

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****SPECIAL CIVIL APPLICATION NO. 8403 of 1990****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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SHIVABHAI H PATEL....Petitioner

Versus

STATE OF GUJARAT & 4....Respondents

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Appearance:

MR DN PANDYA, ADVOCATE for the Petitioner.

MS. SHRUTI PATHAK, LD. AGP for the Respondents No. 1 - 2

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CORAM: HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**Date : 09/10/2013****ORAL JUDGMENT**



1. The petitioner by way of this petition under Article 227 of the Constitution of India has approached this Court challenging the order dated 21/9/1990 passed by Respondent No.1 rejecting the revision application of the petitioner, holding that the sale of land in question made on 5/10/1983 was division of a block contrary to the provision of Prevention of Fragmentation & Consolidation of Holdings Act 1947 (herein after referred to as the 'Fragmentation Act' for the sake of brevity).

2. Facts in brief leading to filing this petition as could be culled out from memo of the petition deserve to be set out in order to appreciate the contentions raised on behalf of the parties.

The petitioner happened to be an agriculturist at Village Mangrol, Taluka Nandod of Bharuch District. At the relevant time he held land bearing Survey No. 653 and 649. Petitioner purchased the land of block no. 652 which was an old survey no. 570/1 admeasuring 0.67.79 by registered sale dated 5/10/1983 from respondent nos. 3, 4 & 5, which as per the say of the petitioner was situated on east side of block no. 653 held by the petitioner. The land being contiguous to his own holding, there was apparently no violation of prevention of fragmentation. However on account of an aggrieved land owner of another contiguous block, petitioner was subjected proceedings under Fragmentation Act as the said owner had claimed that the land if at all was to be sold, then, it should have been sold to him as he had right of preemption. The proceedings were thus undertaken. The concerned authority i.e. Deputy Collector passed an order on 30/8/1985 declaring that the transaction of sale of land was resulting into fragmentation and therefore contrary to the provision of Fragmentation Act and hence summary eviction was ordered and effected. Said order was assailed by the petitioner in the revision application, wherein the revision authority after discussions



concluded that finding of the fragmentation was not correct as the petitioner held contiguous land but land which was sold was forming part of block and result of consolidation and hence part thereof could not have been alienated in any manner as there was clear embargo in form of Section 31 of the Act. Hence, he while quashing the order of concerned Deputy Collector passed on 30/8/1985 directed him to issue notice to the petitioner under section 31 of the Act after giving him an opportunity to be heard qua section 31 of provision of the Act. This notice hearing culminated into passing of order on 11/4/1989 where under it was held that there was clear breach of provision of section 31 of the act and hence summary eviction was effected. This order of Dy. Collector, the authority under the provision of Prevention of Fragmentation Act was carried into revision application by the petitioner which was filed on 26/5/1981 which came to be dismissed by the authority vide its order dated 21/9/1990 which is subject matter of challenge in this petition filed under Article 227 of the Constitution of India.

3. Learned advocate appearing for the petitioner contended that initial proceedings in respect of breach of provision of Prevention of Fragmentation Act on account of petitioner's not holding contiguous land could be said to have been culminated in favour of the petitioner inasmuch as the revision authority clearly held that the finding of the Dy. Collector qua petitioner's land not being continuous was erroneous and hence the subsequent proceedings in the form of proceeding under section 31 of the Act were uncalled for, unwarranted and the authority did not have any power or jurisdiction to order the same.

4. Learned advocate appearing for the petitioner contended that the notice issued as a result of the order of the revisional authority calling upon the petitioner to explain and answer the breach of section 31 of the Act itself was delayed and belated notice cannot result into any adverse



order so as to affect the petitioner's right to hold the land as the Supreme Court has also time & again clearly observed that the unreasonable delay in initiation of proceedings in such matters are contrary to the provision of law.

