HIGH COURT OF GUJARAT

SAHAKAR CO-OP HOU SOC LTD

Versus

AMRAVAN CO-OP HOU SOC LTD AND ORS

Date of Decision: 12 August 2013

Citation: 2013 LawSuit(Guj) 1182

Hon'ble Judges: G R Udhwani

Case Type: Special Civil Application; Civil Application

Case No: 16685, 16686 of 2011; 5298, 5300 of 2013

Subject: Civil, Constitution

Acts Referred:
Constitution Of India Art 227, Art 226
Code Of Civil Procedure, 1908 Or 39R 4, Sec 10, Or 7R 11(a), Sec 11, Or 7R 11
Gujarat Town Planning And Urban Development Act, 1976 Sec 70(1), Sec 70, Sec 68, Sec 71, Sec 65(3), Sec 65

Final Decision: Application disposed

Advocates: Mihir Thakore, Mini M Nair, R J Rawal Assoc, R C Jani, Shivya A Desai, Trusha K Patel

Cases Referred in (+): 20

G. R. Udhwani, J.

[1] Both these petitions are filed by Sahakar Co-operative Housing Society Ltd.

[2] In Special Civil Application No.16685 of 2011, the petitioner seeks to call in question order dated 28.03.2011 below Exh:261 in Regular Civil Suit No.543 of 1994 with a further prayer to allow application Exh:261 by vacating the order of status-quo granted below Exh:5. Said application Exh:261 was preferred under Order 39 Rule 4 of the Code of Civil Procedure, 1908 (C.P.C. for short).

[3] In Special Civil Application No.16686 of 2011, the petitioner seeks to challenge the order dated 28.03.2011 below Exh:254 in Regular Civil Suit No.543 of 1994 which was preferred for rejection of the plaint under Order 7 Rule 11 of C.P.C.

[4] Short facts relevant for the purpose of these petitions are as under:

4.1 Regular Civil Suit No.543 of 1994 came to be filed by respondent No.1 and others in the Court of learned Civil Judge (Senior Division), Ahmedabad (Rural) against Ahmedabad Urban Development Authority (AUDA for short) respondent No.2 herein for an injunction against the operation and implementation of notice dated 16.07.1994 issued by respondent No.2 as also against obstruction, demolition and protection of possession, etc. A decree to set aside notice above-referred was also sought. The prayer was in relation to Land Survey No.72-1-A paiki of Vejalpur, Taluka and District Ahmedabad.

4.2 Prior to that, before sanction of the preliminary scheme, the petitioner filed Civil Suit No.557 of 1987 in the same Court objecting to the construction by respondent No.2 herein as also for a direction against defendant No.2 therein for removal of the construction on the suit land with a further prayer to restore the position of the suit land ante declaration of the T.P. Scheme. It is the case of the petitioner that despite the suit, construction was continued by respondent No.1.

4.3 On 10.01.1994, Preliminary Scheme No.3 of Vejalpur (for short T.P. Scheme), which included the disputed land, was sanctioned by the State Government under the Gujarat Town Planning and Urban Development Act, 1976 (the Act for short). Subsequent thereto, respondent No.1 instituted Regular Civil Suit No.543 of 1994 with the above prayers. On 25.03.1994, an application for injunction also came to be filed praying for the relief similar to one mentioned in plaint Paragraph-18(A). AUDA opposed the prayer by filing a reply produced at Annexure: C to the petition.

4.4 The petitioner-society was allotted Final Plot Nos.112, 113 and 114 in lieu of Survey No.72/1 being Original Plot No.106 in the T.P. Scheme. It is the case of the petitioner that lands were redistributed as detailed in Annexures: I and J to the petition.

4.5 On 24.04.1995 and 31.07.1995 respectively, the petitioner instituted Special Civil Application Nos.3321 of 1995 and 7288 of 1995 inter-alia praying for a writ for removal of construction from Final Plot No.113 of T.P. Scheme No.3 as also for vacant and peaceful possession of the part of land bearing the said Final Plot as also removal of construction made in Final Plot No.116 within the margins whereon no construction was permissible.

4.6 In the meanwhile i.e. by order dated 12.03.2004 at Annexure:D, the learned Civil Judge disposed of application Exh:5 in Regular Civil Suit No.543 of 1994 directing the defendants therein to maintain status-quo in relation to the suit land. The petitioner pleads ignorance of the said order as it was not a party to the suit.

4.7 Both Special Civil Application Nos.3321 of 1995 and 7288 of 1995 were dismissed by separate judgments dated 07.05.2009 at Annexures:K and L, against which two Letters Patent Appeals being Nos.1789 of 2009 and 2169 of 2009 respectively came to be instituted which were disposed of by allowing the petitioner to make a representation to AUDA as also expecting AUDA to take all steps to implement the scheme in its true spirit, subject to the judicial pronouncement either interim or final. As a consequence of the orders in Letters Patent Appeals aforesaid, AUDA preferred application Exh:254 for rejection of the plaint under Order 7 Rule 11 as also Exh:261 under Order 39 Rule 4 for vacation of interim relief. Copies of the said applications are placed at Annexures: N and O to the petition. The rejection of the plaint was sought on the ground of T.P. Scheme having become part of the Act under Section 65(3) of the Act.

