HIGH COURT OF GUJARAT (*D.B.*)

RAJKOT MUNICIPAL CORPORATION

Versus

LAVJIBHAI M PATEL THROUGH HIS P O A HOLDER RAJESH J DOSHI

Date of Decision: 06 April 2000

Citation: 2000 LawSuit(Guj) 250

Hon'ble Judges: D C Srivastava, H K Rathod

Eq. Citations: **2000 3 GLR 2293**

Case Type: First Appeal; First Appeal

Case No: 93 of 1997; 5036 of 1996

Subject: Property

Acts Referred:
Urban Land (Ceiling And Regulation) Act, 1976 Sec 34, Sec 10(3), Sec 33
Urban Land (Ceiling And Regulation) Repeal Act, 1999 Sec 4, Sec 3

Final Decision: Appeal dismissed

Advocates: A K Clerk, Harin P Raval, R C Jani, Harin P Raval

Cases Cited in (+): 5
Cases Referred in (+): 15

D. C. SRIVASTAVA, J.

[1] Rajkot Municipal Corporation-defendant No. 1 has filed this Appeal against the Judgment and Decree dated 14-10-1996 of 2nd Joint Civil Judge (S,D.), Rajkot.

[2] Brief facts giving rise to this Appeal are as under : Plaintiff-Lavjibhai Madanbhai Patel, respondent No. 2, filed Special Civil Suit No. 35 of 1992 in the Court below for declaration, permanent injunction and mandatory injunction against the defendants. He also claimed mesne profits and compensation from the defendants. The plaintiff claimed to be owner of the agricultural land of Survey No. 479 measuring 4 Acres - 7 Gunthas in Rajkot City, Race Course Road. It was acquired by the father of the plaintiff Madan Jaga and is in the ownership of the plaintiff and his father since more than 100 years. Madan Jaga obtained this land from erstwhile Ruler of Rajkot city through a

grant contained in Lekh No. 78 dated 16-4-1946. Entries were made in the Revenue Records as well as village Form Nos. VI, VII and VIII. After the death of Madan Jaga there was partition between the plaintiff and his brothers which was noted in village Form Nos. 6, 7, 7/12. Again partition took place amongst brothers of the present plaintiff and this land was received by the present plaintiff in partition. Entries in the revenue records were accordingly made vide Entry No. 3057 which was affirmed by the Deputy Collector. In this way the plaintiff claimed to be the owner of the land of Survey No. 479 area 4 Acres - 7 Gunthas, which approximately comes to 16900 sq.mtrs. It was alleged that the defendant No. 1 made fencing around the open land and had wrongfully sold 4355 sq.mtrs. from the remaining land to the defendant Nos. 3 & 4. This land measuring 4355 sq.mtrs. was alleged to have been encroached upon by the defendant No. 1 and it is shown in light blue colour in the map annexed with the plaint. This land, according to the plaintiff, is situate in Rajkot city. Upon enforcement of the Urban Land (Ceiling & Regulation) Act, 1976, the plaintiff filled in Form No. 1 under Sec. 6 of the U.L.C. Act before the Competent Authority wherein also plot No. 479 was shown to be belonging to the plaintiff. The Government has recently remanded the case in respect of that land so that the scheme under Section 21 of the Act can be applied for the said land. According to the plaintiff, Survey No. 478, area 1 Acre-9 Gunthas belongs to one Rameshchandra Jasani whereas Survey No. 479, area 4 Acres - 7 Gunthas belongs to the plaintiff and Survey No. 626 belongs to Rajkot Municipal Corporation having an area of 10998 sq.mtrs. According to the plaintiff the defendant No. 1 is entitled to hold, enjoy and manage Survey No. 626 only. The defendant No. 1 had sold to the defendant No. 3 the land admeasuring 7654.50 sq.mtrs. which is shown in black colour in the map annexed with the plaint. The defendant No. 4 also purchased land measuring 4925.84 sq. mtrs. from the defendant No. 1 which is shown by brown colour in the map annexed with the plaint. According to the plaintiff the defendant No. 1 is entitled to manage only 10998 sq. mtrs. of land whereas this defendant has used 15353.47 sq.mtrs. land. In this way, the defendant No. 1 uses 4355 sq. mtrs. more land than coming to its part. The plaintiff alleged that the defendant No. 1 had sold the land to the defendant No. 3 which inter alia includes 627 sq. mtrs. land belonging to the plaintiff shown with black cross lines between brown and red line in the map. It was also alleged that the defendant No. 1 made wire fencing in an unauthorised manner on the remaining land of Survey No. 479. It was further alleged that the defendant No. 3 started raising constructions on the land purchased from the defendant No. 1. Upon inquiry, the plaintiff found that by mistake the plaintiff's land of Survey No. 479 was also sold by the defendant No. 1 to the defendant No. 3. It was pleaded that the defendant No. 3 had no right to raise constructions over the land belonging to the plaintiff. Likewise the plaintiff alleged that the defendant No. 4 who is also purchaser from the defendant No. 1 intended to make constructions over the plaintiff's land. On 21-10-1991 the plaintiff came to know that

the defendant No. 1 erected fencing over his land. The plaintiff requested through letter to the defendant No. 1 to remove the fencing and cancel the Sale Deed of the portion of the land belonging to the plaintiff and sold to the defendant Nos. 3 & 4, but no reply was given. Reminders and personal representations were also made by the plaintiff to the defendant No. 1, but with no effect. Accordingly, the plaintiff prayed for injunction and asked for restoration of possession of his land and further prayed for cancellation of the Sale Deed in favour of defendant No. 3 & 4. Compensation was also claimed by the plaintiff from the Municipal Corporation-appellant.

