(2014) 02 GUJ CK 0109

In the Gujarat High Court

Case No : Special Civil Application No. 8825 of 2012

Vishnubhai Parshottambhai Patel Since DECD through Heirs and Another — APPELLANT

Vs

Somabhai Harmanbhai Patel and Others — RESPONDENT

Date of Decision : 25-02-2014

Acts Referred:

Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 — Section 31 9
Constitution of India, 1950 — Article 226 227

Citation : (2014) 2 GLR 1774

Hon'ble Judges : G.B. Shah, J

Bench : Single Bench

Advocate : V.C. Desai, for Petitioner Nos. 1-1.2, 2, for the Appellant; Rahul Dave, AGP for Respondent No. 9, Mr. Rajesh B. Soni, Advocate, for the Respondent

Final Decision : Allowed

Judgement

G.B. Shah, J.—Heard, Mr. V.C. Desai, learned advocate for the petitioners, Mr. Rajesh B. Soni, learned advocate for the respondent No. 2 and Mr. Rahul Dave, learned Assistant Government Pleader for respondent No. 9. Rule served to respondent Nos. 1 and 3 to 8. Being aggrieved by and dissatisfied with the judgment and order dated 09/01/2012, passed in RTS No. 23 of 2003 by the Additional Secretary (Appeals), Revenue Department, Ahmedabad-the respondent No. 9 herein, by which the judgment and order, passed by the Collector, Kheda, dated 29/01/2003 in RTS Revision No. 22 of 2002, cancelling the mutation entry No. 341 has been confirmed, the petitioners have preferred the present petition.

2. The uncontroversial facts of the case on hand are that the agricultural land bearing Block No. 69, admeasuring Hector 2, Acre 40 sq. Mt. 79 situated at Village Hajatia, Taluka: Mahudha, District: Kheda, originally owned by Harmanbhai Becharbhai and Babarbhai Becharbhai. In respect of said Block No.

69, land admeasuring Hector 1 Acre, 45 Sq. Mts. 68, was sold to the petitioners for Rs. 48,000/- by a Registered Sale Deed dated 26/05/1987 and possession of the said land was also handed over to the said purchasers and since then, the petitioners are in possession of the said land and cultivating the same. On the basis of said Registered Sale Deed, mutation entry No. 341 was posted on 07/06/1988 in the revenue record i.e. Village Form No. 6. Thereafter, another entry No. 398 was also posted on 04/11/1991. In view of the objections raised and RTS Appeal No. 70 of 1992 filed by the sellers before the Deputy Collector, Kheda, said appeal was heard and by the judgment dated 31/05/1993, the said appeal was dismissed. Against the said judgment, sellers filed RTS Revision No. 75 of 1993 before the Collector, Kheda. By a judgment dated 23/06/1997, Collector, Kheda allowed the said appeal and remanded the matter to the Deputy Collector. After the order of remand, said appeal was renumbered as RTS Appeal No. 92 of 1998 and by a judgment dated 22/07/1999, remanded the case to the Mamlatdar with a direction to ascertain as to whether sale transaction had been entered into after obtaining permission of division of Block No. 69. After the said order of remand case was numbered as Takrari Remand Case No. 13 of 1999 and by an order dated 15/04/2000, the Mamlatdar, Mahudha held that the said entry No. 341 was in contravention of the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (for short ''the Fragmentation Act''). Hence, the said mutation entry No. 341 was not certified and Mamlatdar ordered to cancel the said entry. Against the said order of Mamlatdar, the purchasers-petitioners filed RTS Appeal No. 97 of 2000 (New No. 38 of 2000) before the Deputy Collector, Kheda, which came to be dismissed by judgment dated 29/06/2002. Against the said judgment, the purchasers-petitioners filed RTS Revision No. 22 of 2002 before the Collector, Kheda, which came to be dismissed by judgment dated 29/01/2003, against which, the petitioners filed RTS Revision No. 23 of 2003 before the respondent No. 9 herein-Additional Secretary (Appeal), Revenue Department. The petitioners filed the written arguments together with the copies of the judgments relied by them, one which was the judgment reported in 2005 (2) GCD 1277. It is the case of the petitioners that, without considering the legal points raised in the said written arguments so also, the judgments relied upon, by judgment dated 09/01/2002, the respondent No. 9 was pleased to dismiss the said Revision.

