(2004) 12 GUJ CK 0011

In the Gujarat High Court

Case No : Special Civil Application No''s. 8411 of 1991 and 13955 of 1993

Umarji Musa Banglawala — APPELLANT

Vs

Ibrahim Isap Mhd. Ismail Sapa — RESPONDENT

Date of Decision : 08-12-2004

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 135D
Bombay Tenancy and Agricultural Lands Act, 1948 — Section 63

Citation : (2004) 12 GUJ CK 0011

Hon'ble Judges : Jayant M. Patel, J

Bench : Single Bench

Advocate : B.S. Patel and R.B. Patel in Special Civil application No. 13955 of 1993 and Jitendra M. Patel in Special Civil application No. 8411 of 1991, for the Appellant; P.V. Hathi, for Respondent Nos. 1-2, 5-6, 8 and Dipen Desai, Ld. AGP for State for Respondent No. 7, 9 in Special Civil Application No. 13955 of 1993 and Patel for Respondent No. 13, 15 and Purnanand and Co. for Respondent No. 15 and P.V. Hathi and Dipen Desai, Ld. AGP for State in Special Civil Application No. 8411 of 1991, for the Respondent

Judgement

Jayant Patel, J.—Mr.B.S.Patel, learned Counsel as well as Mr.J.M.Patel, learned Counsel seek leave to delete the respondents who are unserved or have expired since they were not aggrieved by the entries, nor they preferred appeal against the entries in favour of the petitioners before the Dy. Collector at the first instance. Permission granted.

2. In these petitions, there are more or less common facts and the common questions involved and, therefore, they are being dealt with the common judgement.

3. The short facts of the case are that the petitioner of SCA No. 13955/1993 purchased the land by registered sale deed in the year 1972 and 1974 and on the basis of the said registered sale deed, the entries No. 182 and 183 dated 15.6.1983 were mutated in the revenue record. Respondent No. 1 herein preferred appeal in the year 1989 against both the entries on the ground that he

is joint owner and the transaction is in breach of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as the "Fragmentation Act"). The said appeal was preferred under Bombay Land Revenue Code (hereinafter referred to as the "Code"). In the appeal, the Dy. Collector found that there is no substance in the contention that the notice u/s 135D of the Code is not served. However, he found that the transaction is in breach of the provisions of the Fragmentation Act and, therefore, ultimately he has taken decision for cancelling the entries made in favour of the petitioner on the basis of the registered sale deed. The petitioner carried the matter before the Collector and thereafter before the State Government. However, both the authorities have confirmed the order passed by the Dy. Collector and under these circumstances the petitioner has approached this Court by preferring this petition.

4. The petitioners of SCA No. 8411/1991 have also purchased the property by registered sale deed and on the basis of the said registered sale deed entry No. 10421 dated 4.7.1973 was mutated. Respondent No. 1 preferred appeal in the year 1990 against the said entry on the ground that he is joint owner of the property and the transaction is in breach of the provisions of the Fragmentation Act. The Dy. Collector ultimately passed the order on 6.3.1990 for cancelling the entry on the ground that the transaction is in breach of the provisions of the Fragmentation Act. The petitioners carried the matter before the Collector and thereafter before the State Government, but the order of the Dy. Collector was confirmed and under these circumstances the petitioners have approached this Court by preferring this application.

5. It may be recorded that in both the petitions while passing the impugned order the Dy. Collector has simultaneously referred the matters to the Competent Authority under the Fragmentation Act for taking action in accordance with law.

6. I have heard Mr.B.S.Patel, learned Counsel appearing for the petitioner in SCA No. 13955/1993 and Mr.J.M.Patel, learned Counsel appearing for petitioners in SCA No. 8411/1991 as well as Mr.P.V.Hathi, learned Counsel appearing for the respondents No. 1, 2, 5, 6, and 8 in SCA No. 13955/1993 and for Respondent No. 1 in SCA No. 8411/1991 and Mr.Desai, learned AGP who is appearing on behalf of the Revenue Authorities, including State Government, Revenue Department.

7. Upon hearing the learned Counsel appearing for the parties it appears that the issues involved in these petitions are covered by the decision of this Court dated 28.9.2004 in case of " Jayantilal Jethalal Soni v. State Of Gujarat" In Sca No. 12547/2004. In the said decision, this Court at paragraphs 7, 8, and 9, has observed as under:

"7. It appears that if a registered sale deed is executed by the holder of the land, it confers the right pertaining to the land in question in favour of the purchaser of the land and, therefore, the rights pertaining to the land in question in normal circumstances can be said to have been acquired over the land in question for which recording is required to be made in the revenue record. It is also well settled that the revenue entries are having value only for fiscal purpose and more particularly for the purpose of recovery of revenue and it neither confers any right or title over the property, nor does it take away the right or title in the property which otherwise cannot be available under the law. However, the question which arises for the consideration is if a sale deed is executed by the holder of the land which runs prima facie counter to the other statutory provisions of other enactment or is barred under the other enactment or it alters or disturbs the rights of the persons under the other enactment then, can the revenue authority shut its eyes by ignoring such flagrant violation of such law or if it is considered, what will be the proper course to be followed ? In case of "Evergreen Apartment Co-op. Housing Society" (supra), this Court has expressed the view that it is not open to the revenue authority exercising power under the Code to exercise power under the other enactment and to decide in respect to the breaches which are committed under the other enactment and thereby to uncertify the entry or to cancel the entry made in the revenue record. In case of "Janardan D. Patel v. State of Gujarat" (supra) at para 11, it has been observed as under:

"11. If any such question arises, the matter should be referred to the authority empowered to deal with under the said other enactment. For example, the validity of a transaction on the basis of Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948 (the Tenancy Act for brief) is sought to be challenged. That question cannot be decided by revenue authorities in RTS proceedings. In such situation, the correct procedure to be followed would be to refer the matter to the authority empowered under the Tenancy Act for his decision. The necessary mutation entry may be made only after the decision of that authority under the Tenancy Act is received. It would, however, not be open to revenue authorities in RTS proceedings to decide that question."

