
(2010) 04 GUJ CK 0120
In the Gujarat High Court

Case No : Special Civil Application No's. 2959 and 2960 of 2010

Sunderdas Vithaldas Tekwani and Others	APPELLANT
Vs	
State of Gujarat and Others	RESPONDENT

Date of Decision : 15-04-2010

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 211
Bombay Stamp Act, 1958 — Section 2
Constitution of India, 1950 — Article 19(1), 226

Citation : (2010) 51 GLR 2147

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

Bench : Single Bench

Advocate : Navin Pahwa, for Thakkar Assoc. and Anand B. Gogla and B.B. Gogia, for Petitioner Nos. 1 to 20, for the Appellant; P.K. Jani, Govt. Pleader and N.J. Shah, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

D.H. Waghela, J.—By way of the first petition, i.e. Special Civil Application No. 2959 of 2010, 20 Petitioners have sought to challenge the order dated 26-12-2008 of Secretary (Appeals) of Revenue Department of the State Government and the order dated 10-12-2003 of Collector, Surat which is confirmed by the afore mentioned order of the Secretary. The impugned order of the Secretary was made in Revision u/s 211 of the Bombay Land Revenue Code (for short, "the BLR Code") and the Petitioners herein were the applicants before the Secretary.

2. The relevant facts in brief are that land admeasuring 2.7 hectares 40 sq. mtrs. falling in Survey No. 89/1 of Alathan, Tal. Chaurasiya, District Surat was auctioned on 18-5-1981 by Special Recovery Officer under the Co-operative Societies Act, even as the land was covered by the provisions of the Urban Land Ceiling Act and no permission thereunder was obtained. Taking it to be an attempt at defeating the provisions of the Land Ceiling Act, the matter was taken

into suo moto revision by the Collector, Surat and the auction was cancelled by order dated 30-9-1989. The buyer of that land, namely, Ravidarshan Co-operative Housing Society, filed a revision application from the aforesaid order dated 30-9-1989 of the Collector and that application was rejected by order dated 15-3-1995 of Secretary, Revenue Department (Disputes). The matter was carried to this Court and in L.P.A. No. 278 of 2003 in Spl.C.A. No. 7687 of 1995, the matter was remanded for hearing and fresh decision u/s 211 of the B.L.R. Code. Again, the Collector made order dated 10-12-2003 cancelling the auction dated 18-5-1981 and the Petitioners again approached the Secretary (Appeals) by way of revision application accompanied with applications for condonation of delay and stay of the order dated 18-5-1981. Orders impugned in the present petitions are the order dated 10-12-2003 and the orders made in the Petitioners' revision applications.

3. According to the elaborate impugned judgment, the Petitioners were permitted to make oral and written submissions and the original owner of the land in question, being a party to the proceeding, was also heard. One of the important issues raised against the revision application was the issue of locus standi of the Petitioners, in view of the fact that the original auction purchaser co-operative society had not challenged the order dated 10-12-2003 of the Collector; and the Petitioners were stated to have not even produced sufficient evidence of being members or plot holders of that cooperative society. In fact, the original owner of the land claimed to be in possession and enjoyment of the land in question.

Government Pleader Mr. Jani, appearing for the State, also raised the issue of locus standi of the Petitioners and it was heard in extenso as the preliminary issue, even as the impugned orders were stated to be otherwise also reasonable and just. It was submitted by Mr. Jani that, as discussed in the impugned judgment, law regarding status of a member of a co-operative society was settled by the Supreme Court in Daman Singh and Others Vs. State of Punjab and Others, and reiterated in State of U.P. and another etc. Vs. C.O.D. Chheoki Employees' Co-op. Society Ltd. and others etc., Even the other peripheral arguments for the Petitioners were now covered by recent decision of the Apex Court in Zoroastrian Co-operative Housing Society Limited and Another Vs. District Registrar Co-operative Societies (Urban) and Others, according to the submission. The important observations made therein read as under:

12. Daman Singh does not indicate that the Act, the Rules and the bye-laws for that matter, have to be given the go-by, merely because the particular bye-law or action of the Society may not accord with our concept of fairness or propriety in terms of the rights available to an ordinary citizen. Therefore, in the light of the observations in Daman Singh what one has to search for, is a provision in the Act or the Rules which prevails over bye-law No. 7 of the Society, confining membership in it, to only a person who is a Parsi. Section 24 of the Act, no doubt, speaks of open membership, but Section 24(1) makes it clear that, that open membership is the membership of a person duly qualified therefore under

the provisions of the Act, the Rules and the bye-laws of the Society.... In fact, the individual right of the member, Respondent No. 2, has got submerged in the collective right of the Society. In *State of U.P. and another etc. Vs. C.O.D. Chheoki Employees' Co-op. Society Ltd. and others etc.*, this Court after referring to *Daman Singh's case (supra)* held in Paragraph 16 that:

Thus, it is settled law that no citizen has a fundamental right under Article 19(1) (c) to become a member of a Co-operative Society. His right is governed by the provisions of the statute. So, the right to become or to continue being a member of the society is a statutory right. On fulfilment of the qualifications prescribed to become a member and for being a member of the society and on admission, he becomes a member. His being a member of the society is subject to the operation of the Act, rules and bye-laws applicable from time to time. A member of the society has no independent right qua the society, and it is the society that is entitled to represent as the corporate aggregate. No individual member is entitled to assail the constitutionality of the provisions of the Act, rules and the bye-laws as he has his right under the Act, rules, and the bye-laws and is subject to its operation. The stream cannot rise higher than the source.