3. Mr. V.C. Desai, the learned advocate for the petitioners submitted that in the RTS proceedings i.e. the proceedings related to mutation in revenue records, the revenue authority exercises powers under Rule 108 of the Bombay Land Revenue Code (for short ''the Code''). While exercising such powers, the revenue authority has no power or authority or jurisdiction to cancel the entry on the ground that the transaction recorded in the entry are in breach of the Fragmentation Act. Moreover, whether the said transaction is valid or not has to be examined within the reasonable time limit by the competent authority under the provisions of the Fragmentation Act by following the procedure prescribed therein more particularly, Section 9 of the Fragmentation Act and by giving opportunity of

hearing to the concerned parties. The learned advocate for the petitioners then submitted that in the case on hand, the revenue authorities including respondent No. 9 have acted contrary to the said legal position and in RTS proceedings, entry No. 341 has been cancelled on the ground that there is breach of Section 31 of the Fragmentation Act and as such, the respondent No. 9 and its subordinate officers have acted beyond the scope of their jurisdiction and the said error is apparent on the face of the record, and hence, the present petition deserves to be allowed.

3.1 The learned advocate for the petitioners then submitted that though on behalf of the petitioners, written arguments, copy of which is produced at Annexure ''E'' to this petition, along with the copies of the relevant judgments on this very point had been produced before the respondent No. 9 herein, the same had not been considered and this approach of respondent No. 9 herein, is in gross violation of the principles of natural justice and accordingly also, the impugned judgment deserves to be set aside. In short, it is the main submission of the learned advocate for the petitioners that without there being a regular inquiry, as contemplated under the Fragmentation Act and that too, after adequate, due and proper opportunity of hearing to the affected parties, in RTS proceedings, the revenue authority has no power, authority or jurisdiction to give any direction to its subordinate officer to inquire as to whether the sale transaction has been entered into after seeking permission of the competent authority under the Fragmentation Act and as such, the direction itself is non-est, arbitrary and without jurisdiction and consequently, on the basis of such direction, if the revenue authorities have acted accordingly, then, also the outcome of such direction for the purposes of deciding the legality of mutation entry, such reliance in RTS proceedings is not in consonance with the provisions of the Fragmentation Act and hence, the entire proceedings conducted by the respondent No. 9 herein and its subordinate officers are in excess of their jurisdiction and the same deserve to be set aside.

3.2 The learned advocate for the petitioners has relied upon a decision in Govindji Chhabaji Vs. Prant officer, He invited attention of the Court to para 9 of the same, which is extracted hereunder:

9. There is also substance in the argument on behalf of the petitioners that while exercising the powers under Rule 108 of the Rules, while considering the question with regard to the mutation entry, the authority has no power and/or jurisdiction to impose the penalty for breach of the provisions of any other enactment and the authority has also no jurisdiction to pass an order with regard to returning the possession. Ordinarily, when a transfer of property takes place by a registered document, an Entry is effected in the Revenue records and such entries are certified subsequently. If there is any dispute, then the suo motu powers can be exercised by the State Government under sub-rule (6) of Rule 108 of the Rules and the entire enquiry under revisional power has to proceed under the Bombay Land Revenue Rules and not under any other enactments like

The Bombay Tenancy & Agricultural Lands Act, The Bombay Urban Land (Ceiling & Regulation) Act, or Bombay Prevention of Fragmentation and Consolidation of Holdings Act. It is well settled that the Entries made in the Revenue records have primarily a fiscal value and they do not create any title. As held by the aforesaid two Judgments, such mutations have to follow either document of title or order passed by the competent authorities under special enactment. Independently, the Revenue authorities cannot pass orders of cancelling the entries on an assumption that the transactions recorded in the entries are against the provisions of particular enactment. Similarly, the Revenue authorities also while exercising the power under Rule 108 of the Rules cannot pass an order with regard to imposing the penalty and/or returning possession of the land in question for breach of the provisions of any other abovesaid enactments and in the present case Section 9 of the said Act Under the circumstances, the judgment and order passed by the Deputy Collector, Viramgam Prant, dated 20th August 1988 in cancelling the Entry No. 1729 dated 13th March 1987 certified on 2.5.1987 and confirmed by the Collector, Ahmedabad, by his judgment and order dated 30th December 1988 passed in Appeal No. 68 of 1989, and further confirmed by the learned Special Secretary (Appeals), Revenue Department, State of Gujarat, by his judgment and order dated 21.9.1993 passed in Revenue Application No. 14 of 1992, requires to be quashed and set aside and are hereby quashed and set aside, restoring the Entry No. 1729 dated 13th March 1987 certified on 2.5.1987 with regard to land bearing Plot No. 431 situate at Village Kujad, Taluka-Dascroi. The petition is accordingly allowed. Rule is made absolute with no order as to costs.

