

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 19786 of 2016**

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MAHENDRA DOLATRAI DESAI & 3....Petitioner(s)

Versus

SARLABEN KANAIYALAL DESAI & 7....Respondent(s)

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Appearance:

MR NV GANDHI, ADVOCATE for the Petitioner(s) No. 1 - 4

ADVANCE COPY SERVED TO GP/PP for the Respondent(s) No. 7

MR ISHAN MIHIR PATEL, CAVEATOR for the Respondent(s) No. 5

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CORAM: HONOURABLE SMT. JUSTICE ABHILASHA KUMARI**Date : 28/12/2016****ORAL ORDER**

1. Heard Mr.N.V.Gandhi, learned advocate for the petitioners and Mr.Ishan Mihir Patel, learned advocate for respondent No.5 (Caveator).

2. Mr.N.V.Gandhi, learned advocate on behalf of the petitioners has made the following submissions:

(i) That respondent No.5 (the vendor) has executed an Agreement to Sell in respect of the land in question in favour of the petitioners on 25.07.1995. As the Sale Deed was not executed,

the petitioners have filed a suit for specific performance which is pending in the Civil Court. The possession of the land was handed over to the petitioners and they are in possession of the land. The Civil Court has also protected the possession of the petitioners. At the relevant point of time, there was no prohibition under Section 43 of the Gujarat Tenancy and Agricultural Lands Act, 1948 ("the Tenancy Act") for executing an agreement to sell. The amendment to Section 43 was made by Gujarat Act No.30 of 1977, more particularly on 04.11.1977, bringing an agreement to sell under the purview of Section 43. This amendment is not retrospective in nature, therefore, the land in question was not subject to the restrictions under Section 43 of the Tenancy Act at the relevant period of time, therefore, no breach of the said provision has been committed by the petitioners and the proceedings against them are unjustified in law.

(ii) That there is a delay of twenty years in initiating proceedings under Section

84C of the Tenancy Act, which aspect has not been taken into consideration by the Deputy Collector and the Gujarat Revenue Tribunal ("the Tribunal"). The action of the respondent authorities and the impugned judgment of the Tribunal are, therefore, in contravention of the principles of law enunciated by the Supreme Court in the case of **Mohamad Kavi Mohamad Amin v. Fatmabai Ibrahim** reported in (1997)6 SCC 71. This judgment lays down that Section 84C proceedings cannot be initiated after a gross delay. The law in this regard is well settled and has been reiterated by the Supreme Court and this Court in several judgments. Action could not have been initiated after such an unreasonable period of time, therefore the case of the petitioner deserves to be considered positively.

Learned counsel for the petitioners has also relied upon the following judgments:

- (a) **Bhanji Devshibhai Luhar v. State of Gujarat & Ors. - 2011(2) GLR 1676** and
- (b) **Valjibhai Jagjivanbhai v. State of**

Gujarat - 2005(2) GLH 34.

(iii) That on 26.03.2003, the land has been converted into old tenure land. This order has not been challenged, therefore, the alleged breach of Section 43 of the Tenancy Act would no longer survive.

(iv) That respondent No.5 is one of the persons (proposed vendor) who has executed the Agreement to Sell. The petitioners have parted with consideration and are in possession of the land ever since the execution of the Agreement to Sell. A proposed seller of the land has no locus standi to question the Agreement to Sell that he is himself a party to, in view of the principles of law enunciated by this Court in the case of **Navuji Lalji Vaghela & Ors. v. State of Gujarat**, reported in **2011(4) GLR 3636**. That, after pocketing the full sale consideration, it does not lie in the mouth of respondent No.5 to raise any objection as he has entered into the transaction with open eyes.

(v) That throughout the proceedings before

the Tribunal, the petitioners were protected by an interim stay of the order of the Deputy Collector. It was suddenly lifted by the Tribunal without granting an opportunity of hearing to the petitioners, by an order dated 09.09.2015, passed on an application filed by respondent No.5. The matter was fixed for final hearing on 28.09.2015. The petitioners had approached this Court by filing Special Civil Application No.15642 of 2015, which was disposed of, by staying the order of the Tribunal whereby the interim relief was vacated and continuing the interim relief till the final decision of the revision petition. Thus, the petitioners, who have paid consideration for the land and are in possession, may be protected by this Court, as they have a good prima facie case, the balance of convenience is in their favour and they would suffer irreparable loss if an interim order is not granted in their favour.

3. The prayer for the grant of interim relief is strongly opposed by Mr.Ishan Mihir Patel, learned advocate for respondent No.5, who is on

Caveat. Though no notice has been issued in the petition so far, respondent No.2 (one of the executants of the Agreement to Sell) has filed a detailed affidavit-in-reply, the grounds canvassed in which are pressed into service by the learned advocate for the Caveator.

4. Mr.Ishan Mihir Patel, learned advocate for the Caveator, has made the following submissions:

(I) That the so-called Agreement to Sell is a sham, bogus and a got up one, which does not confer any rights upon the petitioners. They are illegal occupants of the land as respondent No.5 and the other original owners of the land have not executed any such Agreement. If the Agreement is seen, it contains no signatures and is clearly a fraudulent document.

