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**(2000) 09 GUJ CK 0032**

**In the Gujarat High Court**

**Case No :** Special Civil Application No. 7962 of 2000

Trustee of Dababhai Trust

APPELLANT

Vs

State of Gujarat

RESPONDENT

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**Date of Decision :** 21-09-2000

**Acts Referred:**

**Citation :** (2000) 09 GUJ CK 0032

**Hon'ble Judges :** H.K. Rathod, J

**Bench :** Single Bench

**Advocate :** Ketty A. Mehta, for the Appellant; I.M. Pandya Astt. Govt. Pleader for Respondent Nos. 1 and 4, for the Respondent

**Final Decision :** Allowed

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## Judgement

H.K. Rathod, J.—Ms. Ketty Mehta, learned advocate appearing on behalf of the petitioners and Mr. I.M. Pandya, learned AGP appearing on behalf of the respondent authorities.

2. The present petition has been admitted by this Court and granted ad interim relief in terms of para 14(B) on 19th July, 2000 and the same is continued till date. Today with the consent of the learned advocates for the parties, the matter is taken up for final hearing and the same is proposed to be finally disposed of by this judgment.

3. The brief facts of the present petition are as under

The land of Survey No. 433, 434 and 461 of village Kholwad, Taluka Kamrej, Block 443/A was owned by Dadabhai Trust. The said land was given by the trust to one Shri Dayabhai Nathabhai Patel as tenant. On 30th September, 1965 said Dayabhai Nathabhai Patel expired. His heirs namely the petitioner Nos. 2.1 to 2.5 purchased the land in question as tenant under the provisions of the Bombay Tenancy and Agricultural Lands Act [ hereinafter to be referred to as `the Act' ]. That the Dadabhai Trust was a registered trust and as it was managing hospital and educational institution, only certain provisions namely Section 88(B) of the

said Act would be applied and the tenants did not become deemed purchasers. The petitioner trust gave an application for giving exemption u/s 88(B) of the said Act. On 21st April, 1992, the Assistant Collector, Olpad rejected the said application on the ground that entry No. 3022 dated 11th June, 1991 which was made in favour of the petitioner Nos. 2/1 to 2/5 as purchasers of the land in question after they purchased on 9th November, 1990 was taken in suo motu revision. That on 14th May, 1992, the notice were given to the petitioners regarding suo motu revision of entry No. 3022 dated 11th June, 1991. Thereafter the petitioners gave reply to the said notices inter alia stating that the land was purchased by the tenants and therefore there was no question of sale of the land to non agriculturist and that there was no question of agriculturist not having any other agricultural land within 8 km. Other contentions were also raised in the reply. The petitioners also along with the reply annexed xerox copies of the village form No. 7/ 12 from the years 1978-79 to 1991-92 to show that the tenant and his heirs were all throughout in possession, occupation and use of the land in question. On 10th August, 1992 the Assistant Collector, Olpad by his judgment and order held that the entry No. 3022 dated 11th June, 1991 regarding Block No. 443/A be cancelled. Being aggrieved by the aforesaid order, the petitioners preferred appeal before the Collector, Surat and pointed out that some contention has been raised by the Assistant Collector, Olpad. On 26th March, 1993 the Collector, Surat by his judgment and order rejected the said appeal and confirmed the order of the Assistant Collector, Olpad. Being aggrieved by the said judgment and order dated 26th March, 1993, the petitioners preferred revision application before the Special Secretary (Appeals), Revenue Department, Gujarat State, Ahmedabad. The petitioners also submitted written arguments before the Special Secretary (Appeals). On 12th April, 1999 the Special Secretary (Appeals), Revenue Department Gujarat State by his judgement and order rejected the said revision application of the petitioners and confirmed the order of Collector, Surat. However, the authority has directed that as the revision of the trust preferred under the provisions of the said Act is pending, the order be executed in accordance with the decision that may be given by the Gujarat Revenue Tribunal. The petitioners challenging the said order dated 12th April, 1999 on the ground that the lower authority failed to appreciate that there are errors apparent on the face of the record and order of the lower authority is contrary to law, ultra vires and bad in law on the ground that only after the question regarding breach of Section 63 and 64 of the said Act is decided, entry can be changed by the authority under the provisions of the Bombay Land Revenue Code. That petitioner trust is registered trust and is carrying on educational institution and managing hospital and therefore the trust is entitled to exemption under the provisions of the said Act and the Assistant Collector, Olpad could not have decided the question of cancellation of entry unless Gujarat Revenue Tribunal had taken a decision regarding exemption u/s 88(B) of the said Act and therefore, according to the petitioners, exercise of powers for cancellation of entry was unjustified, unreasonable and contrary to law. Because if the trust is entitled to exemption u/s 88(B) of the said Act,

provisions of Section 63 and 64 of the said Act do not apply to the land in question. That the provisions of Section 3 of the Gujarat Agricultural Lands Ceiling Act did not apply inasmuch as the land was question was never in actual and physical possession of the trust and it was always in possession of the tenant and that the ground of breach of provisions of Section 3 of the Gujarat Agricultural Lands Ceiling Act did not survive and entry could not have been cancelled on that ground as the land was sold to agriculturist and the provisions of Section 63 or 64 of the said Act did not apply. According to the petitioners, in view of settled legal position, the revenue authority cannot decide question of breach of any provisions of the said Act. That the order regarding cancellation of entry on the basis of the breach of provisions of the said Act was without jurisdiction.

