

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 14259 of 2005****With****R/SPECIAL CIVIL APPLICATION NO. 17123 of 2007****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS JUSTICE SONIA GOKANI**

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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 or any order made thereunder ?	

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IBRAHIM RAHEMATULLAH SHANKAR**Versus****STATE OF GUJARAT**

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Appearance:**MR M R MOLAVI for the PETITIONER(s) No. 1.1,1.2,1.3,1.4****MR M R MOLAVI(3362) for the PETITIONER(s) No. 1****MR MTM HAKIM for the PETITIONER(s) No. 1****DS AFF.NOT FILED (R) for the RESPONDENT(s) No. 2,3,4****GOVERNMENT PLEADER for the RESPONDENT(s) No. 1****MR CJ VIN for the RESPONDENT(s) No. 5.1****MR JITENDRA M PATEL for the RESPONDENT(s) No. 6.1,6.2,6.3,6.4,6.5****MR MAHENDRA K PATEL for the RESPONDENT(s) No. 5**

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CORAM: HONOURABLE MS JUSTICE SONIA GOKANI**Date : 26/09/2017**

ORAL JUDGMENT

- 1 Both these petitions since involve identical questions of facts and law, they were heard together and have been decided by this common judgment. For the sake of brevity and convenience, the facts are drawn from Special Civil Application No.14259 of 2005.
- 2 The factual score that is essential to be depicted is that the land bearing Revenue Survey No.1353, admeasuring Acre 12 and 12 Gunthas was mutated in the name of the owner and occupier Patel Mulchand Nathuram and the name of Ibrahimbhai Vahidbhai Raje i.e. respondent No.5 herein. The respondent No.5 was cultivating as a tenant in the said land from the year 1954-55 to the year 1960.
 - 2.1 An entry bearing No.1834 was mutated in the Revenue Record in the year 1960 qua the said land, whereby the said land was declared in the possession and occupation of the respondent No.5.
 - 2.2 On June 11, 1963, the proceedings bearing Case No.70/335 under the Bombay Tenancy and

Agricultural Lands Act, 1948 (hereinafter referred to as 'the Act') came to be initiated under section 32P of the Act, whereby it was held that the right of the respondent No.5 towards the said land ceased to exist.

2.3 At that stage, Patel Mulchand Nathuram was represented by his daughter and sole heir Bai Vimla Ambaram and, therefore, Bai Vimla Ambaram came to be declared the owner of the said land and acquired the said land as granted under section 32P of the Act.

2.4 On September 11, 1963, another entry bearing No.2163 came to be mutated in the Revenue Record enumerating the said proceedings under section 32P of the Act therein. Further, an entry bearing No.2161/22 came to be posted in the Revenue Record, which particularly indicated the proceedings of Tenancy Case No.70/335. The said entries ultimately came to be certified on January 14, 1966, after following due procedure of service of notice and on verification of the

records and orders. Thus, the right of the respondent No.5 with respect to the said land came to an end on July 28, 1962 i.e. on the date of the order passed under section 32P of the Act.

2.5 Since the owner Bai Vimla Ambaram did not acquire the actual possession of the same, the possession continued with the respondent No.5. On April 20, 1963, the respondent No.5 executed a mortgage deed in favour of Saiyed Abdulhamid Dallubhai Hemadi (Darvesh) (hereinafter referred to as 'Saiyed Hemadi'), the brother of Ibrahim Rahematullah Shankar and the uncle of the petitioners and handed over possession of the said land to father of the petitioners, who accepted the same on behalf of Saiyed Hemadi. The possession of the said land continued with the father of the petitioners again on April 09, 1969. The further amount was drawn by the respondent No.5 towards the mortgage of the said land towards Saiyed Hemadi by executing further mortgage deed.

2.6 The respondent No.5 on July 15, 1971, executed a sale deed in favour of Saiyed Hemadi qua the said land, whereupon Ibrahimbhai Shankar i.e. the father of the petitioners, entered into the said transaction on behalf of Saiyed Hemadi. Thus, on October 26, 1978, the father of the petitioners made an application to post an entry in the village revenue record, recording the said said transaction. A notice under section 135D of the Bombay Land Revenue Code came to be issued upon Bai Vimla Ambaram Patel as the land stood mutated in the village Form No.7/12 and Form No.6 extracts in her name. She appeared and replied, whereupon she did not object to the name of the father of the petitioners being mutated in the land revenue records. On October 27, 1978, an entry bearing No.3282 came to be posted in the revenue records in pursuance of the said sale deed in favour of the father of the petitioners on behalf of Saiyed Hemadi and the said entry came to be certified on December 04, 1978. Bai Vimla and the respondent No.5 continued to stay in the said village. The

father of the petitioners expired on March 08, 1992. A legal and valid power of attorney was executed on August 18, 1993, in favour of Yaqub Ibrahim Shankar i.e. petitioner No.1/1, by Saiyed Hemadi and his wife Mazalben.