[3] The suit was resisted by the appellant. No written statement was filed by the defendant Nos. 2 & 4. The defendant No. 5 was subsequently impleaded. The defendant No. 3 however filed written statement and contested the Suit.

[4] The defendant No. 1 pleaded in its written statement that the Suit is not maintainable and that it is further not maintainable for want of notice under Sec. 478 of the B.P.M.C. Act. It was also pleaded that the Suit is time-barred and the Suit filed by the Power of Attorney holder is not maintainable because the said Power of Attorney is not genuine. Title of the plaintiff in the disputed land was denied. It was pleaded that the wire fencing was raised over the land belonging to the appellant-defendant No. 1. It was alleged that the land of Survey No. 479 was declared as excess land by the Competent Authority under the U.L.C. Act. There were 88 huts on the land of Survey No. 479 and the occupants of the huts were in adverse possession of the land against the plaintiff since long. It was also pleaded that the appellant was entitled to get 20% of the surplus land declared excess by the Competent Authority under the U.L.C. Act. 88 hut-owners were removed by the defendant No. 1 and were allotted alternative site. It was also pleaded that 88 hut-owners became owners of the land by adverse possession against the plaintiff and the defendant No. 1 also became owner of the disputed land by adverse possession. According to the appellant, against the order of the Competent Authority declaring surplus land, appeal was preferred by the plaintiff before the Urban Land Ceiling Tribunal which was dismissed. Thereafter, Special Civil Application was preferred by the plaintiff against the order of the Tribunal which was also dismissed. Letters Patent Appeal was also filed by the plaintiff against the order in Special Civil Application which was subsequently unconditionally withdrawn. Thereafter, the plaintiff's son Vinod moved an application to the State Government under Section 34 of the U.L.C. Act for review of the decision of the Competent Authority. The Government, according to the appellant, wrongly reviewed the case and remanded the same to the Competent Authority. The order of the State Government is said to be without jurisdiction null and void. According to the defendant No. 1 land was sold to the defendant No. 3 after making due publication in newspaper, but no objection was raised by the plaintiff. It was also pleaded that the land sold to the defendant Nos. 3 &

4 is part of land of Survey No. 626. With these pleadings the appellant pleaded that the Suit be dismissed.

[5] The defendant No. 3 in its written statement took the plea that this defendant is bona fide purchaser of the land for value without notice of any defect in the title of the defendant No. 1 or dispute of title between the plaintiff and the defendant No. 1. Plea of multifariousness was also taken by this defendant so also the plea of under valuation. It was also pleaded that the Suit is bad for non-joinder of necessary parties and that it is also bad for want of service of statutory notice. It was also pleaded that the ownership and possession of the plaintiff over the land for Suit is disputed.

[6] On the application of the defendant No. 1, the State of Gujarat - defendant No. 5 was impleaded in the Suit. The State Government-defendant No. 5 took the plea that the suit is bad for want of notice under Sec. 80 of the Code of Civil Procedure. It was the stand of the State of Gujarat that the proceedings conducted by the State Government and the subordinate officers under the U.L.C. Act were in accordance with law and the orders passed by them are perfectly legal and within their jurisdiction. It was also pleaded that the plaintiff was allowed to prepare scheme under Sec. 21 of the U.L.C. Act for people belonging to the weaker section.

[7] The trial Court framed 19 issues arising out of the pleadings of the parties. The trial Court found that the plaintiff is the owner of Survey No. 479, area 4 Acres - 7 Gunthas and that the boundaries of Survey Nos. 478, 479 and 626 were duly established by the plaintiff and that its measurements were also established by the plaintiff. The trial Court further found that no portion of land of Survey No. 479 was sold by the defendant No. 1 to the defendant Nos. 2 and 4, but portion of land of Survey No. 479 was sold by the defendant No. 1 to the defendant No. 3 by mistake. Accordingly, compensation of Rs. 25,08,000/- was ordered to be paid by the appellant to the plaintiff-respondent No. 1. It also found that the defendant No. 1 had no right to make fencing over the land belonging to the plaintiff. It further found that the defendant No. 1 failed to prove that it has become owner of the land in Suit by adverse possession. The trial Court negatived the plea of the defendant No. 1 that the order of the Government regarding review of U.L.C, proceedings is void ab initio. It further found that the Suit was not bad for mis-joinder or non-joinder of parties nor it is bad for non-service of notice under Sec. 487 of the B.P.M.C. Act and that the Suit was maintainable. It was further held that the civil Court has jurisdiction to try such suit and the plaintiff was entitled to the reliefs sought. Plea of multifariousness of causes of action was also answered in negative. The trial Court found that the defendant No. 1 encroached upon the land belonging to the plaintiff. It further found that the plaintiff is the owner of Survey No. 479 and no land of this Survey number was declared as surplus. It further found that the order of the State Government granting review was

not null and void and that the Suit is not barred by any provision of the Transfer of Property Act. It further found that there is no effect of constructions raised by the defendant No. 3 over the plaintiffs land except that the plaintiff was entitled to receive compensation. In the last, it held that there is no effect of non-service of statutory notice on the defendant No. 3.

