
(2008) 07 GUJ CK 0068

In the Gujarat High Court

Case No : Special Civil Application No. 3784 of 2008

Prabhaben Harshadray Desai and Others

APPELLANT

Vs

State Government and Others

RESPONDENT

Date of Decision : 01-07-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226, 32

Gujarat Town Planning and Urban Development Act, 1976 — Section 10, 11, 12, 13, 14

Land Acquisition Act, 1894 — Section 4

Maharashtra Regional and Town Planning Act, 1966 — Section 127

Citation : (2008) 3 GLH 120 : (2008) 3 GLR 2380

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : Ajay R. Mehta, for the Appellant; Jaswant K. Shah, learned Assistant Government Pleader for Respondent No. 1 and Dhirendra Mehta, for the Respondent

Judgement

Abhilasha Kumari, J.—By filing this petition under Article 226 of the Constitution of India, the petitioners have prayed for the issuance of a writ of mandamus or any other writ or order to quash and set aside the reservation on the land bearing City Survey No. 3848, Tika No. 86, situated at Navsari Town, and to declare that the reservation qua the land in question, is deemed to have lapsed and that the said land stands released from reservation. It is further prayed that the action of the respondent No. 3 in re-reserving the petitioners' land in the revised Draft Development Plan be quashed and set aside as being illegal, and the preliminary Notification dated 18-8-2007 showing that the land of the petitioners is proposed to be re-reserved, also be quashed and set aside.

2. Rule was issued on 21-4-2008. In the facts and circumstances of the case and, with the consent of the learned Counsel for the respective parties, the petition is being heard and finally decided today.

3. The brief facts of the case, as emerging from a perusal of the averments made

in the petition as well as the documents annexed thereto, are that the petitioners are co-owners of the land bearing Survey No. 3848, Tika No. 86, situated at Navsari Town. By Notification dated 16-3-1985, issued under the provisions of Section 17(b) of the Gujarat Town Planning and Urban Development Act, 1976 ("the Town Planning Act" for short), the land of the petitioners was placed under reservation for the purpose of construction of Municipal Staff Quarters. It is averred that one of the co-owners of the land, namely, Shri Amrutlal Maganlal Desai had filed Special Civil Application No. 3101 of 1992, challenging the reservation of the land in question. This petition was rejected by the Court on the ground that the petitioner was unable to substantiate his challenge to the reservation. Subsequently, Shri Amrutlal Maganlal Desai had issued a notice dated 17-5-1995 to the respondents Nos. 2 and 3 which, admittedly was not in consonance with the requirements of Section 20(2) of the Town Planning Act. However, the said co-owner Shri Amrutlal Maganlal Desai, co-owner of the land in question, issued another notice dated 18-9-1995 through an advocate, calling upon the respondents to initiate action for the acquisition of land, either by agreement or through the process of acquisition, within a period of six months from the date of issue of the notice, failing which the reservation upon the land in question shall be deemed to have lapsed, and the land would stand de-reserved. It is the case of the petitioners that inspite of the service of the notice u/s 20(2) of the Town Planning Act, no action whatsoever has been initiated by the respondents and, therefore, a right has crystalised and accrued in favour of the land owners, including the petitioners, as contemplated by the provisions of Section 20(2) of the Town Planning Act, upon coming into force of the deemed fiction. The grievance of the petitioners is that instead of de-reserving their land as per the provisions of Section 20(2) of the Town Planning Act, the land of the petitioners is proposed to be reserved vide preliminary Notification dated 18-8-2007. Being aggrieved by the above stated acts of omission and commission of the respondents, the petitioners have filed the present petition.

4. Mr. Ajay R. Mehta, learned Counsel for the petitioners has advanced the following submissions:

(a) That there is a catena of judicial pronouncements, including those of the Supreme Court, elucidating the legal position with regard to Section 20 of the Town Planning Act and whereby it has been specifically held by the Supreme Court, that once the legal fiction under the provisions of Section 20(2) of the Act comes into existence, the authorities cannot be heard to assert any right with respect of the said land and this bar will extend even to the exercise of power u/s 21 of the Act, which provides for revision of the Development Plan after every ten years. It is submitted that once the period of 10 years has elapsed and the owner or any person interested in the land has served a notice upon the concerned authority requiring it to acquire the land within six months, and if, within the stipulated period of six months from the date of service of the notice, the land is not acquired and no steps have commenced for its acquisition, then the reservation upon the land in question shall be deemed to have lapsed. As the