8. Therefore, keeping in view of the aforesaid observations made by this Court in the above referred judgement, it appears that it would not be proper to hold that even if there are breaches under other enactment or such transfer is barred under the other enactment, the revenue authorities exercising power under Code could have ignored the same for the purpose of recording the mutation. At the same time, the authorities exercising power under the Code will have to exercise the jurisdiction within the limits of the statutory provisions of the Code. Therefore, on reconciling of both the aspects, it appears that in a case where the transfer of a land is made by registered sale deed and if the revenue authority prima facie is of the view that such transfer is either barred under the other enactment or is resulting into a breach of other enactment or is to result into adversely affecting the rights under the other enactment and consequently sale is prohibited, then in that case, the appropriate course for the revenue authority would be to record the entry for registered sale deed with the express observations that the registered sale deed is prima facie in breach of the other enactment and simultaneously refer the matter to the competent authority under

the other concerned enactment of which breach is committed and the entry should be made subject to the final decision which may be taken by the competent authority under the other concerned enactment. This Court is inclined to take such view, because the one, who may be a bonafide purchaser or one who is interested to purchase the property would normally rely upon the revenue entry for enquiring into the title and the possession of the property. If the entry is certified on the basis of registered sale deed as it is, without recording for aforesaid qualification or clarification, the resultant effect would be that it will not be made known to the either person interested or to the other party who may act upon the revenue entry that the present transaction may be in breach of the other enactment and consequently it may result into not giving correct picture of the title or possession of the property in question in accordance with law. If the entry, on the basis of the sale deed is not at all effected, with the aforesaid qualification or without aforesaid qualification, it may also conversely mislead the public at large and also to those persons who act upon the revenue record, because there will be no recording of such transactions of registered sale deed which has the effect of conferring the right on property unless it is prohibited by the relevant statute under the other enactment or unless such sale deed is declared as null and void by the competent authority or through the process known to law. Therefore, it cannot be said that the authority exercising power under the Land Revenue Code has absolutely no jurisdiction to even prima facie consider the matter as to whether the breach of the other enactment is committed or not. At the most, it can be said that the authority exercising power under the code has no power to conclude as to whether the breach of the other enactment by the impugned transfer or registered sale deed is made or not.

9. In view of the above, it cannot said that the orders passed by all the authorities on the basis that the Mamlatdar has not inquired into the aforesaid three aspects namely as to whether there is any breach of the provisions of the Prevention of Fragmentation Act or the provisions of Tenancy Act, are absolutely without any basis and the orders can be maintained only to the extent that in case it is found by the Mamlatdar after remand that there are prima facie breach of the other enactment by the transfer in question, the revenue authority exercising power under the Code may refer the matter to the appropriate authority under the other enactment or may relegate the affected party to resort to appropriate proceedings under the other enactment and the entry may be considered subject to the final outcome in the proceedings under the other enactment, as observed hereinabove in earlier paragraphs."

8. Therefore, in view of the aforesaid and considering the facts and circumstances, even if the transaction is in breach of the provisions of the other enactment which in the present case is Fragmentation Act, the entry on the basis of registered sale deed is required to be recorded by the Revenue Authority exercising power under the Code, but if the concerned Officer is of he prima facie view that the transaction is in breach of the provisions of the Fragmentation Act, it may be mentioned while certifying the said entry that the transaction is, prima

facie, in breach of the provisions of the Fragmentation Act and the entry is certified subject to the final order which may be passed by the Competent Authority under the Fragmentation Act, but the action for cancellation of the entry in toto cannot be maintained and sustained in the eye of law. No further discussion is required on the said aspects in view of the reasons mentioned in the aforesaid decision reproduced hereinabove.

9. Mr.Hathi, learned Counsel appearing for some of the respondents submitted that even if the order of the Dy. Collector for making reference to the Competent Authority under the Fragmentation Act is maintained, this Court may direct the petitioners herein not to use the entry for any other purpose, including for transfer of the property or otherwise. It is well settled that the revenue entries are having value for fiscal purposes and the entries neither confer any right or title in the property, nor do they alter the rights in the property which otherwise exists as per the provisions of the Transfer of Properties Act and, therefore, it would be for the concerned respondents if aggrieved by any action, to approach before appropriate Forum for obtaining such prohibitory order, if they are so desirous, but this Court in a matter of maintaining or cancelling the revenue entry cannot grant such relief, which essentially can be said to be a subject matter which can be conveniently entertained and examined by Civil Court.

10. In view of the aforesaid, the impugned orders passed by the authorities cancelling entries in question in toto are quashed and set aside and consequently the Entries No. 182 and 183 dated 15.6.1983 which are subject matter of SCA No. 13955/1993 and Entry No. 10421 dated 4.7.1973 which is subject matter of SCA No. 8411/1991 shall stand restored to the Revenue Records of the concerned Village with the observations and qualifications that the transaction is, prima facie, in breach of the provisions of the Fragmentation Act and the entries are mutated in the Revenue Record subject to the final order which may be passed by the Competent Authority under the said Act. It is also made clear that it would be open to the Competent Authority under the Fragmentation Act to take action in accordance with law in which the reference is made by the Dy. Collector in the impugned order. However, as and when such proceedings are initiated, the petitioners concerned will be at liberty to raise all contentions which may be available in law.

11. The petitions are partly allowed to the aforesaid extent. Rule made absolute accordingly. Considering the facts and circumstances, there shall be no order as to costs.