

(1966) 07 GUJ CK 0010

In the Gujarat High Court

Case No : Civil Reven. Application No. 53 of 1962

Alihusain Abbahbai and Others

APPELLANT

Vs

Collector, Panch Mahats

RESPONDENT

Date of Decision : 04-07-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, 2(2)
Land Acquisition Act, 1894 — Section 11, 18, 20, 26(2), 53
Limitation Act, 1908 — Article 176
Limitation Act, 1963 — Article 120

Citation : AIR 1967 Guj 118 : (1967) 8 GLR 311

Hon'ble Judges : P.N. Bhagwati, J

Bench : Single Bench

Advocate : K.A. Daboo, for I.M. Nanavati, for the Appellant; A.D. Desai, Asst. Govt. Pleader, for the Respondent

Judgement

(1) This Revision application raises a short but interesting question of law, namely whether a Reference u/s 18 of the land Acquisition Act abates if the applicant dies and his heirs do not make an application for bringing themselves on record within a period of 90 days from the date of the death of the applicant. The dispute in this Revision Application concerns land bearing Survey No. 56B-12/1 admeasuring 1 acre 25.12 gunthas situate in Dohad in the Panchmahals District. The land belonged to three brothers namely, Abbasabhai, Hathimbahai and Taherbhai each having 1/3 share in the land, in or about 1956 the land was acquired by the State Government under the provisions of the land Acquisition Act for the purpose of State Transport Corporation and after going through the procedure prescribed by law, the Collector, Panchmahals District, made an award dated 23rd September 195; offering compensation at the rate of Rs. 2.62 Np. Per square yard for the land. All the three brothers were dissatisfied with the offer contained in the award of the collector a, and therefore, two of them, namely Hatimbhai and Taherbhai made a joint application and Abbasbai, the third brother, made a separate application to the collector for a reference u/s

18 of the land Acquisition act. Hatimbhai and Taherbhai claimed compensation at the rate of Rs. 12/- per square yard while Ababhai claimed compensation at the rate of Rs. 14.62 Np. Per square yard. On the application of Abbasbhai a reference was made by the collector to the District Court on 26th September 1957 and it was numbered Ref. LAR 9/57 while the reference made on the application Hatimbhai an Taherbhai was numbered Ref. LAR 11/57. Both the reference were sent by the District Court to the Court of the Civil judge, Senior Division, for disposal. The notice of the date fixed for the bearing of Ref. LAR 9/57 was thereafter issued by the learned Civil Judge for the service on Abbashbai but before it could be served on Abbasbhai, Abbasbhai died a result of an accident on 10th October 1957 with the result that it was returned unserved by the Bailiff on 27th November 1957. The petitioners who are the heirs and legal representatives of Abbasbai thereupon addressed a letter dated 2nd January 1957 to the collector requesting the Collector to bring the names of the petitioners on record as heirs and legal representatives of Abbashbaji in ref. LAR 9/57. To this letter according to the petitioners , there was no reply and the petitioners, therefore, did nothing further in the matter until 11th August 1950 when they came to know for the first time on reading the report inn the daily newspaper "Navbharat" that Ref. LAR 11/57 was disposed of by the learned civil Judge and additional compensation of Rs. 9-38 per square yard was awarded to each of Hatimbhai and Taherbhai. On learning about the disposal of Ref. LAR 11/57, the petitioners made enquiries as to what had happened to Ref. LAR 9/57 made at the instance of Abbasbhai and on making inquires, they learnt that in Ref. ALR 9/57 the collector had made an application dated 12th January 1960 that the reference had abated since no application to bring the heirs and legal representatives of Abbashai on record had been made within a period of 90 days from the date of death of Abbasbhai and on such appellation the learned civil Judge had made an order dated 30th July 1960 dismissing the reference as having abated. The petitioners thereupon made an application to the court for setting aside the abatement and there were two grounds on which the application was supported. The first ground was that the order dismissing the Reference as having abated was illegal and invalid since a reference u/s 18 of the Land Acquisition Act couldnot abate on the death of the applicant even if no application to bring the heirs of the applicant on record was made within a period of 90 days from the date of death f the applicant and the second ground was that in any event the petitioners have sufficient cause for not making an application to bring themselves on record within the said period. Both the grounds were, however, negatived by the learned civil Judge and the learned civil Judge rejected the application. Hence the present Revision Application by the petitioners .