4. Ms. Mehta, learned advocate appearing on behalf of the petitioner has raised two specific contention before this Court challenging the order passed by the lower authorities. The first contention which has been raised by Ms. Mehta that the lower authority failed to appreciate that as per the settled legal position of law and as decided in case of Evergreen Apartment Co-operative Housing Society Ltd. Vs. Special Secretary (Appeals), Revenue Department, Gujarat State, , the authority exercising its powers under the Bombay Land Revenue Code has no power or authority or jurisdiction to decide the question arising under the Bombay Tenancy and Agriculture Lands Act. The Second submission which has been contended by Mrs. Mehta that the lower authority has also failed to appreciate that the question regarding breach of Section 63 or 64 of the said Act can only be decided by the Mamlatdar and ALT and therefore, the Assistant Collector, Olpad has no power or authority or jurisdiction to decide the question regarding breach of Section 63 or 64 and on the basis that he could not have cancelled the entry in question. It is also submitted by Mrs. Mehta that it is necessary to first decide the question regarding the breach of Section 63 or 64 then the entry can be changed by the authority under the provisions of Bombay Land Revenue Code. Mrs. Mehta has also submitted that the lower authority has also failed to appreciate the decision of this Court reported in 37 (2) GLR 600 that the Assistant or the Deputy Collector can call for record and proceedings under the provisions of Section 211 of the Bombay Land Revenue Code read with Rule 108 of the Bombay Land Revenue Rules but the said authority cannot himself decide the case in exercise of the suo motu powers and that powers can be exercised only by the State Government. Therefore, according to Mrs. Mehta that under these circumstances, cancellation of entry by the Assistant Collector, Olpad was illegal and ultravires and without jurisdiction and therefore if initial exercise of powers is without jurisdiction, the entry could not have been cancelled. Mrs. Mehta has also submitted that before the lower authorities, all these contentions have been specifically raised by the petitioner even though without considering the same, the orders impugned in this petition have been passed by the lower authorities. Mrs. Mehta has also submitted that in respect of the jurisdiction of the Assistant Collector, the question of examining the matter of

present petition does not arise and therefore, without examining the merits of the matter, only two legal contentions which have been raised, are sufficient for setting aside the order passed by the lower authorities.

5. Mr. I.M. Pandya, learned AGP has submitted that the lower authority has rightly decided on merits. Mr. Pandya has also submitted that the land in question are governed by the Bombay Tenancy Act and the lands in question have been occupied by the tenant and therefore, provisions of Bombay Tenancy Act are applicable. Mr. Pandya further submitted that the fact that the petitioner trust has applied exemption application u/s 88(B), it means that the land in question has been governed by the Bombay Tenancy Act otherwise there is no need to have exemption certificate under the provisions of the Bombay Tenancy Act. Mr. Pandya also submitted that said exemption certificate application filed by the petitioner trust has been rejected and against that revision application was filed by the petitioner which was pending before the authority but no documentary evidence was produced before the authority by the petitioner trust. Mr. Pandya, learned AGP has further submitted that because of the land in question is not in possession of the petitioner trust and therefore Section 3 of the Ceiling Act is not applicable and that fact is also not correct because at the time when the Ceiling Act came into force, the petitioner trust having land 51 acres 16 gunthas was in the name of the petitioner trust and therefore the petitioner trust has filled up form for exemption u/s 3 of the Ceiling Act but such exemption has not been obtained by the petitioner trust and therefore, it amounts to breach of Ceiling Act and the provisions of Section 88 of the Tenancy Act is also applicable and therefore, according to the lower authority, has rightly appreciated the facts and documents on record and no error has been committed by the lower authorities. However, the learned AGP Mr. Pandya has not seriously objected the legal submission which has been made by Mrs. Mehta by relying on the decision of this Court reported in Evergreen Apartment Co-operative Housing Society Ltd. Vs. Special Secretary (Appeals), Revenue Department, Gujarat State, .

