(2013) 06 GUJ CK 0032

In the Gujarat High Court

Case No : Special Civil Application No. 218 of 2013

Thakore Varvaji Talaji APPELLANT

Vs

Collector and District Magistrate RESPONDENT

Date of Decision : 25-06-2013

Acts Referred:

Citation : (2014) 2 GLR 1122

Hon'ble Judges : Harsha Devani, J

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

Harsha Devani, J.—This petition is directed against the order dated 27th December, 2012 passed by the respondent No. 3-Deputy Mamlatdar (Revenue) whereby he has rejected Mutation Entry No. 36290 whereby the petitioner''s name was sought to be entered in the record of rights in respect of land bearing Plot Nos. 27 and 28 of Survey No. 128 (paiki) of Visnagar, Taluka: Visnagar, District: Mehsana. The facts of the case briefly stated are that land bearing Survey No. 128 of mauje Visnagar was converted into non-agricultural land by virtue of order dated 22nd April, 1980 passed by the District Development Officer, Mehsana and non-agriculture permission had been granted as per the lay-out plan granted by the original owner of the said land. Plot No. 27 thereof came to be purchased by one Patel Rasiklal Mulchanddas vide registered sale-deed dated 13th October, 1980 and Plot No. 28 came to be purchased by one Patel Rameshbhai Mulchanddas vide registered sale-deed dated 13th October, 1980. The Power of Attorney holder of Patel Rasiklal Mulchanddas and Patel Rameshbhai Mulchanddas executed registered sale-deed dated 28th August, 2001 in favour of Patel Kiritbhai Bhikhabhai. Patel Kiritbhai Bhikhabhai, an Ex-Army man, executed an irrevocable general Power of Attorney in favour of Patel Ramanbhai Bhikhabhai on 17th March, 2003. Subsequently, the aforesaid Plot Nos. 27 and 28 came to be sold to the petitioner by way of a registered sale-deed executed by the Power of Attorney holder Patel Ramanbhai Bhikhabhai on behalf of Patel Kiritbhai Bhikhabhai. It appears that Kiritbhai Bhikhabhai at the relevant time when he purchased the subject lands had not got his name entered in the record of rights, but for the first time made an application on 21st March, 2012 pursuant to which his name came to be entered in the record of rights on 18th June, 2012. Thereafter, the petitioner submitted an application for entering his name in the revenue record on 2nd July, 2012. It appears that despite the fact that there was a registered sale-deed in favour of the petitioner, the third respondent did not enter the name of the petitioner and called upon him to produce the original Power of Attorney and other documents. It is the case of the petitioner that he had produced affidavit of Patel Rasiklal Mulchanddas from whom Patel Kiritbhai Bhikhabhai had purchased the land as well as the affidavit of Patel Kiritbhai Bhikhabhai from whom the petitioner had purchased the subject lands to the effect that they had sold the lands by registered sale-deeds. The Power of Attorney which had been executed in favour of Patel Ramanbhai Bhikhabhai by Patel Kiritbhai Bhikhabhai was also produced and Patel Kiritbhai Bhikhabhai also personally appeared before the Mamlatdar and submitted a written application that he had authorised Shri Ramanbhai Bhikhabhai Patel by executing Power of Attorney in his favour and that he accepted the transaction entered into by him. Despite the aforesaid position, the name of the petitioner was not entered in the revenue record. Subsequently, vide order dated 27th December, 2012, the application made by the petitioner came to be rejected by the third respondent. Being aggrieved, the petitioner has filed the present petition.

2. Mr. B.T. Rao, learned Advocate for the petitioner invited the attention of the Court to the impugned order passed by the Mamlatdar to submit that the Mamlatdar had refused to enter the name of the petitioner in the record of rights on three counts. Firstly, that no evidence had been produced on record to show that the deficient stamp duty in respect of the Power of Attorney had been paid; secondly, that the original owner had not been served with the notice under Sec. 135D; and thirdly, that certified copy of the Power of Attorney had not been produced. It was submitted that all the three grounds on which the mutation entry has been rejected are misconceived, inasmuch as, while making a mutation entry, the Mamlatdar is not required to enter into the sufficiency or otherwise of the stamp duty on the document. Insofar as service of notice under Sec. 135D of the Bombay Land Revenue Code, 1879 is concerned, the original owner has personally appeared before the Mamlatdar and stated that he has agreed to the transaction. Thus, when the Power of Attorney was produced before the Mamlatdar and the original owner had appeared before the Mamlatdar and had stated before him that he had, in fact, executed such Power of Attorney and authorised Ramanbhai Bhikhabhai Patel to execute documents in his behalf, the Mamlatdar was not justified in rejecting the mutation entry in question.

