

(2013) 10 GUJ CK 0128
In the Gujarat High Court

Case No : Special Civil Application No. 2749 of 2012

Vijaykumar Shantilal Parekh

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 21-10-2013

Acts Referred:

Citation : (2013) 10 GUJ CK 0128

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : A.R. Thacker with Mr. Shivang A. Thacker, for the Appellant; Shruti Pathak, AGP for the Respondent No. 1, Notice Served for the Respondent No. 2 and Notice Served by DS for the Respondents No. 3-4, for the Respondent

Final Decision : Allowed

Judgement

S.R. Brahmbhatt, J.—The petitioner, by way of this petition under Article 226 of the Constitution of India, has approached this Court with following prayers:

(A) To admit and allow this petition,

(B) 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 passed by the respondent No. 3 Deputy Collector, Gondal being City Survey Appeal Remand Case No. 1/08-09 dated 21.12.2011 (Annexure-A) for the reasons stated in the Memo of Petition and in the interest of justice.

(C) Pending admission, hearing and final disposal of the above Special Civil Application to stay the further proceedings of City Survey Appeal Remand Case No. 1/08-09 dated 21.12.2011 (Annexure-A) which now pending before the respondent No. 4 herein for the reasons stated in the Memo of Petition and in the interest of justice.

(D) The Hon'ble Court may kindly be pleased to grant any other appropriate relief as the nature circumstances of the case may require.

(E) To award the cost of this petition

Thus, what is under challenge is the order dated 21.12.2011 passed by respondent No. 3 in City Survey Appeal Remand Case No. 1/08-09, whereunder, the respondent No. 3 revoked the resolution of right verification dated 16.11.1968 in respect of Jetpur Chalta No. 110 & 112, Survey No. 7070 and 7069 and directed the City Survey Superintendent, Jetpur to undertake entire exercise afresh in light of the facts mentioned in the order impugned in this petition. This order is challenged on the ground of patent illegality committed by the respondent No. 3 and others in not appreciating the facts and law and acting in contrary to the provisions of law and committing absolute illegality so as to give cause of action to the petitioner for approaching this Court invoking extra ordinary jurisdiction vested in this Court under Article 226 of the Constitution of India. Facts in brief leading to filing this petition as could be gathered from the memo of petition deserve to be set out as herebelow in order to appreciate the real controversy in question.

2. The Custodian of Evacuee Properties and the Competent Authority auctioned the property, which came to be purchased by the petitioner in the auction held on 22.10.1954. The concerned authority's acknowledgment of the sale transaction, issued sale certificate dated 6.12.1954. Copy and typed copy respectively whereof is reproduced at page No. 27 and 28 at Annexure-C in the petition. The petitioner's guardian was put in possession accordingly by doing all the formalities. Based upon the sale certificate dated 6.12.1954, Sanad came to be issued u/s 133 of the Bombay Land Revenue Code (hereinafter referred as "the BLR Code" for short) by the concerned Collector acknowledging the right, title and ownership of the land in question in petitioner. This Sanad is dated 16.11.1968. The petitioner, thus, was in possession and enjoyment of the property in question. However, unfortunately, after the period of 37 years, the concerned Deputy Collector, Gondal - respondent No. 2 hereinabove, initiated proceedings u/s 211 of the Bombay Land Revenue Code exercising suo-motu powers, issued notice on 30.11.2005. This notice was result of, as could be seen from the papers, a District Collector's communication dated 21.6.2004 in respect of taking into revision the resolution dated 16.11.1968 and cancelling it in respect of the City Survey Ward No. 3 and Chalta Nos. 110 & 112 mentioned thereunder. This matter was numbered as City Survey Revision Case No. 1 of 2005-2006. The same resulted into ex-parte order dated 24.7.2006, whereunder, the order dated 16.11.1968 was cancelled and it was further ordered that City Survey Superintendent, Jetpur is to take into revision the order dated 16.11.1968 in respect of Chalta Nos. 110 & 112, survey No. 7070 and 7069, in light of the observations mentioned in the order, cancelled it and after verifying the exact admissible land, resumed possession of the land unauthorizedly occupant. This order, as per the say of the petitioner amounted to revoking Sanad itself as without any other proceedings straightway, the Deputy Collector, vide his order dated 24.7.2006 directed the City Survey Superintendent to revoke the order dated 16.11.1968 and after verification, take back the

additional land possessed by the petitioner as unauthorized occupant.

