

(2012) 05 GUJ CK 0010
In the Gujarat High Court

Case No : Special Civil Application No. 14413, 14421, 17541 of 2011

Rajiv Maheshkumar Mehta and Others	APPELLANT
Vs	
State of Gujarat and Others	RESPONDENT

Date of Decision : 10-05-2012

Acts Referred:

Constitution of India, 1950 — Article 162, 226, 254, 254(2), 254(2)
Registration Act, 1908 — Section 32, 33, 70

Citation : AIR 2013 Guj 9 : (2012) 2 GLH 457

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : Deven Parikh, with Mr. Nirav P. Shah for Petitioners - 4, for the Appellant; Sangita Vishen, LD. AGP for Respondent: 1, Notice Served for Respondents : 2 - 3, for the Respondent

Judgement

Mr. S.R. Brahmbhatt, J.—Heard learned Counsel for the petitioners in this group of petitions. Rule. Ms. Sangita Vishen, learned AGP waives service of notice of rule for Respondent State in all the petitions. Rule is fixed forthwith. As the Counsels have agreed for final disposal, these matters were taken up for final hearing. In this group, three petitions have been filed by respective petitioner for redressing Circular dated circular dated 8/12/2010 and 7/1/2012 under Article 226 of the Constitution of India issued by the respondents, which according to the petitioners amounted to imposing undue, unwarranted and illegal restrictions upon the petitioners right to have registration in accordance with the provision of Section 70 of The Registration Act 1908. As all the petitioners are involving common challenge on common grounds, they were heard together and are being disposed of by this common judgment & order.

2. The petitioners have entered into an agreement for sale of property which have been directed in the respective agreement and when they presented these documents for registration, on the strength of the impugned circulars the insistence was made to comply with the conditions mentioned there under. Being aggrieved and dissatisfied with this insistence the present petitions have been

filed as stated herein above. The Court at this stage is of the considered view that the fine facts in respect of property or the execution would be not required to be referred to as nothing turns up there upon so far as the legality and validity of those circulars are challenged and, therefore, this Court is not referring to the facts in order to avoid unnecessarily going into details which are really not germane for deciding legality & validity of the circulars. Suffice it to say that the challenge to the circulars is essentially by those persons seeking registration and when they are subjected to comply with the conditions and therefore, the validity and justification of the conditions are to be examined in the petitions.

3. Learned Advocate for the petitioners contended that existing circular dated 7/1/2012 which is in fact clarifying the earlier circular dated 8/ 12/2010, provides additional conditions to be fulfilled by the person presenting the document for registration under the provision of Registration Act 1908. These conditions are not prescribed by way of amendment to the existing provision, nor are they forming part of any legitimate statutory exercise, resulting into incorporation of those conditions under permissible way in law, so that compliance thereof could be insisted legally. The provisions of Power of Attorney Act entitles the persons to act as an attorney i.e. donee on behalf of the donor. Provisions of Power of Attorney Act are not in any manner whittled down and or clubbed or circumscribed in any way. In other words, provisions of Power of Attorney Act, 1882, are still holding the field and therefore, persons are entitled to execute power of attorney and under provisions of the Act the donee that is attorney has all the rights to carry out the functioning assigned to him or entrusted to him under the Power of Attorney Act, 1882, which may include execution of document on behalf of donor and presenting said document for its registration. Learned Counsel for the petitioners thus contended that when Power of Attorney Act itself makes it abundantly clear that the donee or attorney of the donor or principal is fully entitled to execute the document, registration whereof is compulsory and when the power itself is sufficient enough to indicate that the donee, i.e. attorney is entitled even to present the same; then, in view of provisions of Registration Act, especially provision 30 to 32 of the Act, the power of attorney is not to do anything further than merely presenting document along with legible copy of power of attorney document. Therefore, the power of attorney who is himself executant of the document on behalf of the principal, is entitled to present document as can be seen from provision 33 of the Registration Act, which has been interpreted by Apex Court in case of *Rajni Tandon v, Dulal Ranjan Ghosh Dastidar and Anr.*, reported in 2009(3) G.L.H. 533, wherein the Apex Court has elaborately discussed on this point and unequivocally held that the power of attorney holder, if he is executant himself on behalf of his principal, then, he is entitled to present the document so executed for its registration, which is complete compliance with provision of Section 33 of the Registration Act. Learned Counsel for the petitioners has placed emphasis upon para No. 23, 24 & 29 of the judgment in support of this contention.