co-owner of the land has served a legal and valid notice dated 18-9-1995 as per the requirements of Section 20(2) of the Act, and since the respondents have not acquired the land in question within six months from the issuance thereof, the deeming fiction has already come into effect in respect of the land of the petitioners, and the continued reservation upon the land and the proposed re-reservation by the respondent No. 1 is absolutely against the settled principles of law, as laid down in (i) Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, Girnar Traders Vs. State of Maharashtra and Others, , Bhikhubhai Vithlabhai Patel and Others Vs. State of Gujarat and Another, , Balwantbhai Maganlal Chauhan Vs. Municipal Corporation of the City of Surat and Others, and Palitana Sugar Mill Pvt. Ltd. Vs. State of Gujarat, Elaborating upon the above submissions, Mr. Ajay R. Mehta, learned Counsel for the petitioners, has submitted that no Notification under the provisions of Section 4 of the Land Acquisition Act, 1894, which is a preliminary step for the acquisition of the land, has been issued till date and in the said circumstances, it cannot be said that the respondents have commenced proceedings under the Land Acquisition Act, and any intra-departmental correspondence, which may have been carried out can, by no stretch of imagination, be construed as commencement of the proceedings under the Land Acquisition Act. It is further submitted that similarly, the respondents have not entered into an agreement to acquire the land in question within the stipulated period and, therefore, by operation of the provisions of Sub-section (2) of Section 20 of the Town Planning Act, the reservation upon the land of the petitioners is deemed to have lapsed and the petitioners are entitled to a declaration that the land stands de-reserved. It is further urged, that instead of giving effect to the provisions of Sub-section (2) of Section 20 of the Town Planning Act, the respondent No. 1 has issued a Notification dated 18-8-2007, whereby the land is sought to be re-reserved. The petitioners have also issued letter dated 4-2-2008, to the respondent No. 2 whereby the said respondent has been reminded of the earlier notice dated 18-9-1995, and it has been requested that the land of the petitioners be released from reservation, but no action has been taken to de-reserve the land. It is forcefully submitted by the learned Counsel for the petitioners that after the reservation as per the provisions of Sub-section (2) of Section 20 of the Town Planning Act, the land stands de-reserved by virtue of the deeming Section and by not releasing the land from reservation and, on the contrary by proposing to re-reserve the same, the respondents are acting in direct contravention of the pronouncements of the Supreme Court and this Court, as quoted hereinabove.

(b) That it is not denied that Shri Amrutlal Maganlal Desai had filed Special Civil Application No. 2156 of 1996, which was dismissed by this Court on the ground of suppression of facts, and not on merits. It is submitted that the said petition was dismissed because the petitioner therein failed to mention that he had filed Special Civil Application No. 3101 of 1992 earlier, which had been rejected. Another ground for rejection of Special Civil Application No. 2156 of 1996 was that the reply of the respondent No. 2 to the notice dated 17"5-95 was not put

on the record of the petition and, therefore, the Court proceeded to dismiss the petition on the ground of suppressio veri and suggestio falsi. It is emphasised by the learned Counsel for the petitioners, that while dismissing the petition, the Court did not go into the merits of the case, as is evident from the order dated 20-6-1996, annexed as Annexure "B" to the petition and since the petition was dismissed solely on the ground of suppression of facts and not on merits, the bar of res judicata will not come in the way of the petitioners in filing the present petition. It is clarified by the learned Counsel for the petitioners that Review Application No. 1193 of 1996 was preferred by Shri Amrutlal Maganlal Desai against order dated 20-6-1996, which was dismissed and a Letters Patent Appeal against the order of dismissal of the Review Application was withdrawn by the appellant, with a view to prefer a Civil Suit. Accordingly, a Civil Suit was filed by Shri Amrutlal Maganlal Desai but during the pendency thereof, he expired and the same was dismissed for non-prosecution, as his heirs and legal representatives were not brought on record. It is emphasised that though the present petitioners are also co-owners of the land in question, the earlier petitions have been filed by Shri Amrutlal Maganlal Desai and not by them and, therefore, the filing of the present petition is not debarred on the ground of res judicata, constructive res judicata or issue estoppel. In support of these submissions, the learned Counsel for the petitioners has placed reliance upon Daryao and Others Vs. The State of U.P. and Others, , Krishan Lal Vs. State of Jammu & Kashmir, and N. Annappa Vs. State of Karnataka and Another,

(c) That admittedly, the notice dated 18-9-1995 under the provisions of Section 20(2) of the Town Planning Act was issued by the co-owner of the petitioners i.e. late Shri Amrutlal Maganlal Desai but looking to the definition of "owner" as defined in Section 2(18) of the Town Planning Act, it cannot be denied that the present petitioners are also covered by the said definition and are entitled to receive any benefit in relation to the property in question which would have accrued upon the co-owner i.e. Shri Amrutlal Maganlal Desai, who had issued the notice. It is contended by the learned Counsel for the petitioners that even otherwise by virtue of the provisions of Section 20(2) of the Town Planning Act, the deeming fiction automatically comes into play after the expiry of six months from the date of issuance of the notice and the land stands de-reserved, if it has not been acquired, or no steps have been taken for its acquisition, within the stipulated period of six months. The submission of the learned Counsel for the petitioners is to the effect that the deeming fiction relates to the land in question and not to the person giving the notice and its effect has to be given to the land, after the expiry of six months of service of notice, if such land has not been acquired. It is strongly urged by Mr. Ajay R. Mehta that the land has not been acquired within six months from the date of notice i.e. 18-9-1995, and nor have effective steps for its acquisition been commenced within the stipulated period of time and, therefore, the action of the respondent in seeking to re-reserve the land and keep it under reservation in perpetuity, is against the settled principles of law.