2.7 After a period of about 23 years of mutation of entry bearing No.3282 posted in the land record on December 04, 1978, the respondent No.5 preferred an RTS Appeal bearing No.5 of 2001 under section 108(5) of the Bombay Land Revenue Code before the respondent No.4 challenging the said entry bearing No.3282, however, the said appeal came to be rejected by the respondent No.4 vide order dated March 09, 2004, on the ground that past 40 years, the land never came to be mutated in the name of the respondent No.5, there was no question of entertaining the same and, thus, on the ground of delay itself the appeal was rejected. Promulgation of the land records has been performed on two occasions and on none of the occasions, the respondent No.5 raised any objection.

2.8 The respondent No.5 challenged the order

passed by the respondent No.4 in RTS Appeal before the respondent No.3 by way of RTS Revision/Appeal bearing No.8 of 2004 under section 108(6) of the Bombay Land Revenue Code, which ultimately came to be allowed vide order dated April 28, 2004. The respondent No.3, according to the petitioners, proceeded to decide the validity of transfer in favour of the father of the petitioners and concluded that since it was restricted tenure transfer, without prior permission of the Government, the same was illegal and, therefore, the entry was cancelled.

2.9 As the petitioners' possession over the land in question was disturbed, they resorted to institute a Regular Civil Suit bearing No.67 of 2004 on August 18, 2004, seeking declaration and injunction against the respondent No.5, to the effect that the petitioners be declared the owner of the said property and the respondent No.5 does not have any right, title or interest over the said property. The application of injunction came to be allowed in favour of the petitioners on October 27, 2004, restraining the

respondent No.5 from interfering with or entering into the suit land.

2.10 The petitioners also mortgaged the said land with the ICICI Bank at Ahmedabad and an entry to that effect is also posted in the revenue record bearing No.6041 on June 08, 2004.

2.11 Against the order of the respondent No.3, an appeal was preferred before the respondent No.2-Special Secretary, Revenue Department bearing No.14 of 2004, whereby the respondent No.2 rejected the appeal upholding the order of the respondent No.3. It held that the petitioners have no *locus standi* to prefer the present appeal as Saiyed Hemadi had expired at Bahrin and on behalf of the deceased, no person can appear. It also denied the relief on the ground that the father of the petitioners Ibrahim Shankar expired on March 08, 1992 and, therefore, the person acting on behalf of Saiyed Hemadi had also expired and, hence, on that count also, the petitioners did not have any *locus standi*. The petitioners are, therefore, before this Court praying for the following

substantial reliefs :

"23(B) This Honourable Court may be pleased to quash and set aside the order dated 8.4.2005 passed by Special Secretary, Revenue Department (Appeals) in Appeal No.MVB/HKB/Patan/14/2004 and further also be pleased to quash and set aside the order dated 28.7.2004 passed by the Collector, Patan in RTS Revision No.8/2004, in the interest of justice.

(C) This Honourable Court may be pleased to confirm order passed by the Deputy Collector, Radhanpur, passed in RTS Appeal No.5/2001 dated 9.3.2004 and thereby be pleased to hold that Entry No.3282 is legal, valid and justified, in the interest of justice."

- 3 An affidavit-in-reply has been filed by the respondent No.6/1 on behalf of the respondent Nos.6/1 to 6/5, claiming his right through Bai Vimla Patel, who was the owner and occupant of the land Survey No.1353. It was an ancestral land, which was inherited. Further, the pedigree of Bai Vimla is also brought on record. It is lamented that since the deceased Bai Vimla was the owner and occupant of the said land bearing

Survey No.1353 admeasuring Acre 12 and 15 Gunthas, situated at village Sami, Taluka Sami, District Patan, without joining Bai Vimla and her heirs and legal representatives as party, the petition could not have been filed. On realising such pendency, when these respondents chose to approach this Court for impleadment, they were impleaded as party respondents.