[8] Shri B. P. Tanna, learned Senior Advocate for the appellant, Shri K. C. Shah, learned A.G.P. for the respondent No. 5, Shri Harin P. Raval for respondent No. 1 and Shri Pranav G. Desai for the respondent No. 3 were heard at length and in detail and the records were examined. The respondent Nos. 2 & 4 did not appear.

[9] This First Appeal No. 93 of 1997 has been filed by the defendant No. 1-Rajkot Municipal Corporation whereas the First Appeal No. 1500 of 1997 was filed by State of Gujarat and the First Appeal No. 5036 of 1996 was filed by the defendant No. 3-respondent No. 3-Income-Tax Commissioner. The contentions raised by Shri K. C. Shah, learned A.G.P. and Shri P. G. Desai, learned Counsel for the respondent No. 3 will be separately considered in First Appeal No. 1500 of 1997 and First Appeal No. 5036 of 1996 respectively. In the present Appeal contentions raised by learned Senior Advocate Shri B. P. Tanna for the appellant and Shri H. P. Raval for the respondent No. 1 will be considered.

[10] Shri Tanna, learned Counsel for the appellant did not challenge the findings recorded by the trial Court on Issues Nos. 6, 7, 8, 9, 10, 13 & 17.

[11] It is pertinent to mention that no decree was passed by the trial Court against the State of Gujarat-defendant No. 5. Shri P. G. Desai for the defendant No. 3-respondent No. 3 challenged the findings recorded by the trial Court on Issues Nos. 4, 18 and 19.

[12] The first point for determination in this Appeal is whether the plaintiff is the owner of Survey No. 479, area 4 Acres - 7 Gunthas. In Paras : 1 & 2 of the plaint. The plaintiff's Power of Attorney holder has given history as to how the plaintiff became owner of Survey No. 479, area 4 Acres - 7 gunthas. The said Power of Attorney holder Shri S. B. Patel was examined in the Court below. He produced village Form Nos. 6, 7, 7/12 and 8/A in respect of Survey No. 479 where the name of the plaintiff is recorded vide Exh. 130, 131 and 132. Exh. 129 is the Lekh (deed) issued by the erstwhile ruler of Rajkot wherein the name of Madan Jaga ancestor of the plaintiff is mentioned. It is through this document that the plaintiff is tracing the ownership as well as possession. The name of Lavji Madan, father of the plaintiff was mutated in village form No. 6 as well as Form No. 7/12. From Form Nos. 7/12, 8/A and 8 it seems that the plaintiff was owner of Survey No. 479. It is not the case of the defendant No. 1 that the plaintiff is

not the owner of Survey No. 479. On the other hand, the contest is that the plaintiff is not the owner of the disputed land. It is not the case of the defendant No. 1 that the Municipal Corporation is the owner of Survey No. 479. The real dispute is as to whether the disputed land is portion of Survey No. 479 or not. For this in addition to the oral and documentary evidence filed by the plaintiff the documentary evidence of the defendant No. 1 also supports that the plaintiff is the owner of Survey No. 479. For this Exh. 221 report of the then Commissioner of Rajkot Municipal Corporation made in June 19, 1990, to the State Government can be referred. In Para 14 of this note, it was admitted by the Commissioner of Rajkot Municipal Corporation that the plaintiff is owner of Survey No. 479 area 4 Acres - 7 gunthas. Admission of responsible officer, namely, Commissioner of the Rajkot Municipal Corporation, defendant No. 3 is the best evidence in favour of the plaintiff and it could not be proved that this note of the Commissioner of Rajkot Municipal Corporation was prepared under some mistake nor it was explained in evidence that it was mistaken note which could be resiled. Thus, this letter of 19-6-1990 of the Commissioner of Rajkot Municipal Corporation supports the case of the plaintiff.

12A. When Urban Land Ceiling Act came into force the plaintiff filled in form No. 1 under Sec. 6 of the U.L.C. Act before the Competent Authority and he had shown this land to be in his ownership and possession though as karta of the joint Hindu family. The order of the competent Authority as well as of the appellate Authority also does not show that the Form No. 1, under Sec. 6, was filled wrongly by the plaintiff treating himself as the owner of this land. As against the order of declaration of surplus land by the Competent Authority, an Appeal was filed which was dismissed. Thus, the Competent Authority as well as the Appellate Authority under the U.L.C. Act treated the plaintiff as owner of plot No. 479. Even in review, the Government of Gujarat while setting aside the order of the appellate Authority remanded the matter to the Competent Authority and in that order Exh. 142 it was nowhere mentioned that the plaintiff is not the owner of the Survey No. 479. Thus, right from the beginning when the 'Lekh' was granted by the erstwhile ruler of Rajkot in favour of the plaintiffs ancestor till the latest entry in the revenue record the plaintiff was shown as owner of the disputed Survey No. 479, area 4 Acres-7 gunthas., Lekh from the erstwhile state of Rajkot was of the year 1946-47. Its genuineness could not be successfully challenged by the learned Counsel for the appellant. Therefore, through this Lekh Madan Jaga, father of the plaintiff, became owner of Survey No. 479, area 4 Acres 7 Gunthas. Exh. 129 was duly proved by P.W. 1 Savjibhai.

[13] Another evidence in favour of the plaintiff is the written statement of the State Government defendant No. 5 wherein it is admitted in para 4 that the land

admeasuring 4 Acres-7 Gunthas of Survey No. 479 is of the ownership of the plaintiff. It is further admitted in Para 7 of the written statement of the State Government that application under Sec. 21 of the U.L.C. Act was granted on 12-10-1991 by the Deputy Secretary, Revenue Department in favour of the plaintiff. Thus, the State Government also admitted in the written statement that Survey No. 479 area 4 Acres 7 Gunthas was owned by the plaintiff.