4.8 It is the case of the petitioner that though not a party to the above suit, it was adversely affected by non-vacation of the interim relief aforesaid. Similarly, the impugned order below Exh:254 not rejecting the plaint has aggrieved the petitioner.

[5] Learned counsel for respondent No.1 raised preliminary objection against maintainability of Special Civil Application No.16685 of 2011 on the ground of alternative remedy under Order 43 Rule 1(X) against impugned order below Exh:261. Insofar as Special Civil Application No.16686 of 2011 is concerned, the preliminary objection is to an effect that Revision Application under Section 115 of C.P.C. is maintainable against the impugned order below Exh:254 passed under Order 7 Rule 11 of C.P.C. The submission is that if the impugned order is set aside and the relief as prayed for is granted, the suit will be disposed of as required under proviso to Section 115 of C.P.C. and thus, in view of availability of the alternative remedies, it is urged that the petitions should not be entertained. In support of the above contentions, learned counsel has relied upon following authorities:

Punjab National Bank Vs. O.C. Krishnan and others, 2001 AIR(SC) 3208 ;

Pandurang V. Kulkarni and another Vs. Life Insurance Corporation, 2001 2 GLR 1310;

Sheela Devi Vs. Jaspal Singh, 1999 1 SCC 209;

Vallubhai Kukabhai Boliya Vs. State of Gujarat and others, 2005 2 GLR 1225;

Bank of Rajasthan Vs. Karan Fibres and Fabrics Ltd. and others, 2003 2 GLH 294;

[6] As against that, Mr.Mihir Thakore, learned Senior Advocate with Ms.Mini M. Nair, learned counsel for the petitioner fairly conceded that remedies as pointed out by learned counsel for respondent No.1 were available. He, however, urged that the constitutional remedy is not barred, but Courts have deemed it fit to impose restriction on their powers in view of alternative remedy. Learned Senior Advocate would submit that in suitable cases, the High Court would exercise constitutional powers particularly when it is brought to its notice the fact that the Trial Court has not acted within its limits and that continued litigation against the person would cause irreparable and irretrievable injury. Learned Senior Advocate would also submit that though the petitioner was not a party in the civil suit, it was adversely affected by impugned orders, and therefore, these writ petitions would be maintainable at the instance of the petitioner. Learned counsel would point out that T.P. Scheme has been sanctioned and all legal proceedings except civil suit in question have ended; the scheme is final, under which, in exchange of Survey No.72/3 - Original Plot No.108, respondent No.1 was alloted Final Plot No.116 and that respondent No.1 was informed that it had no right over Original Plot No.108. Similarly, the petitioner was allotted Final Plot Nos.112, 113 and 114 plus part of Survey No.72/3. A grievance was made that in compliance with T.P. Scheme, the petitioner had handed over lands in their possession but has not received the plots allotted to it despite the scheme having become part of the Act. It was submitted that no civil suit would lie once the scheme becomes part of the Act inasmuch as the grievance, if any, can be redressed only by way of variation of the scheme under Sections 70 and 71 of the Act.

[7] Learned Senior Advocate would also submit that the agitation and reagitation of the same issue over and over again in Civil Suits and Special Civil Applications as also in the representation made to the State Government by respondent No.1 has deprived the petitioner the fruits from the sanctioned T.P. Scheme, though it has already contributed its land under it. Such litigation is endless abuse of process of the Court and if not arrested by this Court under constitutional powers on the ground of alternative remedy, the petitioner will continue to suffer irreparable injury and hardship. Learned counsel would, therefore, urge this Court to exercise its jurisdiction under the constitutional powers.

[8] Referring to the case of respondent No.1, learned counsel would submit that on 20.09.1967, N.A. Permission was granted to it. Respondent No.1-society was registered on 05.10.1967, development permission was granted to it in the year 1970, loan was obtained in the year 1970 and AUDA came into existence in the year 1976 and the illegal construction was made by respondent No.1 after draft scheme proposing the land in question to the petitioner. It was argued that despite injunction in Civil Suit No.557 of 1987 instituted by the petitioner and despite injunction therein prohibiting

the construction, respondent No.1 continued with the construction. Therefore, according to the learned Senior Advocate, entertaining the grievance of respondent No.1 that their rights are prejudiced, would be giving a premium to the wrongdoer.

