(2004) 11 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 8820 of 2001

Rajnikant Ramshankar Vyas APPELLANT

Vs

State of Gujarat RESPONDENT

Date of Decision : 25-11-2004

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 135B, 135C, 135D
Bombay Tenancy and Agricultural Lands Act, 1948 — Section 63

Citation : (2004) 11 GUJ CK 0001

Hon'ble Judges : Jayant M. Patel, J

Bench : Single Bench

Advocate : Jitendra M. Patel, for the Appellant; Gori, Asst. Government Pleader for Respondent Nos. 1-3 and R.K. Mishra, for the Respondent

Judgement

Jayant Patel, J.—The short facts of the case are that a transaction of registered sale deed was entered into, on the basis of which, the entry was mutated in the revenue record vide Entry No. 5380, dated 13.1.1958. The said entry was not certified by the revenue authority on the ground that the transaction was in breach of provisions of Prevention of Fragmentation Act (hereinafter referred to as "the Fragmentation Act"). It appears that thereafter the purchaser of the land, once again, moved an application in the year 1996 for recording of entry on the basis of the registered sale deed and Entry No. 11181 was recorded on 8.11.1996 in the revenue record. It appears that the petitioner raised the objection against the said entry and on 22.4.1997, the Mamalatdar initially passed the order of certifying the entry and the matter was carried in appeal vide RTS Appeal No. 79/97 before the Dy. Collector and ultimately as per the order, dated 4.11.1997 the Dy. Collector remanded the matter to the Mamalatdar for reconsideration. The Mamalatdar, thereafter, as per order, dated 26.5.1999 cancelled the entry on the ground that after the entry No. 5380, dated 13.5.58, possession as per revenue record is of the petitioner and it was also observed by the Mamalatdar that an objection is raised by the petitioner that the consideration is not paid and therefore the submission of the petitioner deserves to be accepted and therefore the entry No. 11181 was canceled. It appears that the matter was carried in appeal before the City Dy. Collector and the City Dy. Collector merely proceeded on the basis that there is breach of provisions of Fragmentation Act and after 1958, there are also notices for transferring the interest amongst legal representatives and therefore he has dismissed the appeal. It appears that the respondent No. 4 carried the matter in revision before the District Collector and the District Collector found that there is no bar of resjudicata operating against making entry on the basis of registered sale deed and if any party has any grievance, proper relief should be obtained from the competent civil court and therefore it was found by the District Collector that it is not proper to hold that the transaction is in breach of provisions of Fragmentation Act and it was also found by the District Collector that as per the registered sale deed, the possession is handed over after payment of consideration and the same is reflected from the affidavit and there is no reason to cancel the entry based on the registered sale deed and if the parties have any objection, appropriate relief should be obtained from the competent civil court and therefore ultimately the Dist. Collector has allowed the revision by certifying the Entry No. 11181 in favour of respondent No. 4. It appears that the petitioner preferred the revision before the State Govt. against the decision of the Dist. Collector and the State Govt. in its order dated 31.1.2001 found that there is no bar of resjudicata barring certifying any entry which is subsequently made and it was also found that there is no breach of provisions of Fragmentation Act by the sale in question and if either party has any grievance, proper relief could be obtained from the civil court and it was also found by the State Govt. that the petitioner herein is trying to take undue benefit and therefore the intention is not with good conscience and ultimately therefore the revision of the petitioner was dismissed. It is, under these circumstances, the petitioner has approached this court by the present petition.

2. It may be stated that pending the petitioner, the petitioner has brought the draft amendment contending, interalia, that in the independent proceedings under the Fragmentation Act, it is found by the City Dy. Collector that the sale is in breach of the provisions of the Fragmentation Act and the sale is set aside. There is no dispute on the point that the respondent No. 4 has carried the matter before the State Govt. against the order under Fragmentation Act and the matter is pending before the State Govt. There is also no dispute on the point that pending the proceedings before the State Govt. below the stay application, the State Govt. has passed the order of maintenance of statusquo on 11.9.1993 and rejected the stay application but it is observed in the said order that present statusquo is required to be maintained in view of the pendency of the present petition before this court.

