(2017) 03 GUJ CK 0136

In the Gujarat High Court

Case No : 570 of 2017

THAKORE YASHPALSINH GOVINDSINH — APPELLANT

Vs

STATE OF GUJARAT & ORS. — RESPONDENT

Date of Decision : 21-03-2017

Acts Referred:

Constitution of India, Article 226 - Power of High Courts to Issue certain writs

Gujarat Agricultural Produce Markets Act, 1963, Section 6, Section 5, Section 52, Section 2(XIII), Section 2(XIV), Section 54(2), Section 11(5)(a) - Declaration of market areas - Declaration of intention of regulating purchase and sale of agricultural produce in specified area - Power to de-notify or divide market area - Definitions - Definitions - Power of State Government to dissolve and constitute market committee on alteration of limits of market - Constitution of market committee

Citation : (2017) 03 GUJ CK 0136

Hon'ble Judges : N.V.Anjaria

Bench : Single Bench

Advocate : VC VAGHELA, MANISHA SHAH, ROHAN YAGNIK, DILIP B RANA, SP MAJMUDAR, NISHIT P GANDHI

Judgement

1. A facet of colourability in exercise of powers is brought to fore in the facts of the present case.

2. The challenge in this petition, filed under Article 226 of the Constitution, is addressed to Notification dated 09th January, 2017 of the Agriculture and Co-operation Department of the State Government, whereby Bodeli market area of the Bodeli Agriculture Produce Market Committee came to be divided into market area of Bodeli Taluka as well as market area comprised of Sankheda Taluka. Upon such division, a new Bodeli Agriculture Produce Market Committee comprising of the Bodeli Taluka area was brought into existence; and also came to be created Sankheda Agriculture Produce Market Committee for the Sankheda

Taluka area. While effecting bifurcation as above in exercise of power under Section 52 read with Section 5 of the Gujarat Agriculture Produce Markets Act, by the very Notification, the State Government nominated in all 16 members for the different constituencies of the Bodeli APMC to continue in capacity of nominated members for maximum period of two years. They are private respondent Nos.5 to 20 herein.

2.1 The petitioner who is an agriculturist and an elected member of the Managing Committee from the agricultural constituency in the elections held in the year 2012 of the Bodeli Market Committee, is aggrieved and has prayed to set aside nomination of members as per said impugned Notification dated 09th January, 2017, further praying to direct the State to immediately declare the elections to the Bodeli APMC.

3. The four years term of the Bodeli APMC had expired when the impugned Notification nominating the members in the Bodeli APMC was issued. The previous elections to the said APMC were held in October, 2012, whereas the elections to the Chairman and Vice Chairman took place on 03rd January, 2013. The term of the Bodeli APMC therefore expired on 02nd January, 2017. It may be noted that earlier, the Bodeli APMC as previously existed, was in Sankheda Taluka. In July, 2016 the Taluka came to be divided into two Talukas namely Bodeli and Sankheda. On account of division and creation of two Talukas, as per the Policy of the State Government to have an Agriculture Produce Market Committee in respect of each Taluka area, a Notification dated 15th July, 2015 was issued declaring intention to constitute two different market committees- Bodeli APMC and Sankheda APMC.

3.1 At the stage of issuance of Notification dated 15th July, 2016 since the State Government had not taken any decision in respect of the objections thereto, Special Civil Application No.16303 of 2016 was filed wherein a writ of mandamus was prayed for directing the respondents to declare the elections to the Bodeli APMC and complete the same before the expiry of its term on 02nd January, 2017. As averred in the present petition, the said petition was adjourned from time-to-time so as to enable the State Government to file reply but the reply was not filed by the State Government. In the meantime, term of the Bodeli APMC expired on 02nd January,2 017, which was followed by Notification in question dated 09th January, 2017.

4. Heard learned advocate Mr.V.C. Vaghela for the petitioner and learned Government Pleader Ms.Manisha Shah assisted by learned Assistant Government Pleader Mr.Rohan Yagnik for the State authorities, as also learned advocate Mr.Dilip Rana for respondent Nos.4 and 5, learned advocate Mr.S.P. Majmudar for respondent Nos.7 and 16, at length.

5. The present challenge is based on a contention that once the term of the Bodeli APMC had already expired on 02nd January, 2017, it was not competent in law for the State Government to exercise powers to nominate the members and

constitute the APMC comprising of nominated members. The powers to appoint nominated members stems for the State Government under Section 54(2) of the Gujarat Agriculture Produce Markets Act, 1963 (hereinafter referred to as ''APMC Act'' for sake of brevity).

