

(2014) 10 GUJ CK 0022
In the Gujarat High Court

Case No : Special Civil Application Nos. 24676 and 24678 of 2005

Tinabhai Bhikhabhai

APPELLANT

Vs

Jt. Secretary

RESPONDENT

Date of Decision : 17-10-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21, 226, 227
Gujarat Co-operative Societies Act, 1961 — Section 93

Citation : (2014) 10 GUJ CK 0022

Hon'ble Judges : Rajesh H. Shukla, J

Bench : Single Bench

Advocate : B.J. Trivedi, J.T. Trivedi and Jignasa B. Trivedi, Advocate for the Appellant; Udit Mehta, AGP, Anshin H. Desai and Shirish Joshi, Advocate for the Respondent

Judgement

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Rajesh H Shukla, J.—Both these Special Civil Applications are filed by the petitioners under Articles 14, 19, 21 as well as 226 and 227 of the Constitution of India and also under the Bombay Land Revenue Code for the prayer inter alia that appropriate writ, order or direction may be issued for quashing and setting aside the order passed by Respondent No. 1-Secretary (Appeals), Revenue Department, Government of Gujarat dated 10.10.2005 at Annexure-A and also other prayers for direction of the prosecution of the panch.

2. The facts of the case briefly summarized are that the petitioners as a Secretary of Respondent No. 4-Sahakari Mandali failed to deposit the amount of recovery or the receipts and is said to have made some irregularities resulting in the proceedings under Section 93 of the Gujarat Cooperative Societies Act on the basis of the audit report. It is stated that the amount has not been deposited but it has been deposited in the account of the petitioners and thereafter the custodian had taken charge of Respondent No. 4-Society resulting in the litigation by way of Special Civil Application No. 15780 of 2003. However, the

said petition was withdrawn and the land of the petitioners was auctioned on 11.4.2003 which is the subject matter of the present petitions challenging the order passed by the authorities below.

3. Learned Advocate Shri J.T. Trivedi for the petitioners referred to the background of the facts at length and also referred to the order of the High Court (Coram: Jayant Patel, J) dated 21.12.2006. Learned Advocate Shri Trivedi has also referred to the details that the auction was held on 14.11.2003 in haste and hurry without following the procedure or without giving sufficient notice as required under law. Learned Advocate Shri Trivedi submitted that the recovery certificate is for an amount of Rs. 51470/- and the amount is not clear what amount is outstanding which is to be calculated and the rate of interest has to be seen. Learned Advocate Shri Trivedi submitted that the rate of interest would be less for the agriculturist as per the policy for which he referred to the papers and submitted that the interest calculated is much higher contrary to such guidelines or the policy. Learned Advocate Shri Trivedi referred to Annexure-B, a public notice dated 21.11.2003 and submitted that the 30 days notice is required for which he referred to Gujarat Cooperative Societies Act as well as Gujarat State Cooperative Societies Rules. He pointedly referred to Rule 66 in support of his submission. Learned Advocate Mr. Trivedi also referred to the judgment of the Hon"ble Apex Court reported in Vasu P. Shetty Vs. Hotel Vandana Palace and Others, , and submitted that 30 days notice is a mandatory requirement which has not been followed. He again referred to the notice at Annexure-B and submitted that the notice dated 3.10.2003 has been published in "Saurashtra Samachar" on 10.11.2003 in respect of the auction scheduled on 14.11.2003. Learned Advocate Shri Trivedi therefore submitted that it suggests haste and hurry for the auction. Learned Advocate Shri Trivedi has also referred to and relied upon the judgment of the Hon"ble Apex Court reported in Gajraj Jain Vs. State of Bihar and Others,

4. Learned Advocate Shri Trivedi submitted that the possession was taken illegally by Respondent No. 5. He submitted that the valuation could have been made and he would then have the opportunity to make the payment. Learned Advocate Shri Trivedi submitted that no such opportunity has been given and the rules of natural justice have been violated and therefore the auction of the land is bad. Learned Advocate Shri Trivedi emphasized that the absence of valuation itself would be sufficient to set aside the sale. Learned Advocate Shri Trivedi referred to Order 21 and submitted that it is similar to Rule 66 and submitted that such material irregularities would vitiate the entire action. He also referred to the communication by the special recovery officer dated 20.12.2013 produced at Annexure-D and submitted that this communication would make it clear that the possession has not been handed over voluntarily and no sale certificate has been issued at all. Learned Advocate Shri Trivedi therefore emphasized that the possession has been taken over illegally and it was unilaterally without any authority. Again, learned Advocate Shri Trivedi submitted that as the sale certificate is not at all issued, any such proceedings would be vitiated. Learned

Advocate Shri Trivedi referred to Rule 66 of the Rules and submitted that for the sale of mortgage property the procedure is provided. He also submitted that either under the Cooperative Societies Act or under the Bombay Land Revenue Code, the period of 30 days is provided for holding any such auction. He strenuously submitted that as the notice of 30 days has not been given the entire proceeding is vitiated. He submitted that it would deny the opportunity to the petitioners to make the payment to avoid the auction sale and therefore it is in violation of natural justice. Learned Advocate Shri Trivedi also referred to the sale certificate produced on record dated 21.2.2005.