[14] From Exh. 181 and 182, Tippan of Survey Nos. 479 and 478 plaintiffs ownership in Survey No. 479 is prima facie established.

[15] So far as oral evidence is concerned Vallabhbhai Sidhpara, witness of defendant No. 1 admitted in Para 3 of his statement that the ownership of Survey No. 479 is of Lavji Mandan. In Exh. 232 which confidential note by Rajkot Municipal Corporation to the Additional Collector, U.L.C, dated 18-2-1992, it is admitted that Survey No. 479 was of the holder and of the ownership of Lavji Mandan.

[16] Thus, from the above evidence plaintiff succeeded in establishing his title of Survey No. 479, area 4 Acres - 7 Gunthas and none of the defendants could by any reliable evidence demolish the above evidence adduced by the plaintiff. The trial Court, was therefore, justified in holding that the plaintiff is the owner of Survey No. 479, area 4 Acres - 7 Gunthas.

[17] The next point for consideration is whether in spite of this finding recorded by the trial Court, the State Government-defendant No. 5 can be said to have become owner of this land in pursuance of the order passed by the Competent Authority and the Appellate Authority under the U.L.C. Act, 1976. If this point is answered in affirmative, then at present the plaintiff cannot be said to be the owner of the aforesaid Survey Number.

[18] It is clear from the evidence on record that on 15-9-1984 the Competent Authority under the U.L.C. Act declared 40,000 sq. mtrs. of surplus land from the holding of the respondent No. 1. The respondent No. 1 herein preferred Appeal under Sec. 33 of the U.L.C. Act against this order of the competent Authority, which was dismissed on 8-8-1988. The respondent No. 1, herein thereafter, preferred Special Civil Application No. 8674 of 1989 which was dismissed on 16-11-1990. Thereafter, Letters Patent Appeal No. 287 of 1990 was filed by the respondent No. 1 herein against the order of the learned single Judge in the aforesaid Special Civil Application, but it was withdrawn unconditionally on 17-9-1994. Vinod, son of the respondent No. 1 approached the State Government to take up the matter in revision under Section 34 of the U.L.C. Act on 29-8-1991. The Government exercised the powers under Section 34 of the U.L.C. Act and remanded the matter to the Competent Authority for fresh

disposal after affording an opportunity of hearing to Vinod. Thereafter, the Competent Authority under order dated 8-5-1992 passed consequential order in compliance of the order of the State Government in revision. Shri B. P. Tanna, learned Counsel for the appellant has urged that the order of the State Government under Sec. 34 is totally without jurisdiction and illegal for various reasons. Firstly, according to him, when the Letters Patent Appeal was withdrawn unconditionally by the father of Vinod, Vinod could not have reagitated the matter inasmuch as no Form under Sec. 6 of the U.L.C. Act was filed by him and his name was shown in the Form under Sec. 6 filed by his father as member of the joint Hindu Family and the father filled in the form as Karta of the joint family. Consequentally, son was bound by the declaration of surplus land by the Competent Authority which attained finality not only in Appeal, but also in Special Civil Application and Letters Patent Appeal filed before this Court. His further contention was that the State Government could not have re-written the Judgment of this Court in Special Civil Application passed by the learned single Judge, more particularly when the Letters Patent Appeal was withdrawn by the father of Vinod unconditionally. He also contended that the principle analogous to res judicata will apply even to these proceedings and after all some finality to the litigation has to be attached at some stage and not that in intervals one or other coparceners should be permitted to re-agitate the matter again and again. He further contended that since Vinod was claiming under the same title, namely, as coparcener and since Form under Sec. 6 was filed by his father as Karta of the family, declaration of surplus land by the Competent Authority, which was ultimately upheld, is binding upon Vinod also. The case of Bhagvandas T Tandel v. S. N. Sinha, 1996 (1) GLH 433 : 1996

(1) GLR 782 cited by Shri Tanna, to our mind, is distinguishable on facts. In this case, it was held that the doctrine of res judicata or constructive res judicata or principles anologus to them simpliciter cannot apply in case of order of withdrawal simpliciter. For applicability of principles under Sec. 11 of the Code of Civil Procedure or anologus principle the matter must have been heard and finally decided on merit. Since Letters Patent Appeal was not decided on merit, it cannot be said that withdrawal of Letters Patent Appeal amounts to constructive res judicata. Of course, the order of learned single Judge in Special Civil Application attained finality after withdrawal of Letters Patent Appeal. The case of Natvar Textile v. Union of India, reported in 1990 (1) GLR 338 is likewise distinguishable. All that is laid down is that principles anologus to Order : 23 Rule : 1 C.P.C. are applicable to proceedings under Arts. 226/227 of the Constitution of India. It was held that it is true that there would be no bar of res judicata, but on the ground of public policy the second petition on the same cause of action cannot be permitted to be filed. In the case before us there was no attempt to file second Letters Patent Appeal after withdrawing the first Letters Patent Appeal unconditionally, hence the

view taken in this case cannot be applied to the facts of the case before us. The same was the view taken by the Apex Court in Sarbhuja Transport Service v. S.T.A. Tribunal, Gwalior, reported in AIR 1987 SC 88 wherein it was laid down that withdrawal of petition under Art. 226 of the Constitution of India without permission to institute fresh petition in respect of the same cause of action bars subsequent petition. In the case before us no fresh Letters Patent Appeal was filed after withdrawal of the earlier Appeal.