[9] Learned counsel would also submit that apart from initiation of contempt proceedings against respondent No.1, it was unsuccessful more than once in its challenge to the T.P. Scheme before the High Court in Special Civil Application Nos.5708 of 1991 and 1332 of 1994. In the first mentioned petition, respondent No.1 was allowed to make representation for variation of the scheme, wherein also it failed as the representation was rejected. In the later petition, it failed in its challenge to T.P. Scheme. The learned Senior Advocate also invited the attention of this Court to Regular Civil Suit No.543 of 1994 instituted by respondent No.4 particularly prayer made, wherein a relief against the demolition and the obstruction in respondent No.1 enjoyment of the properties etc. was sought and that in view of rejection of the two petitions filed by respondent No.1 as also orders passed in the group of Letters Patent Appeal No.1789 of 2009 and allied matters which were preferred by the petitioner, AUDA was under an obligation to implement the scheme. Learned Counsel also invited the attention of this Court to the observations made by the Trial Court in Regular Civil Suit No.543 of 1994 below Exh:261 in relation to the orders passed by this Court and submitted that the Trial Court misconstrued it and failed to appreciate the directions of this Court.

[10] Learned Senior Advocate while relying upon Kashiben and another Vs. State of Gujarat and another, 1990 AIR(Guj) 24 would submit that the T.P. Scheme has become part of the Act and can be challenged only on jurisdictional error and in the present case, such error being absent, the plaint merited rejection under Order 7 Rule 11 and/or interim injunction deserved to be vacated. While relying upon N. Nanalal Kiklawala and another Vs. State of Gujarat and others, 2005 12 SCC 649, learned counsel would submit that even if the T.P. Scheme is under-challenge, until it is set aside, the consequences which statutorily flow in terms of Section 65 have to be given effect.

[11] While relying upon Maharaj Shri Manvendrasinhji Ranjitsinhji Jadeja Vs. Rajmata Vijaykunverba wd/. Late Maharaja Mahendrasinhji, 1998 2 GLH 823, learned counsel would submit that the Courts under Order 7 Rule 11(a) of C.P.C. were not precluded from applying statutory provisions or case-law to the averments made in the plaint and averments made contrary to law cannot be considered as disclosing cause of action and that the power under Order 7 was exercisable at any stage even after framing of issues. In his submission, since the scheme was part of the Act and can only be varied under Sections 70 and 71 and in absence of any jurisdictional error, the plaint did not disclose the cause of action and therefore, merited rejection.

[12] It is lastly contended by the learned counsel that the direction issued by this Court in the above said group of Letters Patent Appeals to AUDA to implement the scheme was a change of circumstances within the meaning of Order 39 Rule 4 of C.P.C. and the learned Trial Judge failed to appreciate it and has committed a serious error.

[13] As against that, learned counsel for respondent No.1 invited the attention of this Court to the pleadings in the plaint of Regular Civil Suit No.543 of 1994 and would contend that the averments regarding malafide and connivance have been made and it is the Trial Court only who can adjudicate upon the case pleaded by respondent No.1 in the plaint.

[14] It was also contended that as many as 18 suits were instituted by members of the petitioner-society which ultimately came to be withdrawn and therefore, rights if any accrued in favour of the petitioner stood waived.

[15] It was next contended that Special Civil Application No.3321 of 1994 instituted by the petitioner-society for removal of construction made by respondent No.1-society on disputed plot was dismissed, and therefore also, the petitioner has no case.

[16] It was also contended that Special Civil Application No.1332 of 1994 came to be rejected only on the ground that the suit with similar relief was pending and therefore, the present suit in the Trial Court was maintainable.

[17] It was also contended that in the impugned orders, the learned Trial Judge has rightly observed that in absence of challenge to the orders confirming the interim relief in favour of respondent No.1 in the suit, there were no change of circumstances on mere ground of observations made in the Letters Patent Appeals.

[18] It was also contended that the suit was already fixed for cross-examination of the plaintiff and at that stage, an application under Order 7 Rule 11 or under Order 39 Rule 4 was not maintainable and has rightly been rejected by the Trial Court.

[19] It was also contended that the petitioner herein is a third party and the remedy of injunction is a remedy in personan and that since the petitioner is claiming the rights through AUDA, it is bound to accept whatever is given to AUDA by the Courts and cannot make grievance independent of AUDA.

[20] In support of his submissions, learned counsel has relied upon Thansingh Nathmal and others Vs. The Superintendent of Taxes, Dhubri and others, 1964 AIR(SC) 1419 , Mohan Pandey and another Vs. Smt. Usha Rani Rajgaria and others, 1993 AIR(SC) 1225 and Ganesh Co-operative Housing Society Ltd. and others Vs. Ishwarbhai Keshavbhai Patel and others, 2001 3 GLH 702.

[21] It is also contended that the petitioner cannot agitate his so-called rights in the suit filed by respondent No.1 wherein it is not a party and therefore also, rightly the reliefs have been declined by the Trial Court to the petitioner.

[22] Learned counsel would also contend that for rejection of the plaint under Order 7 Rule 11 express or implied provision akin to one under Section 85 of the Bombay Tenancy and Agricultural Lands Act, 1948 must be shown to exist and under the Gujarat Town Planning and Urban Development Act, 1976, in absence of such bar, the application for rejection of the plaint was not maintainable. In support of the above submission, learned counsel has relied upon State of Andhra Pradesh Vs. Manjeti Laxman Kantha Rao (D) by L.Rs.and others, 2000 AIR(SC) 2220 .