5.1 Before going to the said provision of Section 54, visiting with other relevant provisions of the APMC Act, Section 5 in Chapter III provides for declaration of intention to specifying market area, whereas Section 6 is for declaration of market area. As far as powers to denotify or divide the market area is concerned, it is Section 52 which inter alia provides that subject to the procedure laid down in Section 5, the State Government may, by Notification in the Official Gazette, declare that a market area shall ceased to be such area. The State Government may divide a market area into two or more market areas. Market area is defined in Section 2(xiii) and the market committee is defined in Section 2(xiv). The consequential effect of denotifyinq the area of inclusion of market area is provided for in Section 53.

5.2 Section 54 of the Act which bears relevance may be reproduced for ready reference.

"54. Power of State Government to dissolve and constitute market committee on alteration of limits of market.-(1) When during the term of a market committee the limits of the market area for which it is established are altered or the market are is divided into two or more separate market areas, the State Government may by order in writing dissolve the market committee and direct that a market committee be constituted for each market area as formed on account of such alteration. The members of the market committee so dissolved shall vacate their office from the date specified in the order.

(2) A new market committee constituted under the provisions of sub-section (1) shall consist of members nominated by the State Government and its Chairman and Vice-Chairman shall be elected in the manner provided in this Act. The member shall, so far as in the opinion of the State Government may be practicable, be persons who were members of the dissolved market committee.

(3) The members of such new market committee shall not hold office for such period not exceeding two years as the State Government shall by order in writing specify.

(4) On the expiry of the period of office of the members of a market committee under sub-section (3), the market committee shall be reconstituted in the manner provided in section 11."

5.3 Sub-section (2) of Section 54 provide that new market committee shall consist of members nominated by the State Government. The nominations shall last for a period not exceeding two years as per subsection (3). As per sub-section (4), upon expiry of the period of the office of the nominated members under sub-section (3), market committee shall be reconstituted in accordance with provisions of Section 11, that is, by holding elections to the market committee.

5.4 Sub-section (1) of Section 54 begins with the words ''when during the term of a market committee''. Under sub-section (2) it is provided a new market committee which is constituted under sub-section (1) shall consist of the nominated members appointed by the State Government. Reading the provisions of subsection (2) and sub-section (1), brings out a clear position that it is only when ''during the term of a market committee'' a new market committee is established and for that reason a new market committee is to be brought into existence, such market committee will consist of the members nominated by the State Government as per the powers available under subsection (2). In other words, the power to nominate members with whom the new market committee upon creation of new area would consist of, is available only in situation where the new market committee as per sub-section (1) of Section 54 is brought into existence "during the term of the existing market committee". In the facts of the present case, as the term of the Bodeli Market Committee was expired on 02nd January, 2017, the powers to nominate members could not have been exercised post-expiry of the term, but such power was exercised by issuance of Notification on 09th January, 2017.

5.5 Now, in the situation which is obtained in the facts of the case, namely that the term of market committee was over, would attract the applicability of Section 11(5)(a). The Section reads as under.

"(5)(a) Where the term of office of a market committee has expired, the State Government shall, by order published in the Official Gazette, direct that-

(i) Such person as may be appointed by the State Government from time to time shall be the Administrator to manage the affairs of the market committee, during the period beginning with the date specified in the order and ending on the day immediately preceding the date of the first general meeting of the market committee as reconstituted on the expiry of the term of the market committee (hereinafter in this sub-section referred to as "the said period");

(ii) the market committee shall be reconstituted within such period not exceeding on year in the aggregate as may be specified in the order."

5.6 It could have been possible for the State Government to invoke the above Section 11(5)(a) as the four years term of the Bodeli Market Committee had expired on 02nd January, 2017. The said powers under Section 11(5)(a) could have been exercised to rule the APMC for one year in the maximum by administrator. Whether it is exercise of powers under Section 54(2) by nominating the members in the market committee or it is an exercise of powers under Section 11(5)(a) of appointing administrator, in ultimate analysis, the result which would be brought about would be that the election would not be held for the period provided in the respective provision for continuation of the nominated members or the administrator, as the case may be. As a result, in ultimate analysis, it would be the executive government which would be at the helm of control over the market committee either through the agency by nominated members or through the administrator. The respective Sections contemplate that the nominated members may hold the office for a period maximum two years whereas the administrator could continue for a period of one year.