13. When a statute is enacted, creating entities introduced thereunder on fulfilment of the conditions laid down therein, the public policy in relation to that statute has to be searched for within the four corners of that statute and when so searched for, one does not find anything in the Act which prevents the Society from refusing membership to a person who does not qualify in terms of bye-law No. 7 of the Society.

21. Under the Contract Act, a person *sui juris* has the freedom to enter into a contract. The bye-laws of a co-operative society setting out the terms of membership to it, is a contract entered into by a person when he seeks to become a member of that society. Even the formation of the society is based on a contract. This freedom to contract available to a citizen cannot be curtailed or curbed relying on the fundamental rights enshrined in Part III of the Constitution of India against State action. A right to enforce a fundamental right against State action, cannot be extended to challenge a right to enter into a contract giving up an absolute right in oneself in the interests of an association to be formed or in the interests of the members in general of that association. This is also in lieu of advantages derived by that person by accepting a membership in the Society. The restriction imposed, is generally for retaining the identity of the society and to carry forward the object for which the society was originally formed. It is, therefore, a fallacy to consider, in the context of co-operative societies, that the surrendering of an absolute right by a citizen who becomes a member of that society, could be challenged by the said member by taking up the position that the restriction he had placed on himself by entering into the compact, is in violation of his fundamental right of freedom of movement, trade or right to settle in any part of the country. He exercises his right of association when he becomes a member of a society by entering into a contract with others regulating

his conduct vis-a-vis the society, the members constituting it, and submerging his rights in the common right to be enjoyed by all and he is really exercising his right of association guaranteed by Article 19(1)(c) of the Constitution of India in that process. His rights merge in the rights of the society and are controlled by the Act and the bye-laws of the society.

The above observations only confirm and in no way dilute the basic proposition of law laid down by the Constitution Bench of the Supreme Court in *Daman Singh and Others Vs. State of Punjab and Others*, wherein it is said:

11. ...Once a person becomes a Member of a co-operative society, he loses his individuality qua the society and he has no independent rights except those given to him by the Statute and the by-laws. He must act and speak through the society or rather, the society alone can act and speak for him qua rights or duties of the society as a body....

5. The above propositions were buttressed by Mr. Jani by referring to the provisions of Gujarat Co-operative Societies Act, 1961, more particularly, the provisions of Section 37 and provisions of Chapter IX. Section 37 of the Gujarat Co-operative Societies Act, 1961 clearly pronounces that a society on its registration shall be a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to acquire, hold and dispose of property, to enter into contracts, to institute and defend suits and other legal proceedings, and to do all such things as are necessary for the purpose for which it is constituted. It was, on that basis, submitted that the society itself being a legal person and being a party to the original auction sale, which was set aside by the impugned orders and the society having, in effect, accepted the impugned orders, individual members of such society cannot legally assert their rights, if any, against any one outside the society.

6. As against the above legal objections, Mr. Pahwa, learned Counsel for the Petitioners, submitted that the Petitioners were really aggrieved by the impugned orders as they were losing all their rights and interest in the plots allotted to them by their co-operative society; and it was wholly irrelevant that large majority of other members of the society or the society itself were not supporting the Petitioners in carrying on the litigation. He submitted that the Petitioners had acquired legal rights as individual members and plot holders and they must be permitted to assert their rights as such while they were losing their legitimate claim on the plot of lands allotted to them. He relied upon recent judgment of this Court (Coram : K. S. Jhaveri, J.) in *Shivali (Vejalpur) Co-op. Housing Society Ltd. v. State of Gujarat* 2010 (1) GLH 372 wherein it was observed, in the context of the provisions of the Bombay Stamp Act, that:

9. In my opinion, when a housing society issues the allotment letters in favour of its members, with reference to its respective units/shares, an interest in the same will be said to have been created in favour of its members. Even in the case of a tenant co-partnership society or a tenant co-ownership society, where

the land is supposed to be owned by the society and upon which houses are constructed by the society for the benefit of its members or by the members themselves, as the case may be, and when allotment letter is issued in favour of an individual member, in such cases also, interest in the immovable property to be occupied is always created.

10. In the case of a housing society, the right of occupation and enjoyment of the plot allotted to the member is vested in him. Under the provisions of the Gujarat Co-operative Societies Act, a society and its member/s are independent of each other. Both are mutually exclusive. A society can exist even in the absence of its members and it can include any person as its members. A co-operative society is formed in order to allow its member/s to execute their requirements and to avail the benefits, jointly, which is not feasible or possible, individually. Therefore, there is no substance in the contention raised by the Petitioners that a society and its members are not independent of each other. Thus, in view of the provisions of Section 2(g) of the Stamp Act, I am of the opinion that the Respondent-authority was completely justified in demanding stamp duty on the letters of allotment issued by the Petitioner-society to its members.

