

(2021) 12 GUJ CK 0045

In the Gujarat High Court

Case No : R/Special Civil Application No. 14561 Of 2015

Patel Haribhai Bhutabhai - Since Deceased

APPELLANT

Vs

State Of Gujarat & 1 Other(S)

RESPONDENT

Date of Decision : 24-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

Gujarat Town Planning Act, 1976 — Section 67(a), 70, 70(2), 71

Citation : (2021) 12 GUJ CK 0045

Hon'ble Judges : Biren Vaishnav, J

Bench : Single Bench

Advocate : Dhaval Shah, Meet Thakkar, HS Munshaw

Final Decision : ?Dismissed

Judgement

Biren Vaishnav, J

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for a writ of mandamus or any other appropriate writ directing the respondents to decide the representation dated 06.09.2012 as per the order dated 23.08.2012 passed by this Court in Special Civil Application No. 6903 of 1990 read with the order dated 02.08.2013 passed by the respondent no. 1 - the State of Gujarat and the recommendation dated 24.03.2014 given by the Rajkot Municipal Corporation.

2. When this petition was initially heard, this court by an order dated 03.12.2015 disposed of the petition observing that the petitioner will have a liberty to revive the petition.

3. Facts in brief are as under:

3.1 It is the case of the petitioners that during the life time of deceased Bhutabhai Premjibhai Patel (grandfather of the petitioners), a partition was effected between Haribhai Bhutabhai Patel (deceased and father of the

petitioners) and his brother namely Bhikhabhai Bhutabhai Patel. Lands being Survey No. 252 paiki (acre 4-35.5 gunthas) Survey No. 253 paiki (acre 4-33.5 gunthas) and Survey No. 254 paiki (acre 3-27 gunthas) aggregating to acre 13-15 gunthas came to the share of the deceased father of the petitioners. Similarly, land bearing Survey No. 252 paiki (acre 4-0.5 gunthas) Survey No. 253 paiki (acre 8-0 gunthas) and Survey No. 753 paiki (acre 0-3.25 gunthas) aggregating to 12-03 gunthas came to the share of Bhikhabhai Bhutabhai Patel. Entry no. 36 was mutated in the revenue records.

3.2 It is the case of the petitioners that under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976, lands of the petitioners' father and that of Bhikhabhai Patel were granted agricultural exemption. However, in case of Bhikhabhai Bhutabhai Patel, the exemption was withdrawn on 19.04.1990 in view of the fact that he sold the land to one Kedarnath Co-operative Housing Society Limited on which the construction is completed. The Town Planning Scheme was declared on 16.04.1977 at which time the deceased father was the sole owner. Partition was made of the lands and land admeasuring 54,127 sq. mtrs of revenue survey no. 252 paiki, 253 paiki and 254 paiki came to the share of the petitioners whereas land admeasuring 48,563 sq.mtrs of revenue survey no. 252 and 253 paiki came to the share of Bhikhabhai Bhuthabhai Patel. It is the case of the petitioners that in view of the partition, the petitioners' father and Bhikhabhai Patel were independent owners, however, as per the final town planning scheme Haribhai and Bhikhabhai were jointly allotted 49,958 sq. mtrs and 28,177 sq. mtrs respectively with a remark that the rights and shares enjoyed by the owners in original plots will be as it is in the 'Final Plots'.

3.3 It is the case of the petitioners that since the lands were partitioned the holding of the petitioners as heirs should have been treated as an independent holding which was an agricultural open land without any construction standing on the land admeasuring acres 13-15 gunthas equivalent to 54,127 sq. mtrs. According to the petitioners, on an average deduction of 23%, the petitioners would be entitled to land admeasuring 41,678 sq. mtrs.

3.4 The case of the petitioners is that Bhikhabhai had sold the land on which there were constructions. The joint allotment therefore was detrimental to the petitioners inasmuch as larger deduction was made in the share of the petitioners. Moreover, open vacant lands on the final plots were kept for reservation by allotting final plots no. 190 and 191. Special Civil Application No. 6903 of 1990 was filed in which the court on 23.08.2012 directed the respondents to consider the representation for variation. Accordingly the petitioners made an application on 06.09.2012. On 02.08.2013, the respondent no. 1 passed an order opining that there is substance in the petitioners' request for variation and a decision therefore may be taken by the Rajkot Municipal Corporation under Section 70(2) of the Gujarat Town Planning Act, 1976. Accordingly, the petitioners informed the respondent no. 2 on 12.08.2013. Having not received any response they again made a representation on

01.11.2013.

3.5 On 24.03.2013, the Rajkot Municipal Corporation in response to the order dated 02.08.2013 on examination of the record informed the State that they would give consent to the proposal for variation by placing the same before the General Body of the Corporation. On 16.05.2014, the State requested the Corporation to proceed for variation in accordance with law. It appears that on 13.02.2015 the Rajkot Municipal Corporation wrote a letter to the State that the decision be taken by the State Government for varying the scheme. In view of the fact that if the petitioners' request for individual allotment was accepted the deduction of 23% based on such independent allotment would entail the petitioners of a larger piece of land. Representations were made by the petitioners from time to time and since they were not considered the present petition was filed.