(2) Of the two grounds urged before the learned civil Judge Miss. Daboo, learned advocate appearing on behalf opt the petitioners urged only the first since the second was a ground which even if well found could not be raised in revision. Miss. Dobao confined herself to the first ground and urged that the order passed

by the learned civil Judge on 30th July 1960 dismissing the Reference as having abated was illegal and invalid and the learned civil Judge was therefore, in error in rejecting the application for setting aside the abatement Mr. A.D. Dasai, learned Assistant Government, pleader appearing on behalf the Collector, of course disputed the validity of this contention but he also urged in addition that in any event this contention was not open to the petitioners since the Revision Application was not directed only against the redder rejecting the application for setting aside the abatement and so far as that order was concerned it was patently correct for the application in effect sought to obtain a review of the order dismissing the reference as having abated though there was no valid ground for review available to the petitioners. Realising the force of this preliminary contention Miss Daboo applied for leave to amend the revision application by seeking relief against the order dismissing the reference as having abated. The application was granted by me, but that was not the end of the difficulties for Miss. Daboo. The amended revision application in so far as it was directed against the order dismissing the reference as having abated was clearly time barred and the defect was merely one of form in the sense that there was no specific prayer for setting aside the said order. I condoned the delay and entertained the amended Revision Application.

(3) The main challenge of the petitioners on the amended Revision application was directed against the order dismissing the reference as having abated and there were three grounds on which the challenge was founded. Miss. Daboo first urged that the reference could not be said to have commenced before the Collector until the notice of the reference was served on the various persons specified in Section 20 and since Abbashai died before notice of the reference could be served on him, there was no pending proceeding in the reference at the date of death of Abbashai and there was accordingly no question of applicability of order 22 Rule 3 of the CPC and there could be no abatement of the reference even if no application was made by the petitioners to bring themselves, on record in place of Abbabai. It was the duty of the Collector, argued Miss Daboo, to apply to the Court for bringing the petitioners on record as heirs and legal representatives of Abbashai and it was only after they were brought on record and notice of the reference was served on them that the proceeding in the reference could be said to have commenced before the Court Miss Daboo next contended and that was her second contention that in any event order 22 Rule 3 of the CPC did not apply to a reference u/s 18 and the reference did not, therefore, abate even though no application was made to bring the petitioners on record as heirs and legal representatives of Abbassbhai. The last contention of Miss Daboo was that even if the proceeding could be said to have commenced on the receipt of the reference by the court and Order 22 Rule 3 applied to such reference, there was no time limited by law for the making of an application to bring the heirs of a deceased applicant on record, Article 171 of the Indian Limitation act, 1908, being inapplicable and there was accordingly no abatement of the reference even in the petitioners failed to make an application to bring

themselves on record within a period of 90 days, from the date of the death of Abbasbhai. These were the three contentions urged on behalf of the petitioners and on the strength of these contentions it was submitted that the order passed by the learned civil Judge dismissing the reference as having abated was illegal and invalid and was required to be set aside.

(4) In order to determine the validity of these contentions it is necessary to refer to a few provisions of the Land Acquisition Act. After a notification u/s 6 issued acquiring land notice u/s 9 is issued to persons interested inviting claims to compensation for all interests in the land. The Collector then proceeds to inquire into the objections to the measurement of the land which may have been lodged by any person interested, into the value of the land at the date of the notification u/s 4 (1) and into the respective interests of the persons claiming compensation and makes an award u/s 11 determining the true area of the land, the compensation which in his opinion should be allowed for the land and the apportionment such compensation amongst all persons known or believed to be interested in the land Section 12 declares that the award shall except as provided in the succeeding Sections, be final and conclusive evidence as between the Collector and the persons interested of the true area and the value of the land and the apportionment of compensation amongst the persons interested. Now it is well settled that though called an award this is really nothing but an offer on the part of the Government which the person interested may or may not accept, a remedy is provided to him by Section 18 which says in sub section (1).