[23] It was next contended that absence of cause of action and to making good the cause of action after evaluation of evidence and the facts are two different things and what the petitioner urged was to appreciate the facts and the evidence for rejection of the plaint which was not permissible in view of the decision in Mayar (H.K.) Ltd. and others Vs. Owners and Parties, Vessel M.V. Fortune Express and others, 2006 AIR(SC) 1828 and Patel Meghjibhai Vithalbhai Vs. Khetivadi Utpan Bazar Samiti, Upleta, 1995 2 GLR 1497

[24] It was lastly contended that the land vests in Ahmedabad Municipal Corporation and not in AUDA and therefore, AUDA was not competent to issue the notices impugned in the suit and therefore also, the suit questioning unauthorized notices were maintainable.

[25] While learned counsel for respondent No.2 would support the arguments advanced by the petitioner, learned counsel for respondent No.3 would contend that the Ahmedabad Municipal Corporation was not a party to the suit and the dispute between the parties herein is of a private nature and it would be in the interest of justice if the constructed properties are kept unaffected by the T.P. Scheme and the plans be reconstituted.

[26] In the above backdrop of the facts and legal position, the arguments advanced by learned counsel for the parties are required to be appreciated.

[27] The first issue is as regards the maintainability of the petition at the instance of a third party and also its maintainability in the face of admitted existence of alternative remedy.

[28] It is a settled law that the jurisdiction of the High Court under Article 227 of the Constitution of India is in the nature of superintendence over all Courts or Tribunals throughout territories in relation to which it exercises jurisdiction.

[29] Merriam Webster Dictionary defines the term:- superintend , to mean the act or function of superintending or directing; supervision and it also gives synonyms of the term superintendence, thus administration, care, charge, control, direction, guidance, handling, manage, operation, oversight, regulation, running, conduct and supervision etc.

[30] In State of Bihar and another Vs. J. A .C. Saldanna and others, 1980 AIR(SC) 326 , the Hon ble Supreme Court while interpreting the term superintendence as appearing in Section 3 of the Police Act held as under:

> the word superintendence in S. 3 of the Police Act would imply administrative control enabling the authority enjoying such power to give directions to the subordinate to discharge its administrative duties and functions in the manner indicated in the order. Where the subordinate subject to such power of superintendence of the superior is discharging administrative and executive functions, obligations and duties, the power of superintendence would comprehend the authority to give directions to perform the duty in a certain manner, to refrain from performing one or the other duty, to direct some one else to perform the duty and no inhibition or limitation can be read in this power unless the section conferring such power prescribes one. Such is the scope and ambit of power conferred by S. 3 of the Police Act on the State Government of superintendence over the entire police force of the State.

[31] In Managing Director, Hassan Cooperative Milk Producer s Society Union Ltd. Vs. Assistant Regional Director, Employees State Insurance Corporation, 2010 AIR(SC) 2109 , the Hon ble Supreme Court again had occasioned to define the term supervision in the context of Employees State Insurance Act in Paragraph-22 observed as under:

> .....The ordinary meaning of the word supervision is authority to direct or supervision i.e., to oversee. The expression supervision of the principal employer under Section 2(9) means something more than mere exercise of some remote or indirect control over the activities or the work of the workers. As held in C.E.S.C. Ltd., 1992 AIR(SC) 573 that supervision for the purposes of Section 2(9) is consistency of vigil by the principal employer so that if need be, remedial measures may be taken or suitable directions given for satisfactory completion of work. A direct disciplinary control by the principal employer over the workers engaged by the contractors may also be covered by the expression supervision of the principal employer .....

[32] Although, the term superintendence or supervision were being interpreted in the context of administrative control, meaning thereof can as well be imported into Article

227 of the Constitution of India which also uses the term of superintendence . It can thus be seen that the power of the High Court under Article 227 of the Constitution of India are very wide. At the same time, it is settled law that the High Court under Article 227 of the Constitution of India will not exercise the powers unless perversity or material irregularity or illegality or apparent error causing miscarriage of justice in the functioning of the Courts or Tribunals under its jurisdiction is noticed. Further, normally the High Court will not exercise its jurisdiction in case of existence of alternative remedy. However, it is also settled law that these are self-imposed restrictions on the powers of the High Court and the High Court will exercise its jurisdiction under Articles 226 and 227 of the Constitution of India, on noticing, abuse of process of law/Court. The Courts exist for administration of justice. Justice is not the one conceived or desired by the litigant but justice is what is available to it by virtue of legal provision or settled law etc. Of course party is at liberty to move the Court as and when required but such requirement cannot depend upon the desire of the party; but on existence of such right. Once by final verdict, the Court approves or terminates the right of the party, it will be inappropriate for the litigant to reagitate for the same cause over and over again. Such an exercise can be regarded nothing but abuse of process of Court. It is with this intention that Sections 10 and 11 of C.P.C. have been enacted. Both of these provisions operate in favour of public policy.