5. Learned Advocate Shri Trivedi referred to the impugned order at Annexure-A and submitted that the observations and findings are contrary to the record. He submitted that no opportunity is given to repay the outstanding dues as the petitioners were willing to pay the outstanding amount and still no opportunity has been granted. Learned Advocate Shri Trivedi submitted that as it was not specified exactly with regard to the amount for which the auction sale is held the entire proceedings are bad and void ab initio.

6. Learned Advocate Shri Trivedi referred to the affidavit in reply filed by Respondent No. 5 and submitted that he has taken the possession by himself. He also referred to the provisions of the Gujarat Cooperative Societies Act and the background in support of his submission.

7. Learned Advocate Shri Anshin H. Desai for the Respondent referred to the papers and submitted that the petitioners were the Secretaries of the Mandali in the year 1981 to 1993 where they have committed irregularities by siphoning off the money of the Mandali which has resulted in the proceedings. Learned Advocate Shri Desai submitted that as the outstanding amount was to be recovered ultimately an auction sale has been held for recovery of the amount as arrears of the land revenue as per provisions of the Gujarat Cooperative Societies Act. Learned Advocate Shri Desai submitted that there are members of the society where the loans are taken by the petitioners in their name and the amount has been misused. Learned Advocate Shri Desai submitted that the recovery notice has been issued for recovery of the amount. The petitioners have been making attempts to stall such proceedings by abuse of process of law. For that purpose, learned Advocate Shri Desai has referred to the background and the earlier round of litigation. He submitted that therefore public notice was required to be given. He has also referred to the papers and submitted that the auction could not have been held. He submitted that in order to be liable as on the date (2002) the proceedings were undertaken and ultimately the Secretary (Appeals) after hearing the parties, dismissed the applications of the petitioners. However, again another notice dated 30.1.2003 came to be issued. Thereafter the petitioners had moved revision applications and ex parte stay was granted. Thereafter the revision was dismissed vide order dated 25.7.2003 and thereafter public notice was given. Learned Advocate Shri Desai submitted that public notice is dated 3.10.2003 and the auction is held on 14.11.2003 and therefore

there is sufficient compliance. He submitted that on 13.11.2003 the petition came to be filed being Special Civil Application No. 15780 of 2003 and it was dismissed and the auction has been held for which the panchnama is also made. He therefore submitted that as discussed at length in the impugned orders, pursuant to the earlier round of litigation being Special Civil Application No. 15780 of 2003 the matter was remanded and thereafter again the matter has been heard. Learned Advocate Shri Desai submitted that it is required to be mentioned that though the society was vitally affected was joined as party in those proceedings which reflect the attitude of the petitioners. Learned Advocate Shri Desai submitted that Special Civil Applications Nos. 13700 of 2004 to 13702 of 2004 were filed and it was allowed partly and the order in Revision Application Nos. 3, 4 and 5 of 2005 are set aside as it was remanded back to the Secretary (Appeals) to decide after hearing all concerned. Therefore learned Advocate Shri Desai submitted that the opportunity has been given to the petitioners to remain present and even after remand they did not remain present and therefore again it was rejected and the sale certificate has been issued which is produced on record. He submitted that the petitioners are totally silent about the sale certificate and the litigation is pursuant only to consume time as and by way of abuse of process of the court. He submitted that deliberately the auction purchaser is not joined as a party respondent and subsequently he has been joined as a party respondent on his own request. He therefore submitted that the prayer clause also does not contain any prayer except to set aside the impugned order at Annexure-A and it does not refer to the sale certificate. He therefore submitted that the prayer to set aside the order is prayed without challenging the sale certificate. Learned Advocate Shri Desai emphasized and submitted that the sale certificate issued would be a conclusive proof or the evidence with regard to the proceedings both under the Gujarat Cooperative Societies Act read with the Rules and also under the Bombay Land Revenue Code. Learned Advocate Shri Anshin Desai therefore submitted that the objections have not been raised by the society or anybody and therefore in view of the certificate it has not been even challenged. He therefore submitted that the present petitions cannot be entertained. Learned Advocate Shri Desai referred to the papers and submitted that in fact at the time of auction not only they were present but at their instance the auction was postponed when they requested that they would deposit the amount. Learned Advocate Shri Desai therefore submitted that as they failed to deposit the amount even after request was accepted the auction was held and therefore the contention about the opportunity or violation of rules of natural justice are misconceived. He therefore submitted that the petition is essentially under Article 227 and the court may not exercise the discretionary jurisdiction in such a matter looking to the conduct of the petitioners. Learned Advocate Shri Desai strenuously submitted that the present petitioners have successfully stalled the proceedings since 2004 (2002) and have avoided not only the payment but despite the fact that Respondent No. 5 who is the bona fide purchaser for a value in an auction to the knowledge of the petitioners he has not been conveniently joined as party respondent. Learned Advocate Shri Desai submitted that the