4. The respondent State without bringing about an amendment, by way of an

executive instruction in form of Government Resolution could not have permitted the registering Authority to insist for conditions mentioned there under, as it amounts to depriving the person or executant of his right to have registration of the document or his fulfilling requirement for presenting valid document as contemplated u/s 32 & 33 of the Registration Act. and interpreted by Apex Court in this judgment.

5. Learned Counsel for petitioner has placed reliance upon decision of the Apex Court in case of State of Rajasthan and Others Vs. Basant Nahata, , in support of his aforesaid contention wherein it could be seen from para-8 that State of Gujarat was also had an opportunity to canvass its stand. Learned Counsel has drawn attention of this Court to para No. 53, 58, 59, 60 & 61 of this judgment in support of his contention.

6. Learned Counsel for the petitioner contended that plain reading of Section 32 & 33 of the Registration Act, coupled with interpretation thereof by Apex Court again in case of Rajni Tandon (supra), it can be safely concluded that there exists no impediment in way of registering document which is executed by power of attorney, if presenting person fulfills criteria mentioned by the Apex Court elaborately. However, in the present case, the resolution intends to incorporate the conditions which are not partaking any characteristic of legislative amendment in any manner. Therefore, assuming for the sake of examining, without conceding that such an amendment was permissible at the end of the State, as registration of document being part of the concurrent list in form of List-3, Entry No. 6 read with Article 254, then also same could not have been done by the Government by way of issuing resolution impugned in this petition. Learned Counsel further submitted that if one looks at the provisions of the Registration Act as it is, and the provisions of Power of Attorney Act, then, one will have no doubt that even State will have no Authority to bring in amendment which is repugnant to provision of the Act, which is a Central Act; and also it has an adverse impact upon operation of another Central Act being Power of Attorney Act 1882. In other words, insistence for said conditions as it is incorporated in the impugned circular would amount to creating illegal hurdles depriving the presenter of the document being registered in accordance with law. Therefore, this resolution cannot brook existence and it is required to be quashed and set aside forthwith, as it lacks competence from all angle, nor it does have any justification in eye of law.

7. Learned AGP Ms. Sangita Vishen contended that the facts of each case and revenue record produced would indicate that the State is justified in issuing this additional safeguards for arresting any attempt of fraud at any end. The fraud or attempt to commit fraud is not to be encouraged in any manner and, if an act or action is taken to restrict or limit such likelihood of commission of fraud then, the same is required to be appreciated in its true spirit and, therefore, petitioners cannot have any right to maintain and succeed in these petitions.

8. Without prejudice to the aforesaid submissions, learned AGP further submitted

that the matter of registration of documents is falling under Entry No. 6 of the Concurrent List and, therefore, undoubtedly, State has competence to legislate and enact law based upon prevalent and peculiar situation warranting enactment of such law in the State of Gujarat. The nature of litigations arising and number of revenue litigations would justify issuance of such direction which is in fact not in any way an impediment in the way of presenter of document in having it registered, as the document could be registered and it is only formality which the presenter has to undergo, namely that he has to file an additional affidavit narrating few facts. namely; that the original owner is existing on the date when the affidavit is filed, and that the document is containing signature of original owner, and that the address furnished is the address of owner giving power and further that the power of attorney is neither revoked or withdrawn and is operational till date. On such affidavit the presenter's document is accepted for registration after following formalities of taking finger print, photographs etc. Thereafter additional duty is cast upon Sub-Registrar for issuing notice to original owners of the property for obtaining their consent and if consent is not coming within 30 days, then, the tacit consent is to be treated as available and hence the registration process be undertaken.

9. These provisions are incorporated in the circular so as to restrict even remote chance of any fraud being perpetuated. When the State has competence to legislate on the subject it can only legislate by way of provision of amendment or can do by way of executive instructions under Article 162 of the Constitution, as the State's legislative power would justify action to be taken under Article 162 by way of executive instruction also as the executive instruction is permissible to be operative in the field where State has competence to enact law and legislation. Therefore these instructions issued under impugned Resolutions can be treated as State's action taken under Article 162 and therefore, it cannot be assailed on ground of allegation of competence to issue such direction and on this count also the petition is required to be dismissed.

10. Learned AGP in support of her above contention relied upon decision of Apex Court in case *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, (Vol. 42, C.N. 84), and contended that the power to issue executive instructions in the field, which is otherwise covered under legislative competence, can not be frowned upon in any manner. Therefore, the petitions are required to be dismissed and the Resolutions impugned are required to be upheld.

