

(1981) 01 GUJ CK 0018
In the Gujarat High Court

Case No : Second Appeal No's. 20 and 3 of 1978

Savarkundla Nagarpalika

APPELLANT

Vs

Maninagar Nivas Nirman Sahkari Mandli Ltd.

RESPONDENT

Date of Decision : 20-01-1981

Acts Referred:

Gujarat Municipalities Act, 1963 — Section 253
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1981 Guj 243 : (1982) GLH 396 : (1981) GLR 866

Hon'ble Judges : D.H. Shukla, J

Bench : Single Bench

Advocate : J.D. Ajmera, for A.P. Ravani, for the Appellant; D.U. Shah, for the Respondent

Judgement

1. xxxxx xxxxx xxxx

2. The facts giving rise to the Second Appeals may shortly be summarized as under:-

The Respondent Society was providing houses to its members and it had requested the appellant Nagarpalika to allot land to it for the purpose of constructing houses and in pursuance to that request, the appellant had allotted 27,554 sq. yards of land to the respondent on lease. It was averred that the respondent was allotted the aforesaid land after the permission of the Collector, Bhavnagar, vide the letter No. 418 dated 10th September, 1955 and after that also, the map was sanctioned by the Collector by letter No. 419 of 1st February, 1956. According to the map, the land was divided in 41 plots and the possession of the entire land was given to the respondent and it is the further say of the respondent that it has been in continuous possession of the said land thereafter all throughout. It was felt by the respondent at one point of time that plots Nos. 36 to 41 were situated on an uneven and rough land and so the respondent had forwarded a request to the appellant to change the land of these plots, namely plots Nos. 36 to 41 and in exchange to give other land. The request was not

however granted by the Government and therefore according to the respondent the land as originally granted continued to remain in the respondent's possession. The respondent had allotted each plot respectively to its members and when the allottee of plot No. 41 started construction on it, the appellant Nagarpalika obstructed him and did not grant permission. So, the respondent gave an application No. 22 of 1970 to the Assistant Collector, Mahuva, allegedly for declaration of its ownership, but the Assistant Collector decided against the respondent and therefore an appeal bearing No. 140 of 1971 was preferred in the Office of the Collector at Bhavnagar, which appeal was allowed, and being dissatisfied by the decision of the Collector in appeal, the appellant Nagarpalika preferred a Revision Petition No 262 of 1972, to the Special Secretary, Revenue Department, Government of Gujarat, who allowed the Revision Application and restored the order of the Assistant Collector, Mahuva. It is the say of the respondent in the present suit that it had not referred the question of ownership of land to the Assistant Collector and the consequent decision by the Special Secretary is illegal and void, The respondent further submitted that it had already paid the occupancy price of the plots as well as the lease amount of some of the plots. It further submitted that the appellant Nagarpalika refused to accept the lease amount of the other remaining plots although the respondent is in possession thereof. It is categorically denied by the respondent that it had ever surrendered possession of the plots to the Appellant Nagarpalika when it made a request for exchange of some land, The respondent sought a prayer in the suit that it be declared that plots Nos, 36 to 41 are of the ownership of the respondent-Society and consequently it further sought an Injunction restraining the appellant Nagarpalika to interfere with the possession of the respondent-society and to prohibit the appellant Nagarpalika from alienating those lands.

3 to 11. xxxxx xxxx xxxx xxxx xX

12. The next point which was urged before me was as to whether the respondent-society was required to give a statutory notice u/s 253 of the Gujarat Municipalities Act, 1963, before filing the suit, This point is also not urged at the earlier stages of the suit, but since it is a material point of law, touching the maintainability of the suit, I have considered it fit to properly consider it, The relevant portion of S. 253 of the Gujarat Municipalities Act runs as under:

"253 (1) No suit shall lie against a municipality or against any officer or servant of municipality in respect of any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act --

(a) unless it is instituted within six months next after the accrual of the cause of action and

(b) until the expiration of one month after notice in writing has been, in the case of a municipality, delivered or left at the municipal office and, in the case of an officer or servant of a municipality, delivered to him or left at his office or place

of abode; and all such notices shall state with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his advocate, pleader or agent, if any, for the purpose of the suit,"