3. Thus, in terms, there is no reference qua Sanad in the order. The effect of this order was that of cancelling or modifying the Sanad itself. The petitioner annexed this order dated 24.7.2006 in Appeal before the Collector, Rajkot, who vide his order dated 27.3.2008 quashed and set aside the order dated 24.7.2006 and remanded the matter back to the Deputy Collector for rehearing the revision application. The matter was thus, heard by the Deputy Collector on remand, as it is stated by the petitioner in memo of petition and hearing was over in the month of September, 2009 and it was kept for delivering the order. On transferring of the said incumbent of the office, the successor fixed the matter for hearing, which was assailed by the petitioner by filing Special Civil Application No. 15457 of 2011, which came to be disposed of by this Court (Coram: S. R. Brahmhatt, J.) vide order dated 18.10.2011. The Court passed the following order.:

Shri AR Thacker, learned counsel appearing for the petitioner seeks the permission to withdraw this petition with a view to take out appropriate application before the concerned authority, i.e. Dy Collector, Gondal, Respondent No. 3 herein, pursuant to the notice dated 30/11/2005, indicating lack of jurisdiction that may be considered in accordance with law. Permission as sought for is granted. Petition is disposed of as withdrawn. No costs. The Court has not opined anything on merits of the matter. However, it goes without saying that the concerned authority, if confronted with such an application, will have to decide the same in accordance with law. Direct service permitted for respondent No. 3.

4. Accordingly, after serving copy of the order, hearing was conducted. It was urged that how and in what manner Section 211 of the BLR Code was not applicable. The order was passed on 21.12.2011. The petitioner has submitted that this order can be said to be an order without adverting to the ground of lack of jurisdiction, which was specifically required to be dealt with in light of the direction issued by this Court in the order dated 18.10.2011. The petitioner, therefore, by way of this petition, approached this Court invoking Article 226 of the Constitution of India.

5. This Court (Coram: Smt. Abhilasha Kumari, J.) on 01.03.2012 passed the following order:

Heard Mr. A.R. Thacker, learned advocate for the petitioner. It is submitted by him that the impugned order dated 21.12.2011, has been passed by the Deputy Collector without taking into consideration the reason for which Special Civil Application No. 15457 of 2011 was permitted to be withdrawn by order dated 18.10.2011, of this Court. It is further submitted that the issue regarding lack of jurisdiction was to be decided by the Deputy Collector and the application of the petitioner in this regard was specifically on the point of jurisdiction of the Deputy Collector u/s 211 of the Bombay Land Revenue Code, 1879, against the order passed by the Collector u/s 133 of the Code, which aspect has not even been touched upon by the Deputy Collector in the impugned order.

Issue Notice for final disposal returnable on 12.03.2012. Ad-interim relief, in terms of Paragraph 11(C) is granted till then.

In addition to the normal mode of service, Direct Service for respondents Nos. 3 and 4, is also permitted.

and on 30.4.2013, the Court (Coram: Ms. Harsha Devani, J.) passed the following order:

1. Heard Mr. A.R. Thacker, learned advocate for the petitioner and Ms. Nisha Thakore, learned Assistant Government Pleader for the respondents.

2. Issue rule returnable on 24th June, 2013. Ms. Nisha Thakore, learned Assistant Government Pleader waives service of rule on behalf of the respondents. In the meanwhile, it would be open for the respondents to file affidavit-in-reply in response to the averments made in the petition. Ad-interim relief granted earlier to continue till the final disposal of the petition.

6. The learned advocate for the petitioner has contended that the order impugned is required to be quashed and set aside as specific direction in respect of deciding the issue of lack of jurisdiction is over looked by the respondent No. 3 and therefore, the order, which is passed contrary to the specific direction, is required to be quashed and set aside only on that ground, as it was not open to the respondent No. 3 to over look the specific direction contained in the order, which indicates that there is no justification on the part of the concerned authority for ignoring the direction issued by this Court for deciding the aspect of lack of jurisdiction in Deputy Collector for deciding the matter.