[19] Shri Raval contended that Vinod, son of the respondent No. 1 was coparcener in the Joint Hindu Family, still he was entitled to receive notice from the Competent Authority and since no notice was issued to him by the Competent Authority he could have approached the State Government to take action under Sec. 34 of the U.L.C. Act. Two cases were cited by him in support of his contention. The case of R. I. Sorathia v. U.L.C. Tribunal, 1996 (2) GLH 432 : 1997 (1) GLR 439 relied upon by Shri Raval is apparently distinguishable on facts. Here it was a case of ancestral land where the original holder died before the U.L.C. Act came into force leaving behind his widow, four sons and a daughter. All the heirs were members of HUF. Widow and four sons filled Form No. 1 under Sec. 6 and the Competent Authority declared excess vacant land. Daughters did not file Form No. 1 nor her share was disclosed in the form filed by her brother and mother. No notice under Rule 5 was issued to her by the Competent Authority nor her case was considered by the Competent Authority. The U.L.C. Tribunal confirmed the order. It was held that the claim of the daughter who is otherwise entitled to share in the ancestral property under the Hindu Succession Act could not be refused without issuing notice under Rule 5 and affording an opportunity of being heard. The claimant as such cannot be divested of her right under the Act. The facts before us are however different. Here the original holder of the land was alive and the Form No. 1 under Sec. 6 was filled in by him showing all the members of the HUF. Consequently, notice to the Karta was sufficient notice to all the coparceners and no separate notice was required to be issued to Vinod, son of the original holder.

The case of Babuben Haribhai v. Competent Authority, reported in 1995 (2) GCD 239 (Guj.) is likewise distinguishable on facts. Here the claimant did not file Form No. 1 under Sec. 6 within the prescribed period under the Rules framed under the U.L.C. Act. She was basing her claim on the rights under the Hindu Succession Act and it was her case that she came to know about the U.L.C, proceeding only in the year 1986 and no notice under Rule 5 was served upon her. The case was remanded on the ground that keeping in view the hardship caused to the petitioner and also the fact that no notice under Rule 5, was issued to the petitioner by the Competent Authority. In the case before us, it cannot be said that Vinod, son of the plaintiff-respondent No. 1, had no knowledge of U.L.C, proceedings. The said

proceedings continued before the Competent Authority, Tribunal, the State Government as well as the High Court. There is no allegation that the father of Vinod was hostile to his interest. As such this case also does not help Shri Raval.

[20] It was next contended that after dismissal of Appeal by the Tribunal under Sec. 33 of the U.L.C. Act the State Government could not have exercised revisional powers under Sec. 34. Reliance was placed upon the case of Jagdishbhai M. Patel v. State, reported in 1996 (2) GLR 499. Learned single Judge of this Court in this case has held that revisional powers cannot be resorted to by the State Government in case where the order of the Competent Authority was questioned before the appellate Authority under Sec. 33 of the Act and the Appeal was dismissed. The order of the Competent Authority would merge with the order of the appellate Authority and as such revision under Sec. 34 will not be maintainable if the same order was questioned and decided in an Appeal.

In Nagindas v. Competent Authority, reported in AIR 1988 (Guj.) 162 : 1988 (1) GLR 588, this question was not considered that the revision could not be entertained under Sec. 34 where the Appeal was decided under Sec. 33. On the other hand in this case the point laid down was that the powers of the appellate Authority under Sec. 33 are almost equal to the powers of the State Government under Sec. 34 and this is with a view to exercise check on the powers of the Competent Authority.

[21] Another contention has been that the revisional power of the State Government could be exercised within reasonable time and not after inordinate delay. According to Shri Tanna the order of the Competent Authority was passed on 15-9-1984 whereas the Appeal was decided on 8-8-1988 and the order of the State Government was passed on 28-8-1991. It was argued that thus the revisional jurisdiction was exercised by the State Government after about three years of the order of the appellate Authority and seven years after the order of the Competent Authority and such exercise of powers by the Government was bad in the eyes of law. The case of M/s. M. Ravji v. State of Gujarat, reported in 1993 (2) GLH 57 was referred so also the case of State of Gujarat v. Patel Raghav Natha, reported in AIR 1969 SC 1297 : 1969 GLR 992 (SC). It was also contended that no reason was given by the State Government why delayed action was taken in exercising the revisional power by the State Government and that serious prejudice was caused on account of belated exercise of powers under Sec. 34. Reliance was placed on the case of Mansukhlal Gordhandas v. State of Gujarat, reported in 1995 (1) GLH 264.

[22] Shri Raval on the other hand contended that where no period of limitation was prescribed under the Tenancy and Land Laws of Orissa for filing revision, the revisional

power must be exercised within a reasonable time, but in State of Orissa v. Vrundavan Sharma, reported in 1995 Suppl. (3) SCC 249, according to him, the delay of about 27 years was condoned by the Apex Court and quashing of the order by Board of Revenue was held justified by the Apex Court.

[23] On the above submissions, it was further contended that the order of the State Government under Sec. 34 of the Act is void order. Consequentally, the plea of nullity can be set up at any stage and even in collateral proceedings. Reliance was placed upon the case of Charity Commissioner v. State of Bombay, 1993 (1) GLH 94. It was held in this case that finding which is nullity can be set up in collateral proceedings even though it is not challenged earlier.

