

(2010) 10 GUJ CK 0104

In the Gujarat High Court

Case No : Special Civil Application No. 5128 of 1995

Secretary

APPELLANT

Vs

Sama Sidhik Saheb and Others

RESPONDENT

Date of Decision : 25-10-2010

Acts Referred:

Bombay Inams (Kutch Area) Abolition Act, 1958 — Section 10, 18, 19

Citation : (2010) 10 GUJ CK 0104

Hon'ble Judges : K.S. Jhaveri, J

Bench : Single Bench

Advocate : Rashesh Rindani, AGP, for the Appellant; B.Y. Mankad, for Respondent Nos. 1, 5, 8, 10, 12, 14, 26, 28, 33, 38, 41 and 49, Y.S. Mankad, for Respondent Nos. 1, 5 - 6, 8, 10, 12, 14, 26, 28, 33, 38, 41 and 49, Kirtidev R. Dave, for Respondent Nos. 2 - 4, 9.2.1, 13, 15 - 16, 18 - 20, 22 - 25, 27, 30 - 32, 34 - 36, 39 - 40, 42 - 48 and 50 - 51 and Rahul K. Dave, for Respondent Nos. 2 - 4, 9.2.1, 13, 15 - 16, 18 - 19, 22 - 25, 27, 30 - 31, 34 - 36, 39 - 40, 42 - 48 and 50 - 51, for the Respondent

Judgement

K.S. Jhaveri, J.—By way of this petition, the petitioner - State has challenged the judgment and order of the Gujarat Revenue Tribunal, dated 9.2.1993 in Appeal No. TEN.A.K.2 of 1990 whereby the Tribunal has allowed the appeal filed by the respondents and quashed and set aside the order passed by the lower Court u/s 37(2) of the Land Revenue Code (hereinafter referred to as "the Code") by declaring the land bearing Survey Number mentioned in the order situated at Kala Dungar and Gora Dungar in the maps of the village Juna, Dhoravar, Rabviyari, Kumariya, Ganipor, Tunga, Kutri, Dhrobana, etc. of Western Kutch were of the private ownership of the respondents.

2. The brief facts of the case are that, 9 respondents out of the present respondents filed an application u/s 37(2) of the Code in the Court Mamlatdar, Bhuj on 31.7.1968 stating therein that Kala Dungar and Gora Dungar situated in the village Khavda are of the ownership of the respondents. It was their case that they were the Inamdars of village Khavda and claimed that u/s 10 of the

Bombay Inam (Kutch Area) Abolition Act (hereinafter referred to as "the Act") all public roads, lanes, path, bridges, ditches, etc. vests in the Government but Kala Dungar and Gora Dungar were not included u/s of the said Act. There were several trees on both these Dungars and grass were also grown naturally on these Dungars. Therefore, they are of the nature of "Rakhal" and such "Rakhal" properties could not vest in the Government u/s 10 of the Act. It is stated that at the time of proceedings under the Act, the respondents represented their case before the Mamlatdar that both these Dungars should not vest in the State Government u/s 10 of the Act. The Mamlatdar directed the respondents to file necessary applications u/s 37(2) of the Code for obtaining necessary order under the provisions of the Code. Therefore, in view of the aforesaid facts and circumstances, they filed an application before the Court of learned Mamlatdar, Kutch for such declaration.

2.1 It is the case that after holding necessary inquiries, the learned Mamlatdar, by judgment and order dated 2.2.1971 held that the appellants-respondents were not the owners of Kala Dungar and Gora Dungar.

2.2 Being aggrieved by the aforesaid judgment and order passed by the Mamlatdar, the respondents filed Appeal No. TEN. A.K. 5 of 1978 before the Tribunal. The Tribunal by its judgment and order dated 10.9.1978 set aside the order passed by the Mamlatdar and remanded the matter for fresh enquiry and re-hearing.

2.3 The Mamlatdar, after issuing necessary notices to all the interested parties, by his order dated 29.4.1979 held that the respondents were the owners of Kala Dungar and Gora Dungar.

2.4 Against the above order, the respondents filed Appeal No. TEN.A.K. 35 of 1979 before the Tribunal and the Tribunal set aside the order passed by the Mamlatdar and remanded the matter for re-hearing.

2.5 On remand, the case was numbered as Case No. 15 by the Mamlatdar, and he accordingly served notices to all the necessary parties including the present respondents. The Mamlatdar, after hearing both the parties, by his order dated 17.5.1982 declared that the respondents were not the owners of the said land of Kala Dungar and Gora Dungar and observed that the Dungars vested in the Government u/s 10 of the Act.