3.3 Another judgment relied upon by the learned advocate for the petitioners is in Rinki Shashikant Gandhi Vs. Mamlatdar Vadodara Taluka and 4, passed by this Court in Special Civil Application No. 8537 of 1998, para 17, 18, 21, 22 and 23 are relevant, which are extracted hereunder:

17. This brings us to the very competence of respondent No. 4 to file an appeal against the entry evidencing the Sale Deed. Respondent No. 4 is the vendor who has executed the Sale Deed willingly, in favour of the petitioner. He has also conveniently pocketed the sale consideration. It appears that after four to five years respondent No. 4 suddenly had second thoughts of disputing the very sale transaction to which he is party, on grounds of undue influence and violation of the provisions of the Fragmentation Act. It is noteworthy that there is no material on record to support the grounds of undue influence inducement, and RTS proceedings are not the appropriate proceedings for such allegations. Under such circumstances, not only is the conduct of the respondent No. 4 unethical, it is clearly aimed at seeking some pecuniary advantage from the petitioner, by exerting pressure upon her. Such conduct on the part of a vendor has been deprecated by a Division Bench of this Court in Rameshbhai Ambalal Shah v. State of Gujarat (Supra), in the following terms:

18. ***

We are of the view that the position of law is very clear. Firstly, to maintain a petition under Article 226 or 227 of the Constitution of India, the party aggrieved must show that any of his fundamental rights or any other legal rights have been infringed, and thereby, the party is aggrieved by such infringement. Who can be said to be "a person aggrieved" ? One of the meanings is that "a person will be held to be aggrieved by a decision", if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved". Again a person is aggrieved, if a legal burden is imposed upon him. Can it be said that the appellants would fall within the words "persons aggrieved" or "a person who has a genuine grievance because an order has been made which prejudicially affects his interest"? On the contrary, this is an appeal by persons who are trying to take advantage of their own wrong. The maxim: "Nullus commodum capere potest de injuria sua propria" (No man can take advantage of his own wrong) is very much applicable in the facts and circumstances of the present case. The maxim: "Nullus commodum capere potest de injuria sua propria" (No man can take advantage of his own wrong) is one of the salient tenets of equity. The appellants cannot secure the assistance of a court of law for enjoying the fruit of their own wrong.

(emphasis supplied)

18. In Smt. Ratnaprabhabai v. M/s. Tulsidas V. Patel (Supra) this Court has held that:

18. *** *** ***

It appears that the petitioner having pocketed Rs. 1,00,000/- years back in 1962 is trying to catch at a straw and is practically indulging in the policy of dog in the manger by seeing that the hanging sword of the present litigation lingers on so that at sometime respondents Nos. 1 and 3 may come round and may given some added financial advantage to the petitioner by way of bargain and if the present proceedings are kept pending, such oblique intention of the petitioner may get fructified. The court obviously cannot be a party to such a design. When the petitioner is not a legally aggrieved party, it is impossible to give her any relief in the present proceedings under Article 227 of the Constitution by restoring these proceedings to the file of the Tribunal so that the transaction entered into by the petitioner in favour of respondent No. 1 years back in 1962 may once again be brought in the melting pot."

19. xxx

20. xxx

21. Having considered the above aspects of the matter, the question whether the Collector could have cancelled the entry of sale and directed forfeiture of the land to the State Government, for violation of the provisions of the Fragmentation Act, would now arise for consideration.

22. The nature of the power to be exercised by the Collector under RTS proceedings is clear from sub rule (6) of Rule 108 reproduced herein above As already held by this Court, the said power does not extend to directing forfeiture of the land in question. A more important aspect of the matter is: under which proceedings is the Collector empowered to exercise the power conferred by Rule 108(6)? Under this sub-rule the Collector is exercising power under RTS proceedings regarding disputed mutation entries and certainly not under the provisions of the Fragmentation Act. The impugned order of the Collector very clearly reveals that he has come to the conclusion that the sale transaction between the petitioner and respondent No. 4 is hit by the provisions of the Fragmentation Act, and on this ground has directed forfeiture of the land to the State Government.