[24] As against this, on behalf of the respondent No. 1 reliance was placed upon the case of Bai Dhani v. State of Gujarat, 1996 (3) GCD 15 (Guj.) wherein it was held by learned single Judge that exercise of revisional power by the State Government under Sec. 34 of the U.L.C. Act is justified even though the Appeal under Sec. 33 of the Act was filed and decided. It was further held that Appeal filed by the third party cannot be considered as impediment in the exercise of powers of revision by the State Government.

[25] It was also urged by Shri Tanna that under Sec. 21 of the U.L.C. Act sanction was granted by the State Government to the respondent No. 1 for framing scheme as to how the vacant land is to be treated not as excess in certain cases where the land holder intends to construct dwelling units for weaker sections of the society.

[26] We have given our thoughful consideration to the above submissions of Shri Tanna. In our view, detailed discussion is not required on the above points raised by Shri Tanna in view of the Repeal of the Urban Land Ceiling Act through the Repeal Act of 1999. Whether the order of the State Government under Sec. 34 of the U.L.C. Act is valid or void and nullity makes no difference for the obvious reason that the provisions of Section 3 of the Repeal Act are applicable to the facts of the case before us. It is evident from the record that so far possession of the excess land has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or the Competent Authority. If the Competent Authority has not taken possession of the excess land nor the State Government or any person duly authorised by the State Government has taken possession of the excess land as provided in Secs. 10(3) and 10(6) of the Act, the notional vesting of the vacant land in the State Government will not render the State Government to be owner of excess vacant land.

[27] Section 3(1) of the Repeal Act provides that the repeal of the principal act shall not affect vesting of any vacant land under sub-sec. 3 of Section 10 possession of

which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or the Competent Authority.

[28] It therefore, follows from this provision that if excess land has been declared by the Competent Authority which has been confirmed in Appeal, but possession of vacant land was not taken over by the State Government or any person duly authorised by the State Government in this behalf, then under the aforesaid provision the State Government cannot be treated as owner of the excess land. It is only where the possession is taken over by the State Government under Sec. 10(3) of the Act that the provisions of the Repeal Act shall not affect the right and title of the State Government.

[29] It would be convenient to refer to Sec. 4 of the Repeal Act also. If the State Government has remanded the matter to the Competent Authority, then all proceedings relating to any order made or purported to be made under the Principal Act pending immediately before the commencement of this Act before or any Court, Tribunal or other Authority shall abate. Even the writ petitions pending on the day of enforcement of Repeal Act will also abate has laid down in Maganbhai M. Patel v. Competent Authority, 1999 (2) GLH 350 : 1999 (3) GLR 2105.

[30] For the reasons stated above since the possession of vacant land was not taken over by the State Government under Sec. 10(3) of the Act and since it is also established that the plaintiff continues to remain in possession of Survey No. 479, area 4 Acres - 7 Gunthas, the ownership of the plaintiff cannot be disturbed and the State Government, defendant No. 5 cannot be held to be the owner of the land in dispute.

[31] The appellant-Municipal Corporation by no stretch of imagination can be considered to be the owner of Survey No. 479, area 4 Acres - 7 Gunthas. At no point of time, the appellant claimed to be the owner of this Survey Number. On the other hand the Appellant is claiming title over Survey No. 626. Consequently, the Municipal Corporation appellant cannot be said to be the owner of Survey No. 479 belonging to the plaintiff.

[32] The appellant, however, claimed that under resolution of the Government the appellant is entitled to hold and manage 25% or 30% of excess vacant land. Since we have held above that the State Government has not become owner of any portion of Survey No. 479 it cannot be said that the Municipal Corporation-appellant is entitled under any resolution of the State Government to hold and manage 25% or 30 % of the surplus land. The resolution pointed out by Shri Tanna is all together ineffective.

[33] After hearing the arguments of the two sides, it seems that the real dispute raised by the appellant is regarding location of the disputed land. The appellant felt that it was part of Survey No. 626 and under this mistaken belief portion of the

plaintiff's land was sold to the respondent No. 3. The controversy about location of the disputed land has been resolved by the trial Court on the basis of oral and documentary evidence and also on the basis of report and map prepared by the Commissioner. Shri Tanna raised objection that the report of the Commissioner appointed by the Court with consent of the parties is unreliable inasmuch as measurements were done by the Commissioner in the absence of any representative of the appellant. According to him, it was ex parte report hence it cannot be relied upon. We, however, feel that no such objections were filed in the trial Court that the report of the Commissioner was liable to be set aside being ex parte. As such at this stage in this Appeal the challenge to the map and the report of the Commissioner cannot be sustained.

[34] It cannot be said that the Commissioner was inexperienced. The Court Commissioner was appointed by this Court with the consent of the parties. He was none else than Shri Patel, Deputy Town Planner of tlhe Town Planning and Valuation Department. He prepared map and report on the basis of old tippans and measurement sheet of Survey No. 626. The measurement was carried out by adopting plain table system. This system is more accurate for the purpose of the measurement of the kind of suit land. The Chief Town Planner of Gujarat State was examined and it cannot be said that inexperienced officer of the State carried out measurement. Consequently, from the map and report of the Court Commissioner, the controversy regarding location of the disputed land stands resolved and it was correctly found by the trial Court that the disputed land is part of Survey No. 479. We do not find any force in the contention of the learned Counsel for the appellant that the Court Commissioner was in hot hurry and he conducted measurements behind the back of the defendant No. 1. Information was given by the Commissioner to the defendant No. 1, namely, the appellant before us and if despite this information nobody appeared on behalf of the appellant, the report of the Court Commissioner cannot be said to be unreliable or illegal.