(d) It is alternatively submitted by the learned Counsel for the petitioners and without prejudice to the other submissions made by him, that the conduct of the respondents Nos. 2 and 3 qua the reservation of the land in question amounts to hostile discrimination and is motivated by malafide intentions, for reasons best known to the concerned authorities. It is submitted that various parcels of land were reserved by the Final Development Plan of 6-3-1985, which included the land of the petitioners. However, the Chief Town Planer rejected the proposal for reservation submitted by the said respondents, regarding the lands at Sr. Nos. 1 to 10 and 17 of the Resolution dated 25-10-2004, a copy of which is attached as Annexure "IV" to the reply filed by the respondent No. 2, on the ground that the lands were "Gamthal" lands. It is submitted by Mr. Ajay R. Mehta that although the opinion of the Chief Town Planner was accepted by respondent Nos. 2 and 3 in respect of all other similarly situated lands, but in the case of the petitioners' land, the opinion of the Chief Town Planer was not accepted and reservation was continued in the Draft Development Plan, without assigning any valid reason. According to the learned Counsel for the petitioners, this action, on the part of the respondents Nos. 2 and 3, amounts to nothing short of hostile discrimination and since there is no reason why the land of the petitioners should continue to be placed under reservation when other similarly situated lands have been de-reserved, shows that the action of the said respondents is motivated by malafide intentions. It is emphasised by Mr. Ajay R. Mehta, learned Counsel for the petitioners, that the reason for de-reserving the other lands, as mentioned in Resolution dated 25-10-2004, is not only the opinion of the Chief Town Planner but reference has also been made to the judgments of the Supreme Court, and if the respondent-authorities are alive to the legal position in respect of the other lands, the same treatment should have been meted out to the petitioners as well.

5. On the strength of the above submissions, it is prayed by the learned Counsel for the petitioners that the petition be allowed.

6. Mr. Dharendra Mehta, learned Counsel for the respondents Nos. 2 and 3, drawing the attention of this Court to the affidavit-in-reply filed by the respondent No. 2-Municipality has submitted that:

(a) No legal or fundamental right of the petitioners has been infringed and the petitioners have no locus standi to file the petition since, an earlier petition had been filed by Shri Amrutlal Maganlal Desai, wherein it was not disclosed that there were co-owners of the land in question.

(b) That the earlier writ petition filed by the co-owner, Shri Amrutlal Maganlal Desai was dismissed by the Court vide order dated 20-6-1996 and in view of the dismissal of the said petition, the present petitioners, who are also co-owners of the land in question, cannot maintain the petition, which is barred by the principles of res judicata. According to the learned Counsel for the respondents Nos. 2 and 3, the petition had been dismissed not only on the ground of suppression of facts but also on merits. It is submitted that the Review Application challenging the order of dismissal of the writ petition was also

dismissed, and the Letters Patent Appeal filed by the co-owner was withdrawn, with a view to filing a Civil Suit and, therefore, the petition is not maintainable and should not be entertained.

(c) That the petition, in its present form, cannot also be maintained, on the ground of non-joinder of parties as the petitioners have not joined the other co-owners to the petition.

(d) That the notice dated 18-9-1995 under the provisions of Section 20(2) of the Act was issued by the co-owner, namely, Shri Amrutlal Maganlal Desai and not by the present petitioners and, therefore, they cannot get the benefit of the same.

(e) That the petitioners have not filed their objections to the Resolution dated 25-10-2004 whereby their land is proposed to be re-reserved, within a reasonable period of time and, therefore, they cannot be heard at this stage to say that reservation upon their land should be lifted.

(f) The allegation of malafides have been strongly denied by the learned Counsel for the respondents Nos. 2 and 3 on the ground that the Municipality was within its rights not to accept the opinion of the Chief Town Planner to de-reserve the land of the petitioners.

(g) That the Draft Development Plan whereby the land of the petitioners is proposed to be re-reserved was sent by the respondents Nos. 2 and 3 to the State Government under the provisions of Section 16 of the Town Planning Act on 25-8-2005 and, therefore, the respondents Nos. 2 and 3 are not in a position to take any steps regarding the de-reservation of the land.

7. On the basis of the above submissions, Mr. Dharendra Mehta, learned Counsel for the respondents Nos. 2 and 3, has prayed that the petition be dismissed.