23. The Fragmentation Act is a self-contained Code that lays down a detailed procedure to be followed by the competent authority in the event that its provisions are found to be violated. It also envisages giving of notice to the person concerned. The circumstances under which the fragment of land shall vest in the State Government is also laid down. It is significant to note in the present case, that no proceedings, whatsoever, under the Fragmentation Act have been initiated against the petitioner. The proceedings initiated by respondent No. 4 are RTS proceedings, under the Gujarat Land Revenue Rules, 1972. In exercise of power under sub-rule (6) of Rule 108 in RTS proceedings, the Collector cannot exercise power under the Fragmentation Act. Being a quasi judicial authority, the scope of exercise of power by the Collector is confined to the extent permitted by sub-Rule (6) of Rule 108. He is not empowered to transgress the limits of the power vested in him under RTS proceedings, as the power to be exercised by him is a statutory power. It may be possible that the Collector was under the mistaken notion that the power he exercises is inherent in his position or designation, as Collector. If it is so, such a notion is an absolutely erroneous one. The Collector cannot, by virtue of his position or designation, exercise power under another enactment when he is dealing with a matter under a different enactment. The position of law in this regard is no longer res integra.

3.4 I have also heard, Mr. Rajesh B. Soni, the learned advocate for the respondent No. 2. He opened up the matter contending that the present petition is filed under Article 226/227 of the Constitution of India and as per the Full Bench judgment, the petition is not maintainable for want of joining the necessary parties.

3.5 The learned advocate for the respondent No. 2 drew attention of the Court to the order passed by the Deputy Collector, Kheda in RTS Appeal No. 97 of 2000 (New No. 38 of 2000) dated 30/09/2002, more particularly, the observations therein, reflected in page 19 to this petition. He submitted that the order of remand is not challenged by the petitioners herein. He further submitted that three authorities have held that no prior permission of the competent authority was taken.

3.6 In reply to the query put to Mr. Soni, the learned advocate for the respondent No. 2, that whether the order passed at the initial stage by the Mamlatdar to the effect that there is a violation or breach of the Fragmentation Act and accordingly, the sale was as such, prohibited, to which, Mr. Soni, the learned advocate for the respondent No. 2, submitted that the Collector has remanded back the matter to the Mamlatdar, vesting powers in him.

3.7 I have also heard Mr. Rahul Dave, learned Assistant Government Pleader for respondent No. 9 herein. He submitted that for non-joinder of the necessary party, the petition should be dismissed. The learned Assistant Government Pleader drew attention of the Court to Annexure ''A'', page 16 to the petition, which is the copy of Village Form No. 6. He invited attention to the first entry dated 07/06/1988 which was not certified and registered as disputed entry. The learned Assistant Government Pleader further submitted that the sale itself is in violation of the Fragmentation Act.

4. I have considered the above-referred rival submissions made by the learned advocates for the parties. Mr. Soni, the learned advocate for the respondent No. 2 has drawn attention of the Court to page 19 (internal page 2), which is the order dated 29/06/2002 passed by the Deputy Collector, Kheda in RTS Appeal No. 97 of 2000 (New No. 38 of 2000) and submitted that, as mentioned therein, by order dated 23/06/1997, passed by the Collector, Kheda in RTS Revision No. 75 of 1993, the said appeal was allowed and remanded the matter to the Deputy Collector and after the order of remand, said appeal was renumbered as RTS Appeal No. 92 of 1998 and vide judgment and order dated 22/07/1999 remanded the case to the Mamlatdar with a direction to ascertain as to whether the sale transaction has been entered into after obtaining permission of division of Block No. 69 and accordingly, the Mamlatdar, Mahudha held in Takrari Remand Case No. 13 of 1999 vide its order dated 15/04/2000 that the said entry No. 341 is in contravention of the Fragmentation Act and accordingly, the said entry No. 341 was not certified and order of cancellation of the said entry was passed. The learned advocate for the respondent No. 2 has then submitted that as the Collector, remanded the case, the Mamlatdar being subordinate to him, has decided the issue in question and as such, there appears no jurisdictional error on the part of the Mamlatdar and hence, all the orders, subsequently passed by the concerned officials putting reliance on the order passed in Takrari Remand Case No. 13 of 1999, were passed in accordance with law. Thus, the present petition requires to be dismissed.