(II) That the provisions of unamended Section 43 of the Tenancy Act would be applicable and the said provisions would also cover an agreement to sell, as has been held by the High Court of Bombay in:

(i) Shri Parshuram Kathod Gaikar v. Pandu Mahadu Hard and Anr. - 1994(1) Bom.C.R. 715,

(ii) Lotan Ramchandra Shimpi and Ors. v. Shankar Ganpat Kayasth and Ors. - 1994(4) Bom. C.R. 575, and

(iii) Saraswati Shamrao Dhere v. Khutub Babu Malani and Ors. 2015(2) ALL.M.R. 533

(III) It is submitted that in the above judgments, the High Court of Bombay has taken the view that Section 43 of the Tenancy Act as it stood at the relevant period of time, which is pari materia with the unamended provision that operated in the State of Gujarat, covers an Agreement to Sell, therefore, there is a breach of Section 43 in executing the Agreement to Sell, even if it is assumed that there is such an agreement.

(IV) That there is no delay in the initiation of proceedings under Section 84C of the Act for the breach of Section 43 of the Tenancy Act as there is no Agreement to Sell in the eyes of law.

(V) That for conversion into old tenure land

the previous sanction of the competent authority is required. Ex post facto sanction would not validate the possession of the petitioners over the land.

(VI) That the Tribunal, in its order, has dealt with all aspects of the matter in a legal and valid manner, hence no interim relief deserves to be granted to the petitioners.

5. This Court has heard learned counsel for the petitioners at great length and detail, perused the averments made in the petition and the affidavit-in-reply filed by respondent No.2, considered the material on record and the judicial pronouncements of the Supreme Court, this Court, and the High Court of Bombay, relied upon by learned counsel for the respective parties. After such consideration, it is found that the following salient aspects arise for deeper and further consideration of the Court:

(1) Whether the delay of twenty years in initiating proceedings under Section 84C of the Tenancy Act is fatal to the case of the

respondents in view of the principles of law enunciated by the judgments relied upon by learned counsel for the petitioner, or not ?

(2) Whether judgments of the High Court of Bombay, which have a persuasive value, regarding the provisions of Section 43 of the Bombay Tenancy Act which is pari-materia with Section 43 of the Gujarat Tenancy Act, as it stood before its amendment by Gujarat Act 30 of 1977, would be applicable to the present case; especially when the legislature of the State of Gujarat has thought it fit to introduce an amendment specifically bringing an agreement to sell within the purview of Section 43 of the Gujarat Tenancy Act, thereby implying that it was excluded from the said provision before the amendment? Further, does the amendment have retrospective effect?

(3) Whether the conversion of the land in question into old tenure land would take it out of the purview of Section 43 for any alleged breach of the said provision?

(4) Whether this Court can look into the aspect regarding the validity of the Agreement to Sell, to enforce which a suit for specific performance is pending in the civil Court: Whether this Court ought to examine the allegations regarding the manner in which the agreement was executed?

(5) Whether one of the executors of the Agreement to Sell, after pocketing the sale consideration, can contest the validity of the said Agreement in proceedings under Section 84C of the Tenancy Act that were initiated suo-motu by the Mamlatdar and ALT, after remaining silent for a period of 20 years from the date of the execution of the said Agreement?

6. These are some of the glaring issues that, in the view of the Court, require in-depth consideration.

7. At this stage, the petitioners have pointed out certain aspects of the matter that have not been controverted, as below:

(a) The petitioners have paid the entire sale consideration pursuant to the Agreement to Sell and were put into possession of the land in question. The civil court has found them to be in possession and has protected their possession by granting a temporary injunction in the suit for specific performance.

(b) Initially, proceedings under Section 84C of the Tenancy Act were initiated suo-motu by the Mamlatdar and ALT after twenty years from the execution of the Agreement to Sell. The proceedings have not been initiated at the behest of respondent No.5 and the original owners. The said proceedings were dropped by the Mamlatdar and ALT by an order dated 22.06.2009. The Deputy Collector, therefore, granted permission to convert the land into old tenure for agricultural purposes, by an order dated 26.03.2003. This order has remained unchallenged.

(c) Respondents Nos.1 to 5 entered the legal arena only at this stage, to challenge the order

of the Mamlatdar and ALT, by which the proceedings under Section 84C were dropped. Till then, the said respondents had remained silent spectators, without demur.

(d) No explanation surfaces from the material on record to explain the delay of twenty years in the initiation of the proceedings by the Mamlatdar and ALT.

8. Considering the above aspects of the matter cumulatively, this Court is of the view that a prima-facie case exists in favour of the petitioners. The balance of convenience also tilts in their favour and, as they are in possession of the land, which is being cultivated by them and their possession is protected by the civil court, irreparable harm would be caused to them if this Court does not pass an interim order in their favour.

9. Needless to state that all the above observations are prima-facie in nature. However, at this stage, they necessitate the passing of the following order:

Issue Rule, returnable on 04.12.2017.

Interim relief in terms of Paragraph-7(B) is granted till the final decision of the petition.

(SMT. ABHILASHA KUMARI, J.)

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