7. The learned advocate appearing for the petitioner invited this Court's attention to the affidavit-in-reply filed by the respondent State, wherein, the deponent - author of the order has chosen not to answer the specific contention qua ignorance of the direction issued by this Court as there appears to be no dealing with said aspect in the reply affidavit.

8. Learned advocate appearing for the petitioner without prejudice to aforesaid contention addressed this Court on merit and submitted that the entire proceedings initiated by the authorities were without any jurisdiction or authority of law. The reliance upon the decision of the Supreme Court in case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, followed by the judgment reported in Popcorn Entertainment and Another Vs. City Industrial Development Corpn. and Another, M.D., H.S.I.D.C. and Others Vs. Hari Om Enterprises and Another, and Godrej Sara Lee Ltd. Vs. Asst. Commissioner (AA) and Another, and submitted that the impugned order therefore is required to be quashed and set aside as the order of Collector could not have been made subject matter of review by his subordinate officer, and fact remains to be noted that the order of Collector is u/s 133, under which, the Sanad came to be issued on behalf of the petitioner.

9. The ground of jurisdiction is essentially based upon the provisions of Sections

9 and 133 of BLR Code and it was submitted that the inquiry u/s 133 of the BLR Code is an inquiry akin to inquiry u/s 37(2) of the BLR Code, wherein, only the inquiry is as to whether any government land is encroached upon by the owner of the land and in case of any dispute, the land revenue authority did not have any authority, power or competence to decide the same. The powers u/s 37(2) to be exercised by the Mamlatdar were by way of delegation then also, the Collector cannot invoke Section 211 of the BLR Code for revising such type of orders. On the same analogy in the instant case, when the Sanad was issued by the Collector in exercise of power u/s 133, it could be said that the Collector himself by delegated power to City Survey Officer for holding inquiry and thereafter Sanad in Form H is required to be issued by the Collector and therefore, such an order could not have been taken into review even by Collector much less by the Deputy Collector u/s 211 of the BLR Code and therefore, on that count also the power is wrongly exercised. The learned advocate for the petitioner placed heavy reliance upon the decision of this Court rendered in Letters Patent Appeal No. 660 of 2011 in SCA No. 4758 of 2010 decided on 9.9.2011 to support his aforesaid submission.

10. Learned advocate appearing for the petitioner thereafter contended that without prejudice to the contention qua patent lack of jurisdiction for invoking power u/s 211, the impugned order is not tenable in eye of law in light of the fact that the revisional power, which were none, yet were invoked in this matter after elapse of as many as 37 years. The counsel relied upon the decision in case of State of Gujarat v. Raghavnatha Patel, reported in 10 GLR 992, vehemently contended that this entire exercise was thus sheer abuse of purported power which did not exist so far as present facts and circumstances of the case are concerned. The show cause notice itself was not tenable in eye of law for want of lack of jurisdiction as well as belated action and therefore, the resultant orders also, would be vitiated and are required to be quashed and set aside.

11. It would be out of place to mention here that based upon the impugned order passed by the respondent No. 3, the notice came to be issued on 11.1.2012, compelled the petitioner to prefer Misc. Civil Application No. 322 of 2012 in Special Civil Application No. 15457 of 2011, for revival of the main petition, which came to be disposed of by this Court on 15.2.2012, order whereof is produced at page-74, wherein, while rejecting the said Misc. Civil Application the Court observed that the petitioner was at absolute liberty to take out appropriate proceedings including filing of substantive petition challenging the orders sought to be assailed in the Misc. Civil Application. Hence, present petition was preferred.