6. Adverting to a provision in purported exercise of power as such not available therefrom and obviate the application of the proper provision applicable in the situation and attaining a particular object-is such exercise of powers by the State Government not a colourable exercise? Indeed it is. A colourable exercise of powers is the exercise of powers which powers are not derivable from the provision. Colourability is bound up with incompetency. A colourability creeps in, when the power is exercised though as such the power is not available, but by projecting that it is available. Referring to Black''s Legal Dictionary, the Supreme Court in R.S. Joshi, S.T.O. v. Ajit Mills Limited [(1977) 4 SCC 98] stated lexicographical meaning of "colourable" in law as "an appearance, semblance or simulacrum, distinguished from which is real. Colourability, in other words, deceptive appearance in exercise of powers which power would lack in reality. In State of Punjab v. Gurdial Singh [(1980) 2 SCC 471], the Apex Court brought out a juristic clarity for the concept of, what is called colourable exercise of power. It stated that when the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested, the court calls it a colourable exercise and is undeceived by illusion. The doctrine of colourability is also explained in K.C. Gajpati Narayan Deo v. State of Orissa [AIR 1953 SC 375] which was further referred to by the Supreme Court in Welfare Association A.R.P. Maharashtra v. Ranjit P. Gohil [(2003) 9 SCC 358].

6.1 Thus, the doctrine of colourable exercise of powers revolves round the question of competency for exercising the powers. When a legislature enacts without enjoying source of power for the enactment, the legislation which would born would be termed as colourable legislation and the exercise of such legislative power is colourable exercise. In the same way, an authority or custodian of statutory power though in reality does not derive the power but resorts to a provision purportedly claiming that a power is available therefrom, such authority could be said to be acting colourably and the exercise of powers by it would be colourable exercise of powers. What is crucial in the juristic concept of colourable exercise is transgression of authority or usurpation of power. Such transgression may be patent, manifest, direct or even covert or in a disguised frame. As the colourability in exercise of powers is a tainted form of exercise falling in the realm of incompetency, it is not concerned with motive or bona fides. Therefore, bona fides or mala fides apart and the motive or bad faith irrespective, colourable exercise of power occurs where the power which is not available is purportedly exercised. The element of absence of motive of mala fide tells about a fine distinction between colourability of power with abuse of power, for, in the connotation "abuse of power", the bad faith or bad motive is an ingredient.

7. In light of above position of law, irrespective of the motive of the State Government in issuing the impugned Notification and nominating the members to be comprised in the market committee, what emerges is that the State Government did not have any power under Section 54(2) of the Act to nominate members once the term of the market committee had expired. Yet the State Government exercised the power purportedly claiming to possess such power. This was done even as a provision to be properly applied in the situation obtained was available in the statute. The said provision of Section 11(5)(a) was not resorted to, instead the members were nominated and an advantage was gained by nominating them for maximum period of two years to rule the market committee. Whether there was a bad faith or not on part of the State Government is irrelevant question, when the exercise was traced in the realm where the powers were not available, wrongly claimed to be available and came to be exercised. Element of bad faith may enter in colourable exercise of powers to the extent that despite non-availability of powers, powers are exercised knowing that the power is not available. Picking up a provision which did not give the power and apply it, simultaneously not resorting to a properly applicable provision, consequently gain some advantage, whether out of some motive or not, is an evident facet of colourability, which has surfaced in the facts of this case. The impugned Notification suffers from vice of colourability in exercise of powers in so far as it resorted to the provision of Section 54(2) to nominate the members in the market committee for the period mentioned.

8. In State of Tamil Nadu v. K. Shyam Sunder [(2011) 8 SCC 737], the concept of colourable exercise of power is explained. The observations are apt to be considered and applied in the present case. It is observed, "When power is exercised in bad faith to attain ends beyond the sanctioned purpose of power by simulation or pretension of gaining a legitimate goal, it is called colourable exercise of power. The action becomes bad where the true object is to reach an end different from the one for which the power is entrusted, guided by an extraneous consideration, whether good or bad irrelevant to the entrustment." (Para 36)

9. In light of the foregoing reasons, discussion and position of law obtaining, the Notification dated 09th January, 2017 of the Cooperation and Agriculture Department of the State Government is hereby set aside. The State Government is directed to hold the elections to the Bodeli Agriculture Produce Market Committee in accordance with law which shall be held expeditiously and in any case within a period of one year from the date of the Notification, that is 02nd January, 2017.

10. The petition is allowed as above.