[33] When it is brought to the notice of the Court that the litigant before it has been abusing the process of Court by frequently espousing the cause which is terminated either by operation of law or by pronouncement of the Court, it is its duty to come down heavily upon such litigant. If the sub-ordinate Courts are unmindful of this legal position and entertain the suit or other proceedings over and over again, pronounce the orders or judgment and expose its rival to unnecessary appeals or revision, the High Court would certainly exercise its powers of superintendence to remind the Court below to act within its jurisdiction and prevent the abuse of process of law/Court. If that is not done, the day is not too far when the litigant may lose faith in the judicial system. Therefore, even if the alternative remedy is available or appeal or revision is maintainable, powers under Article 227 of the Constitution of India are exercisable.

[34] In Mohan Pandey and another , it was on account of private dispute sought to be agitated under Article 226 of the Constitution of India that the Hon ble Supreme Court ruled that the remedy was a Civil Suit. In absence of such similar facts and situation, ratio laid down therein cannot be applied in the present case.

[35] It is apparent from the above observations that by no means, the Hon ble Supreme Court lays down the proposition that in all cases, where alternative remedy is available, the High Court under Article 226 of the Constitution of India will not exercise its jurisdiction. In the facts and circumstances as noticed above, if the case of the

petitioner is dismissed on the ground of existence of alternative remedy, it will further delay implementation of T.P. Scheme, giving a free hand to the respondent to further abuse the process of the Court, particularly in light of conduct of respondent No.1 depicting its habit of agitating and reagitating the same issue over and over again. The petitioner has been litigating since more than a decade and despite surrendering its land under T.P. Scheme, is unable to reap its fruits ever since 1994. Litigation, therefore, must stop right now in this petition itself and it will be onerous for the petitioner, in the facts and circumstances of the case to be relegated to alternative remedy.

[36] Undisputedly, the Preliminary Town Planning Scheme No.3 of Vejalpur has been sanctioned in 1994 making redistribution of the plots as indicated above. The case of the petitioner is that it has contributed the parcel of land as required by the sanctioned scheme whereas it is still waiting to receive the possession of the plots allotted to it under the scheme only because of protracted and prolonged litigation resorted to by respondent No.1. Undisputedly respondent No.1, while claiming its rights which were sought to be derived by virtue of T.P. Scheme No.3, in Special Civil Application before this Court, the representation before the State Government and in some other litigations as well was unsuccessful. This Court while dismissing Special Civil Application No.1332 of 1994 instituted by respondent No.1 made following observations:

> [1] This petition was originally preferred with the following prayers :
>
> (A) A writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction may kindly be granted quashing and setting aside the order dated 8th December, 1993 at Annexure-A to the petition;
>
> (B) A writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction may kindly be granted quashing and setting aside the preliminary scheme vis- -vis the land of the petitioner society bearing Survey No.72/1/A of Vejalpur which is given Final Plot No.116 in Vejalpur Town Planning Scheme No.3 and that the State Government be directed not to approve the Vejalpur Town Planning Scheme No.3;
>
> (C) Pending admission, hearing and final disposal of this petition, an interim in unction restraining the State Government from giving approval to Vejalpur Town Planning Scheme No.3 and more particularly with regard to the proposal of land bearing Survey No.72/1/A of Vejalpur which is given Final Plot no.116 in Vejalpur Town Planning Scheme No.3, which belongs to the petitioner Society, may kindly be granted;

(D) Any other appropriate relief as the nature and circumstances of the case requires, may kindly be granted;

(E) The costs of this petition may kindly be awarded.

[2] Thereafter, with the permission of the Court, the following prayers came to be added by the petitioner:

(AA) A writ of mandamus or a writ in the nature or any other appropriate writ, order or direction may kindly be granted quashing and setting aside the order passed by the State Government in purported exercise of powers under Section 65 of the Gujarat Town Planning and Urban Development Act, 1976 which is published in the Gujarat Govt. Gazette dated 08-12-1993 finalising Vejalpur Town Planning Scheme No.3 and directing the respondents to suitably modify the said scheme vis--vis land of the petitioner society bearing Survey No.72/1/A situated in Vejalpur which is given final Plot No.116, in accordance with the representations made by the petitioner in that regard.

(BB) A writ of mandamus or a writ in the nature of mandamus or any other appropriate writ order or direction may kindly be granted quashing and setting aside the impugned notice dated 16th July, 1994 issued under Section 68 and Rule 33 of the Act and the Rules respectively.

(CC) Pending admission and final hearing of this petition, an interim stay staying the operation, implementation and execution of the notice dated 16th July, 1994 issued under Section 68 of the Act and Rule 33 of the Rules may kindly be granted.

(CC) Pending the admission, hearing and final disposal of this petition, an interim injunction may kindly be granted restraining the respondents, their officers, subordinates, agents and servants from implementing the Vejalpur Town Planning Scheme No.3 vis-avis the land of the petitioner society hearing Survey No.72/1/A of Vejalpur which is given final plot No.116 and be pleased to further restrain them from dealing with the constructed and other properties belonging to the members of the petitioner society situated over the said land in any manner whatsoever.