13. Mr. Ajmera referred me to a ruling reported in Jalgaon Borough Municipality Vs. Khandesh Spinning and Weaving Mills Co. Ltd., (The Jalgaon Borough Municipality v. The Khandesh Spinning & Weaving Mills Co. Ltd.). He referred to the following observations appearing in that judgment (at p, 206):

"The acts which would fall within the category of those "done or purporting to have been done in pursuance of this Act" could only be those which were done under a vestige or semblance of authority or with some show of a right. If an act was outrageous and extraordinary or could not be supported at all, not having been done with a vestige or semblance of authority, or some sort of a right invested in the party doing that act, it would not be an act which is done or purports to have been done in pursuance of the Act. The distinction is really between ultra vires and illegal acts, on the one hand, and wrongful acts, on the other, wrongful in the sense that they purport to have been done in pursuance of the Act; they are intended to seem to have been done in pursuance of the Act and are done with a vestige or semblance of authority, or sort of a right invested in the party doing those acts."

The facts of the case were quite different and the wide observation on which Mr. Ajmera has sought reliance cannot have application when its applicability is viewed in the light of the facts of this case. In the present case, the real question is that the respondent-society wants to construct buildings on a portion of the land which land according to it has been leased to it by the appellant Nagarpalika after the necessary sanction of the Collector. The appellant Nagarpalika did not grant the permission for construction to the respondent-society on the ground that the disputed land continued to be vested in the Nagarpalika and that the respondent-society had no right of lease In respect Of it, or for that matter it had no other right with respect to it, When therefore the appellant Nagarpalika was denying the title of the respondent-society, can it be said that it was an act done by it in pursuance or execution or intended execution of the Act, that is to say the Gujarat Municipalities Act, 1963? Mr. Ajmera submitted that wider S. 80 of that Act, a Municipality may acquire any land property and therefore it was the right of the Municipality to preserve and maintain its property and therefore, when the permission sought by the respondent-society was negatived by the Officer of the Appellant Nagarpalika, it was done in pursuance of the provisions of that Act. With respect, there is no force in the argument of Mr. Ajmera. It would have been quite a different matter if the appellant Nagarpalika had rejected the respondent's application on the ground based upon the rules or regulations governing the construction of the building, but it is quite a different matter when the appellant Nagarpalika refused permission on the ground that the respondent-society had no claim to it whatever. In other words, the ground on which the appellant Nagarpalika did not accord its sanction to the permission

sought for construction of the houses on the disputed land was dehors the provisions of the Gujarat Municipalities Act, 1963, and it was not in pursuance or execution or intended execution of it. Mr. Ajmera was not able to meet with this argument. In the result, therefore, it cannot be said that the suit was incompetent without statutory notice given as required by Section 253 of the Gujarat Municipalities Act, 1963. The argument based upon point No. 3 is also required to be rejected.

14. So far as Suit No. 23 of 1975 is concerned, the injunction was sought to prohibit the appellant Nagarpalika from holding public auction, but there also it is difficult to hold that the Nagarpalika's decision to hold auction of the concerned plots had any legal basis, inasmuch as it could not hold public auction of the land which was leased out to respondent-society and which was in possession of the respondent-society. It cannot be considered to the function of the Municipality to hold public auction of lands belonging to other persons. The action of the Appellant Nagarpalika is required to be considered in the light of the letter (Exh. 23) as well as the receipt for the payment of occupancy price vide Exh. 40. The decision was therefore ab initio void and illegal even if we do not call it mala fide under the factual circumstances of the case and therefore the suit cannot be held to be incompetent for the want of a statutory notice as urged on behalf of the appellant Nagarpalika.