"18. (1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measure of the land, the amount of compensation, the persons to whom it is payable, or the apportionment of compensation amongst the persons interested."

The person interested who does not wish to accept the award can by a written application to the Collector raise an objection to the measurement of the land, the amount of the compensation or the apportionment of such compensation among the persons interested and require the Collector to refer his objection to the Court for determination. Of course the proviso to the Section prescribes a time-limit within which an application must be made but that is not material to the present controversy. On receipt of the application, if the Collector finds that the application complies with the requirements of Section 18, the Collector is bound to make a reference to the Court and Section 19 sets out what facts shall be stated by the Collector for the information of the Court while making the reference. When the reference is received by the Court, Section 20 says:

"20. The Court shall thereupon cause a notice, specifying the day on which the Court will proceed to determine the objection, and directing their appearance before the Court on that day, to be served on the following persons, namely:

(a) the applicant;

(b) all persons interested in the objection, except such (if any) of them as have consented without protest to receive payment of the compensation award; and

(c) if the objection is in regard to the area of the land or to the amount of the compensation, the Collector".

The Court then proceeds to hear the reference on the day fixed for hearing or on any adjourned day or days and after hearing the parties, makes an award determining the objection and specifying the amount of compensation for the land or the apportionment of such compensation. Section 26(1) prescribes the form of the award and Section 26(2) assimilates the award to a decree by declaring:

"26. (2) Every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of section 2, clause (2) and section (2), clause (9), respectively of the Code of Civil Procedure, 190".

Section 53 makes the provisions of the CPC applicable to the reference and it says:

"53. Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the CPC shall apply to all proceedings before the Court under this Act".

It will be seen from these provisions that the scheme of the Act is that the applicant who does not accept an award has to make an application to the Collector within the prescribed period raising his objection to the award and requiring the Collector to refer his objection for the determination of the Court. If the conditions set out in Section 18 are satisfied the Collector is bound to make a reference and when the reference reaches the Court, it is taken on file and numbered and it becomes a proceeding before the Court. Now obviously since the reference is made by the Collector and is not initiated directly before the Court by the Applicant, notice of the day fixed for the hearing of the reference must be given to the applicant so that he can take steps for the purpose of proceeding with the reference. Equally notice must be given to other persons, if any, interested in the objection so that a proper determination of the amount of compensation or apportionment of such compensation binding on all interests can be made by the Court. Notice must also necessarily go to the Collector for it is the Collector representing the Government who would be vitally concerned to repeal the objection of the applicant to the amount of compensation. Section 20, therefore, provides for service of notices on these various persons by the Court on receipt of the reference. But that does not mean that the reference does not become a proceeding before the Court until such notices are served by the Court. The reference becomes a proceeding before the Court as soon as it is received, taken on file and numbered and it is because it is a proceeding already initiated before the Court that the court can fix a day for its hearing and give notice of such date to the various persons mentioned in Section 20. Moreover, it is difficult

to appreciate how notice of reference can go to the Collector who is in the position of a defendant before the reference has commenced. Ordinarily notice of a proceeding would go to the opposite party after the proceeding has commenced before the Court, unless the proceeding is before the Court, there would be no question of giving notice of the proceeding by the Court to the opposite party. The contention of the petitioners that the proceeding in the reference had not commenced at the date of the death of Abbasbhai since no notice was served on him before his death is, therefore, clearly unsustainable and it must be concluded that the proceeding in the reference commenced before the Court as soon as the reference was received, taken on file and numbered and it was pending when Abbasbhai died.