3. Vehemently opposing the petition, Ms. Nisha Thakore, learned Assistant Government Pleader placed reliance upon the averments made in the affidavit-in-reply. It was submitted that insofar as maintenance of the revenue record is

concerned, the same is governed by the provisions of Sec. 135D of the Code. Section 135 of the Code has been subsequently amended in the year 2010, and inter alia, provides that where the certifying officer has reason to believe that such mutation entry violates or contravenes any of the provisions of the Act or any other Act, he shall not certify such entry and shall intimate the same with reasons in writing to the person concerned. It was submitted that accordingly, the Mamlatdar having found that sufficient stamp duty had not been paid in respect of the Power of Attorney, had in view of the above provision, not certified the entry and had intimated the petitioner about the same. As regards the contention that Patel Kiritbhai Bhikhabhai had himself remained present before the Mamlatdar, it was submitted that the owner did remain present before the Mamlatdar, but after the passing of the impugned order. It was urged that the Power of Attorney dated 17th March, 2003 on the basis of which the sale-deed in favour of the petitioner has been executed was drawn on a non-judicial stamp paper of Rs. 100/- and was executed before a Notary and was not registered. It was submitted that the State Government has time and again issued administrative instructions/circulars and that vide Circular dated 6th September, 2005, the State Government had given general instructions to the respective authorities wherein it is stated that in case of quasi-judicial proceedings, whenever a Power of Attorney is produced, the authority shall call for the affidavits of such persons about existence of Power of Attorney. At the same time, it is also provided that in case it is found that such Power of Attorney gives power of transfer/sale, acceptance of consideration and/or to execute such document on their behalf, then in such cases, the Power of Attorney shall be sent to the competent authority under the Stamp Act to verify about the deficit stamp duty. It was submitted that in the present case, it was found that the sale-deed was entered through Power of Attorney holder Shri Ramanbhai Bhikhabhai Patel. On a perusal of the said Power of Attorney, it was found that the original owner namely, Shri Kiritbhai Bhikhabhai Patel had executed "irrevocable Power of Attorney" on non-judicial stamp paper of Rs. 100/- on 17th March, 2003 and it was executed before a Notary and was an unregistered document. That a perusal of the Power of Attorney reveals that it has been executed giving absolute power to the holder Ramanbhai Bhikhabhai Patel in respect of the subject land, hence, the same would amount to transfer, and as such, the document is required to be registered. It was, accordingly, urged that the respondent No. 3 was wholly justified in rejecting the mutation entry.

4. The facts noted hereinabove reveal that a registered sale-deed came to be executed by Shri Ramanbhai Bhikhabhai Patel on behalf of Patel Kiritbhai Bhikhabhai in favour of the petitioner in respect of the subject lands. Pursuant thereto, Mutation Entry No. 36290 came to be posted in the revenue record on 2nd July, 2012. The said mutation entry has been rejected by the Mamlatdar on three counts. Firstly, that no evidence has been produced to show that the deficient stamp duty has been paid in respect of the Power of Attorney. Secondly, notice under Sec. 135D of the Code had not been served on the owner, and

thirdly, that certified copy of the Power of Attorney had not been produced. The question that arises for consideration is whether the Mamlatdar was justified in rejecting the mutation entry on the aforesaid grounds.

5. As noticed earlier, the first ground for rejecting the mutation entry is that no evidence has been produced to show that the deficient stamp duty has been paid in respect of the Power of Attorney. On behalf of the respondents, it has been submitted that it is in the light of the provisions of the amended Sec. 135D of the Code that the Mamlatdar is empowered to refuse to certify a mutation entry where he has reason to believe that such mutation entry violates or contravenes any of the provisions of the Act or any other Act. It would, therefore, be necessary to refer to the said provision.