15. The last question which is urged before me is that the respondent-society is not entitled to any declaration about its lease-hold rights when the title to the property in question was not transferred by a legally registered deed of conveyance by the appellant Municipality. This is also a question which has not been urged at the stage either of the trial or at the stage of first appeal. It appears that the appellant Nagarpalika is trying to clutch at all technical objections after having lost in the first appeal. Before I dispose of this contention, it is necessary to recall certain facts. The respondent-society was allotted a land admeasuring 27554 sq. yards by the appellant Nagarpalika after having obtained the sanction of the Collector of Bhavnagar by his order bearing No. Land 418 dated 10th September, 1955. The land was plotted and plots bore Nos, 1 to 41. When the dispute arose, there was already construction made on plots Nos. 1 to 30. The respondent-society had entered into possession of the entire land " and the dispute arose only after the respondent society suggested for an exchange of plots Nos. 36 to 41 as that was a land not quite suitable for the purpose of constructing houses. As I have noted above, that suggestion was even approved of at the level of the Nagarpalika, but the Government rejected that suggestion. Then after -the payment of the occupancy price was called for and the payment was made. It was only when the holder of plot No. 41 tried to obtain permission for the purpose of a construction on his plot that the appellant Nagarpalika refused the permission on the ground that the respondent society was not the owner of the land and therefore the permission could not be granted. It is pertinent to note that the resolution by which the land was granted to the respondent-society is not on the record of the case. But apart from that, the

main question which is argued before me by the advocates of the rival sides is as to whether the provisions of Section 53A of the Transfer of Property Act has any applicability to the present case. The two conditions which are necessary for the application of Section 53A are that the transfer is for consideration and in writing signed by the transferor or on his behalf and that the transferee has in part performance of the contract taken Possession of the property or any part thereof. If these two conditions are satisfied, then notwithstanding that the contract, though required to be registered has not been registered, the transferor or any person claiming under him shall be debarred from enforcing against the transferee, any right in respect of the property of which the transferee has taken possession. There is no manner of doubt that the transfer was in writing signed by and on behalf of the transferor inasmuch as the transfer took place by a resolution of the appellant Nagarpalika with the sanction of the Collector and secondly it is also not in dispute that the respondent-society as long back entered into possession of the land in pursuance to the said allotment,

16. The lower Appellate Court has allowed the respondent plaintiff's prayer by granting a declaration that it is the owner as holding leasehold property rights and as person in possession of plots Nos. 36 to 41 and plots Nos. 32 to 35, 43 and 23/2. The learned Advocate, Mr. Ajmera, did not contest the position that the respondent-society would be entitled to the benefit u/s 53A of the Transfer of Property Act as the necessary conditions for its applicability were satisfied. One question arises which I must consider although Mr. Ajmera did not argue the point from that point of view. It is a settled legal position that the right conferred by this section is a right only available to a defendant to protect his possession, and that this section does not create a title on the defendant. The nature of the title available to a transferee is stated in the following observation in Mulla's Commentary on the Transfer of Property Act (6th Edition), page 292, Note No. 18:-

"It merely operates as a bar to the plaintiff asserting his title. It is limited to cases where the transferee had taken possession, and against whom the transferor is debarred from enforcing any right other than that expressly provided by the contract. The section imposes a bar on the transferor. When the conditions mentioned in the section are fulfilled, it debars him from enforcing against the transferee any right or interest expressly provided by the contract. So far as the transferee is concerned, the section confers a right on him to the extent it imposes a bar on the transferor. But that is only a right to protect his possession against any challenge to it by the latter contrary to the terms of the contract."

17. It is also found observed on page 293 as under:

"The section does not confer any title on the defendant in possession, and he cannot maintain a suit on title. The Supreme Court has approved this principle."

18. If this legal position is to be applied per se, the respondent-society's prayer

for declaration must be dismissed as without a registered lease it cannot be declared to be the holder or the owner of leasehold rights in the property in question. So far as the facts of the present case are concerned, the non-suiting of the respondent would entail untold complications and great hardship on the members of the respondent-society. The result will be that the decision of the respondent-society as a lessee shall not be recognised and the appellant Nagarpalika will be at liberty to alienate the property in dispute as well as to refuse permission for the construction on the disputed plots. If these consequences are bound to occur on account of a legally certain provision, the Court can't help the distressed party. But fortunately so far as the respondent Society is concerned, there appears a silver lining in the otherwise clouded sky as an interpretation put by a Judicial Authority on the application of S. 53A comes to its rescue. The commentaries on p. 293 runs as under:-

"The words of the section do not warrant a conclusion that the plaintiff as such is necessarily debarred from the benefit of the section. The true position, as explained by Subba Rao, C. J., as he then was, in a case from Andhra Pradesh (Achayya v. Venkata Subba Rao AIR 1957 AP 854), is:

"Whether the transferee occupies the position of a plaintiff or a defendant, he can resist the transferor's claim against the property. Conversely, whether the transferor is the plaintiff or the defendant, he cannot enforce his rights in respect of the property against the transferee. The utility of the section or the rights conferred thereunder should not be made to depend on the manouevring for positions in a Court of Law, otherwise a powerful transferor can always defeat the salutary provisions of the section by dispossessing the transferee by force and compelling him to go to a Court as plaintiff. Doubtless, the right conveyed under the section can In relied upon only as a shield and not as a sword but the protection is available to the transferee botb as a plaintiff and as a defendant so long as he uses it as a shield."