6. I have heard the learned advocates at length. I have also considered the decisions which have been cited this Court by Mrs. Mehta. In case of Evergreen Apartment Co-operative Housing Society Ltd. Vs. Special Secretary (Appeals), Revenue Department, Gujarat State, , wherein this Court has observed as under :-

"It is quite possible that an officer of the Revenue Department may be occupying different capacities under different enactments. That however, would not empower him to exercise any power under one enactment while proceeding under another enactment. So far as the proceedings under Rule 108 of the Rules, popularly known as RTS proceedings, are concerned, it is well settled that the entries made in the revenue records have primarily a fiscal value and they do not create any title. Such mutations have to follow either the documents of title or the orders passed by the competent authorities under Special enactments. Independently, the Revenue Authorities, as mentioned in Rule 108 of the Rules,

cannot pass orders of cancelling the entries on an assumption that the transaction recorded in the entry are against the provisions of a particular enactment. Whether the transaction is valid or not has to be examined by the competent authority under the particular enactment by following the procedure prescribed therein and by giving an opportunity of hearing to the concerned parties likely to be affected by any order that may be passed. Thus on this second ground also the orders of the Collector and the Additional Chief Secretary appear to be beyond their jurisdiction. The Additional Chief Secretary has held that the sale by auction was not consistent with the provisions of Section 27 of the Urban Land (Ceiling and Regulation) Act. Section 27 relates to prohibition of transfer of urban land with a building thereon. Apart from legal position that Section 27 has been struck down as ultra vires, it is quite obvious that no such question of transferring urban land with a building thereon has ever arisen in the present case. Thus, the order of the revisional authority has proceeded on a misconception of relevant legal provision."

7. Considering the above decision and looking to the facts and circumstances of the present case, the authority - Assistant Collector exercising the powers under the Bombay Land Revenue Code has no power or authority or jurisdiction to decide the question arising under the Bombay Tenancy and Agricultural Lands Act. In the present case, the Assistant Collector vide his order Annexure-C which is placed on page 29 of the petition has decided on 10th August, 1992 coming to the conclusion that the entry which has been recorded vide entry No. 3022 dated 11th June, 1991 has not properly certified and therefore the same is set aside by the Assistant Collector while exercising the powers under Rule 108(6) of the Bombay Land Revenue Rules. Therefore, the Assistant Collector has no power to consider the merits and to examine the question of breach of Section 63 or 64 of the Tenancy Act. He has only powers to call for record and proceedings but cannot himself decide the case on illegality being noticed. Such powers can be exercised only by the State Government. This view has already been taken by this Court in case of KALPATARU LAND DEVE., VS ASSISTANT COLLECTOR reported in 37(2) GLR 600, this Court has considered relevant provisions of Rule 108 of the Bombay Land Revenue Rules and considered whether it is open for the Assistant Collector to take the matter in suo motu revision and cancel the entry. It is based upon a decision after a formal inquiry held by the Mamlatdar and confirmed by the Gujarat Revenue Tribunal. There was no dispute about the fact that the disputed entry which came to be cancelled by the Assistant Collector on the basis of the judgment and order of the Mamlatdar recorded in formal inquiry. This Court has observed that :

"It could very well found from the aforesaid provisions included in Chapter 15 of the Rules that specific provisions are made as to who can hear and decide the revision under sub-Rule (6) of the Rule 108. The expression "Commissioner" has to be now read as "Government" about which there is no dispute in this group of petitions. Rule 108 is incorporated in Chapter 15 which deals with record of rights. In case of any change or mutation in a disputed case, formal inquiry is

required to be conducted. After the inquiry is conducted, will have to be certified. Provision of appeal is made in Rule 108(5); whereas provision is made for revision in sub Rule (6) of Rule 108. It is amply clear from the bare perusal of provisions of Rule 108(6) of the Rules that the Government may call for and examine record of inquiry or proceedings of any subordinate revenue officer held under the Rules for the purpose of satisfying as to regularity, legality or propriety of the proceedings. It is not a case that power to hear revision is delegated to some authority under the Rules. Therefore, the impugned order is illegal and is contrary to the provisions of Section 211 of the BLR Code and Rule 108(6) of the Rules."

8. After considering the decision of this Court as referred above, according to my opinion, the Assistant Collector has committed gross error in exercising the suo motu powers of revision and deciding the merits of the matter by order dated 10th August, 1992 - Annexure-C page 29 and to set aside the entry No. 3022 dated 11th June, 1991. The said order apparently is without jurisdiction and therefore naturally net effect of subsequent order passed by the Collector dated 26th March, 1993 and order passed by the Additional Chief Secretary (Appeals) dated 12th April, 1999 are required to be quashed and set aside. The orders passed by the Assistant Collector dated 10th August, 1992 which has been confirmed by the Collector in appeal No. 199 / 92 dated 26th March, 1993 and thereafter the Additional Chief Secretary (Appeals), Revenue Department of State of Gujarat has confirmed the earlier two orders passed by the Assistant Collector as well as Collector by his order dated 12th April, 1999 and since it is concluded that the Assistant Collector had no jurisdiction and therefore, subsequent orders passed by the higher authorities confirming the order passed by the Assistant Collector are required to be quashed and set aside and therefore, the present petition is allowed. The order passed by the Assistant Collector dated 10th August, 1992 and the order passed by the Collector dated 26th March, 1993 so also the order passed by the Additional Chief Secretary (Appeals) dated 12th April, 1999 are hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No order as to costs.