(5) The next question that arises is whether Order 22 Rule 3 applied to the Reference for it is only if that provision applied to the reference that the question of abatement could arise. Now Section 53 which is reproduced above clearly declares that save in so far as they may be inconsistent with anything contained in the Act, the provisions of the CPC shall apply in all proceedings before the Court under the Act and since a reference u/s 18 is a proceeding before the Court under the Act, Order 22, Rule 3 must apply to the reference unless that provision is inconsistent with anything contained in the Act. The question which, therefore, calls for consideration is whether there is anything in the Act which is inconsistent with Order 22 Rule 3. Order 22 Rule 3 enacts a provision in the following terms:

"O. 22 R. 3 (1) where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone or a sole plaintiff or sole surviving plaintiff does and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff ."

Now, here is manifestly no specific provision in the Act which is directly inconsistent with Order 22 Rule 3 and the only inquiry can, therefore, be whether there is anything in the Act which is by necessary implication inconsistent with Order 22 Rule 3. The argument of Miss Daboo was that the nature of the proceeding itself is such that the applicability of Order 22 Rule 3 is incompatible with it and the said provision cannot, therefore, apply in case of death of the applicant in a pending reference and this argument she sought to support by relying on the decision of a Division Bench of the Madhya Pradesh High Court in Abdul Karim and Another Vs. State of Madhya Pradesh, . This decision of the Madhya Pradesh High Court does not undoubtedly support the argument of Miss Daboo but with the greatest respect to the learned Judges who decided this case,

I find myself unable to accept it as correct. The decision proceeds on the hypothesis it works out the conclusion that even if the applicant does not appear or produce evidence in support of the objection, the reference cannot be dismissed but an award must be made even though such award be in the same terms as the award of the Collector and equally if the applicant dies and his heirs do not make an application to bring themselves on record, the reference cannot abate, but the Collector must supply the names of the heirs to the Court and the Court must give notice of the reference to the heirs and then proceed to make an award, which in the absence of evidence in support of the objection may be in the same terms as the award of the Collector. This conclusion is clearly not justified by the scheme and language of the Sections. What is referred to the Court for determination in a reference u/s 18 is the objection of the applicant to the award of the Collector and it is that objection which is determined on the reference by the Court. The objection has to be determined by the Court on the evidence before it and if no evidence is led by the applicant in support of the objection and the Collector also does not lead any evidence in justification of the award, the objection would be negated by the Court and the reference would be dismissed. There would in such a case be no question of the Court making an award, for there being no evidence before the Court as to the measurement or value of the land, it would not be possible for the Court to make its own award. The award to be made by the Court would have to be based on the evidence before the Court and if there is no evidence before the Court, the Court obviously cannot make an award determining the amount of compensation. If the Court were to make an award in the same terms as the award of the Collector it would mean that in the opinion of the Court the amount of compensation determined in the award of the Collector was the proper amount of compensation but the Court cannot possibly arrive at such opinion without evidence before it. The Court, would, therefore, have no alternative but to reject the objection as unsupported by evidence and to dismiss the reference. Similarly if the applicant fails to appear at the hearing of the reference, the reference would have to be dismissed for default of an appearance under Order 9 Rule 8 as applied by Section 53. It is difficult to see how the Court can in the absence of the applicant proceed to determine his objection on merits unless of course the Collector choose to lead evidence for the purpose of satisfying the Court that the amount of compensation determined in the award of the Collector is the proper amount of compensation for the land. But there is no obligation on the Collector to lead evidence for the purpose of supporting the award and if the Collector does not lead evidence, on what evidence would the Court proceed to make an award in the same terms as the award of the Collector? It is, therefore, clear that the nature of a reference u/s 18 it is not such that it must necessarily result in the making of an award by the Court and when I use the word "award" I mean it in the sense of an award determining the amount of compensation for the land. The reference is not different from an ordinary civil proceeding in which the applicant who is in the position of a plaintiff objects to the amount of compensation offered in the award of the Collector and claims additional compensation. If the applicant