[3] ******

[4] Subsequent thereto, a preliminary scheme came to be finalized by virtue of sanction accorded under Notification dated 8th December, 1993 and the scheme has been in force from 10th January, 1994.

[5] It is also an accepted fact that immediately thereafter, the final scheme which was forwarded to the Government on 16th May, 1992 came to be sanctioned vide

Notification dated 9th December, 1993 and has been in force on and from 11th January, 1994.

[6] ******

[7] ******

[8] ******

[9] There can be no dispute with the proposition that if either the preliminary scheme or final scheme is defective on account of an error, irregularity or infirmity under the provisions of Section 70(1) of the Act, an appropriate authority is entitled to make a written application to the State Government for variation of the scheme. At the same time, Section 71 of the Act also provides that a Town Planning Scheme can be varied only by a subsequent scheme which is made, published and sanctioned in accordance with the provisions of the Act. It is also a settled position in law that the variation cannot be claimed as of right.

[10] In the facts of the present case, the petitioner had made representation to the authority in 1988, approached this Court in 1991 and the petition came to be disposed of leaving it open to the petitioner to make representation in accordance with law as the preliminary scheme had not attained finality. Admittedly, on 20th January, 1992, the petitioner made such representation. It is not the case of the petitioner that the said representation made pursuant to the order made by this Court, has not been considered by respondent authority. The representation was duly considered and this becomes apparent when one reads the communication dated 8th December, 1993, which is under challenge. The petitioner has sought to distinguish the factual averments made therein, for example, the say of respondent authority is that only 9.63% of the total land of the society, as constituting the original plot, has been deducted while preparing the scheme and allotting the final plot, but the petitioner seeks to dispute the same by referring to certain figures as narrated in paragraph No.4(D) of the petition. Thus, at the best, it can be stated that there are disputed questions of fact. The Court is not required to enter into that arena and determine as to which set of facts are correct. In this context, it is necessary to take note of the fact that the petitioner society had already filed Civil Suit No.505 of 1987 before the Court of Civil Judge, Ahmedabad (Rural), Ahmedabad and withdrawn the same unconditionally on 3rd July, 2004. The prayers made in the said suit are, except for minor difference in the language, similar to the submissions made in the present petition. Therefore, on this limited count, the petition is required to be rejected.

> [11] Under the provisions of Section 65(3) of the Act, once a scheme is sanctioned, either preliminary or final, such scheme acquires status of statute and any variation, thereafter, is permissible only in accordance with the provisions of Section 71 of the Act and the other relevant provisions of the Act, including Section 70(1) of the Act, by following the procedure provided for such variation. Therefore, there is no question of the petition being entertained in the facts of the present case.

[37] Thus, it is crystal clear that the petition was rejected not only on the ground of pendency of the Civil Suit but also on merits. Therefore, the contention of the learned counsel for respondent No.1 that the petition was dismissed only on the ground of pendency of the Civil Suit deserves no merit.

[38] The question, therefore, is whether under such circumstances, when the petition was dismissed on merits, it was permissible for respondent No.1 to reagitate once again the same thing before the different Courts under the superintendence of the High Court. The ground agitated by the learned counsel for respondent No.1 for maintainability of the suit is that sanctioning of T.P. Scheme was malafide. Even on such ground, is the Trial Court competent to entertain the suit on the same subject on mere ground of issuance of notice of eviction to respondent No.1 from the plots allotted to the petitioner? Notice under Section 68 of the T.P. Act is only consequential to sanction of the Town Planning Scheme, the rights in the land except as mentioned in T.P. Scheme stand terminated. The notice under Section 68 is a mere summary proceedings for eviction and no grievance can be made when the competent authority under the Town Planning Act intends to act in terms of sanctioned scheme. During the subsistence of the sanction T.P. Scheme, no other proceedings or action like withdrawal of the suit or petition in relation to the rights and obligations contemplated under the T.P. Scheme would be capable enough to unsettle such rights and obligations.

[39] Once the scheme becomes a part of the act, it derives the colour of statute i.e. it is as good as the provision of the Act. The Civil Court would be incompetent to grant the relief prayed for unless it is able to declare the T.P. Scheme ultra-vires to the constitutional provision. That prerogative is vested in the constitutional Courts. When, by virtue of scheme becoming the part of the Act, the Civil Court is incapacitated from granting relief, it cannot be said that respondent No.1 had a cause of action to agitate before the Trial Court.

[40] It also cannot be said that a bare look at the pleadings discloses the cause of action. In fact, after pleading that the lawful construction was made by respondent No.1 prior to 1976, the plaintiff-respondent No.1 herein assailed the notice dated 16.07.1994 by virtue of which the fact that T.P. Scheme No.3 was sanctioned by the

State Government was conveyed to it. Thus, it appears that the said fact was in the notice of the Trial Court. Therefore, it was the duty of the Trial Court to look into relevant provisions of law before rendering decision in an application under Order 7 Rule 11 or Order 39 Rule 4 of C.P.C.

