

**(2021) 04 GUJ CK 0017**

**In the Gujarat High Court**

**Case No : R/Special Civil Application No. 5865 Of 2021**

Varis Gulam Mahida

APPELLANT

Vs

State Of Gujarat

RESPONDENT

**Date of Decision : 05-04-2021**

**Acts Referred:**

Constitution Of India, 1950 — Article 226

**Citation : (2021) 04 GUJ CK 0017**

**Hon'ble Judges : Ashutosh J. Shastri, J**

**Bench : Single Bench**

**Advocate : Viral K Shah, Meet Thakkar**

**Final Decision : Dismissed**

## Judgement

Ashutosh J. Shastri, J

1. This petition under Article 226 of the Constitution of India is filed for the purpose of seeking the following reliefs : -

"9(A) Your Lordships be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction quashing and setting aside the order dated 03.07.2020 and 01.10.2019 at Annexure-A and Annexure-B above (refer page 23 and 28).

(B) Pending admission, hearing and final disposal of this petition, Your Lordships be pleased to stay the implementation and execution of the orders impugned.

(C ) Ex-parte ad interim relief in terms of prayer (B) may be granted.

(D) Such other and further reliefs as may be deemed just and proper in the facts and circumstances of the present case may kindly be granted."

2. Mr. Viral K. Shah, learned advocate for the petitioner has submitted that there is a clear error committed by the authorities below in passing the impugned orders. It has been submitted that at one breath the Collector, Surat was pleased

to confirm the order dated 01.01.2019 whereas, on the other count, the matter came to be remanded to the Mamlatdar, Kamrej with respect to the sale mutation entry no. 10661 for taking a fresh decision and as such, that being the position, has straightway rushed down to this Court by way of the present petition under Article 226 of the Constitution of India.

3. Based upon the aforesaid brief submission, it appears to this Court that while passing the impugned orders, the authorities below have applied their mind on the complicated questions of fact which are narrated and after passing the order has clearly opined that if the petitioner is aggrieved by the order in question, there is a specific remedy of appeal available to the petitioner which can be availed of within a period of sixty days and as such, during the course of hearing, it was informed to the learned advocate for the petitioner as to whether he is inclined to avail such remedy or not, at that juncture, the learned advocate for the petitioner has submitted that since the facts are clear, the order can be examined by the High Court as well.

4. To this submission, this Court is of the clear opinion that the finding of facts are not to be analyzed or re-examined by the High Court in exercise of extra ordinary jurisdiction unless, there is any perversity or apparent illegality. Apart from that, when the statute has prescribed a specific remedy, first that remedy will have to be exhausted and this is not the case extra ordinary in nature, in which, the petitioner can be allowed to bypass such statutory remedy which is undisputedly provided and available to the petitioner. It is the settled position of law that whenever such mechanism is provided under the statute, the High Court should not usher up the discretion of the statutory authority and pass any order which is otherwise to be passed by the competent authority and as such, keeping in view such settled position of law, undisputedly, the statutory remedy is available to the petitioner, this Court is not inclined to exercise extra ordinary jurisdiction and as such, on this count alone, the present petition is disposed of. Since the petition is not entertained only on account of statutory remedy being available to the petitioner, this Court has not expressed anything on merit on any of the contentions which are mentioned in the memo of the petition, leaving it open for the petitioner to raise all the permissible contentions before the authority where the statute has provided the remedy to the petitioner,

4.1. This issue about exhaustion of statutory remedy is no doubt self imposed by and large but the same is to be respected to and that proposition of law is laid down by the following decisions of the Apex Court which the Court has kept in mind. The relevant extract contained the said decisions are reproduced hereunder :-

4.2. In the case of D.N. Jeevaraj v. Chief Secretary, Government of Karnataka & Ors., reported in (2016) 2 SCC 653, the relevant extract contained in para 41, 42 and 43 read as below :-