12. Learned advocate for the petitioner has relied upon the following decisions:

- (I) Sambhaji Balaji Solankar Vs. The Mamlatdar of Baramati and Others,
- (II) Govind Murji Patel (Kerai) and Others Vs. State of Gujarat and Others,
- (III) 1995(1) GLH 216, in case of Thakershi Popatbhai Patel v. State of Gujarat;

(IV) 1983 GLH 394, in case of Shah Mahendrakumar Nagindas v. State of Gujarat;

(V) AIR 1948 207 (Privy Council)

(VI) 1984 GLH (U.J.) 61, in case of Kutubbbhai Saifuddin Katabjiwala and others v. Chandrakant Narmadashankar Dave and others;

(VII) 2013(2) GLH 591, in case of Naranbhai Nathubhai Patel v. State of Gujarat;

(VIII) 2005(1) GLH (U.J.) 1, in case of Cold Cap Tyres Pvt. Ltd. v. Additional Chief Secretary;

(IX) 1996(2) GLH (U.J.) 35, in case of Champaklal Manubhai Sopariwala and Ors. v. State of Gujarat;

(X) Chandulal H. Ghodasara and etc. Vs. State of Gujarat and Others,

(XI) Special Civil Application No. 8617 of 1993 decided on 16.08.1994;

(XII) Bhayabhai Vajshibhai Hathalia and Others Vs. State of Gujarat and Others,

and submitted that the order impugned is not sustainable as there is patent lack of jurisdiction, the order is also not tenable on account of being subject matter of proceedings initiated after a period of 37 years and as held by the Bombay High Court in case of Sambhaji Balaji Solankar v. The Mamlatdar of Baramati and others (supra) and this Court in case Govind Murji Patel (Kerai) & Ors. v. State of Gujarat & Ors. (supra), the Sanad once granted, cannot be subject matter of any revision and it is to be only assailed or annulled by way of seeking declaration from the competent Civil Court.

13. Learned AGP invited this Court's attention to the order impugned and submitted that the petitioner has filed this petition challenging the order of remand only and when the original order of 16.11.1968 is sought to be reviewed or rather order to be reviewed, the petitioner could not have filed this petition under Article 226 of the Constitution of India and therefore, the petition may be dismissed.

14. Learned AGP for respondent invited this court's attention to the details mentioned in the order passed by the Deputy Collector - the respondent No. 3 hereinabove and contended that peculiar facts and circumstances of the case would clearly indicate that on the face of order that the petitioner is in possession of larger land than the land, which was admissible to him under auction purchase and therefore, the error committed in the order dated 16.11.1968, based whereupon the Sanad was issued by the Collector, itself was required to be taken into review. Thus, in her submission, the order impugned cannot be said to be a cancellation of Sanad or any proceeding for cancellation of Sanad as sought to be canvassed on behalf of the petitioner.

15. Learned AGP appearing for respondent State thereafter contended that the order impugned contains specific finding qua the measurement of the land in

question and such finding are sufficient to persuade this Court not to interfere with the order impugned as by taking into review the order dated 16.11.1968, the illegal possession of a large piece of land, is sought to be rectified, which may not call for any interference in exercise of power under Article 226 of the Constitution.

16. Learned AGP thereafter contended that the respondent No. 3-deponent of the affidavit, unfortunately has not dealt with the aspect of jurisdiction specifically raised but that itself should not be viewed as grave prejudice to the petitioner so as to avoid the proceedings to be undertaken by the City Survey Superintendent in respect of the Chalta Nos. 110 & 112 and survey No. 7070 and 7069 and by way of this petition, the petitioner has avoided the proceedings in which the correct nature of holding and measurement could be decided.

17. Learned AGP invited this Court's attention to the fact that the record of the office indicate that there was a remark in inspection report of the year 1998, wherein, it was observed that the order dated 16.11.1968 did contain mistake qua measurement of the land in question. This was the basis for the concerned Collector in issuing communication dated 21.6.2004 resulting into Deputy Collector issuing direction to the City Survey Superintendent to take into review the order dated 16.11.1968, as a result whereof, the City Survey Case No. 30 of 2005 came to be registered and after affording reasonable opportunity, the concerned collector has arrived at conclusion that the order dated 16.11.1968 was incorrect and therefore, the Collector has ordered the order dated 16.11.1968 to be reviewed, than, there cannot be lack of jurisdiction or illegality anywhere and therefore, the petition may be dismissed.