3.1 It is further his say that in Special Civil Application No.14259 of 2005, the judgment and order dated April 25, 2005, passed in Revision Application No.14 of 2004, by which the Revision Application was dismissed by the State in pursuance of the certification of the mutation entry bearing No.3282 dated October 27, 1978. It is further his say that the name of Ibrahim Hemadi i.e. respondent No.5, who claims to be in occupation of the land in question, at the time of promulgation as its original owner could not produce any evidence to show that he was the owner of the same.

3.2 The proceedings under section 32G of the Act

were initiated in the year 1960-61 and the purchase was made ineffective as the tenant refused to purchase the land. Thereafter, the proceedings under section 32P read with section 15 of the Act have been initiated by the Mamlatdar, who by his order dated July 28, 1962, terminated the tenancy of the original tenant and passed an order for giving land for personal cultivation to the deceased Bai Vimla, who was the heir of the deceased Mulchandbhai Nathuram and the said orders got reflected in the revenue entry bearing No.2161. With all other details, it is urged further that the respondent No.5 had no right, title or interest to hand over it to the power of attorney holder Saiyed Hemadi, who was staying at Bahrin. He urged that this petition does not deserve to be entertained as the respondent No.5 had no right, title or interest over the suit land bearing Survey No.1353, he could not have passed a better title.

- 4 It is necessary to make a brief reference of the petition bearing Special Civil Application

No.17123 of 2007, preferred by the very respondents viz. surviving heirs and legal representatives, wherein it is substantially prayed as under :

"19(A) to quash and set aside the mutation entry No.3282 dated 27.10.1981 at Annexure-G.

(B) to quash and set aside the transaction between respondent No.5 i.e. Ibrahimbhai Vyad Rajebhai and deceased Ibrahimbhai Rahemantullah Shankar on behalf of Saiyed Abdul Hamed Darves dated 15.6.1971 (Annexure-F) and also further be pleased to declare the said transaction is illegal, null and void.

(C)be pleased to confirm the judgment and order of the State Government dated 25.4.2005 passed in Revision Application No.14 of 2004 at Annexure-J and pleased to dismiss the Special Civil Application No.14259 of 2005 filed by heirs and legal representatives of deceased respondent No.1.

(D) This Special Civil Application be heard along with Special Civil Application No.14259 of 2005 filed by respondent No.1."

5 This Court has heard Shri M.T.M. Hakim, learned counsel appearing for the petitioners of Special

Civil Application No.14259 of 2005. He has lamented the fact that Bai Vimla had expired on November 20, 1993, intestate. Special Civil Application No.17123 of 2007 has been preferred by the cousin of Bai Vimla. There is an inordinate delay in challenging the right, interest and title of the petitioners. He has urged that both i.e. the respondent No.2 and the respondent No.3, did not regard the delay as a ground. 32 years have passed, which itself should be the reason for interference. When an application was moved in Regular Civil Suit, no relationship was established to claim through Bai Vimla. Bai Vimla herself never challenged such order when she was alive and, therefore, challenge through her must fail.

- 6 Shri M.T.M. Hakim, learned counsel appearing for the petitioners of Special Civil Application No. 14259 of 2005, has urged that the heirs of Vimlaben sought to implead themselves as party defendants by making an application before the learned Civil Judge, Harij, but, for want of non-prosecution such an application came to be

dismissed by the Court concerned. He, further, urged that if the heirs are desirous of litigating against the petitioners and others, they can chose to so do it within their own rights and subject to the provisions of law of limitation. However, there was no requirement of the petitioner to have impleaded them as party defendants in the matter between them and the heirs of Respondent No.5, who had transferred the land way back in the year 1978 to the petitioners and who had enjoyed all throughout unhampered possession of the land.

6.1 He also urged that the Court may not enlarge the scope of this petition, inasmuch as challenge here is to the order of the revisional authority of not sustaining the Revenue Entry No. 3282, which was certified in the year 1978.

7 *A contrario sensu*, Shri J.M. Patel, learned counsel appearing for the petitioner of Special Civil Application No.17123 of 2007, urges that the purchase price under section 32G of the Act was to be paid by the petitioner, however, as he refused to pay such amount, the proceedings

under section 32P were initiated and since the tenant did not pay the purchase price, the land was given to the original owner Mulchand Nathuram, however, no challenge to such order was made. Entry No.913 was posted in the village Form No.6. The petitioner had purchased the same from Ibrahim Shankar by way of executing a document on a stamp paper of Rs.5/-. As the respondent No.5 himself had no right to sell, neither any power of attorney nor any registered sale deed had been effected, the Talati-cum-Mantri wrongly mentioned that mutation entry No.3282 was based on the registered sale deed. Bai Vimla never received any notice under section 135D of the Bombay Land Revenue Code. Since the last order of the year 2007, they have been pursuing the litigation. Bai Vimla has never been joined as party in the suit. The respondent No.2-SSRD has rightly confirmed according to the learned advocate that there is no flaw in the order impugned.