5. Learned advocate in order to support aforesaid contention of unreasonable delay in initiating proceedings invited this Court's attention to the decision of this Court rendered in case of *Labhubhai Valjibhai Gajera v. Secretary (Appeals) Revenue Deptt., Gujarat State & Ors*, reported in 2011 (1) G.L.R. 279 and also in case of *Vithalbhai M. Patel & Ors. v. Deputy Collector, Kaira & Anr*, reported in 2011 (1) G.L.R. 610 . It was vehemently contended on behalf of the petitioner that the ratio of the aforesaid two decisions would be sufficient to persuade this Court to hold that the proceedings initiated under section 31 of the Act were admittedly belated and therefore, same could not have been permitted to be proceeded and resultant order deserved to be quashed and set aside. The revision authority unfortunately did not appreciate this aspect and therefore, the revision authority committed serious and grave error in not appreciating this aspect and hence the order of revision authority impugned in this petition is also required to be quashed and set aside.

6. Learned advocate appearing for the petitioner thereafter contended that the consolidation and transfer of the land as could be seen from extract of 7/12 was forming part of original survey no. 570/1, as it can be said that from the entire holding it was transferred so as to save the selling form the vice or infirmity of so called breach of section 31 of the Act. This aspect is not appreciated by the authority and therefore the petition is required to be allowed.

7. Learned advocate for the petitioner thereafter contended that the proceedings initiated for breach of provision of section 7 of the Act



could not have been thereafter transformed into proceedings wherein the petitioner was held to be guilty of committing breach of the provision. The proceedings which is started at the behest of land owner of adjacent land wherein petitioner was shown to be defendant could not have been culminated in such a way as to visit the petitioner with further liability of explaining his own conduct which amounts to compelling the petitioner to be witness against himself and, therefore, on this ground also the order impugned is deserved to be quashed and set aside.

8. Learned advocate for the petitioner thereafter contended that in law the original applicant at whose behest the proceedings started did not have any semblance of right to start the proceedings as there exists no preemption or privity, and therefore the original applicant who started the proceedings has no locus to initiate the proceedings. In support of this submission learned advocate has relied upon decision of this Court in case of *Chhaganbhai Zinabhai Patel & Ors v. Vallabhbhai Virambhai & Ors*, decided on 25/7/1975 in *Special Civil Application No. 683 of 1970*.

9. Learned advocate for the petitioner relying upon decision of this Court in case of *Vallabhbhai Nathabhai Parmar v. Shana Sabur*, pronounced in *Special Civil Application No. 761 of 1977 decided on 17/7/1981* contended that the judicial authority while exercising power conferred upon it cannot pass any order which has trappings of administrative order and therefore he contended that the revision authority while recording finding qua subject land being contiguous to the petitioner's land in its order dated 26/4/1988 could not have asked the competent authority to issue notice for breach of section 31 of the Act. Shri Pandya at the cost of repetition reiterated that the facts of the case indicate that there was clear violation of Article 20 (3) of the Constitution of India as the petitioner against whom proceedings were initiated was by way of subsequent order made against him and he was compelled to be



witness against himself.

10. Learned advocate for the petitioner has lastly contended that the petitioner is an agriculturist and he would suffer hardships in case the order of summary eviction of the authority is implemented. In support of his submission learned advocate relied upon decision of this Court in case of *Ranchhodbhai Lallubhai Patel V. State of Gujarat & Ors*, decided on 21/6/1984 in *Special Civil Application No. 1583 of 1977 and reported in 1984 (2) G.L.R. pg. 1225* and contended that the respondent authority ought not to have passed the order of summary eviction.

11. Learned AGP for the State contended that the petition is required to be dismissed as the sale dated 5/10/1983 itself was contrary to the provision of law and therefore the same could be said to be *void ab initio* and under such a void sale no right inherits in the petitioner to take out proceedings much less proceedings under Article 227 of the Constitution of India.

12. Learned AGP contended that the aspect of delay sought to be heavily pressed into service on the part of the petitioner is unfortunately not available to the petitioner as the development of the instances in the present case would indicate the land which was illegally purchased on 5/10/1983 was subject matter of proceedings straightway in the year 1985 and she relies upon decision of the Court to indicate that merely delay or time gap in the proceedings in itself would not be sufficient ground to persuade this Court that there existed delay in conducting the proceedings. Learned AGP while relying upon decision in case of *Patel Somabhai Devidas v. Dahyaji Somaji Thakore & Ors.*, reported in 2010 (5) *G.L.R. 4152* contended that the length of reasonable time must be determined by facts of the case and nature of the order impugned. The observation of the Division Bench in that judgment would go to indicate



that very ground of delay on account of time lag in initiation of proceedings in act of illegality in itself would not be sufficient to quash the order on account of delay.