8. Mr. Jaswant K. Shah, learned Assistant Government Pleader for the respondent No. 1, has adopted the submissions made by the learned Counsel for the respondents Nos. 2 and 3. In addition thereto, he has submitted that:

(a) The claim of the petitioners is as co-owners of the land in question and not as partners and, therefore, they will be bound by the consequences of the notice dated 18-9-1995 and, therefore, the decision in the case of the other co-owner, namely, Shri Amrutlal Maganlal Desai, in Special Civil Application No. 2156 of 1996, as also Review Application being Misc. Civil Application No. 1193 of 1996, and the withdrawal of the Letters Patent Appeal No. 836 of 1996 vide order dated 11-2-1997, will come in the way of the petitioners who are, therefore, estopped from maintaining the present petition. It is submitted that the Letters Patent Appeal was withdrawn with a view to filing a Civil Suit, which was dismissed for non-prosecution, and without revival of the Civil Suit, the petitioners are estopped from maintaining this petition. In support of his submissions, reliance has been placed on Union of India (UOI) and Another Vs. Bhojraj Makkad and Another,

(b) That the notice dated 18-9-1995, which is relied upon by the petitioners, was also on record in the previous petition i.e. Special Civil Application No. 2156 of 1996 and since that petition was dismissed and the relief claimed by the petitioners was not granted, therefore, the notice stands exhausted and cannot be revived and the petitioners can not seek the benefit of that notice at this stage.

(c) That the petitioners have not taken any objection at any point of time regarding the proposed re-reservation of the land to the respondent No. 1.

9. It is, therefore, contended by the learned Assistant Government Pleader, that the petition be dismissed.

10. I have heard Mr. Ajay R. Mehta, learned Counsel for the petitioners, Mr. Dharendra Mehta, learned Counsel for the respondent Nos. 2 and 3 and Mr. Jaswant K. Shah, learned Assistant Government Pleader for the State, at length and in great detail, and have gone through the averments made in the petition and the documents annexed thereto.

11. In view of the submissions made by the learned Counsel for the respective parties, the following four questions arise for the adjudication of this Court:

(i) Whether the petitioners are barred by the principles of res judicata, constructive res-judicata or issue estoppel from maintaining the petition?

(ii) Whether the reservation upon the land of the petitioners has lapsed in view of the provisions of Section 20(2) of the Town Planning Act?

(iii) Whether the land of the petitioners can be re-reserved after the expiry of the statutory period, as provided u/s 20(2) of the Town Planning Act?

(iv) Whether the petitioners, as co-owners, can get the benefit of the notice dated 18-9-1995, issued by another co-owner under the provisions of Section 20(2) of the Town Planning Act?

12. As far as the issue of res judicata is concerned, it is not disputed that the co-owner of the petitioners, i.e. Shri Amrutlal Maganlal Desai had filed Special Civil Application No. 2156 of 1996, which was dismissed by the Court on the ground of suppressio veri and suggestio falsi. The order of the Court dated 20-6-1996 is to be found at Annexure "B" to the petition. The operative part of the order is reproduced hereinbelow:

The petitioner is thus found guilty of suppressing this material and vital fact as well from this Court. It is a settled principle of law that the jurisdiction of this Court under Article-226 of the Constitution of India is equitable in nature. It is a sound principle of equity that the person claiming equity has to come before the court with clean hands. It would mean that the litigant claiming equitable relief has not to be guilty of suppressio veri and suggestio falsi. In his case, the petitioner is found to have made false statements in the petition and is found to have concealed from this Court the material and vital facts. He is thus found

guilty of both suppressio veri and suggestio falsi. This petition, therefore, deserves to be and is hereby rejected on this ground alone. Notice is therefore discharged, however with no order as to costs.

13. From the above quoted order it is evident that while dismissing the petition, the Court has not gone into the merits of case. The Court has dismissed the petition on the ground of suppression of the fact that earlier the petitioner therein had filed Special Civil Application No. 3101 of 1992 which had not been mentioned in Special Civil Application No. 2156 of 1996, and secondly, there was no reference to the reply of the Municipality to the earlier notice given by the co-owner on 17-5-1995. It is also a matter of record that against the order dated 20-6-1996, Misc. Civil Application No. 1193 of 1996 was filed for review of the said order, which was dismissed. A Letters Patent Appeal was filed against the order of dismissal of the Review Application, which was withdrawn by the co-owner of the petitioner, with a view to instituting a Civil Suit. In fact, Civil Suit No. 80 of 1997 was instituted by the said co-owner, Shri Amrutlal Maganlal Desai, who expired during the pendency of the same. The Civil Suit was thereafter, dismissed for want of prosecution, as the heirs and legal representatives of Shri Amrutlal Maganlal Desai were not brought on the record of the Civil suit.

14. At this stage and in the background of the above factual position, it will be fruitful to advert to the legal position on the issue of res judicata.

15. The learned Counsel for the petitioners has placed reliance upon *Daryao v. State of U.P.* (Supra), wherein a Constitution Bench of the Supreme Court has held as under:

19. We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If

the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all: but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32. Because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other. It is in the light of this decision that we will now proceed to examine the position in the six petitions before us.

In *Krishan Lal v. State of J & K* (Supra), it has been held as under:

12. Insofar as the second ground given by the High Court the same being bar of res judicata it is clear from what has been noted above, that there was no decision on merits as regards the grievance of the appellant; and so, the principle of res judicata had no application. The mere fact that the learned Single Judge while disposing of the Writ Petition No. 23 of 78 had observed that:

This syndrome of errors, omissions and oddities, cannot be explained on any hypothesis other than the one that there is something fishy in the petitioner's version....

which observations have been relied upon by the High Court in holding that the suit was barred by res judicata do not at all make out a case of applicability of the principle of res judicata. The conclusion of the High Court on this score is indeed baffling to us, because, for res judicata to operate the involved issue must have been "heard and finally decided". There was no decision at all on the merit of the grievance of the petitioner in the aforesaid writ petition and, therefore, to take a view that the decision in earlier proceeding operated as res judicata was absolutely erroneous, not to speak of its being uncharitable.