3.6 As stated hereinabove the same was disposed of by order dated 03.12.2015 which reads as under:

"1. Heard Mr. Vimal Patel, learned advocate with Mr. Dhaval Shah, learned advocate for the petitioner, Ms. Megha Chitaliya, learned Assistant Government Pleader for respondent No.1 and Mr. H.S. Munshaw, learned advocate for respondent No.2.

2. The main and the only issue which arises in this petition is that the respondent authorities have not adhered to the directions issued by this Court (Coram: D.H. Waghela, J. as he then was) rendered in Special Civil Application No.6903 of 1990 dated 23.8.2012. It is contended that no further proceedings are undertaken inspite of the fact that the petitioner as well as respondent No.2 have in fact proceeded further as per the directions issued by this Court.

3. In nut-shell, the case of the petitioner is that even though an application for variation as provided under Section 70(2) of the Gujarat Town Planning and Urban Development Act, 1976 (hereinafter referred to as the Act) is pending before the State Government and according to the petitioners, though there is an error or a mistake in the land belonging to the petitioner which is forming part of Town Planning Scheme No.6, no actions are taken by the State Government.

4. This Court in Special Civil Application No.6903 of 1990, after hearing the parties, was pleased to issue the following directions, relying upon this Courts decision in the case of Kartik Mohanbhai Patel Vs. State of Gujarat, reported in 2011 (2) GCD 1246.

2. Learned Senior Advocate Mr.A.K.Clerk, appearing for respondent Nos.1 and 2, expressed no objection to an order being made in the aforesaid terms, without prejudice to the rights and contentions of respondent Nos.1 and 2. Learned A.G.P. Mr.Rakesh R.Patel, appearing for the State Government, submitted, on instruction, that, in view of the aforesaid decision of the Division Bench of this Court, competent officer of the State Government may have to consider the

representation as aforesaid, if direction is issued in that regard. Accordingly, the petition is disposed and Rule is discharged, subject to the direction that the petitioners may make appropriate representation for variation of the scheme in question, within a period of sixteen days, i.e. on or before 07.09.2012, to the Secretary, Urban Development and Urban Housing Department, Gujarat State and, if such representation is received in time, the State Government shall consider it in accordance with the provisions of section 70 (2) of the Act and, after affording an opportunity of being heard to the petitioners as well as other respondents or any other parties affected thereby, pass appropriate order in accordance with law, within a period of three months, as suggested and agreed among learned counsel. It was also clarified and understood at the bar that the representation of the petitioners shall not be rejected only on the ground that no application or proposal was received for variation from respondent Nos.1 and 2. It is further directed that until the representation is considered and decided by the State Government in accordance with law, or till 07.12.2012, whichever is earlier, status quo as regards possession of the land in question shall be maintained by the parties. There is no order as to costs. Direct service.

5. The record of this petition clearly indicates that thereafter, the petitioner filed a detailed representation dated 6.9.2012. The record indicates that respondent No.2, as an appropriate authority, by communication dated 24.3.2014 has already informed the Officer on Special Duty of Urban Development and Urban Housing Department, State of Gujarat about the details which were necessary to be made available by respondent No.2 to the State Government.

6. The learned advocate for the petitioner further submits that even though the said communication was addressed by the Commissioner of the respondent Corporation, nothing has been done by the State Government.

7. It is an admitted position that order dated 23.8.2012 was passed by this Court on the basis of the statement made by the learned Assistant Government Pleader who appeared on instructions on behalf of the State Government.

8. Considering the aforesaid facts, without expression any opinion on merits as regards the representation dated 6.9.2012 filed by the petitioner as well as the communication dated 24.3.2014 addressed by the respondent Corporation, in opinion of this Court, interest of justice would be served if the authority of the State Government is directed to comply with the directions issued in Paragraph 2 of the order dated 23.8.2012 in Special Civil Application No.6930 of 1990 at the earliest. It is ordered accordingly.

9. With these observations, this petition is disposed of. Liberty to revive in case of difficulty. Direct service is permitted."

3.7 Since no decision was taken by the respondents, a contempt petition was filed which was disposed of and thereafter when the petitioners filed an application for revival of the petition, in MCA No. 1 of 2017, this Court on 24.10.2018, passed an order reviving the petition.