11. Learned AGP further submitted that reliance placed in respect of observation of the Apex Court in case of *Rajni Tandon* (supra) would be of no avail to support the challenge as even the Supreme Court has in that judgment clearly observed that fraud was neither pleaded nor was in question on facts appearing there under. Whereas in the instant case, as was referred to few documents in the beginning to indicate that likelihood of fraud was required to be arrested, therefore this circulars/resolutions are required to be issued and therefore the petitions are required to be dismissed.

12. This Court has heard learned Advocates for the parties and perused the documents. The fact remains to be noted is that the provisions of Power of Attorney Act 1982, does not require the attorney or the donee to do anything more than what is required to be done for acting under the valid power of attorney. The law of the land takes care of the fraud, if committed, under the fraudulent act. On the apprehension and or even past experience nothing could be done which may have effect upon curtailment of any statutory right or derogation in the statutory duty cast upon the Authorities. Thus, when the valid power of attorney is made basis for executing of document and when the said power of attorney who is himself executant of document is present himself, then requirement of law of the Power of Attorney Act, 1882, and Registration Act, 1908, are completely complied with and fulfilled. Therefore, in such a situation, question arises as to whether, can the State through issuance of administrative instructions impose more conditions for registering the document, which the statute do not acknowledge or recognize or required in any manner. The answer would be an emphatic NO.

13. The Power of Attorney Act, 1882, read with the provisions thereof, and interpretation of the Apex Court in case of Rajni Tandon (supra) would eminently go to show that once power of attorney holder himself is executing document on behalf of the person or donor whose power is enjoying, or the power of attorney holder, the requirement as envisaged under Registration Act as well as Power of Attorney Act would complete, and, therefore, any further insistence with regard to filing of affidavit etc., on the spacious ground of likelihood of any fraud being committed cannot be permitted to or imposed or else, it will amount to indirectly amending the statutory provision by executive instructions which is highly impermissible in the system which we have adopted in the constitutional provision.

14. The Court is unable to accept the attractive proposition canvased at the Bar by learned AGP that, this instructions are to be treated as instructions issued under Article 162 of the Constitution, as the State has power and Authority to issue instructions, and has power to make legislation. This argument is rightly dismissed to be of no avail by learned Counsel for the petitioners by relying upon constitutional provision in respect of Article 254 (2), and submits that the provision of Power of Attorney Act as well as the Registration Act cannot be said to be in any way whittle down, nor can they be permitted to be whittle down on account of even State's legislation much less by issuance of administrative instructions, which cannot assume characteristic of any instruction to be issued under Article 162 of the Constitution. Assuming for the sake of examining and without holding these are instructions under Article 162, then also, in view of the submissions made and provision SCA/ 14413/2011 10/12 JUDGMENT of Article 254(2), these instructions have no validity in the eye of law. For ready reference Article 162 and 254 of the Constitution are quoted here under :-

162. Extent of executive power of State:-- Subject to the provisions of this

Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :-

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or Authorities thereof.

Article 254 of the Constitution reads thus :--

254. Inconsistency between laws made by Parliament and laws made by the Legislature of States-- (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State [****] with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State :-

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

15. The plain reading of Article 162 and 254(2) of the Constitution would clearly go to show that the power of State to make law is subject to provision of Article 254 (2), and therefore, when the law which is competent to be made is also subject to Article 254, naturally, there is no exemption or immunity on the executive action therefrom. On this ground also, when provision of Power of Attorney Act 1882 and Registration Act 1908 do not provide for any other requirement, then, additional requirement by way of executive instructions cannot be permitted to be an impediment in the way of registration. Mr. Parikh in support of this submission has relied upon the decision in case of State of Rajasthan and others v. Basant Nahata (supra).

16. Therefore, in my view, the provisions of those instructions being dehors the provisions of law cannot be permitted to be sustained and, hence, they are required to be quashed and hereby they are quashed. Learned AGP at this stage requests for staying of implementation and operation of this order for a period of 15 days, so as to enable the respondent State to prefer Letters Patent Appeal

challenging this order. Learned Counsel for the petitioners strongly objected to this request. The Court is also unable to accept this request on the ground that when the Court has held that the executive instructions which has been struck down have been issued without Authority law, and it amounted to creating additional impediment which the relevant statutory provisions do not recognize or acknowledge. Therefore, the citizens who are regirous of registering their documents to these conditions would amount to subjecting them to illegal insistence on the part of the Authorities and, therefore, no stay of this order is required to be granted.