Further, the observations of the Supreme Court in *Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another*, , are relevant, and are reproduced herein-below:

31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the

determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum. But that situation does not exist here. Principles of constructive res judicata apply with full force. It is the subsequent stage of the same proceedings. If we refer to Order XLVII of the Code (Explanation to Rule 1) review is not permission on the ground

that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment.

16. Although, in Special Civil Application No. 2156 of 1996, the co-owner of the present petitioners i.e. Shri Amrutlal Maganlal Desai had made a prayer to issue a declaration to the effect that the reservation on the land in question deemed to have lapsed, the Court, while dismissing the said petition by order dated 20-6-1996 did not go into the merits of the case and the petition was dismissed, solely on the ground of suppression of facts.

17. The observations of the Constitution Bench of the Supreme Court in *Daryao v. State of U.P.* (Supra), that "if the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated" are clear and the principle of law has been lucidly and succinctly laid down, which is squarely applicable to the facts of the present petition. The petition filed by the co-owner of the present petitioners was not dismissed on merits, as is evident from a perusal of the order dated 20-6-1996.

18. Mr. Jaswant K. Shah, learned Assistant Government Pleader has relied upon *Union of India (UOI) and Another Vs. Bhojraj Makkad and Another*, wherein it has been held that where a writ petition challenging the legality of an order passed by an authority is withdrawn without reserving liberty to file a fresh petition, the court will not entertain a second petition. While the principles of law enunciated in this judgment cannot be disputed the same cannot be made applicable to the facts and circumstances of the present case, since in this case the co-owner of the petitioners, withdrew the Letters Patent Appeal with liberty to file a Civil Suit which, later on, was filed by him. The fact that the Civil Suit was dismissed for non-prosecution will not debar the petitioners from maintaining the present petition, since the petitioners had availed of the liberty granted by the Court while withdrawing the Letters Patent Appeal, and the subsequent dismissal of the Civil Suit cannot operate as a bar to filing the present petition.

19. In support of his contention that the petition is barred by the principle of constructive res judicata, Mr. Dharendra Mehta, learned Counsel for the respondents Nos. 2 and 3, has placed reliance upon *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others*, wherein it has been held in para 20 that "An adjudication is conclusive and final not only as to

the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence." Seen in the light of the principles of law laid down in this judgment, it does not transpire that the petition is barred by the principle of constructive res judicata, as by the earlier judgment dated 20-6-1996 the court has not rendered a conclusive or final adjudication on the actual matter in issue and nor has it decided the issues which are incidental, or essentially connected with, the subject matter of that litigation.

20. In my considered view, therefore, in the light of the principles of law laid down in *Daryao v. State of U.P.* (Supra), and, reiterated in *Krishan Lal v. State of J & K* (Supra), the dismissal of Special Civil Application No. 2156 of 1996, which had been filed by a co-owner of the land in question on the ground of suppression of facts, and not on merits, would not be a bar to the filing of the present petition. The petition can, therefore, be maintained by the petitioners, in the light of the legal and factual position detailed hereinabove, and the principle of res judicata and principles analogous thereto would not come into play.

21. In order to determine the question whether the reservation upon the land in question has lapsed in view of the provisions of Section 20(2) of the Town Planning Act, it would be pertinent to refer to the scheme of the Town Planning Act and relevant provisions of law. Section 12 of the Town Planning Act relates to the contents of the Draft Development Plan. Section 13 provides for its publication and under the provision of Section 14, objections relating to the Draft Development Plan are to be heard by the Area Development Authority. Further, Section 15 provides that modification can be made by the Area Development Authority in the Draft Development Plan. It is provided in Section 16 that the Draft Development Plan be submitted to the State Government, and Section 17 provides for accord of sanction by the State Government, to the said Draft Development Plan. Section 19 provides for the variation of the Final Development Plan. The relevant provisions of law which are relevant for the purpose of adjudicating the issue whether reservation upon the land has lapsed, is Section 20 of the Town Planning Act, which is reproduced hereinbelow:

Section 20. Acquisition of land.

(1) The area development authority or any other authority for whose purpose land is designated in the final development plan for any purpose specified in Clause (b), Clause (d), Clause (f) Clause (k), Clause (n) or Clause (o) of Sub-section (2) of Section 12, may acquire the land either by agreement or under the provisions of the Land Acquisition Act, 1894, I of 1894.

(2) If the land referred to in Sub-section (1) is not acquired by agreement within a period of ten years from the date of the coming into force of the final development plan or if proceedings under the Land Acquisition Act, 1894 I of

1894, are not commenced within such period, the owner or any person interested in the land may serve a notice on the authority concerned requiring it to acquire the land and if within six month from the date of service of such notice the land is not acquired or no steps are commenced for its acquisitions, the designation of the land as aforesaid shall be deemed to have lapsed.