3. Mr. Patel, Ld.counsel for the petitioner mainly raised two contentions, i.e. (i) the second entry for the same transaction can not be made in the revenue record and (ii) that the transaction is in breach of provisions of Fragmentation Act and now in view of the order passed by the competent authority under the other

enactment, i.e. Fragmentation Act, the order passed by the Collector as well as State Govt. which are impugned in this petition deserve to be quashed.

4. So far as the first contention is concerned, it is to be noted that the Entry No. 5380 was entered in the revenue record on 13.1.1958 and on 18.2.1958 the same is not certified. Perusal of the entry and noting regarding noncertifying the entry shows that the same was on the ground that it is in breach of the provisions of Fragmentation Act. Even the extract of village Form 6 for Entry No. 5380 copy whereof is produced by the petitioner at annexure "D" on page 27 does not show that the said order for not certifying the entry was passed after giving opportunity of hearing to the purchaser of the property nor does it refer to that the entry was taken into register of disputes and after giving opportunity of hearing to both sides the said order came to be passed by the competent authority for not certifying the entry.

5. So far as recording of rights in the revenue record is concerned as such it refers to the incidence of acquiring rights in the property and upon perusal of the relevant provisions of section 135 B, C and D of Bombay Land Revenue Code (hereinafter referred to as "the Code") shows that if a certification of the entry refused by the officer concerned is of one sided decision on the ground that the transaction is, primafacie, in breach of the provisions of other enactments, it can not operate as a bar to the person who has acquired the interest in the property to move once again for mutation of entry in the revenue record based on the transaction which is by land is purchased by registered sale deed. As such, if the proviso of Section 135C are read, it reads as under:

"Provided further that any person acquiring right by virtue of registered document shall be exempted from the obligation to report to the Village Accountant."

Therefore, so far as the acquisition of rights is concerned, in normal circumstances if the rights are acquired, same is required to be intiamted to the Village Accountant, now Talati-cum-Mantri. If the rights are acquired on the basis of registered sale deed, the person acquiring the right is not under an obligation to intimate to the Village Accountant. The second proviso to section 135C of the Code shows the intention on the part of the legislature to take recognition of the acquisition of right, which is by way of registered sale deed. Further, the scheme of the Code read with Rules provides for maintenance of record in the form of index of the land. Therefore, when the rights are acquired on the basis of registered sale deed, even if it is not intimated by the person acquiring the right, the same is required to be recorded by the Village Accountant about the incidence of acquisition of right u/s 135C. Had it been a case where the decision is rendered by the competent authority under the Code upon the objections of either side and by taking the entry to the register of disputed cases/entries and thereafter the decision is rendered it may stand on different footing. But, in a case where the acquisition of right in the property is either intimated by the person acquiring the right or is acted upon on the basis of registered sale deed and if the said entry is not certified, it can not be said that the rights of the person who has acquired the rights in the property or the rights of person who has transferred the property are finally decided for the purpose of mutation in the revenue record. As observed earlier, it does not transpire from the record that the decision for non certification of entry was after giving opportunity of hearing to the person affected and/or was taken treating the matter as a disputed case. As such, when any objection is raised in response to notice u/s 135D of the Code, such entry is transferred to the register of disputed cases/ entries and the decision will be required to be taken either to maintain the entry or to cancel the entry. Such decision can not be said as certification or noncertification of entry. In the present case, in the year 1958 there was noncertification of entry and not a decision to maintain the entry or to cancel the entry. When the decision appears to have not been rendered even for noncertification of Entry No. 5380 after giving opportunity of hearing to the affected person it can not be said the second entry was barred under the revenue record under such circumstances. The said contention of Mr. Patel for the petitioner that for the same transaction second time entry could not be entered is meritless, and hence, rejected.