6.1. Learned Counsel Mr. Pahwa also relied upon another judgment of this Court (Coram : Jayant Patel, J.) in Sureshbhai Babubhai Sunara v. Ahmedabad District Co-op. Bank Ltd. 2002 (3) GLH 176, wherein the question was whether members of the society should be given right to challenge award of the Board of Nominees, more particularly when officebearers of the society did not prefer any appeal before the Tribunal. The Court observed as under:

10. So far as the contention of Mr. Vakharia that there is no privity of contract between the Bank and the members of the society are concerned, prima facie, it appears that in every co-operative society the members are not the third party to any litigation of the society, more particularly, when it is for the purpose of recovery of amount from the property of the society which is given by the society to its members for utilization of their leasehold rights or otherwise. The society if remains lethargic or does not defend the rights properly, it cannot be said that the members have just to act like silent spectators of the functioning of inefficient or dummy office-bearers and have to accept or abide by the order though they have remedy to recourse available under law. In a given case, if the Organizer or Developer for the reasons best known to them or some office-bearers of the society for the reasons best known to them may not to prefer appeal against the award of the Nominee, but if the members of the society who are going to be directly affected by the award of the Nominee, if desire, they have right to prefer appeal on the ground that they are directly aggrieved by the award of the Nominee. In a Housing Co-operative Society, when the members have been allowed to occupy the property and on account of some debt outstanding against the society which is to be recovered from the property which is under the occupation of the members, it cannot be said that the members are

not affected or aggrieved by the award of the Nominee. Under the circumstances, I am of the prima facie view that the members of the society can be said to have been aggrieved by the award of the Nominee for the recovery of the amount from the property of the society which is under occupation of the members concerned. In the case before the Supreme Court, i.e. in the case of Daman Singh (supra), the facts were that the society was to be amalgamated, under statutory exercise of power and at that stage in a matter of amalgamation, the Apex Court observed that the member has no right or individuality to object. In the matter of amalgamation, there will be merger of property between two societies and rights and liabilities of such members would be changed and the scheme of amalgamation is required to be approved by the general body, and thereafter, only there will be exercise of statutory power for grant of sanction, and therefore, the scheme of amalgamation as per the provisions of the Act is first to be placed before the general body where each member will have the say and then only the decision shall be taken which ultimately will be scrutinized by the authority. When the majority of the general body has agreed for amalgamation, the individual members cannot object to the same. Whereas in the present case, it is a Housing Co-operative Society where each member is allotted separate plot for the purpose of occupation and upon adjudication before the learned Nominee if the amounts are required to be recovered, the members in occupation will be deprived of the said property, and therefore, cannot be equated with the scheme of amalgamation, and therefore, I am of the view that the judgment on which the reliance is placed is not applicable to the facts of the present case and is of no help to the Respondent No. 1-Bank.

The above view was followed by the same Court in Hargovindbhai M. Panchal v. Ahmedabad District Co-op. Bank Ltd. 2003 (1) GLH 361.

7. There is no dispute about the facts that the Petitioners claim their rights or interest in the land in question only on the basis of their membership of the co-operative society which had purchased the land in auction in the year 1981. Not only that the auction and the transfer of the land in the revenue record were set aside by the impugned orders, but the auction and the transfer were, prima facie, found to be otherwise illegal on account of the fact that the land in question was not liable to be auctioned as the original owner was not in any way liable to pay the debt in discharge of which the auction was held. Besides that, the impugned orders dated 26-12-2008 and 10-12-2003 are now sought to be challenged by the petitions filed in February, 2010, even though the Petitioners herein were the applicants in the revision applications entertained and decided by the Secretary (Appeals). In these facts, when the transfer or auction of the land to the co-operative society is found and held to be illegal on several counts and the society is not making any grievance against the impugned orders, ratio of the Constitution Bench decision of the Apex Court in Daman Singh (supra) squarely applies in the facts of the present case. As seen earlier, the relevant ratio in Daman Singh (supra) is not in any way diluted, but only confirmed and followed also in the subsequent judgment of the Apex Court and the Petitioners

are held to have no locus standi to approach this Court.

8. By way of the second petition, i.e. Special Civil Application No. 2960 of 2010 against the same Respondents, four Petitioners having the same status and grievance as members of the same co-operative society, have challenged the order dated 11-2-2009 of Secretary, Revenue (Appeals) summarily dismissing their Revision Application No. 1 of 2008 u/s 211 of the Bombay Land Revenue Code on the ground of limitation and for the reason that the Collector's order dated 10-12-2003 did not call for interference. The original order dated 10-12-2003 of Collector, Surat being common and the same in both the petitions, the above arguments and discussions mutatis mutandis apply and the conclusion remains the same.

9. Accordingly, following the ratio of Constitution Bench decision of the Apex Court in Daman Singh (supra), the Petitioners are held to have no locus standi for approaching this Court and claiming any relief on their own under Article 226 of the Constitution and the petitions are dismissed only on that ground with no order as to costs.