the margin of 6 mtrs. distance, which is a statutory requirement and ''khuts'' as existed are also at 6 mtrs. distance. The respondent No. 2 after being put into possession has invested Rs. 60 lacs for renovation and updating the machineries without extending the factory premises. The respondent No. 2 originally came from Kolkatta for establishing the business unit in the State of Gujarat and they were never in the business of land dealing, broking, real estate and incidental activities. The properties purchased by the respondent No. 2 are for enduring purpose and not for short term gain. The entire issue is, therefore, completely misplaced and all sorts of allegations and averments were made against the respondent No. 2.

9. Mr. Shah has further submitted that the applicant has preferred present application to overreach the order of confirmation. The properties are sold on ''as

is where is and whatever there is basis''. As per Condition No. 20 of the tender document, the purchaser shall be deemed to have purchased the properties after complete examination and inspection and the purchaser shall not be entitled to make any request or raise any objection as to the title or consideration of the property or any part thereof. Even as per Clause 21 of the tender document, while selling the property, the Official Liquidator as such does not give any warranty or indemnity of any kind whatsoever. The applicant has purchased the land with open eyes. He has further submitted that the allegation pertaining to the encroachment on the government land is completely misplaced. The land alleged to have been encroached is unused land called ''kharabo''. There is no wire fencing on the said land and hence some stones were placed to protect the unit of respondent No. 2 from outside encroachment during day and night time. The said stones were removed by the respondent No. 2.

10. In rebuttal of these submission, Mr. Sadhwani, learned advocate appearing for the applicant has submitted on the basis of further affidavit of 27.2.2008 that from the very beginning, the conduct of the respondent No. 2 Company is malafide and illegal. In fact, they were sold only 10117 sq.mtrs., with plant and machinery and the draft sale deed also mentioned the said aspect but then at the time of final sale deed, the Director of the respondent No. 2 Company misled the Official Liquidator and not only for 10117 sq.mtrs. but also adjoining land of Official Liquidator i.e. the land of 17098 sq.mtrs., which is subsequently sold to the applicant, was covered under the sale deed and it was executed for the entire land of 27115 sq.mtrs. Thereafter, the respondent No. 2 had also encroached 881 sq.mtrs., government land as well as using the land of 17098 sq.mtrs., by placing its entire raw material-limestones on the site and also by extending shed and servant quarters therein. This fact has come to light only after the entire land was surveyed by DILR. Moreover, after taking possession of the factory the respondent No. 2 had illegally and without taking any permission from the competent authorities extended the factory sheds and constructed the servant quarters on the land sold to the applicant. He has further submitted that even the approved valuer appointed by the Official Liquidator had prepared the valuation report and in the said report it is found that this extended portion and servant quarters were not at all in existence. In DILR survey map, extended part is shown as encroachment by the respondent No. 2. Perusal of both these map and valuer report would go to show that when the possession of the unit was taken over by the respondent No. 2, the extended shed and the servant quarters never existed and even the structure on the government land did not exist. Thus, the same has been illegally carried out at later stage by the respondent No. 2. He has further submitted that the extension of shed and servant quarters is contrary to the Town Planning and Municipal Corporation''s bye-laws and said construction has been carried out illegally and unauthorizedly without seeking any permission from the competent authority. He has further submitted that the applicant has already drawn plans for his project and if the encroachment is not removed or the applicant is not given the land sold to him the entire project of

the applicant would not be feasible at all. He has, therefore, submitted that it is not feasible to part with and accede to the request of the respondent No. 2 for buying some parcel of land from the applicant.

11. Mr. Sadhwani has further submitted that giving up this parcel of land of 1715 sq.mtrs., would amount to giving a premium to a wrong doer and the person who has illegally and unauthorizedly utilized the entire government land as well as land of company in liquidation free of cost for a period of 4 years and the person who has carried out the construction in the land of the government as well as company in liquidation contrary to the bye-laws and in breach of the N.A. Permission would not deserve any lenient treatment from this Court. Not only the respondent No. 2 is liable to vacate the excess land over which they have made an encroachment but they are also liable to pay rent for utilisation of such land till this date without any permission or sanction from the competent authority.