contention about the uncertainty that the payment of consideration is under cloud is misconceived. It was submitted that though the issue has been joined with regard to the possession the sale certificate which has been issued and the possession has been handed over would be a conclusive proof and it is for the parties who claims or disputes will have to discharge the burden. Again he referred to the provisions of Gujarat Cooperative Societies Act and submitted that as provided the recovery can be effected as arrears of Land Revenue Code. He therefore referred to the provisions of Sections 165 and 166 of the Code. Learned Advocate Shri Desai referred to Section 178 of the Code and submitted that the application has to be made in the manner prescribed within a period of 30 days, the petitioners were aware but no such application was made and now the grievances are sought to be made. Learned Advocate Shri Desai also referred to the panchakam at page 42 and submitted that the panchnama is made in presence of three members of the society who are the President and the Member of the society and Mamlatdar and therefore it cannot be brushed aside. Learned Advocate Shri Anshin Desai has also referred to the various papers and submitted that in fact the petitioners are guilty of suppression of facts and also the irregularities qua the society but even in the proceedings they have conveniently joined the persons who are likely to be affected. He submitted that the photographs which have been relied upon by the petitioners are not the same and in fact it is the government land and therefore submissions made are without any basis. Learned Advocate Shri Desai has referred to and relied upon the judgment of the Hon''ble Apex Court reported in Janak Raj Vs. Gurdial Singh and Another, and referred to the observations made in paragraphs 4, 5, 8 and 22. Learned Advocate Shri Desi also referred to and relied upon the judgment of the Hon''ble Apex Court reported in Sagar Mahila Vidyalaya, Sagar Vs. Pandit Sadashiv Rao Harshe and others, , and also the judgment of the Hon''ble Apex Court reported in P. Udayani Devi Vs. V.V. Rajeshwara Prasad Rao and Another, , and emphasized the observations made in paragraphs 6 and 7. Learned Advocate Shri Desai has also referred to and relied upon the judgment of the Hon''ble Apex Court reported in Shyam Sunder and Another Vs. Ram Kumar and Another, Therefore learned Advocate Shri Desai strenuously submitted that looking to the conduct of the petitioners and the manner in which they have successfully stalled the proceedings, the discretionary jurisdiction under Article 227 may not be exercised in view of the concurrent findings of facts and the present petitions may be dismissed.

8. In view of this rival submissions it is required to be considered whether the present petitions deserve any consideration and whether it could be entertained and allowed.

9. As it transpires from the background of the facts as recorded herein above while recording the submissions made by both the sides it is evident that the main emphasis made by learned Advocate Shri J.T. Trivedi for the Petitioners is on the aspect of notice which according to him is a mandatory requirement of 30 days. He has emphasized that since the notice of 30 days has not been given the

entire proceedings of the auction sale would be void. Further he has referred to the papers to join an issue with regard to the possession. He has also tried to submit that the petitioners are ready and willing to pay the outstanding amount and the amount came to be specified. Learned Counsel Shri Trivedi while referring to these aspects has made a reference to the provisions of the Gujarat Cooperative Societies Act and the Rules as well as Bombay Land Revenue Code. Though the contentions have been sought to be raised the same are required to be considered in background of the facts and the conduct of the petitioner himself. As it is evident from the order passed by the Tribunal as well as the affidavit in reply filed by the Respondent No. 5 and also the further affidavit it is clear that the petitioners are trying to raise issues and abuse the process of the court only to subvert the legal process. The first aspect which is required to be considered is that the petitioners have not raised certain issues which they could have raised at the relevant time. The affidavit in reply filed by Respondent No. 4-Society has clearly referred to the background of the past litigations which have been filed to stall the recovery. It is required to be mentioned that the contention about the 30 days notice is misconceived as the facts clearly suggest that the notice was given and thereafter the auction has been held. However assuming that there is any procedural irregularity then as per provisions of Section 178 of the Bombay Land Revenue Code 1879 the petitioners are required to make an application within 30 days from the date of sale of such immovable property. Admittedly no such application has been made. Section 179 provide for the order confirming or setting aside the sale on the basis of any such application. Admittedly no such steps have been taken. Again the similar rules are to be found in Gujarat Cooperative Societies Rules. Rule 114 provide for procedure for sale of immovable property and Rule 128 is pari materia with Section 178 of the Bombay Land Revenue Code. Rule 128 of the Rules 1965 provide for making an application within 30 days from the sale of the immovable property on the ground of irregularity. Rule 128(6) provide that such certificate shall be conclusive evidence of the fact of purchase in all courts and tribunals. Admittedly the petitioners have not made either an application challenging such a sale on the ground of irregularity nor have challenged the certificate issued by the authority on 2.12.2005 pursuant to such sale. Not only that as stated in the reply affidavit by Respondent No. 4-Society the petitioners had on the contrary requested for postponement of the proceedings on the ground that they may make an arrangement for the amount and accordingly time was given and indulgence was shown to the petitioners. The history of litigation also reveals that the petitioners who were given an employment by Respondent No. 4 had misappropriated huge amount of the society and have not repaid the amount which lead the Respondent No. 4-Society to proceed for recovery of the amount and the petitioners have been taking the proceedings one after the other to stall the recovery. In fact the Secretary of the Society was compelled to file criminal complaint 41/2002 against the petitioners and similarly at the end of the auction sale the possession of the purchaser Respondent No. 5 was sought to be disturbed for which the Respondent No. 5 had to make the complaint before the