fails to appear at the hearing of the reference, the reference must by force of Order 9 Rule 8 which is made applicable by Section 53 be dismissed for want of appearance like any other civil proceeding and in the same way if the applicant does not produce evidence in support of the objection, the reference must be dismissed just as any other civil proceeding would be dismissed for want of evidence in support of the claim. When the reference is dismissed the award of the Collector stands and the applicant can always accept the offer contained in such award. Now if the reference can be dismissed for default of appearance of the applicant or for the want of evidence before the Court, there is no reason why Order 22 Rule 3 should not be applicable to the reference. If Order 22 Rule 3 does not apply to the reference, what is to happen when the applicant dies during the pendency of the reference. The right to claim additional compensation which the applicant is agitating in the reference would certainly survive to his heirs and there is nothing in the nature of the references which should preclude the heirs from making an application to the Court for bringing themselves on record in place of the applicant. It is difficult to see why instead of permitting the heirs to follow the ordinary and simple procedure of applying to the court for bringing themselves on record in place of the applicant and proceeding with the reference, the law should insist that the Collector who is the opposite party must supply the names of the heirs to the Court and the Court should issue notices to the heirs as persons interested in the objection and then proceed with the reference. There is clearly nothing in the nature of the reference which is inconsistent with Order 22 Rule 3 sub-rule (1) and the provision contained in Order 22 Rule 3 sub-rule (2) provides for abatement of the proceeding if no application for bringing the heirs on record is made, within the time limited by law and the question may, therefore, well arise whether there is any time limited by law for the making of an application to bring the heirs of a deceased applicant on record in a pending reference. If there is a time prescribed by law for making such application and such application is not made within the time so prescribed, the reference would abate leaving the award of the Collector unaffected. But if no time for making such application is prescribed by law, the application can obviously be made at any time and there would be no abatement of the reference and in that event as soon as the application is made, the Court would bring the heirs of the deceased applicant on record and proceed with the reference. Order 22 Rule 3 sub-rule (2) is also, therefore, not in any way inconsistent with the nature of the reference. The provision enacted in both the sub-rules of Order 22 Rule 3 can be made applicable without creating any inconsistency or disharmony and it must, therefore, be concluded that O. 22 R. 3 applies to a reference u/s 18.

(6) This view which I am inclined to take is considerably fortified if reference is made to the earlier Land Acquisition Act, X of 1870. In that Act there was no provision corresponding to present Section 53 making all the provisions of the CPC applicable to proceedings before the Court under that Act, but Section 36 of that Act provided that the provisions of the CPC in regard to certain specified

topics shall apply to a reference and one of the topics so specified was "death of parties". Now if the provisions of the CPC in regard to death of parties were made applicable to a reference under the earlier Act, it is difficult to conceive of any reason why those provisions should be held inapplicable to a reference, when the Legislature actually enlarged the scope of applicability of the provisions of the CPC and made all the provisions of the CPC applicable, unless there was anything inconsistent in the Act. Moreover, if under the earlier Act the provisions of the CPC in regard to death of parties were applicable to a reference, it is not possible to say that the nature of the reference is such that the provisions of the CPC in regard to death of the parties are inconsistent or incompatible with the reference. I am, therefore, unable to agree with the ratio of the decision of the Madhya Pradesh High Court in Abdul Karim and Another Vs. State of Madhya Pradesh, and I must hold that Order 22 Rule 3 applies to a reference u/s 18.