2.6 Being aggrieved by the said order, the respondents filed Appeal No. 74 of 1987 before the Court of Court of Assistant Collector, Bhuj. The Assistant Collector by his order dated 31.3.1989 dismissed the appeal filed by the respondents.

2.7 Being aggrieved by the said order, the respondents preferred Appeal No. TEN. A.K.2 of 1990 before the Tribunal. The Tribunal came to the conclusion that the aforesaid Dungars could not vest in the State Government u/s 10 of the Act and hence it allowed the appeal of the respondents by its judgment and order

dated 9.2.1993 and quashed and set aside the order by the lower courts u/s 37(2) of the Code and declared that the aforesaid Kala Dungar and Gora Dungar situated in the midst of villages Juna, Dhoravar, Rabiya, Kanariya, Ganipor, Tunga, Kutni, Dhrobana etc. of western Kutch are of the ownership of the respondents.

2.8. Aggrieved by the aforesaid judgment and order of the Tribunal, the State has preferred the present petition before this Court challenging its legality, validity and propriety.

3. I have heard learned AGP Mr. Rashesh Rindani, appearing for the petitioner-State. He has submitted that the judgment and order passed by the Tribunal is contrary to the provisions of law and evidence on record. He submitted that there is nothing on record to show that the respondents were the owners of the land and in spite of that the Tribunal a finding in paragraph 15 of the judgment and order that the disputed land is "Rakhal" which does not come within the purview of Section 10 of the Act. He further submitted that there was no material on record to support this finding of the Tribunal and therefore, the judgment and order of the Tribunal is required to be quashed and set aside. According to the submission of learned AGP Mr. Rindani, prior to the year 1948, the District of Kutch was ruled by the Royal Family. Most of the villages are given by the ancestors of the Royal Family to the Inamdars and they were looking after the administration and management of such villages. In Khavda area of Taluka Bhuj, villages of Kunariya, Kuran, Dhoban, Rathadia, Gorava, Thuga, and Juna are situated. As per the geographical situation, in the middle of all these villages, there were waste lands and Kala Dungar and Gora Dungar are two prominent Dungars and all the aforesaid 7 villages used these Dungars for the purpose of grazing their cattle. On coming into force of the Inam Abolition Act, as per the provisions of Section 10 of the Act, all the public roads, lanes, paths, bridges, ditches, etc. were vested in the Government. He submitted that in the present case, as per the case of the respondents, in these two Dungars trees and grass naturally grow and they used to give permission to the people to cut woods and graze their cattle. He further submitted that on coming into force of the Act, the said gauchar and waste lands vested in the Government as per Section 10 of the Act. But, the Tribunal has not considered these facts and the legal provisions of the Act and therefore erred in passing the impugned judgment holding that the respondents are the owners of the land in question.

3.1 Learned AGP further submitted that the people were taking permission from them for cutting the woods and grazing their cattle on the land in question, but they have not produced any evidence on record in support of their case. No account was maintained by them nor any written permission was granted to them, and no evidence to that effect has been produced. In absence of any such evidence, there was no reason for the Tribunal to come to the conclusion that the respondents were the owners of the suit land.

3.2 Learned AGP further submitted that from the order passed by the Mamlatdar,

it is clear that the Talatis of the aforesaid villages were examined and they have also produced the relevant land records before the Mamlatdar. He submitted that from the aforesaid Government records and entries of land records, it has been noticed that there was no evidence to show that the respondents were the owners of the said land but entries in the land records disclose that the suit lands were being used by the people of nearby villages as gauchar land to graze their cattle. Therefore, according to him, this proves that the suit land was not belonging to the particular village and hence the respondents were not the owners of the suit land.