- 8 On thus having heard both the sides, the picture that emerges is that Ibrahim Vahidbhai Raje i.e.

respondent No.5, was the tenant of the land. At the time of promulgation, the proceedings under section 32G of the Act were initiated somewhere in the year 1960-61 and the purchase was made ineffective as the tenant had refused to purchase the land.

9 The proceedings under section 32P read with section 15 of the Tenancy Act were initiated by the Mamlatdar in the year 1962 and by his order dated July 28, 1962, the Mamlatdar terminated the tenancy of the original tenant and passed an order giving land for personal cultivation to Bai Vimla, who was the heir of the owner deceased Mulchand Nathuram. Such an order came to be reflected by mutation Entry No.2161.

10 It also transpires that the respondent No.5- Ibrahim Raje was the tenant and as reflected above, his tenancy came to be terminated on July 28, 1962. A sale deed was executed by the respondent No.5 on June 15, 1971, which was an unregistered document, by using four different stamp papers of Re.1/- each and thereby, he transferred the land in favour of respondent

No.5-Ibrahim Rahemtullah Shankar, who was the power of attorney holder of Saiyed Abdul Darvesh. Saiyed Abdul Darvesh was residing at Bahrin since long. In pursuance of the same, a mutation entry bearing No.3282 dated October 27, 1978 was posted in the revenue record, which was certified on December 04, 1978. The said entry had been certified on the ground that the property was transferred in pursuance of the registered document and this was not a correct fact. There was no registered sale deed. Admittedly, the property valued more than Rs.100/- was required to be transferred by way of a registered sale deed, however, in the present case the same has been transferred by way of four stamp papers of Re.1/- each.

- 11 Shri Ibrahim Shankar was given power of attorney by Shri Saiyed Abdul Darvesh, and, the present petitioners are the heirs and legal representatives of Shri Ibrahim Shankar.
- 12 It appears that respondent No.5-Ibrahim Vahid in this petition, who was ex-tenant had preferred RTS Appeal No.5 of 2001 before the Deputy

Collector, Radhanpur, challenging Mutation Entry No.3282. The Deputy Collector, Radhanpur vide his judgment and order dated March 09, 2004, dismissed the appeal and confirmed the Mutation Entry No.3282 dated December 04, 1978.

13 Against such an order, the respondent No.5 also preferred further Revision Application No.8 of 2004 before the Collector, Patan, who vide judgment and order dated July 28, 2004, cancelled Mutation Entry No.3282 dated December 04, 1978. Therefore, the heirs of the the deceased Ibrahim Rehmatulla Shankar had preferred Revision Application bearing No.14 of 2004 before the State Government, which by its order dated April 08, 2005, dismissed the Revision Application.

14 It appears that these proceedings of challenging Mutation Entry No.3282 had been proceeded without joining the deceased Vimlaben Patel and her heirs and legal representatives. Admittedly, the respondent No.5 had lost his right as once the proceedings under section 32G had been initiated in the year 1960-61, the purchase was

made ineffective as the tenant had refused the purchase of land and by an order of the Collector on July 28, 1962, tenancy of the original tenant had been terminated and he passed an order of giving land for personal cultivation to the deceased Vimlaben Patel, who was the heir and legal representative of the deceased Mulchand Nathuram. The said order is already reflected in the Mutation Entry NO.2161. In pursuance of the said order passed under section 32P of the Tenancy Act dated July 28, 1962, the possession also was handed over to Ms.Vimlaben Patel. It is quite clear that presently the parties who are litigating before this Court for and on behalf of Vimlaben Patel are the heirs and legal representatives of Vimlaben and Shri Saiyed Abdul Darvesh has passed away at Berlin. It is Ibrahim Shankar's heirs and legal representatives, who are litigating and who had got the rights from the respondent No.5 Ibrahim Shankar who is the original tenant and whose tenancy had been terminated long ago by the Collector in the year

1962. He had no right, title and business to transfer the land to any one, any proceedings, *inter se* between him and those to whom he had purportedly transferred the land was without the presence and consent of the original owner. Assuming that the original owner was in the same proceedings made a party, the fact remains that the respondent No.5 tenant had no right to deal with such property once having refused to pay the purchase price.