police. Even the Respondent No. 5 who is a purchaser in an auction was not made a party in the proceedings filed by the petitioners. The details of the Affidavits filed by Respondent No. 4 and Respondent No. 5 reflects the conduct of the petitioners.

10. Apart from the conduct as stated above the petitioners who claims about irregularity in the proceedings or the auction sale have failed to show that they had taken any steps as required under law of filing an application within 30 days to set aside the sale. In fact as stated above the sale certificate has been issued in favour of Respondent No. 5 which is also not challenged. Not only that but they were given indulgence before the auction sale as requested by them but they failed to deposit the amount and the proceedings of the auction had taken place. Apart from this the order at Annexure-A has referred to these aspect. Again the photograph which has been referred are stated to be not of the land of the petitioners but is a government land. The panch rojkam clearly suggest that he was present and therefore the submissions are without any merit.

11. The submissions made by learned Counsel Shri J.T. Trivedi referring to the judgment of the Hon''ble Apex Court reported in Vasu P. Shetty Vs. Hotel Vandana Palace and Others, , would not have any application to the facts of the case as it refers to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act and the procedure thereunder and therefore it will not have any application. Similarly the submissions made by learned Counsel Shri Trivedi referring to the judgment of the Hon''ble Apex Court reported in Gajraj Jain Vs. State of Bihar and Others, , with regard to the manner and procedure to be adopted which he has stated to be a fair procedure for the sale of the property is also misconceived. This judgment refers to the statutory provisions of the State Financial Corporation Act where the tenders are invited and broadly it refers to the general principles with regard to the sale of the property in exercise of power for recovery of the outstanding dues.

12. A useful reference can be made to the judgment of the Hon''ble Apex Court reported in Central Bank of India Vs. Ravindra and Others, This judgment refers to the banking regulations and the proceedings for recovery. It has also reference to the Civil Procedure Code for the purpose of interest and the observations which are referred to by learned Counsel Shri Trivedi would not apply to the facts of the present case. Similarly the judgment of the Hon''ble Apex Court reported in Corporation Bank Vs. D.S. Gowda and Another, , referred to the Banking Regulation Act and the proceedings for recovery and charging of the interest. The observations made referring to the rate of interest which have been charged cannot have any application to the present case. In the facts of the case for recovery of the outstanding amount which the petitioners have tried to stall after rounds of litigations. In fact the petitioners have said to have committed irregularity and misappropriated and still when this amount is sought to be recovered one after the another litigations are filed. Having failed the

present petitions are one further attempt by the petitioners to stall which cannot be entertained otherwise it would amount to granting premium on dishonesty.

13. Therefore having regard to the well settled principles with regard to exercise of discretion under Article 227 that unless the discretion or the order of the Tribunal or the Court is totally misdirected or contrary to the statutory provision or is such which could be said to be resulting in miscarriage of justice, normally the High Court would decline to interfere in exercise of discretion under Article 227.

14. In the background of the facts as stated above the present petitions cannot be entertained and it does not call for any interference with the impugned order at Annexure-A and the present petitions therefore deserve to be dismissed and accordingly stand dismissed.

Further Order

After the order was pronounced, learned Advocate Shri J.T. Trivedi has requested for stay of the operation of the order to enable his client to have further recourse. Though, it is resisted by learned Advocate Shri Anshin Desai and learned Advocate Shri Baiju Joshi, the operation of the order is stayed till 15.11.2014.