3.3 It is further submitted by learned AGP that from the evidence on record of the case, it was found that in the suit land, the historical "Panchmai Pirs" place is also situated. The foot-prints of Guru Datatreya was also there and the management of the same was done by Khavda Lohan Mahajan. They got their buildings, guest houses, well, etc. Some inscriptions were also there. As per the evidence of the President of the Mahajan, earlier on the top of the Dungar only a foot-print of Guru Datatreya was there but subsequently, the Mahajan built the temple, guest house, water tank etc. and also they got the lake situated therein repaired. As per the submission of learned AGP, at the time of examination, as per the say of Mahajan, the management of that place was being done by him. The suit lands of both the Dungars were being used as gauchar land by the village people of the surrounding areas. As per his say, the aforesaid Datatreya Temple is also registered with the Office of the Charity Commissioner under the Trust Act. During the month of Badar and also on every Shivaratri, the people of the nearby villages used to hold big fair. During that period, traders from the nearby areas used to come there and do their business by putting up their stalls. The rent towards the same was being collected by the Poojari of the Temple. No Inamdar of any village used to collect the rent etc. From the evidence of the President of the Mahajan, it is quite clear that at no point of time the suit lands belonged to the respondents. According to them, if the suit lands were belonging to the respondents, how the same have come into the possession of Mahajan and why they gave permission the Mahajan to construct the Temple and also gave permission to the Poojari to collect the rent etc. Therefore, contrary to the observations made by the Tribunal, the material on record of the case clearly shows that the suit lands never belonged to the respondents. While arriving at the finding that the respondents were the owners of the suit lands, the Tribunal has erred in appreciating these material evidence available on record and therefore the finding arrived at by the Tribunal is perverse and suffers from non-application of mind and hence, the order of the Tribunal is required to be quashed and set aside.

3.4 Learned AGP Mr. Rindani submitted that the President of the Mahajan was also supported by the evidence adduced by the Deputy Mamlatdar. In the year 1958, the suit land was being used by nearby village people for the purpose of grazing their cattle. Therefore, the said land vested in the Government u/s 10 of the Act and the Deputy Mamlatdar has deposed that he got necessary documents

in support of his deposition. The Tribunal has erred in appreciating this evidence and a contrary decision has been taken declaring that the respondents were the owners of the suit land. The Tribunal has relied upon the oral evidence adduced by the witnesses of the respondents which is not supported by any documentary evidence, either primary or secondary. Against that, the State has also examined various witnesses who have supported the case of the State that the suit lands belonged to the State, but the Tribunal disbelieved such evidence. The Tribunal ought to have held that the suit lands vested in the State Government u/s 10 of the Act. He further submitted that even other wise when any land which is situated within the State does not belong to any person and there is no record to prove that any person is the owner of such land, then not only under the provisions of the Act but even otherwise such land vests in the Government unless and until contrary is proved by the person claiming the ownership right. But, the Tribunal failed to appreciate this important aspect of the matter.

3.5 Learned AGP further submitted that on coming into force of the Constitution of India, as provided in the provisions of it, all lands which are not of the ownership of any person, then automatically such lands vest in the Government. In the instant case, the respondents have not produced any evidence to show that at the time of coming into force of the Constitution of India, they were the owners of the suit lands and in the year 1958 when the Act came into force, at that time also they were owners of the suit lands. According to him, in absence of any such evidence on record, the Tribunal ought not to have come to any contrary conclusion otherwise than which was arrived at by the Mamlatdar and the Deputy Collector. Therefore, the finding recorded by the Tribunal that the respondents were the owners of the suit lands is contrary to the provisions of the Act and also the provisions of the Constitution of India and hence, the judgment and order is required to be quashed and set aside.

3.6 According to learned AGP, the Tribunal in support of its findings, relied upon a decision of the Hon"ble Apex Court reported in State of Gujarat Vs. Gujarat Revenue Tribunal and Others, The Tribunal has erred in relying upon the aforesaid judgments for coming to the conclusion that the suit lands belonged to the respondents. Learned AGP submitted that the facts of the said cases are completely different than the facts of the present case. He further submitted that the suit lands vested with the Government u/s 10 of the Act. The evidence on record clearly shows that the suit lands are not private properties of the present respondents. Therefore, without properly appreciating the decision rendered by the Hon"ble Apex Court in the aforesaid case, the Tribunal ought not to have come to the conclusion that the respondents were the owners of the suit lands.