6. So far as the second contention of Mr. Patel for the petitioner is concerned, this court had an occasion to consider more or less similar question in the case of Jayantilal Jethalal Soni v. State of Gujarat and Ors. in Special Civil Application No. 12547/04 as per its decision, dated 28.9.2004 wherein at paras 7, 8 and 9 it was observed as under:

"7. It appears that if a registered sale deed is executed by the holder of the land it confers the right pertaining to the land in question in favour of the petitioner of the land, and therefore, the rights pertaining to the land in question in normal circumstances can be said to have been acquired over the land in question for which recording is required to be made in the revenue record. It is also well settled that the revenue entries are having value only for fiscal purpose and more particularly for the purpose of recovery of revenue and it is neither confers any right or title over the property nor does it take away the right or title over the property which otherwise can not be available under the law. However, the question which arises for the consideration is if a sale deed is executed by the holder of the land which runs primafacie counter to the other statutory provisions of other enactment or is barred under the other enactment or it alters or disturbs the rights of the persons under the other enactment then can the revenue authority shut its eyes by ignoring such flagrant violation of such law or if it is considered what will be proper course to be followed. In case of Evergreen Apartment Coop. Housing Society (supra) this court has expressed the view that it is not open to the revenue authority exercising power under the code to exercise power under the other enactment and to decide in respect to the breaches which are committed under the other enactment and thereby to uncertify the entry or to cancel the entry made in the revenue record. In case of "Janardhan D. Patel v. State of Gujarat"(supra) at para 11 it has been observed as under:

"If any such question arises the matter should be referred to the authority empowered to deal with under the said other enactment. For example, the validity of a transaction on the basis of section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948 (the Tenancy Act for brief)is sought to be challenged that question can not be decided by revenue authorities in RTS proceedings. In such situation, the correct procedure to be followed would be to refer the matter to the authority empowered under the Tenancy Act for his decision. The necessary decision of that authority under the Tenancy Act is received, it would however not be open to the revenue authorities in RTS proceedings to decide that question.

8. Therefore, keeping in view of the aforesaid observations made by this court in the above referred judgment it appears that it would not be proper to hold that even if there are breaches under other enactments or such transfer is barred under the other enactments, the revenue authorities exercising power under the Code could have ignored the same for the purpose of recording the mutation. At the same time, the authorities exercising the power under the Code will have to exercise the jurisdiction within the limits of the statutory provisions of the Code. Therefore, on reconciling of both the aspects, it appears that in a case where the transfer of a land is made by registered sale deed and if the revenue authority primafacie is of the view that such transfer is either barred under the other enactment or is resulting into a breach of other enactment or is to resulting into adversely affecting the rights under the other enactments and consequently sale is prohibited then in that case the appropriate course for the revenue authority would be to record the entry for registered sale deed with the express observations that the registered sale deed is primafacie in breach of the other enactment and simultaneously refer the matter to the competent authority under the other concerned enactment of which breach is committed and the entry should be made subject to final decision which may be taken by the competent authority under the other concerned enactment. This court is inclined to take such view because the one who may be bonafide purchaser or the one who is interested to purchase the property would normally rely upon the revenue entry for inquiring into the title and the possession of the property. If the entry is certified on the basis of registered sale deed as it is, without recording for aforesaid qualification or clarification, the resultant effect would be that it will not be made known to the either person interested or to the other party who may act upon revenue entry that the present transaction may be in breach of the other enactment and consequently it may result into not giving correct picture of the title or possession of the property in question in accordance with law. If the entry on the basis of the sale deed is not at all effected with the aforesaid qualification or without aforesaid qualification, it may also conversely mislead the public at large and also to those persons who act upon the revenue record because there will be no recording of such transactions of registered sale deed which has the effect of conferring the right on property unless it is prohibited by

the relevant statute under the other enactment or unless such sale deed is declared as null and void by the competent authority or through the process known to law. Therefore, it can not be said that the authority exercising power under the Land Revenue Code has absolutely no jurisdiction to even primafacie consider the matter as to whether the breach of the other enactment is committed or not. At the most, it can be said that the authority exercising the power under the code has no power to conclude as to whether the breach of the other enactment by the impugned transfer or registered sale deed is made or not.