[41] The principles for dealing with the case under Order 7 Rule 11(d) of C.P.C. are well settled by the Division Bench of this Court in Maharaj Shri Manvendrasinhji Ranjitsinhji Jadeja . The pertinent observations are reproduced hereinunder:-

> To find out whether a plaint discloses a cause of action or not, the Court has to look only to the averments made in the plaint. When a plaint is based on a document filed along with the plaint, it can, however, be considered to ascertain if plaint discloses any cause of action. Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. The words "cause of action" mean the whole bundle of material facts which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit. What is to be done by the Court at the stage of deciding as to whether the plaint discloses any cause of action or not is to find out from the allegation of the plaint itself as to whether a bogus, wholly vexatious or frivolous litigation is sought to be initiated under the garb of ingenuous drafting of the plaint or not because it is the duty of the Court to guard against the mischief of a litigant misusing the process of Court by entering into a false litigation merely for the purpose of harassing the other party and to nip in the bud the litigation which is sham and shabby in character. In order to find out whether the plaint discloses a cause of action or not, the averments made in the plaint and documents annexed thereto should be scrutinised meaningfully and if on such scrutiny it is found that the plaint does not disclose cause of action, it has got to be rejected in view of the provisions of Order 7, R.11(a) of the CPC. When it is said that the Court should take into consideration the averments made in the plaint for the purpose of deciding the question whether the averments made in the plaint disclose cause of action or not, it does not mean that the Court is precluded from applying the statutory provisions or case-law to the averments made in the plaint. If an assertion made in the plaint is contrary to statutory law or case-law, it cannot be considered as disclosing cause of action.....
>
> ....If a plaint can be rejected at threshold of the proceedings, we do not see any reason as to why it cannot be rejected at any subsequent stage of the proceedings. Even if after framing of issues, the basic defect in the plaint persists, namely, absence of cause of action, it is always open to the contesting defendants to insist that the plaint be rejected under O.7, R.11 of the CPC and the Court would be acting within its jurisdiction in considering such a plea. O.7, R.11 of the CPC does

not place any restriction or limitation on the exercise of the Court's power. It does not either expressly or by necessary implication provide that power under O.7, R.11 of the CPC should be exercised at a particular stage only....(Para 14)

In our view, considering the question whether rule of primogeniture has ceased to apply or not cannot be termed as going into the merits of the case at all. On careful scrutiny of the plaint, it becomes evident that the whole case of the appellant in the plaint is based on the footing that deceased Mayurdhvajsinhji having expired intestate, the appellant is entitled to inherit all the properties left by him under the rule of primogeniture. Therefore, in order to find out whether the plaint discloses a cause of action or not, it becomes relevant to consider whether the rule of primogeniture still subsists or not. In fact, rule of primogeniture is the sole and entire basis of the plaint and therefore if the Court addresses itself to the question whether the said rule of primogeniture subsists or not, it cannot be said that the Court is deciding the matter on merits. As observed earlier, while deciding application filed under O.7, R.11(a) of the CPC, the Court has to apply the statutory law as well as case-law to the facts pleaded in the plaint and find out whether any cause of action is disclosed or not. If such an attempt is made, it can hardly be said that merits of the case are taken into consideration while deciding application for rejection of the plaint as not disclosing any cause of action.

A bare perusal of Section 4 would indicate that any custom or usage as part of Hindu Law in force will cease to have effect after the enforcement of Hindu Succession Act with respect to any matter for which provision is made in the Act. If rule of lineal primogeniture in estate left by deceased Mahendrasinhji is a customary one, it will certainly cease to have effect. We are fortified in our view by the decision of the Supreme Court rendered in the case of Bhaiya Ramanuj Pratap Deao v. Lalu Maheshanuj Pratap Deo and others, 1981 AIR(SC) 1937. Section 5 of the said Act stands as an exception to Section 4 of the Act referred to above and inter alia provides that the said Act will not apply to any estate which descends to a single heir by the terms of covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act. The next question which would immediately arise for consideration of the Court is whether the estate which descended to deceased Mayurdhvajsinhji is an estate governed by the terms of any covenant or agreement entered into by the ruler with Government of India and therefore covered under the provisions of S. 5(ii)of the Hindu Succession Act.

[42] In view of above principles, it is more than clear that it was open for the Trial Court to have considered not only the pleadings but also Section 65 of the T.P. Act and it also could have read the above cited principles as also notice dated 16.07.1994. It

can also be noticed from the above observations that powers under Order 7 Rule 11 can be exercised at any stage of the suit and therefore, merely because the evidence was being recorded, it is not correct to say that powers under Order 7 Rule 11 were not available to the Trial Court. In the light of the above, principles in Maharaj Shri Manvendrasinhji Ranjitsinhji Jadeja , Patel Meghjibhai Vithalbhai and Mohan Pandey and another decided by the learned Single Judge of this Court are of no assistance to respondent No.1.