[35] From the report of the Court Commissioner and other evidence the trial Court rightly concluded that the boundries of Survey Nos. 626 and 479 as well as 478 were clearly demarcated and from the report of the Court Commissioner it was also rightly concluded that the disputed land sold to the defendant-respondent No. 3 belonged to the plaintiff and not to the appellant. Oral evidence was also to the same effect. It seems from the evidence on record that under bona fide mistake the defendant No. 1 sold the disputed land to the defendant No. 3 believing that it formed part of Survey No. 626.

[36] Shri Tanna contended that advertisement for auction of the disputed land was given in newspaper Exh. 230, but the plaintiff did not file any objection. However,

advertisement in the newspaper and failure of the plaintiff to file objections cannot operate as estoppel against the plaintiff. It is admitted case of both the parties, namely, the plaintiff and the defendant No. 1 that they were proceeding under the mistake that the disputed land belonged to the defendant No. 1. If the disputed land did not form part of Survey No. 626, it could not be owned by the appellant. The appellant has never contended that plot No. 479 was under its management, supervision and control.

[37] Thus, in the first instance the appellant could not establish by any oral and documentary evidence that Survey No. 479 belonged to it or was under its management. It also could not be established that Survey No. 479 belonged to the State of Gujarat. Thus, the title of the State of Gujarat, defendant No. 5 as well as the title of the defendant No. 1-appellant could not be established.

[38] The next contention of Shri Tanna had been that through adverse possession the plaintiff has lost right, title and interest over the land in suit and that the defendant No. 1-appellant became owner by adverse possession. The law of adverse possession is quite settled. Person claiming adverse possession is required to prove that he was in possession adverse and hostile to the title of the real owner for a continuous period of 12 years or more. The possession should be of the person claiming adverse possession and not of trespassers or a strangers. From the written statement of the appellant it appears in the first instance that adverse possession of 88 hutment dwellers who encroached upon the land of the Municipal Corporation-appellant was alleged against the plaintiff-respondent No. 1. Those hutment dwellers have been removed and according to the appellant they have been allotted alternative site. Shri Raval however contended that all the 88 hutments were not over Survey No. 479. On the other hand according to him only 3-1/2 hutments were existing over Survey No. 479. Consequently, according to him it is incorrect to say that all the hutment dwellers acquired title by adverse possession. It may be mentioned at this stage that those hutments dwellers did not apply for impleadment in the Suit and they did not claim title over the land in dispute or over the land of Survey No. 626 by adverse possession. As such the Suit of the plaintiff cannot be dismissed on the ground that some unauthorised persons occupied portion of the disputed land and raised 3-1/2 unauthorised hutments. The so-called encroachment and possession of the hutment dwellers over a portion of the land could not ennure to the benefit of the appellant. The appellant was not in actual possession of the land in dispute for a period of 12 years or more. As such the Municipal Corporation appellant cannot claim title by adverse possession over the plaintiffs land.

[39] There may be two kinds of cases where a plaintiff can claim title. One is where the title is claimed under Title Deed. In that case, the plaintiff is not required to

establish that he remained in continuous possession for a period of 12 years. On the other hand, in the second category of cases where the plaintiff alleges title on the ground of long and continuous possession exceeding 12 years that he is required to establish such long and continuous possession for a period exceeding 12 years to perfect his title by possession. Continuous possession exceeding 12 years is not required to be established where the claim of the plaintiff is based on title. The Apex Court recently in the case of Indira v. Am Mugan, AIR 1999 SC 1549 considered the scope of old Art. 142 and new Art. 65 of the Limitation Act and observed that it is obvious that when the Suit is based on title for possession once the title is established on the basis of relevant documents and other evidence unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited. This observation of the Apex Court applies with full force to the facts of the case before us.

[40] In Gurvinder Singh v. Lal Singh, reported in AIR 1965 SC 1553 the Apex Court has held that burden is on the defendant to establish that he was in adverse possession for 12 years before the date of the suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims, but not adverse possession of independent trespassers. This observation of the Apex Court compels us to repel the contention of Shri Tanna. The appellant did not claim that the hutment dwellers were persons through whom the appellant was claiming adverse possession. On the other hand, even according to the appellant the hutment dwellers were trespassers who made encroachment upon the land under the management and control of the appellant. Consequently, the alleged possession of the hutment dwellers trespassers cannot be considered to be adverse possession of the appellant as against the plaintiff. Thus, even on the basis of adverse possession the appellant cannot be said to have become owner of the disputed land nor the State Government can be said to have become owner of the disputed land by adverse possession.

[41] We do not find any merit in the contention of Shri Raval that even though the order of the State Government is alleged to be void and illegal, it cannot be ignored unless it was set aside by a Competent Court in competent proceedings. Since that order was challenged in the Suit out of which the present Appeal arose the appellant was not obliged to file separate suit. Void and null orders can be ignored at any stage even though not questioned and set aside earlier.

[42] We, however, find force in the contention of Shri Raval that since no application under Sec. 23 of the U.L.C. Act has been moved and no allotment has been made the State Government cannot claim title by vesting under the U.L.C. Act. He was justified in contending that since the proceedings under the U.L.C. Act did not reach upto the

stage provided under Sec. 10 of the Act notional vesting could not have conferred title in favour of the State Government.