18. Learned AGP for the respondent thereafter contended that the provisions of Section 211 of the BLR Code, unequivocally provide for revisional power of the State as well as Officers mentioned thereunder and the provisions of Sections 9 and 12 would clearly show that the concerned officer was having statutory power and authority to review the order. The impugned order cannot be classified to be an order seeking review of the Sanad. It is only an order passed by the Inquiry Officer, City Survey on 16.11.1968 based whereupon the Sanad was issued. Therefore, when the cancellation of Sanad was not intended directly, it would not be open for the petitioner to assail the order of revision only on the count of lack of authority or jurisdiction in the officer concerned.

19. Learned AGP thereafter contended that the order dated 16.11.1968 was passed by the concerned officer working under City Survey Superintendent and officer i.e. Inquiry Officer, City Survey is a post akin to the additional Mamlatdar and hence, the concerned Collector or Deputy Collector did have power to take into revision any orders passed by the sub-ordinate officer, as the Inquiry Officer, City Survey Superintendent was holding the post equivalent to Additional Mamlatdar and when Additional Mamlatdar order is amenable to revision u/s 211 of the BLR Code, and on that analogy, orders passed by the City Survey Superintendent, Jetpur is amenable u/s 211 for revision.

20. Learned AGP further submitted that the order of Deputy Collector impugned in this petition could have been challenged by filing appropriate proceedings before the Collector and as the petitioner has not availed the same, the petition is required to be dismissed even on the ground of non-exhausting the alternative remedy.

21. Learned AGP thereafter contended that the order impugned in this petition is also assailed on ground of non-dealing with the specific ground of lack of jurisdiction for passing the order and therefore, this Court may remand the matter back to the Deputy Collector for specifically deciding the same issue instead of entertaining the entire petition on merits.

22. This Court has heard learned advocates for the parties and perused the papers appended to the petition. Before advertng to the rival contentions of the parties, it would be most appropriate to summarize the indisputable aspect, which would go to show that how and in what manner the orders are passed.

23. The petitioner was given the land in question under auction and as such the certificate of sale is produced along with memo of petition. This fact unequivocally indicate that the petitioner is allotted the land by way of sale for which, he has paid the sale consideration and Compete Authority in exercise of its powers issued sale certificate, which certificate contains specific reference to the property being subject matter of sale. The certificate contains the four directions surrounding the property, and when such a sale certificate is culminated into peaceful possession of the petitioner, from the date when he entered upon the land, the question arises as to whether and in what extent such a possession is liable to be disturbed in any manner whatsoever.

24. It is also required to be noted that the counsel for the petitioner has contended in unequivocal terms that at the relevant time in the area of Saurashtra, Bombay Land Revenue Code had no applicability and after 1958, the Bombay Land Revenue Code was applied. The petitioner was legitimately right in obtaining the acknowledgment of sale at the end of State Authority and representative of the State i.e. the Collector, who is empowered u/s 133 of the Code in acknowledging such right, ownership and title on the land in question, which culminated into issuance of valid Sanad on 16.11.1968, copy whereof is produced on the record. Therefore, again one more question is cropped up as to whether the authority erred in having any justification for undertaking the inquiry without first seeking any revocation of the Sanad, as the Sanad contains clear acknowledgment of the allotment of the land mentioned thereunder and this Sanad is always executed for and on behalf of the State. The Sanad is not to be disturbed as submitted by learned AGP appearing for respondent State but if one looks at the orders impugned namely the earlier order and subsequent order dated 21.12.2011, then, one can safely conclude that it was clearly an attempt to ignore, nullify and modify the Sanad without referring to same in any manner. Thus, in my view it was indeed unfortunate as there exists no authority or power or justification on the part of the concerned Deputy Collector or for that matter,

even the Collector to invoke and exercise powers u/s 211 of the Bombay Land Revenue Code for taking into revision the Inquiry Officer's order dated 16.11.1968 whereby, the indirect attempt is made to nullify the Sanad, which is not admissible to nullify or modify as per the observation of the Bombay High Court as well as this Court as stated hereinabove under power of Section 211 of the Code.