"41. This Court has repeatedly held that where discretion is required to be

exercised by a statutory authority, it must be permitted to do so. It is not for the courts to take over the discretion available to a statutory authority and render a decision. In the present case, the High Court has virtually taken over the function of the BDA by requiring it to take action against Sadananda Gowda and Jeevaraj. Clause 10 of the lease-cum-sale agreement gives discretion to the BDA to take action against the lessee in the event of a default in payment of rent or committing breach of the conditions of the lease-cum-sale agreement or the provisions of law.[8] This will, of course, require a notice being given to the alleged defaulter followed by a hearing and then a decision in the matter. By taking over the functions of the BDA in this regard, the High Court has given a complete go-bye to the procedural requirements and has mandated a particular course of action to be taken by the BDA. It is quite possible that if the BDA is allowed to exercise its discretion it may not necessarily direct forfeiture of the lease but that was sought to be pre-empted by the direction given by the High Court which, in our opinion, acted beyond its jurisdiction in this regard.

42. In *Mansukhlal Vithaldas Chauhan v. State of Gujarat*[9] this Court held that it is primarily the responsibility and duty of a statutory authority to take a decision and it should be enabled to exercise its discretion independently. If the authority does not exercise its mind independently, the decision taken by the statutory authority can be quashed and a direction given to take an independent decision. It was said:

"22.Mandamus which is a discretionary remedy under Article 226 of the Constitution is requested to be issued, inter alia, to compel performance of public duties which may be administrative, ministerial or statutory in nature. Statutory duty may be either directory or mandatory. Statutory duties, if they are intended to be mandatory in character, are indicated by the use of the words "shall" or "must". But this is not conclusive as "shall" and "must" have, sometimes, been interpreted as "may". What is determinative of the nature of duty, whether it is obligatory, mandatory or directory, is the scheme of the statute in which the "duty" has been set out. Even if the "duty" is not set out clearly and specifically in the statute, it may be implied as correlative to a "right".

23. In the performance of this duty, if the authority in whom the discretion is vested under the statute, does not act independently and passes an order under the instructions and orders of another authority, the Court would intervene in the matter, quash the order and issue a mandamus to that authority to exercise its own discretion."

43. To this we may add that if a court is of the opinion that a statutory authority cannot take an independent or impartial decision due to some external or internal pressure, it must give its reasons for coming to that conclusion. The reasons given by the court for disabling the statutory authority from taking a decision can always be tested and if the reasons are found to be inadequate, the decision of the court to by-pass the statutory authority can always be set aside. If the reasons are cogent, then in an exceptional case, the court may take a

decision without leaving it to the statutory authority to do so. However, we must caution that if the court were to take over the decision taking power of the statutory authority it must only be in exceptional circumstances and not as a routine. Insofar as the present case is concerned, the High Court has not given any reason why it virtually took over the decision taking function of the authorities and for this reason alone the mandamus issued by the High Court deserves to be set aside, apart from the merits of the case which we have already adverted to. "

4.3. The said principle is also reiterated by the Apex Court in a recent decision in the case of Vasai Engineering College Parents Association & Ors., v. State of Telangana & Ors., reported in (2019) 7 SCC 172. However, with a view to avoid unnecessary burden on the order, the relevant extract is not incorporated hereunder, but a reference is already taken in aid on the observations contained in para 24, 45, and 26 of the said order.

4.4. Even this principle is also reiterated in the recent decision of the Apex Court of the year 2020 as well that the High Court cannot assume the power of the sub-ordinate court/authority and the extra ordinary jurisdiction to be exercised sparingly. This being the sound principle of law propounded by the series of decisions, this Court is not inclined to exercise discretion particularly, no distinguishable or exceptional circumstance is pointed out which can permit the Court to deviate from those propositions. Of course this alternative limited remedy is not the rule of law, but rule of prudence, still however, a distinguished circumstance will have to be made out by the petitioner to deviate from the said principle and here the case on hand is not such where any exception deserves to be taken. Hence, the Court is not inclined to entertain the petition.

5. In view of the aforesaid situation being prevailing on record, when the petitioner is having undisputedly statutory remedy available, the petition is not entertained and the same deserves to be dismissed.

6. Accordingly, the present petition stands dismissed with no order as to costs.