- 15 Being conscious of the fact that the Respondent No.5 had challenged the Entry No. 3282 after about 23 years, as discussed herein above, the respondent No.5, himself, had no right after once in the year 1962 when their father had chosen not to pay the value of the land as determined by the authority concerned, which had led to the land being given back to the heirs of the original owner, i.e. Vimlaben. Of course, it is being claimed that Respondent No.5 had transferred the land to Mr. Dharvesh, and through him, the authority has been given to the father of the present petitioners, who have

enjoyed possession over the years.

16 This Court needs to bear in mind that after once the revisional authority concluded and chose not to uphold the say of the petitioner, it had filed Civil Suit No. 67 of 2004 before the learned Civil Judge, Harij, to establish their right qua the property in question. While so doing, they have chosen not to implead the heirs of Vimlaben. It is not relevant that an application made by the heirs of the Vimlaben before the Appellate forum was not entertained on the ground that they not having gone before the trial Court and it also noted that the trial Court, for want of prosecution, has not entertained the very application and therefore, substantially such an application has not been decided. Be that as it may, the fact remains that the petitioner, who are claiming their rights through Respondent No.5, in respect of the Suit land are in fact, claiming right over the property, which is otherwise owned by the late Vimlaben, as is quite apparent from the record. Therefore, any claim in respect of such

a property, without impleading either Vimlaben or her heirs, cannot be permitted to be continued and as is quite clear from the settled position of law. A mutation entry is only for fiscal purpose and also for those, who are desirous to deal with the property, as non-reflection of those details in the mutation entry can harm the prospective buyers or those who would be dealing or transacting in relation to this land. However, when it comes to deciding the rights, title or ownership of the land, needless to state that only the competent Civil Court shall have power to decide the same. The petitioners, therefore, have rightly chosen the forum of learned Civil Judge, Harij, but, such a claim cannot be restricted in wake of the overwhelming *prima facie* evidences of the ownership of Vimlaben, when heirs of hers being impleaded as party defendants. It is not the question of enlarging the scope of this petition, but, this petition is being entertained and being decided on the ground that after a long span, the revenue authorities have

chosen to entertain the say of respondent No.5 and has interfered with the mutation entry No. 3282. Any claim, in relation to the property in question, was needed to be determined by the competent Civil Court. This Court, from the record, can make out that Respondent Nos. 6/1 to 6/5, who claim through Vimlaben, shall have to establish their right as heirs in respect of the property in question. At the same time, the present petitioners, who are before this Court and claiming through Respondent No.5, who no longer had any right or title over the said land of being a tenant and having not fulfilled his obligation under the Tenancy Act, all the disputed questions of facts in regard to the title shall have to be determined by the Civil Court only and they shall need to be determined in the presence of the parties, who are not only the proper parties, but, are also necessary parties while adjudicating finally all the aspects threadbare. The petitioners, though, fully aware and conscious of all the details had chosen not to implead Vimlaben or her heirs and

legal representatives as the party defendants and had only restricted the litigation to Respondent No.5.

17 So far as the challenge to the order of the learned Special Secretary, Revenue Department, Dated: 08.04.2005, in Appeal No. MVB/HKB/Patan/14/2004 so also to the order of the Collector, Patan, in RTS Revision NO. 8/2004 dated 28.04.2004 is concerned, the petitioners are directed to maintain **STATUS QUO** in regard to the land bearing Revenue Survey No. 1353, admeasuring Acres 12, Gunthas 15, situated at Village: Sami, District: Patan and also not to transact by way of gift, exchange, transfer etc., till the competent Court decides the question of title of the parties concerned.

18 So far as the petition of Respondent Nos. 6/1 to 6/5 being Special Civil Application No. 17123 of 2007 is concerned, it raises various disputed questions of facts. This Court needs to direct those issues to be decided by the competent Civil Court, which the petitioners have

approached.

19 While parting, they are directed to implead the heirs and legal representatives of Vimlaben as party defendants. The respondents, independently, shall be at liberty to pursue their cause before the competent civil Court. Various issues, which they have raised in respect of the title of the land in question being the disputed questions of facts in the writ-petition, in the opinion of this Court, need not be gone into.

20 For the foregoing reasons, both the petitions stand disposed of accordingly.

(MS. SONIA GOKANI, J.)

AAKAR/SUDHIR