9. In view of the above, it can not be said that the orders passed by all the authorities on the basis that the Mamalatdar has not inquired into the aforesaid three aspects, namely, as to whether there is any breach of the provisions of the Prevention of Fragmentation Act or the provisions of the Tenancy Act are absolutely without any basis and the orders can be maintained only to the extent that in case it is found by the Mamalatdar after remand that there are primafacie breach of other enactment by the transfer in question the revenue authority exercising power under the code may refer the matter to the appropriate authority under the other enactment or may relegate the affected party to resort to appropriate proceedings under the other enactment and the entry may be considered subject to the final outcome in the proceedings under the other enactment as observed hereinabove in earlier paragraphs."

Therefore, if the aforesaid view is taken into consideration, in the present case, the consequence would be that the Entry No. 11181, dated 8.11.1996 deserves to be maintained in the revenue record with the qualification that the transaction is in primafacie breach of the provisions of Fragmentation Act. Mr. Patel for the petitioner is right in submitting that the Collector as well as the State Govt. could not have finally concluded on the issue by holding that the transaction is not in breach of the provisions of Fragmentation Act. However, the said aspect is coupled with the facts and circumstances that the competent authority under Fragmentation Act has found that the transaction is in breach of provisions of Fragmentation Act and the sale deed is set aside as per the order, dated 30.9.02. It is also a fact that the matter is carried before the State Govt. in revision/ appeal and the same is pending, and therefore, at the most, the Entry No. 11181 can be allowed to continue in revenue record subject to the final outcome in the proceedings of revision/appeal pending before the State Govt. against the order, dated 30.9.02.

7. Further, there are additional circumstances in the present case and for which there is no dispute that the Civil Suit No. 344/99 is preferred by the respondent No. 4 and the same is pending and the petitioner has also preferred Civil Suit No. 331/01 for declaration that the sale is null and void and the same is also pending. Therefore, in view of the pendency of aforesaid two suits, it was not open to the State Govt. to finally conclude on the question of possession as well as on the validity of sale transaction as to whether the consideration is passed or whether the possession is actually handed over or not. It would be for either side

to pursue their rights and to establish their case in the appropriate above referred civil suits and therefore appropriate modification deserves to be made qua the observations made in the impugned orders passed by the Collector as well as by the State Govt.

8. In view of the aforesaid, petition is partly allowed to the extent that the order passed by the Collector as well as by the State Govt. for maintaining the Entry No. 11181, dated 8.11.1996 in the revenue record shall continue to operate with the clarification and the qualification that the transaction is in primafacie breach of the provisions of Fragmentation Act and as per the order passed by the City Dy. Collector the transaction is found to be in breach of the provisions of Fragmentation Act and the decision is subject to final outcome in the revision/ appeal pending before the State Govt. and the entry shall be subject to final decision which may be taken by the State Govt. in Revision Application No. 6/02. The entry shall also be with further clarification or qualification that the same shall be subject to the final outcome in the proceedings of Civil Suit No. 344/99 and 331/01 which are preferred by the respondent No. 4 herein and the petitioner herein respectively.

It is further clarified that it will be open to either side to pursue their rights in the proceedings of Civil Suit No. 344/99 and 331/01 in accordance with law and the observations made by the Deputy Collector and/or by the State Govt. while maintaining the entry shall not prejudice the rights of either party in the proceedings of concerned civil suit.

9. Mr. Patel, Ld. counsel for the petitioner submitted that the interim relief granted by this court for maintenance of statusquo of the land in question be continued till the civil suits are finally decided and/or the proceedings of revision are decided. In my view, the subject matter of this petition is only pertaining to the revenue entry and as observed earlier the revenue entry would not prejudice any right for possession and/or for title of the property in question of either side, if otherwise, exist as per the provisions of Transfer of Properties Act and therefore said injunction is not required to be continued. However, it will be open to either side to move appropriate application for injunction, if otherwise, permissible under law in the concerned civil suit in case there is apprehension on the part of either side for disturbance of possession or otherwise.

10. Rule is partly made absolute. Considering the facts and circumstances, there shall be no order as to costs.