22. This provision of law has been minutely considered and extensively dealt with by the Supreme Court in *Bhavnagar University v. Palitana Sugar Mill (P) Ltd.*, (Supra) wherein it has been observed as under:

32. Sub-section (2) of Section 20, however, carves out an exception to the exercise of powers by the State as regards acquisition of the land for the purpose of carrying out the development of the area in the manner provided for therein; a bare reading whereof leaves no manner of doubt that in the event the land referred to under Sub-section (1) of Section 20 thereof is not acquired or proceedings under the Land Acquisition Act are not commenced and further, in the event an owner or a person interested in the land serves a notice in the manner specified therein, certain consequences ensue, namely, the designation of the land shall be deemed to have lapsed. A legal fiction, therefore, has been created in the said provision.

33. The purpose and object of creating a legal fiction in the statute is well known. When a legal fiction is created, it must be given its full effect. In *East End Dwelling Co. Ltd. v. Finsbury Borough Council* (1951) 2 All ER 587, Lord Asquith, J, stated the law in the following terms:

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

The said principle has been reiterated by this Court in *M. Venugopal v. Divisional Manager, LIC of India*. See also *Indian Oil Corporation Ltd. v. Chief Inspector of Factories*, *Voltas Ltd. v. Union of India*, *Harish Tandon v. ADM, Allahabad* and *G. Viswanathan v. Hon''ble Speaker, T.N. Legislative Assembly*.

34. The relevant provisions of the Act are absolutely clear, unambiguous and implicit. A plain meaning of the said provisions, in our considered view, would lead to only one conclusion, namely, that in the event a notice is issued by the owner of the land or other person interested therein asking the authority to acquire the land upon expiry of the period specified therein viz. ten years from the date of issuance of final development plan and in the event pursuant to or in furtherance thereof no action for acquisition thereof is taken, the designation shall lapse.

23. In *Girnar Traders v. State of Maharashtra* (Supra), the provisions of Maharashtra Regional and Town Planning Act, 1966 ("the Maharashtra Act" for short) were in issue. Section 127 of the Maharashtra Act is in pari materia with the provisions of Section 20(2) of the Town Planning Act and, therefore, the observations of the Supreme Court in relation to Section 127 of the Maharashtra Act, as reproduced below, can safely be made applicable to the facts and circumstances, as obtaining in the present case.

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Section 127 permitted inaction on the part of the acquisition authorities for a period of 10 years for de-reservation of the land. Not only that, it gives a further time for either to acquire the land or to take steps for acquisition of the land within a period of six months from the date of service of notice by the landowner for de-reservation. The steps towards commencement of the acquisition in such a situation would necessarily be the steps for acquisition and not a step which may not result into acquisition and merely for the purpose of seeking time so that Section 127 does not come into operation.

55. Providing the period of six months after the service of notice clearly indicates the intention of the legislature of an urgency when nothing has been done in regard to the land reserved under the plan for a period of 10 years and the owner is deprived of the utilisation of his land as per the user permissible under the plan. When mandate is given in a section requiring compliance within a particular period, the strict compliance is required therewith as introduction of this section is with legislative intent to balance the power of the State of "eminent domain". The State possessed the power to take or control the property of the owner for the benefit of public cause, but when the State so acted, it was obliged to compensate the injured upon making just compensation. Compensation provided to the owner is the release of the land for keeping the land under reservation for 10 years without taking any steps for acquisition of the same.

The underlying principle envisaged in Section 127 of the MRTP Act is either to utilise the land for the purpose it is reserved in the plan in a given time or let the owner utilise the land for the purpose it is permissible under the town planning scheme. The step taken under the section within the time stipulated should be towards acquisition of land. It is a step of acquisition of land and not step for acquisition of land. It is trite that failure of authorities to take steps which result in actual commencement of acquisition of land cannot be permitted to defeat the purpose and object of the scheme of acquisition under the MRTP Act by merely moving an application requesting the Government to acquire the land, which Government may or may not accept. Any step which may or may not culminate in the step for acquisition cannot be said to be a step towards acquisition.

24. From the principles of law enunciated in the judicial pronouncements referred to hereinabove, it is evident that the legal fiction contained in Section 20(2) of

the Town Planning Act will come into play on the service of a notice upon the concerned authority, requiring it to acquire the land within a period of six months from the date of service of such notice and, if the land is not so acquired within the stipulated period, or no effective steps are commenced for its acquisition, the reservation upon the land shall be deemed to have lapsed. The language of Section 20(2) is crystal clear, unambiguous and leaves no manner of doubt about the intention of the Legislature in enacting this provision and creating the legal fiction. Once the stipulated period of time i.e. ten years has elapsed and the land has not been acquired for the purpose for which it is designated or reserved, the land owner or person interested in the land has a right to serve the notice upon the concerned authority to acquire the land or take effective steps for its acquisition within six months. In spite of this, if the authority concerned does not do the needful as required by Section 20(2) of the Town Planning Act, then the land cannot be reserved in perpetuity and the land owner cannot be deprived of his right to use the land for the purpose permissible under the Town Planning Scheme. The law does not contemplate a situation where the concerned authority does not take necessary action to utilise the land for the purpose for which it was reserved and, at the same time, deprive the land owners from using it as permitted by law, after the coming into effect of the legal fiction. When the ingredients of Sub-section (2) of Section 20 are present and the requirement of law is met, then the reservation upon the land would automatically lapse.