4.1 There appears no substance in the submission made by Mr. Soni because, it is fact that the order dated 22/07/1999, passed in RTS Appeal No. 92 of 1998 has not been challenged by either of the parties. Considering the provisions of Section 9 of the Fragmentation Act, it is clear that whenever any question crops up as to whether the entry has been made in contravention of the provisions of the Fragmentation Act then the only power entrusted u/s 9 of the Fragmentation

Act to the Collector and no other official can decide the said issue. Moreover, as such, while remanding the case and while giving direction to the concerned Mamlatdar to decide the issue in question to ascertain as to whether the sale transaction has been entered into after obtaining the permission of division of Block No. 69, the concerned official, either the Deputy Collector suo motu draw the attention of the Collector on Section 9 of the Fragmentation Act or the Collector himself could have directed to register the dispute under the special register keeping separately, so far as the dispute under the Fragmentation Act is concerned. But it is fact that leaving aside the relevant provisions of the Fragmentation Act, the entire process has been carried out in violation of the Fragmentation Act and the order giving direction to the Mamlatdar to ascertain and to decide the issue as to whether the sale transaction has been entered into after obtaining the permission of division of Block No. 69, is nothing but the non-est one and thereafter, each and every proceeding, based on the said order has, as such, no meaning in the eye of law, is the submission made by the learned advocate for the petitioners and there appears force and substance in the same.

4.2 The main case of the petitioners in this petition and as submitted by the learned advocate for the petitioners is that, whether the registered sale transaction dated 26/05/1987 is in breach of or in contravention of the provisions of the Fragmentation Act or not, cannot be decided in RTS proceedings, while exercising powers under Rule 108 or under any of the provisions of the Bombay Land Revenue Code or the Rules made thereunder. This case of the petitioners is supported by the cases on which the learned advocate for the petitioners has placed reliance, as referred herein above i.e. i) Govindji Chhabaji and Others Vs. Prant Officer and Others and ii) Rinki Shashikant Gandhi Vs. Mamlatdar, Vadodara Taluka and others (supra). Under the circumstances, I have no hesitation to come to the conclusion that without there being a regular inquiry as contemplated in the Fragmentation Act and that too after giving adequate, due and proper opportunity of hearing to the affected parties, in RTS proceedings, the revenue authority has no power, authority and jurisdiction to give any direction to its subordinate officer to inquire as to whether the sale transaction has been entered into after seeking permission of the competent authority under the Fragmentation Act. It is the submission of the learned advocate for the petitioners that such direction itself is non-est and without jurisdiction and consequently, on the basis of such direction, if revenue officers have relied upon outcome of such direction for the purposes of deciding the legality of mutation entry, the entire proceedings conducted by respondent No. 9 and its subordinate officers are in excess of their jurisdiction and the same deserves to be set aside. I find the force and substance and merits in it and accordingly, I am agreeable to the same. It is important to note that the petitioners have put the same case before the respondent No. 9, also drawing attention on the relevant case law, but for the reasons best known to the respondent No. 9, he has not touched the said aspect nor has considered the said points/issues raised by the petitioners herein. This approach of respondent No. 9 appears unjust and in violation of the principles of natural justice and also contrary to the settled legal position as narrated in Para 4.2 and 4.3 herein above. It is also important to note that having pocketed sale consideration on 26/05/1987, the sellers including their legal heirs have no right to challenge the legality of Sale Deed and/or entry No. 341 because they have executed the Sale Deed willingly in favour of the petitioners and thereafter, all of a sudden, after approximately five years, on the grounds of violation of provisions of the Fragmentation Act, they filed the RTS Appeal No. 70 of 1992, which in my view they cannot, because, they had not preferred the said proceedings in good faith and they also had not come with the clean hands. It is one of the salient tenets of equity that ''no man can take advantage of his own wrong'' and thus, as settled by the Honourable the Apex Court, one cannot, in the case on hand the respondent Nos. 1 to 8 cannot, secure assistance of a Court of law for enjoying the fruits of their own wrong.

Considering the above aspects, this Court is of the opinion that there is considerable merit and substance in the case of the petitioners. In view of the aforesaid discussion, it is clear that the impugned order of respondent No. 9 i.e. the Additional Secretary (Appeals), Revenue Department dated 09/01/2012 is wholly unsustainable in law and hence, the present petition is allowed. The order dated 09/01/2012, passed by the respondent No. 9 herein-Additional Secretary (Appeals), Revenue Department is set aside and accordingly, the rest of the judgments and orders dated 15/04/2000, 29/06/2002 and 29/01/2003 respectively at Annexures ''B'', ''C and ''D'' are also set aside and the respondent No. 9 and its concerned subordinate revenue officer are directed to certify the disputed entry No. 341. Rule is made absolute accordingly.