13. Learned AGP further submitted that the illegal action was under scrutiny and while appreciating the petitioner's contention the competent authority in revision came to the conclusion that the sale dated 5/10/1983 was not tenable as it amounted to selling part of the consolidated block and therefore he did the very just and proper act in directing the authorities to issue notice as the original notice was not qua breach of section 31 of the Act. The notice was not issued under section 31 and therefore though there was breach clearly of section 31 of the Act and petitioner was before revision authority in an attempt to save the sale, the authority in fact did the right thing in directing concerned authority for issuance of notice so that the principle of natural justices are followed. Such an act cannot be said to be an illegal act in any way and therefore the Court may not interfere with the order impugned.

14. Learned AGP relying upon decision of the Supreme Court in case of *State of Orissa And Others v. Brundaban Sharma And Another*, reported in 1995 Supp (3) SCC 249 contended that the action of sale being absolutely illegal and void, the ground of delay, when the same is quashed, would not be available or used by the petitioner as it is clearly observed by the Apex Court in the aforesaid judgment.

15. Learned AGP further submitted that the invocation of Article 20 (3) of the Constitution of India is wholly misconceived and unwarranted as the petitioner cannot be said to be in any manner compelled to be witness against himself. The order of the authority was to the effect that there was breach of section 31 of the Act and action if at all is required to be taken, then, it would be taken under said provision by issuing notice.



The direction is in consonance with law and therefore this Court in exercise of power under Article 227 of the Constitution may not interfere with the order impugned.

16. The Court heard learned advocate for the parties and perused the memo and annexures in the petition. The fact remains to be noted that the sale of questioned land had taken place on 5/10/1983 and at the relevant time this land was forming part of the consolidated block. This finding recorded by the authority, whose order is under challenge under Article 227 of the Constitution of India, is incapable of being interfered with in any manner and when this fact is required to be accepted, then there appears to be clear breach of section 31 of the Fragmentation Act which would justify the action taken by the authorities.

17. The Court is of the considered view that the earlier proceedings wherein the petitioner was one of the opponent and as a result thereof also could not have been held as an impediment in the way of concerned authority in initiating proceedings for breach of section 31 of the Fragmentation Act. The Court is unable to accept the submission of learned advocate for the petitioner that the proceedings which was started were belated in view of the judgments cited at the Bar. The Court is of the view that the decisions cited at the Bar reported in 2010 (5) GLR pg. no. 4152 (supra) would be of much relevance as the Division Bench has also clearly held that the action and its quashment and time gap between the two alone would not be a factor for holding that the action of the authority is belated or initiated after reasonable time. In fact the concept of delay in initiating proceedings is developed only on account of disturbance in settled position of parties and accrual of vested interest and rights in the property. The said concept will not if applied in the present facts, permit the petitioner to argue or contend that the proceedings in the form of notice after 1988 on the basis of the order



were belated as the transaction of sale which was absolutely illegal had taken place on 5/10/1983 and thereafter continuous proceedings in the form of illegality of the sale were going on and it culminated into order dated 26/4/1988, in which the authority recorded its finding that the fragmentation is in fact on account of breach of section 31 of the Act as the land of such nature was incapable of being sold at all and therefore it cannot be said that the petitioner purchaser had not been aware of the proceedings nor it can be said that the authorities had at any point of time given up its pursuit of nullifying the illegal sale in appropriate manner. The factum remains to be noted that the sale itself was illegal and such illegal sale could not be permitted to be perpetuated when the proceedings were initiated, though the same proceedings did not culminate into summary eviction, but that in itself would not be a ground to say that petitioner had vested interest or had changed his position to his detriment on account of the sale or inaction on the part of the authority. In fact in the instant case there cannot be said to be any inaction so as to permit the petitioner to gather an impression on the act of sale. Had it been so the ground of belated action or action being taken after unreasonable time gap would be having some justification, but in the instant case the sale itself is under question through out and therefore when the sale itself was under question through out, the petitioner also has not at all pleaded any such development, the petitioner cannot be said to be without knowledge of it being illegal.