25. In the present case, the co-owner of the land in question, Shri Amrutlal Maganlal Desai, issued notice dated 18-9-1995 under the provisions of Section 20(2) of the Town Planning Act, requiring the concerned authority to take steps for the acquisition of the land in question within six months. It is not the case of the respondents that this notice does not meet with the requirements of Section 20(2) of the Town Planning Act. Admittedly, the land in question has not been acquired till date and no effective steps have been commenced for its acquisition. No notice under the provisions of Section 4 of the Land Acquisition Act, 1894, has been issued till date. Mere intra-departmental communication cannot be construed as a step towards acquisition of the land and, therefore, the reservation upon the land is deemed to have lapsed and the legal fiction as provided for in Section 20(2) has to be given effect to after the stipulated period of time.

26. The next question that arises is whether the land of the petitioners can be re-reserved, after the expiry of the statutory period as envisaged by Section 20(2) of the Town Planning Act by undertaking a revision of the final Draft Development Plan u/s 21. The petitioners have also laid challenge to the Preliminary Notification dated 18-8-2007, whereby the land of the petitioners is sought to be re-reserved. This issue is no longer *res integra* and has been decided in *Palitana Sugar Mill v. State* (Supra) as under::

96. On behalf of the land owners since we have tried to place a reasonable construction on the provisions of Sections 20 and 21 to make their working

practicable and not unjust to either the citizens or the State, we have not found the provisions of Section 21 to be irrational and unconstitutional. We find great force in the contention advanced on behalf of the land owners that if the provisions of Section 21 are interpreted in a manner as is sought to be done on behalf of the State so as to empower the State Government that every revision of the final draft development plan to keep the same land under reservation for decades or in perpetuity, then the provision would render nugatory the right given to a citizen for obtaining de-reservation of his land on expiry of ten years and six months notice period u/s 20 of the Town Planning Act. The result of the interpretation sought to be placed by the State u/s 21 would be to perpetuate reservation with every revision of draft development plan once or more in 10 years, and a citizen irrespective of the provisions of Section 20 of the Act, would be deprived of optimum use of his land. It is true that Constitution no longer recognises right to property as a fundamental right under Article 19 of the Constitution but such indefinite or serious restraint on use of land on the property by the owner on such provision permitting perpetual reservation would suffer from the vice of being arbitrary and irrational under Article 14 of the Constitution.

97. We have already held above that even if in the revised development plan u/s 21 the Government chooses to continue to reserve the same land in the earlier final development plan, then also in that case, the consequences which have ensued on expiry of ten years and six months" notice period by the land owners u/s 20(2) of the Town Planning Act would not get nullified. For conjoint operation of Sections 20 and 21, the latter Section has to be interpreted in a manner so as to make applicable to it provisions of Sections 9 to 20, but subject to provisions contained in Section 20(2). If Section 21 is not so interpreted, Section 20(2) would be rendered nugatory and that cannot be held to be a legislative intent in making applicable the provisions of Section 20 to the process of fresh revision of development plan u/s 21. The provisions of Section 20(2) really express intention of the Legislature not to allow reservation of land indefinitely and in perpetuity to the serious prejudice of the land owner, particularly, in cases where acquisition of reserved land is not feasible for want of funds or other reasons by the authorities for whom the reservation is made.

27. The judgment of the Division Bench of this Court in Palitana Sugar Mill v. State (Supra) has been upheld by the Supreme Court in Bhavnagar University v. Palitana Sugar Mill (P) Ltd. (Supra). The observations of the Supreme Court, as contained in paragraphs 38 and 39 of the reported decision are reproduced herein-below:

38. Section 21 does not envisage that despite the fact that in terms of Sub-section (2) of Section 20, the designation of land shall lapse, the same, only because a draft revised plan is made, would automatically give rise to revival thereof. Section 20 does not manifest a legislative intent to curtail or take away the right acquired by a land owner u/s 22 of getting the land defreezed. In the

event the submission of the learned Solicitor-General is accepted the same would completely render the provisions of Section 20(2) otiose and redundant.

39. Sub-section (1) of Section 20, as noticed hereinbefore, provides for an enabling provision in terms whereof the State become entitled to acquire the land either by agreement or by taking recourse to the provisions of the Land Acquisition Act. If by reason of a revised plan, any other area is sought to be brought within the purview of the development plan, evidently in relation thereto the State will be entitled to exercise its jurisdiction under Sub-section (1) of Section 20 but it will bear repetition to state that the same would not confer any other or further power upon the State to get the duration of designation of land, which has been lapsed, extended. What is contemplated u/s 21 is to meet the changed situation and contingencies which might not have been contemplated while preparing the first final development plan. The power of the State enumerated under Sub-section (1) of Section 20 does not become ipso facto applicable in the event of issuance of a revised plan as the said provision has been specifically mentioned therein so that the State may use the same power in a changed situation.