3.7 Learned AGP further submitted that in para 16 of the judgment and order of the Tribunal, it has been observed that admittedly both the Dungars situated between Inam villages and Sama and Sodha people were Inamdars of these villages, who have no occupation other than grazing cattle. It is also observe3d that the respondents have produced sufficient evidence to prove that the suit

Dungars are "Rekhals" do not come within the purview of Section 10 of the Act. The Tribunal has also relied upon a Government Resolution dated 14.7.1980 issued by the Revenue Department to come to the conclusion that the waste lands which were not cultivated were not allowed to be vested in the Government u/s 10 of the Act and hence as per the conclusion arrived at by the Tribunal, this Resolution also helps the respondents for holding that the suit lands do not come within the purview of Section 10 of the Act and hence the same cannot vest in the Government. Therefore, the Tribunal allowed the appeal and set aside the judgments and orders passed by the lower Courts and declared that the suit lands belonged to the respondents. He submitted that the Tribunal failed to appreciate that the respondents were never the owners of the suit lands prior to coming into force of the Act. The respondents have not produced any evidence on record to prove their ownership of the suit lands. In absence of their proving their case that they are the owners of the suit lands, how the above resolution of the Government could be of any help to them, is not answered by the Tribunal. It simply observed that the waste lands and the lands which not cultivated were not to vest in the Government. Unless and until the respondents prove that these lands, whether waste or uncultivated belonged to them, they cannot claim that only because the suit lands do not vest in the Government under the provisions of the Act, they are the owners of the same. Before claiming the right of ownership, they should prove that the lands belonged to them even prior to coming into force of the Act and hence it does not vest in the Government, but the respondents have not at all proved that they are the owners of the suit lands. Therefore, in absence of the same, the Tribunal has erred in holding that the respondents are the owners of the suit lands and therefore, the judgment and order of the Tribunal is required to be quashed and set aside.

4. As against the aforesaid submissions made by the learned AGP Mr. Rashesh Rindani, learned Counsel appearing the respondents have strongly opposed the same. An affidavit-in-reply dated 17.12.2007 has been filed one Sama Alana Haji Hasan, respondent No. 42, resident of Dhoravar stating therein that the approach of the State can be viewed from the fact the affidavit of Mr. Joshi has been affirmed as back as on 10.8.2007. Thereafter the State has taken more than ten adjournments over a period of five months. It was contended that the affidavit has been tendered in the office of the Hon"ble Court. However, till 10.12.2007, the copy of the affidavit was served to the advocate for the respondents. It was also found that the same was not there in the file of the Hon"ble Court when the matter was taken up for hearing on 10.12.2007. The respondents do not want to make out an issue out of that, however, the behaviour of the petitioner, the mighty State, requires consideration.

4.1 It is further stated in the said affidavit that it is really unfortunate that the Dy. Collector has come up false affidavit. He has stated that village Khavda is near the Indo-Pak Border. This is not a fact that has come out recently. From the day one when the proceedings begun, the State was aware of this. Therefore, there was need to repeat or disclose this fact. It is alleged in the affidavit that

in the next sentence, the Dy. Collector contends that this area is also used for illegal activities. This statement is contrary to what is stated in para 4 of the affidavit of the Dy. Collector. It is further stated that illegal activities is quite a vague and general statement which is misleading and designed to win the sympathy of the Hon"ble Court. No such activities are going on in the area that would be a problem for National safety. The respondents are staying in this area even before the partition of India in 1947. The respondents are Indian national and they love the motherland as any other citizen of India. It is important to note that none of the respondents or anybody from their villages has been ever arrested or found involved for any nefarious activities. Therefore, the bare words of the Dy. Collector are nothing but a gimmick to get favour of the Hon"ble Court and that the approach of the Senior Government has to be tackled with heavy hands.

4.2 It is further alleged in the affidavit that the Dy. Collector does not know his office. It has been stated in the affidavit filed by him in para 3 that the land in question is full of minerals and so in the larger public interest the property be kept with the Government. As per the laws for forest and minerals the Collector is the authority to take steps. The present dispute is there for over four decades. However, no notification under the Mines and Minerals Act and Rules has been promulgated so far. If any such action is to be taken it has to be by the Collector. Therefore, the mere statement of the Dy. Collector without any action on his part or on part of his office is not only improper but it is contrary to law.

4.3 It is further alleged in the affidavit that the respondents are staying in the area for quite long period. No activity of mining is found in the area. The area in question is open land for cattle grazing. The grass in the area is of special specie known as "Rato (Red) Grass". This specie of grass is not found anywhere else. Because of this quality of grass, animal husbandry has been developed in the area and it is world famous for that. It is further stated in the affidavit that it is important to note that this business is in the Rann of Kachchh. This is a major source of income for the survival of the villagers. It is also necessary to note that the area for which petition is going on includes three village sites. Therefore, the statements of the Dy. Collector appears to be made while sitting in the chamber and willfully ignoring the ground realities.