18. The observations of the Supreme Court reported in 1995 Supp (3) SCC 249 in case of State of Orissa and Others (supra) would rather support the proposition that the illegal order would not inherits in the petitioner any right much less any right so as to defeat the avowed principle of statute and this Court at-least in exercise of power under Article 227 of the Constitution of India can ever be party to perpetuating the same.



19. Learned advocate for the petitioner's contention qua Article 20(3) of the Constitution of India is also of no avail to the petitioner as the Court is not in a position to accept the submission that on account of subsequent proceedings for breach of section 31 of the Act the petitioner was said to have been compelled to be a witness against himself. The attempt on the part of learned advocate for the petitioner is to draw analogy between the criminal proceedings and the proceedings in civil nature wherein the parties are not to be compelled to do something or depose something against their own interest. But in the instant case the Court need not elaborately dwell upon this aspect as suffice it to say that even remotely also the principle enunciated under Article 20 (3) of the Constitution of India is not capable of being invoked in the instant case, as the petitioner is also equally responsible party in illegal act of transaction of sale of a land which was not permitted to be sold at all and therefore the same cannot be said to be permitted to be held by the petitioner contrary to the provisions of law.

20. Petitioner's contention qua hardship and petitioner's right to purchase the land, selection of purchaser etc. also would be of no avail to the petitioner as they are to say the least not the factors which would persuade this Court in quashing the order. Those considerations would be of no avail, as assuming for the sake of examining without holding that the vendor has a right to select his buyer, the said principle has no applicability when the vendor did not have any right to sell the land. In the first instance when the seller's right itself was said to be non-est it can not be said that said authority or proposition of law would not resolve the controversy in favour of the petitioner and therefore it is not applicable in the present case.

21. So far as the submission of petitioner being an agriculturist and the



sufferings etc. are concerned, the Court is of the view that same is also not so impressive as to exercise jurisdiction under Article 227 of the Constitution of India in favour of the petitioner.

22. The submission canvassed on behalf of the petitioner that the authorities could not have ordered fresh proceedings as it had ordered under order dated 26/4/1988 is also not tenable in law as the decision cited at the Bar that the authorities while exercising power even judicial in nature, but if he happens to be superior authority administratively, cannot be observed as glaring illegal in our system of governance. If such watertight compartment is created as is pleaded and accepted then, it would amount to permitting illegally to be perpetuated which can never be said to be open to this Court at the behest of one who himself has committed illegality and invoked jurisdiction of Article 227 of the Constitution of India. The Court is viewing this submission from the angle of jurisdiction available to the Court and the propriety and illegality of the action in question. Therefore, the decisions cited at the Bar is clearly distinguishable as in the instant case what is under challenge is the order which is passed wherein it is held that the petitioner's action of purchasing the land was contrary to the provision of section 31 of Fragmentation Act. The order which is said to be illegal on account of the authority exercising administrative power was the order of 26/4/1988 which has not been challenged by the petitioner at any point of time and that order has not only culminated into its enforcement and thereafter when the notice was issued, even at that time also such a contention was not taken. When such contention is not taken and when order has been even given effect of, it would not be open to the petitioner to agitate at this stage that the order order of 26/4/1988 was incorrect or illegal. The Court is to examine only the order dated 21/9/1990 in exercise of its power under Article 227 of the Constitution of India and when the same is not suffering from any illegality, infirmity nor has it



been resulting into any miscarriage of justice, the Court would not be justifying in interfering therewith. Hence the petition being meritless deserves dismissal and is accordingly dismissed. Rule discharged.

23. Learned advocate for the petitioner submits that the interim relief which has been continuously in operation be continued for further period of eight weeks. Learned AGP is vehemently opposing this request.

This Court is of the considered view that when interim relief has been continuous since the year 1990, extension thereof for further period would not be so unjust as to reject this request. Hence the interim relief granted earlier shall be continued till 29/11/2013 only with a view to enable the petitioner to approached the appellate forum.

(S.R.BRAHMBHATT, J.)

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