28. A similar view has been expressed in *Bhikhubhai Vithlabhai Patel v. State of Gujarat* (Supra), where the Supreme Court has observed as under:

39. The appellants are deprived of their right to use the land for residential purposes for over a period of more than a quarter century. The Authority included the land in the residential zone but the State Government reserved the land for the purposes of South Gujarat University but the authority for whose benefit it was required failed to acquire the land leading to re-reservation of the land for the very same purpose which was ultimately struck down by this Court in *Bhavnagar University*.

40. The present move of the State Government to designate the land for the educational use u/s 12(2)(o) of the Act is declared ultra vires and void and this shall put an end to the controversy enabling the appellants to utilise the land for residential purposes. The authorities including the State Government shall accordingly do the needful, without creating any further hurdle in the matter.

29. In the light of the settled position of law, the proposed re-reservation on the land of the petitioners, as envisaged by Notification dated 18-8-2007, also cannot be held to be sustainable in law.

30. Lastly, the question whether the petitioners can claim the benefit of the notice issued by a co-owner of land can now be looked into. A contention has been raised by the learned Counsel for the respondents Nos. 2 and 3 that the notice dated 18-9-1995, under the provisions of Section 20(2) of the Town Planning Act, was not issued by the petitioners but by Shri Amrutlal Maganlal Desai, who was the co-owner of the land in question and, therefore, the petitioners cannot get the benefit of the said notice and the deeming fiction, as contained in Section 20(2) of the Town Planning Act cannot be given effect, as

far as the land of the petitioners is concerned. If the provisions of Sub-section (2) of Section 20 are perused, it is evident from a plain meaning thereof that the legal fiction, culminating in the deemed lapse of reservation upon the land, shall operate upon the service of a notice on the concerned authority, requiring it to acquire the land within a period of six months from the issuance thereof and if the land is not acquired within six months and no effective steps are commenced for its acquisition, the reservation upon the land shall be deemed to have lapsed. The notice under the provisions of Section 20(2) is to be given by the "owner" or "any person" interested in the land. Admittedly, the notice dated 18-9-1995 was given by Shri Amrutlal Maganlal Desai, one of the co-owners of the land. The petitioners are also co-owners of the said land and can, therefore, be said to be interested in it. The effect of reservation is upon the land and not upon the owner or person interested in the land. The co-owner issued the notice regarding the very same land as also owned by the petitioners. The plain and unambiguous language of Sub-section (2) of Section 20 does not preclude the petitioners, who are also co-owners of the land, from getting the benefit of the deemed provision. Just because the notice was issued by the co-owner, cannot deprive the petitioners of the legal consequences of the same, since the land in question is the same.

31. In this context, the definition of "owner", as contained in Section 2(xviii) of the Town Planning Act is relevant and reads as under:

(xviii) "owner" in relation to any property, includes any person who is, for the time being receiving or entitled to receive, whether on his own account or on account of or on behalf of, or for the benefit of, any other person or as an agent, trustee, guardian, manager or receiver for any other person or for any religious or charitable institution, the rents or profits of the property; and also includes a mortgagee in possession thereof;

In terms of the above definition also the petitioners cannot be precluded from getting the benefit of the notice issued by another co-owner. The notice dated 18-9-1995 will directly effect the situation of the land in question qua reservation. The only requirement of law is that it should be issued by the "owner" or "any person" interested in the land. As the concerned authority has not acquired the land within six months from the issuance of the notice dated 18-9-1995 by the co-owner and no effective steps for the acquisition thereof have been taken within the stipulated period of six months, it cannot be said that the deeming fiction, which has come into force qua the land in question cannot operate to the benefit of the petitioners.

32. Viewed from all perspectives, in the ultimate analysis, I am of the considered opinion that there is merit in the petition, which deserves to be allowed. The petition is, therefore, allowed. It is held that the land of the petitioners bearing City Survey No. 3848, Tika No. 86 situated at Navsari Town, which has been reserved for the construction of Municipal Staff Quarters, having not been acquired within ten years from the date of coming into force of the Final

Development Plan or within six months of the notice period, shall stand released in favour of the petitioners, for development by them in accordance with law. The reservation of the land for construction of Municipal Staff Quarters is declared to have lapsed with all consequential effects under the Gujarat Town Planning and Urban Development Act, 1976. As a consequence thereof, the Notification dated 18-8-2007 issued by the State Government, insofar as it proposes to re-reserve the land of the petitioners bearing City Survey No. 3848, Tika No. 86 situated at Navsari Town, in the revised Draft Development Plan, is not sustainable in law and be not given effect to. Rule is made absolute, accordingly. There shall be no orders as to costs.