12. The Court heard Mr. J.S. Sadhwani, learned advocate with Mr. Suresh N. Shelat, learned Senior Counsel appearing for the applicant, Mr. J.S. Yadav, learned advocate appearing for the Official Liquidator and Mr. Pavan S. Godiawala, with Mr. Ashok L. Shah, learned advocates appearing for respondent No. 2 at great length. Copy of application with supporting documents, affidavits, counter affidavits and further affidavits filed alongwith several documents and the reports of the Official Liquidator as well as DILR are taken into consideration. The controversy between the parties are in relation to the measurement of the land sold to the respondent No. 2 initially and after taking back the possession of the part of the land, the said part sold to the applicant. Broadly speaking there is no much dispute about the fact that the land admeasuring about 10117 sq.mtrs., is sold to the respondent No. 2 and land admeasuring about 17098 sq.mtrs., is sold to the applicant. The dispute is about 2596 sq.mtrs., of land which is said to have been encroached upon by the respondent No. 2 and this land is comprising of the land partly belonged to the applicant and partly belonged to the State government. Right from the beginning, the conduct of the respondent No. 2 remains doubtful. The Court had an occasion to deal with this issue at great length in its earlier order whereby the Court was constrained to heavily bounce upon the office of the Official Liquidator and was at pains to point out that the respondent No. 2 and the Official Liquidator in collusion with each other have executed the sale deed for the entire piece of land bearing Survey No. 255 admeasuring about 27215 sq.mtrs., despite the fact that the land sold was only to the extent of 10117 sq.mtrs. Even after taking back the land admeasuring about 17098 sq.mtrs. and after it is sold to the present applicant, the dispute was not resolved. The actual measurement was not taken place. The land was continued to be in possession of the respondent No. 2 for about 3 to 4 years, during which period the respondent No. 2 had also placed its material on the said land. The report of the DILR made it abundantly clear that the respondent No. 2 is in possession of the excess land which is not sold to the respondent No. 2.

13. The only question which is to be examined by the Court in light of the fact

that the property sold to the respondent No. 2 is in the form of factory and land admeasuring about 10117 sq.mtrs., and while taking back the excess land whether it affects the factory premises or any statutory violation takes place or not. The record produced before the Court does not indicate that after it is purchased, the respondent No. 2 has made any further construction. If the factory is sold then land appurtenant thereto as per the statutory requirement should also be protected to the extent possible. This does not, however, mean that the respondent No. 2 should be permitted to retain land more than the land sold to them i.e. 10117 sq.mtrs. The offer of the respondent No. 2 to purchase the said land at whatever price does not seem to be acceptable as the applicant has purchased the land of 17098 sq.mtrs., and he has planned out his affairs accordingly. The Court would not compel the applicant to part with any portion of the said land. The Court has made several attempts to persuade the parties and to decide the whole issue amongst themselves. The Court, therefore, cannot accept the plea of the respondent No. 2 to allow them to retain the excess land or the land more than the land sold to them i.e. 10117 sq.mtrs. Hence, such excess land whether it belongs to the State Government or to the applicant the same will have to be returned to the Government or to the applicant, as the case may be. The Court, therefore, directs the Official Liquidator to act as per the report submitted by the DILR and execute the sale deed in favour of the present applicant for 17098 sq.mtrs. While doing so, if any part of the land being in excess of 10117 sq.mtrs. land is required to be taken back from the respondent No. 2, the same should immediately be taken back from the respondent No. 2. The Official Liquidator shall carry out this exercise within two weeks from today and execute the sale deed in favour of the present applicant. Before executing the sale deed in favour of the applicant 17098 sq.mtrs., land as indicated above, the Official Liquidator shall get modified the earlier sale deed executed in favour of the respondent No. 2 for land bearing Survey No. 255 admeasuring about 27215 sq.mtrs. and shall restrict the same only to the extent of 10117 sq.mtrs.

14. With this observation and direction this Company Application is accordingly disposed off.

15. On pronouncement of the judgment and/or order Mr. Godiawala prays for stay against operation, implementation and execution of this order. However, this request being devoid of any merit is rejected.