6. Sub-section (8) of Sec. 135D on which reliance has been placed on behalf of the respondents reads thus:

(8) Where the certifying officer has a reason to believe that such mutation entry violates or contravenes any of the provisions of the Act or any other Act, he shall not certify such entry and shall intimate the same with reasons in writing to the person concerned.

7. On a plain reading of the above provision, it is apparent that by virtue of the said provision, the Mamlatdar is empowered not to certify a mutation entry if he has reason to believe that such mutation entry violates or contravenes any of the provisions of the Act or any other Act. The mutation entry would violate any provision of law provided the acquisition of right which is sought to be entered vide the said entry is contrary to any provision of law. In other words, if the Mamlatdar finds that there is a breach of any law which would render the transaction itself illegal or unlawful, whereby the mutation entry would violate the provisions of the Code or any other Act, resort can be made to sub-sec. (8) of Sec. 135D of the Code. But for breach of any other provision of law, which has no direct relation to the validity of the transaction/acquisition of right, the Mamlatdar cannot refuse to certify an entry. In the facts of the present case, the deficiency in payment of stamp duty in respect of the Power of Attorney would not render either the transaction in question or the mutation entry violative or being in contravention of any of the provisions of the Code or any other Act. Thus, in respect of any ancillary breach, which has no direct bearing to the transaction in question, resort cannot be made to sub-sec. (8) of Sec. 135D of the Code. In the opinion of this Court, such provision would be applicable where there is a breach of the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 or such other Act which would render the transaction itself invalid. However, deficit stamp duty in respect of a Power of Attorney would not render the transaction invalid. The contention that from the contents of the Power of Attorney, it appears to be in the nature of a transaction of transfer and the document is required to be registered, flies in the face of the decision of the Supreme Court in the case of Suraj Lamp and Industries Pvt. Ltd. Vs. State of

Haryana and Another, , wherein it has been held that a Power of Attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The Power of Attorney is creation of an agency whereby the grantor authorises the grantee to do the acts specified therein, on behalf of the grantor, which when executed will be binding on the grantor as if done by him. It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring the title to the grantee. Thus, the first ground on which the Mamlatdar has rejected the mutation entry cannot be said to be consistent with the provisions of sub-sec. (8) of Sec. 135D of the Code, and therefore, cannot be sustained.

8. Insofar as the second ground for rejecting the application namely, that notice under Sec. 135D of the Code was not served upon the original owner, it is an admitted position that the owner, though subsequently, had appeared before the Mamlatdar and had stated that he had authorised the Power of Attorney to execute such documents and that he agreed to the same. As regards the production of the Power of Attorney is concerned, learned Advocate for the petitioner states that such Power of Attorney has, in fact, been produced before the Mamlatdar.

9. In the light of the aforesaid discussion, this Court is of the view that insofar as the first ground for rejection of mutation entry is concerned, the same cannot be sustained. Insofar as the other two grounds for rejection of the mutation entry is concerned, the interests of justice would be served if the order passed by the Mamlatdar is quashed and set aside and the matter is remanded to the Mamlatdar to decide the same afresh after affording the petitioner an opportunity to produce a copy of the Power of Attorney as well as an affidavit of the original owner to the effect that he has executed the Power of Attorney and has no objection to the transaction in question. For the foregoing reasons, the petition is partly allowed to the extent indicated hereinabove. Rule is made absolute to the following extent. The impugned order dated 27th December, 2012 is hereby quashed and set aside. Mutation Entry No. 36290 is restored to file and the matter is remanded to the Mamlatdar for deciding the same afresh. The Mamlatdar shall consider the question of certification of the mutation entry afresh, after giving the petitioner an opportunity of removing the other two deficiencies indicated by him in the impugned order. Having regard to the facts and circumstances of the case, it is expected that the Mamlatdar shall decide the same within a period of thirty days from the date of receipt of a copy of this order.

Direct Service is permitted.