[43] We do not find force in the plea that the Suit is bad for want of notice under the B.P.M.C. Act. The reason is that the Suit was not under the B.P.M.C. Act nor any action was taken under this Act. On the other hand, action was taken under the U.L.C. Act hence no notice under the B.P.M.C. Act was required to be served by the plaintiff.

[44] We also do not find merit in the contention and plea of the State Government that the Suit is bad for want of notice under Sec. 80 C.P.C. Since the State Government defendant No. 5 was impleaded during the pendency of the suit on the objection of the appellant-defendant No. 1 the plaintiff was not obliged to serve notice under Sec. 80 C.P.C. during the pendency of the Suit. Moreover, since no relief was sought by the plaintiff against the defendant No. 5 no notice under Sec. 80 C.P.C, was required to be served on the State Government.

[45] It was not a case of summary relief of recovery of possession hence provisions of Sec. 6 of the Specific Relief Act are not attracted and since the plaintiff sought possession of the disputed land from the defendant Nos. 1 & 3 on the basis of title Regular Civil Suit was the only course open to the plaintiff for redressal of his grievance.

[46] The last contention of Shri Tanna has been that the compensation was awarded by the Court below at an exorbitant rate of Rs. 4000/- per sq. mtr. He urged that in the year 1986 the lands in the vicinity were sold at the rate of Rs. 2000/- per sq. mtr. hence award of compensation at the rate of Rs. 4000/- per sq. mtr. is unjustified. The trial Court has however given cogent reasons for awarding compensation at the rate of Rs. 4000/- per sq. mtrs. It was argued in the trial Court on behalf of the plaintiff that he must be awarded compensation at the rate of the market value and the market value of the land was more than Rs. 8000/- per sq. mtr. The trial Court rightly found that the claim of compensation at this rate was exaggerated. The reasonable amount of compensation, according to the trial Court, was Rs. 4000/- per sq. mtr. which the defendant No. 1 is bound to pay to the plaintiff. The reasons for coming to this figure have been given by the trial Court in its judgment. The trial Court has relied upon Exh. 221 which is report of June, 1990 made by the then Commissioner of the appellant to the Secretary of the State Government. In Para 7 of this report he mentioned that the market value of the land around the disputed land can fetch between Rs. 4000/- to Rs. 4200/- per sq. mtrs. Not only this admission regarding market value of the land in June 1990 there was also a written offer made by the Bank of India to the defendant No. 1 to purchase the land at the rate of Rs. 4000/- per sq. mtr. This offer was from the Bank of India regarding this very land. As such in the first place there was

admission of the Commissioner of the Rajkot Municipal Corporation that the market value of the land could be between Rs. 4000/- to Rs. 4200/- per sq. mtr. in June, 1990. Subsequently, there was offer by the Bank of India topurchase this land at the rate of Rs. 4000/- per sq. mtr. There was thus sufficient material before the trial Court at the time of delivering the judgment on 14-10-1996 that the land could fetch market value at the rate of Rs. 4000/- per sq. mtr. If this amount could be reasonable market value of the land in June, 1990 judicial notice can be taken that during a period of six years the prices of land must have increased. The trial Court ignored the increase of price of land during the interval of six years and based its judgment on the market value as admitted by the Commissioner of defendant No. 1 at Rs. 4000/- in June, 1990. Thus, the compensation awarded by the trial Court cannot be said to be excessive and exorbitant.

[47] To sum up, therefore, it can be said that the plaintiff succeeded in establishing that he is owner of Survey No. 479, area 4 Acres - 7 Gunthas. He further succeeded in establishing that neither the State Government nor the Rajkot Municipal Corporation is owner of this land. The plaintiff also succeeded in establishing that the Appellant made encroachment over portion of Survey No. 479 by raising wire fencing. He further succeeded in establishing that a portion of his land was sold by the defendant No. 1 to defendant No. 3. Of course the sale was conducted under mistake of boundary. As such the trial Court was justified in refusing to pass order for demolition of multistoreyed building constructed by the Income-tax Department represented by the respondent No. 3. The plaintiff has further succeeded in establishing that he was entitled to receive compensation for unauthorised sale of his land. On these established facts the trial Court was justified in granting decree in favour of the plaintiff, against the defendant Nos. 1 & 3. The trial Court was further justified in dismissing the Suit against the defendant Nos. 2 and 4 because it was established that no portion of land belonging to the plaintiff was sold to these defendants. The trial Court was further justified in dismissing the Suit against the defendant No. 5. The decree passed by the trial Court, therefore, requires no interference. In our opinion, the Appeal is without merit and is bound to fail.

[48] The Appeal is hereby dismissed with no order as to costs.

FURTHER ORDER :

At this stage Shri B. P. Tanna, learned Counsel for the appellant requests for eight weeks time to approach the Apex Court. We, however, find that no stay order was passed in this Appeal at any stage. However, on 23-6-1998 learned Counsel Shri H. P. Raval for the respondent No. 1 made a statement before this Court that the respondent No. 1 shall not execute the Decree challenged in all the Appeals till the

disposal of the Appeal. Shri Raval now agrees that this statement may be continued for a period of two months from today to enable the appellant to approach the Apex Court for appropriate relief and the words "till the disposal of the Appeal" made in his statement under order dated 23-6-1998 be read as for a period of two months from today.

Appeal dismissed.