4.4 It is also alleged in the affidavit that in para 4 of the affidavit of the Dy. Collector Mr. Joshi has stated that the portion of this land is in physical possession of the Border Security Force (BSF) and Army. This is a case of total non application of mind or it willful and wishful application of mind. The area of Kala Dunger is 14,371.14 Hectares. The entire area is open and no possession of the Army is there. There is only one post of BSF on the top of the Kala Dunger in about half of an acre. Therefore, to contend that the land is in possession of the Army and BSF is incorrect statement on oath made by the Dy. Collector.

4.5 It is further stated in the affidavit that it is expected that the Dy. Collector knows the law and as a person authorised to give oath understands the sanctity

of affidavit to be submitted before this Hon''ble Court. The Army and the BSF would not trespass over any land unless in the situation of emergency. Therefore, there must be revenue record with the Collector office any land having been allotted to the Army or BSF. The Dy. Collector has not produced any such record and has filed vague affidavit. As persons residing in the border area the respondents know that the area in possession of Army or BSF is restricted area. This can be known by the boards placed at the entry point of the area. In this vast area no such notice board has ever been posted and therefore, the statement of the Dy. Collector is incorrect.

4.6 It is also alleged in the affidavit that it is important to note that the State has published a notification on 28.2.1986 to declare certain area as protected one under the Wild Life (Protection) Act, 1972. The said notification had been challenged before this Hon''ble Court in SCA No. 18441 of 2005 and as per the order of this Court, the file of it is kept with the present petition. The said petition was heard and decided in the year 2005 till that time the State had not contended that this land is in possession of the Army and BSF. A Map and the notification dated 28.2.1986 to that effect has also been annexed with the affidavit. The deponent of the affidavit has also produced some photographs to demonstrate that the area is open and cattle grazing is going on. The area of BSF post can also be shown but that being restricted area, no photograph has been taken.

4.7 It is further stated in the affidavit that this is a petition against the order of the Tribunal. Therefore, the petitioner has to take action to see that the legal heirs of deceased respondents are brought on record. As per the information at least 17 out of 53 respondents have expired. Their names are enumerated in the Annexure attached with the affidavit. It is true that the legal heirs of respondent No. 29 are there in the petition and that this contention is raised to place the things on record.

4.8 It is further alleged in the affidavit that while challenging the order of a Tribunal, the petitioner cannot agitate to take into account anything which was not on the record of the Tribunal. While in the present case, the petitioner has tried to drive away the petition to altogether different considerations and that cannot be permitted in a petition like this. The Dy. Collector and the State have authority to take actions for possession of the land under other enactments if permitted and the case falls within that ambit. It is further alleged that however, when the order of the Tribunal is just and legal one, it cannot be circumvented by the State in a petition like this. The State is only a litigant before this Court. This petition is for the limited purpose for the relief claimed in it. Therefore the present move by the State through the affidavit of the Dy. Collector is unwarranted and uncalled for.

4.8 It is lastly stated in the affidavit that under the circumstances, the petition deserves to be dismissed. The illegality and excess of jurisdiction exercised by the subordinates have been rightly set at naught by the impugned order.

Therefore, no interference in the order is required and to dismiss the petition.

5. Heard learned advocates appearing on behalf of the parties.

6. It is stated that the Notification u/s 18 of the Act has also been issued declaring certain areas of Kachchh District as Wild Life Sanctuary and thereafter, the Collector has issued proclamation u/s 19 of the Act calling upon the persons interested in the land covered in the Sanctuary to present their claims and it is the contention of behalf of the petitioner by Collector that the respondents have not submitted their claims. However, it is required to be noted that the competent authority was required to complete the survey settlement within the period of 2 years after the publication of the proclamation u/s 19 of the Act, which is not done till date. However, as stated in the affidavit-in-reply, looking to the vast area covered under the Sanctuary, the said proceedings could not be completed. Under the circumstances, let all the respondents submit their claims before the competent authority as early as possible, i.e. on or before 30th April 2011 and thereafter, within a period of six months, the competent authority is directed to complete the proceedings as required under the provisions of the Wild Life Act. The aforesaid direction is issued as it will be in the interest of public at large to have the Wild Life Sanctuary in the Rann of Kachchh and one additional opportunity is also required to be given to the petitioner to complete the proceedings.

7. With these observations and directions, the present Special Civil Application is disposed of. Rule is discharged, with no order as to costs. Interim relief shall stand vacated.