"Whether the above statement was a correct statement of the law or not was kept open by the Supreme Court." (Delhi Motor Co. V. U. A. Basrurkar (dead) by his legal representatives Delhi Motor Company and Others Vs. U.A. Basrurkar and Others, .

19. In the case of Delhi Motor Co. v. U. A. Basrurkar (supra), Their Lordships of the Supreme Court took into account the observations of the Allahabad High Court in the case of Pandit Ram Chander Vs. Pandit Maharaj Kunwar and Others, and quoted in their judgment the following passage from it (at p. 798):-

"Now, in the present case, what is it that the plaintiff is attempting to do? He is not attempting to set up a transfer which is invalid; he has not instituted a suit for the declaration of the validity of the transfer, he has not instituted a suit in which he claims an order against the defendant directing him to perform any covenant of the transfer. What he is seeking to do is to debar the defendants from interfering with his possession into which he has entered with the consent

of his transferor after the execution of a transfer in his favour. He is, in other words, seeking, to defend the rights to which he is entitled u/s 53A of the Transfer of Property Act. The defendants Nos. 1 and 2 in demolishing part of the property of which the plaintiff had obtained possession were acting suo motu with the aid of the Municipal Board of Moradabad. It is the defendants who are seeking to assert rights covered by the contract. The plaintiff seeks merely to debar them from doing so; the plaintiff is seeking to protect his rights. In a sense, in the proceedings he is really a defendant and we see nothing in the terms of Section 53A of the Transfer of Property Act to disentitle him from maintaining the present suit."

20. Bhargava J., speaking for the Bench observed as under:-

"Without expressing any opinion as to the correctness of the view taken by the Allahabad High Court, we have to point out that the interpretation put on Section 53A of the Transfer of Property Act even by that Court is of no assistance to the firm in the present case."

In other words, as rightly observed by the learned Commentator of Mulla on Transfer of Property Act, the Supreme Court kept the point open.

21. In the present case, the respondent-Society is precisely in the same position. Although the suit is filed for the relief of declaration that it is the owner of the leasehold rights, the real gravamen of the grievance of the respondent-Society is that the appellant-Nagarpalika is deliberately causing disturbance in his possession and that the Nagarpalika is also attempting to defeat the leasehold rights of the respondent Society by alienating the disputed property. What the respondent-society basically seeks in this suit is the protection from the uncalled for, unjust and illegal actions of the appellant Nagarpalika. I pointed out the legal position to Mr. D. U. Shah, and he fairly conceded that it was so and he agreed that what basically the respondent-Society seeks is the protection to its possession u/s 53A of the Transfer of Property Act. Under the circumstances of this case and from a perusal of the record of this case, it does appear to me that the respondent-society must be protected from the unjust invasion by the Nagarpalika over its legitimate rights. More so, when the factual " position has gone so much further that there are constructions made over 30 plots of land. There is no manner of dispute that a process of the same resolution, the respondent-society has entered into the possession of the entire land and it has paid the occupancy price. If the nature of the respondent's suit is examined at its very roots, it is clear that the respondent-society seeks protection of Section 53A as a shield and not as a sword. In the result, therefore, the mandatory provisions of the Indian Registration. Act are required to be respected and obeyed, and on the other, the respondent-society must be secured a right to possession acquired by it u/s 53A of the Transfer of Property Act. In order, to reconcile this apparently conflicting position, I am of the view that the declaration granted by the learned Appellate Judge requires modification. I modify the order of the learned Appellate Judge in both the appeals on the

question of declaration to the effect that the respondent-society is hereby declared to be entitled to the protection of the provisions of Section 53A of the Transfer of Property Act, and after the same modification, the other part of the order of the learned Appellate Judge is left undisturbed.

22. xx xx xx xx xx xx xx

23. Appeals partly allowed.