[43] It is true that in Ram Prakash Gupta Vs. Rajiv Kumar Gupta and others, 2007 3 GLH 649, in Mayar (H.K.) Ltd. and others and in Saleembhai and others Vs. State of Maharashtra and others, 2003 1 SCC 557, principle that the averments in the written statement cannot be basis for deciding the application under Order 7 Rule 11 of C.P.C. is laid down. However, as indicated in Maharaj Shri Manvendrasinhji Ranjitsinhji Jadeja , it is permissible for the Court to take into consideration the case law or statutory provision which determine an issue and thus justifies to hold that the plaint lacks cause of action and doing such an exercise would not amount to considering the material extraneous to the plaint. In the instant case also, as indicated above, the Trial Court was incapacitated from granting the relief by virtue of sanction of the scheme as well as ruling of this Court in Special Civil Application No.1332 of 1994. Such material was relevant and could not have amounted to considering something beyond the pleadings in the plaint or the documents produced along with the plaint. In fact, by virtue of averments in the plaint that notice dated 16.07.1994 disclosing that T.P. Scheme was sanctioned and thus had become a part of the T.P. Scheme, the averments made in the notice were as good as the averments made in the plaint, and therefore, the Court below would have been justified in looking into the such documents to find out existence or non-existence of cause of action.

[44] It is true that in State of Andhra Pradesh , the Hon ble Supreme Court laid down the proposition of law that exclusion of the jurisdiction of the Civil Court cannot be readily inferred. However, in the instant case, there was sufficient material in the nature of notice dated 16.07.1994, the averments made in the plaint as also statutory provisions, as also the case law justifying the Trial Court to rule on its absence of jurisdiction.

[45] It is settled law that the third party can prefer an appeal if aggrieved by a judgment and decree with a leave of the Court. Therefore, there is no reason to debar the third party preferring an appropriate application or a writ petition complaining of its rights being detrimentally affected by interim order of the Court. Therefore, argument to the contrary cannot be accepted. Consequently the argument that injunction is a remedy in personan and that a third party whose rights are represented by a party to the suit can claim only through that party also falls into insignificance. Under Article

227 of the Constitution of India, the High Court can exercise the powers of superintendence even at the instance of a third party i.e. a person not a party to the suit inasmuch as there are no fetters on the power of the High Court under Article 227 of the Constitution of India against entertaining the petition at the instance of the third party. Only requirement for exercise of power under Article 227 of the Constitution of India is as to whether the exercise of superintendence is necessitated. Once such necessity is shown to exist, there can be no reason for the High Court to abstain from exercising powers under Article 227 of the Constitution of India.

[46] As noticed above, in Letters Patent Appeals being Nos.1789 of 2009 and 2169 of 2009, the Division Bench of this Court directed AUDA to implement the scheme subject to final/interim order of the Court. AUDA was under obligation to implement the T.P. Scheme and since it was directed by the Court, it can be said that there was a change of circumstance within the meaning of Order 39 Rule 4 inasmuch as it was not possible for it to implement the scheme unless status-quo order granted by the Court was vacated. The learned Trial Judge failed to appreciate the aforesaid aspect.

[47] In light of the above fact, Ganesh Co-operative Housing Society Ltd. and others which is distinguishable on facts, is of no assistance to respondent No.1.

[48] In view of the above discussion, it is held that despite existence of alternative remedy, the petition is maintainable. It is also held that in the facts of the present case, Order 7 Rule 11(a) was attracted and the plaint is required to be rejected for want of cause of action. It is also held that order in Letters Patent Appeals being Nos.1789 of 2009 and 2169 of 2009 was a change circumstances enabling AUDA to move the Trial Court for vacation of interim relief under Order 39 Rule 4 of C.P.C.

[49] In the result, the petitions succeed. Interim relief as granted below Exh:5 in Regular Civil Suit No.543 of 1994 by the Trial Court is vacated by allowing the application Exh:261 moved by AUDA. Application Exh:254 for rejection of the plaint moved by AUDA in Regular Civil Suit No.543 of 1994 is also allowed and plaint is rejected under Order 7 of C.P.C.

[50] The respondent-Amravan Co-operative Society who has misused the process of law frequently, despite the fact that the High Court by rejecting the petition filed by it challenging the Town Planning Scheme in question, filed civil suit and delayed the implementation of the scheme. To deter the said respondent from resorting to such unhealthy legal procedure, it is necessary to impose exemplary cost upon it. Accordingly a cost quantified at Rs.1,00,000/- (Rupees One Lakh) is directed to be deposited by the respondent society within a period of eight weeks from today with the

Gujarat Legal Service Authority, failing which, necessary proceedings for recovery of the cost under the Bombay Land Revenue Code shall be taken.

[51] At this stage, learned counsel for the respondent society requests for stay of this order to enable the said respondent to have a further legal recourse. Request cannot be granted in view of the observations made hereinabove. Granting such request will further delay the implementation of the Town Planning Scheme which has already become final in the year 1994. Such request is therefore declined.

[52] Rule is made absolute accordingly. No costs.

[53] Civil Applications do not survive and they are accordingly disposed of.