25. The Court is of the considered view that when there are two valid documents enuring in favour of the petitioner existed, namely the sale certificate, which in terms provide for description of the land and Sanad dated 16.11.1968, then, without first having them revoked by way of appropriate proceedings, no other indirect illegal method could have been adopted creating consternation to the citizen like present petitioner. The action, even if assuming for the sake of examining without holding that there was having justification on account of error, which is sought to be highlighted by order impugned, then also, such an error would not justify the authorities invocation of provisions of law, which was not capable of being invoked in present facts and circumstances of the case. Therefore, the entire action impugned is wholly without jurisdiction and resultant order, therefore, is required to be quashed and set aside.

26. The Court is also of the considered view that the petition is required to be allowed on following grounds in light of the discussion hereinabove namely- (I) The petitioner's land could not have been subject matter of any scrutiny without their being first declaration qua incorrect Sanad and sale certificate enuring in favour of the petitioner. Therefore, assuming for the sake of examining without holding that there exists a valid justification and it is correct that the land in question is larger than the land intended to be sold by the auction, then also, without having sale certificate nullified and Sanad being declared to be incorrect, no authority much less, the Deputy Collector and Collector have any power or justification for issuing show cause notice, which in my view, was wholly misconceived, illegal and without any jurisdiction.

(II) The Court is also of the considered view that learned advocate for the petitioner is also justified in contending that the revisional power is not enuring in either the Deputy Collector or Collector in the subject matter, as assuming for the sake of examination without holding that there exists no Sanad or no sale certificate in favour of the petitioner, then also, in a given set of circumstances, as it is existing in the present case, the order passed by the Inquiry Officer i.e. City Survey Officer, could not have been subject matter of revision, as the orders clearly indicate that the City Survey Officer was functioning under the power derived by the State u/s 18 of the Code. Section 18 of the Code unequivocally provide the hierarchy to be prescribed by the State and in absence of any such document indicating the hierarchical set-up, in the present case the Deputy Collector or Collector has no authority to invoke Section 211 for revising the order. In the instant case, it is unfortunate that the language employed by both the authorities as well as City Survey Superintendent clearly betray non-

application of mind and scant regard to rule of law as the Collector in its order dated 21.6.2004 has clearly disclosed that the entire exercise was merely a formality and it is decided at his end to revoke the order dated 16.11.1968. Such an exercise would naturally result into the premeditated and desired resultant order and therefore, on this ground also, the order being wholly unjustified, is required to be quashed and set aside.

(III) The Court is unable to accept the submission of learned AGP qua impugned order amounting to revising the order dated 16.11.1968 and not the Sanad in as much as though it is an attempt to indicate that what is sought to be revised is the only order of Inquiry Officer and not the Sanad, as the operative part of the order clearly indicate that it amounted to revoking the Sanad only and to that extent, the order being wholly illegal, deserve to be quashed and set aside.

(IV) The Court is also unable to accept the submission of learned AGP appearing for the respondent State that there existed an alternative remedy and petitioner be relegated to the authority under the Act. The Court would fail in its duty if it is not compelled to observe that the concerned authority have evinced lack of sanctity and scant regard for rule of law, or else, in light of the catena of decisions of this Court as well as Supreme Court, when time limit for invoking revisional jurisdiction would have in first instance prevented the authority from issuing the notice dated 30.11.2005, the notice itself was not required, as it was sought to be issued, for revising the order of 16.11.1968, that too, when same has been culminated into issuance of valid Sanad, which was not subject matter of any scrutiny by any authority. Therefore, the entire exercise is nothing but the exhibition of lack of audacious approach calling for due interference at the end of High Court or else the petitioner would not have been compelled to approach the Court on account of highhanded action exercised by the authority to achieve the desired result, as the result was pronounced by the Collector's communication dated 21.6.2004, therefor, in my view, the petition is required to be allowed and is hereby allowed.

For the aforesaid reasons, the order dated 21.12.2011 passed by respondent No. 3 in City Survey Appeal Remand Case No. 1/08-09 is hereby quashed and set aside. The petition is allowed with costs. Rule is made absolute to aforesaid extent.