4. Mr. Vimal Patel, learned advocate appearing for Mr. Dhaval Shah, learned advocate for the petitioners would submit that it is the case of the petitioners that the Town Planning Scheme needed to be varied especially when this court by an order dated 23.08.2012 specifically so opined. He would submit that apparently there was an irregularity or informality in finalization of the plots. The total holding of the petitioners was 54,127 sq. mtrs and on a 23% deduction, they would be entitled to 41,678 sq. mtrs. It is the case of the learned counsel that instead of deducting 12,943 sq. mtrs the Town Planning Officer has deducted 19,323 sq. mtrs taking into consideration Final Plot Nos. 190 and 191 which have gone into reservation. Had the petitioners' land not been jointly counted with that of Bhikhabhai who had sold the land on which constructions were made and if the adjoining lands also namely those of Survey No. 253/3 were not constructed lands of Sagar Co-operative Society, the petitioners would have got open piece of land if independent calculation was made.

4.1 Mr. Patel would rely on the communication dated 24.03.2014 of the Rajkot Municipal Corporation accepting the State's opinion of seeking variation. Reading the letter, he would draw the attention of the court to the fact that the Rajkot Municipal Corporation had calculated the availability of open land in terms that there was land admeasuring 6,906 sq. mtrs in Survey No. 126 paiki; 10,700 sq. mtrs of land in Survey No. 125 paiki; land admeasuring 13,412 sq. mtrs in Survey No. 130 paiki; total admeasuring 31,018 sq. mtrs being a deficit of 10,660 from the total entitlement of 41,678 sq. mtrs. In the opinion of the Corporation that deficit could be bridged by allotting land from the 12 mtr road and also from the final plot no. 192. It is in this context that the counsel for the petitioners relied on a decision of this Court in the case of Shamjibhai Ramjibhai Kevadia vs. Town Planning Officer [2017 JX (Guj) 869].

5. Mr. Meet Thakkar, learned AGP for the State together with Mr. H.S. Munshaw, learned advocate appearing for the Rajkot Municipal Corporation would rely on the affidavit-in-reply filed by the Senior Town Planner in the application for restoration. Mr. Thakkar would submit that it was not a case where variation under Section 70(2) of the Town Planning Act was possible. In fact a letter dated 20.12.2017 had been sent to the Rajkot Municipal Corporation by the State that it was a case of variation under Section 71 but not under Section 70(2) as the defect could not be said to be an irregularity or informality under Section 70(2).

5.1 Mr. Thakkar would rely on the observations in the order dated 23.08.2012 in Special Civil Application No. 6903 of 1990 to submit that there was no mandamus to vary the scheme under Section 70(2) of the Town Planning Act. Reliance was placed on the communication dated 10.11.2017 annexed to the reply and also on the chronology of dates mentioned in the reply.

6. Having considered the submissions made by the learned advocates for the respective parties, what is evident is that on 03.09.1990, the petitioners filed Special Civil Application No. 6903 of 1990. The same was disposed of 23.08.2012 with an observation that the petitioners may make appropriate representation for

variation of the scheme and the respondents may pass an order in accordance with law. Vide notification dated 27.02.1988 the principal development plan was sanctioned. The revised development plan was sanctioned by the State Government on 20.02.2004 and the second revised development plan was sanctioned in 2016. Notices were given to the petitioners before finalizing the preliminary scheme which was then sanctioned on 29.03.1990.

7. As is evident from the facts mentioned hereinabove, the case of the petitioners seeking variation is on the ground that had he been allotted an independent plot rather than a joint holding, the joint allotment of final plot considering the fact that Bhikhabhai Bhutabhai had sold his plot on which constructions were made resulted in a deficit of open space being allotted to him. Reading the communication dated 10.11.2017, what is evident is that the petitioners' share was 54,127 sq. mtrs. By a letter dated 24.03.2014, the Rajkot Municipal Corporation in response to a communication dated 02.08.2013 recommended to give consent for variation. In the earlier part of this order, the gist of the recommendation in terms of the break up of the land is considered. What is evident is that on 01.05.2017, the Rajkot Municipal Corporation opined that action has to be taken under Section 67(a) of the Act. On assessment on site, it was found that the land which the co-sharer Bhikhabhai had sold has constructions on it which were existing prior to the coming of the T.P. Scheme. These constructions were regularized by the State on payment of impact fee. There was no open land on which possession could be taken on. Even the adjacent lands of the other agriculturists had constructions on it. It was in this context that the letter opined that variation under Section 70(2) was not possible however what can be done was an exercise could be taken under Section 71 of the Act.

8. Apparently, therefore, when this communication is read in light of the provisions of Sections 70 and 71 of the Town Planning Act which are reproduced hereunder, it cannot be said that the scheme is defective on account of an error, irregularity or informality. In view of the constructions on the lands, based on which the petitioners seek allotment on the basis of independent holding and therefore a smaller deduction cannot be done because of the constructions on the adjacent land.

Therefore, the only possible exercise that can be undertaken is that the scheme notwithstanding anything contained in Section 70 be varied by a subsequent scheme.

9. Accordingly, the case of the petitioners for seeking a variation under Section 70(2) of the Act is misplaced. Petition is accordingly dismissed. Notice is discharged.