(7) It is, therefore, clear that when the applicant died during the pendency of the reference, the petitioners as the heirs and legal representatives of the applicant were entitled to make an application to the Court for bringing themselves on record under Order 22 Rule 3 sub-rule (1). But the question is whether they were bound to make such application within any particular period. It is only if a time for making such application was limited by law that the failure to make such application within the time so limited could invite the penalty of abatement under O. 22 Rule 3 sub-rule (2). The controversy between the parties, therefore, centered round the question as to whether any time was limited by law for the purpose of making an application by the heirs of a deceased applicant in pending reference for bringing themselves on record. Mr. A.D. Desai on behalf of the Collector relied on article 176 of the Indian limitation Act, 1908, and urged that this Article provided a period of ninety days from the date of death of the deceased applicant for making an application to have the heirs of the deceased applicant made parties in the reference. Article 176 of course talked of an application to have the legal representative of a "deceased plaintiff" made a party and provided a period of ninety days from the date of death of the "deceased plaintiff ", but the argument of Mr. A.D. Desai was that the reference was a suit and the applicant was a plaintiff in such suit and this Article had, therefore, application to a reference. And support for this contention was sought to be drawn from Section 26(2) and 53 of the Land Acquisition Act. The contention broadly divided itself into two parts. The first part of the contention sought to equate an applicant in a reference with a plaintiff in a suit and thereby to attract the applicability of Article 176 and the argument in support of this part of the contention was that the word "plaintiff" in this Article was sufficiently wide to include applicant in a reference. Now, there can be no doubt that there can be a plaintiff only in relation to a suit and the question must, therefore, resolve itself into a narrow one, namely, what is the suit contemplated by the Limitation Act. The word "suit" has received different judicial interpretations in different enactments; some times it has received, narrow construction and sometimes a wider construction depending upon the context of the enactment. The question

as to what is the sense in which the word "suit" is used in the Limitation Act would, therefore, have required an examination of the context of the statutory provisions enacted in the Limitation Act but fortunately this question is no longer open to controversy for it is concluded by a decision of the Privy Council in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 . The Privy Council in this case concerned with the interpretation of the word "suit" occurring in Section 3 of the Limitation act and Lord Russeel delivering the opinion of the Privy Council observed that the word "suit" in Section 3 of the Limitation Act ordinarily means a civil proceeding instituted by the presentation of a plaint. The decision of the Privy Council clearly established that the "suit" contemplated by the Limitation act is a civil proceeding commenced with presentation of a plaint and the "plaintiff" in Article 176 must, therefore, mean a plaintiff in such a suit and cannot include an appellant in a reference. It is significant to note that though Section 53 makes the provisions of CPC applicable to a reference, it does not make Article 176 of the Limitation Act cannot therefore be held to be applicable to a reference on the argument that an applicant in a reference is a plaintiff in a suit within the meaning of that Article. That disposes of the first part of the contention. The second part of the contention is also in my view equally futile. The argument under the second part of the contention was that a reference is in the nature of statutory suit and Article 176 of the Limitation Act, must, therefore be held applicable to it. Now in the first place it must be remembered that unless there is a statutory fiction deeming a reference to be a suit for the purpose of the Limitation Act, Article 176 cannot have any application to a reference to be a suit for the purpose of the Limitation Act, Article 176, cannot have any application to a reference. There is no such statutory fiction either in the land Acquisition Act or in the Limitation Act. There is no doubt a statutory fiction created in Section 26(2) and by that statutory fiction an award made on a reference is deemed to be a decree within the meaning of Section 2(2) of the Code of Civil Procedure. But that does not convert a reference into a suit" it does not fictionally make a reference into a suit. The statutory fiction is a limited one and , it has merely the effect of converting an award which is not a decree into a decree for the purposes of Section 2(2) of the Code of Civil Procedure. As a matter of fact this statutory fiction clearly postulates that a reference is not a suit, for if it were a suit, the award would straightway have been a decree and there would have been no need to enact the statutory fiction. Moreover in that event it would not have been necessary to enact Section 53 for the purpose of making the provisions of the CPC applicable to a reference. Those provisions would have applied proprio vigore by reason of the reference being a suit. It is, therefore, evident that a reference is neither a suit nor a deemed suit and Article 176 of the Limitation Act has, therefore, no application to it. If that Article does not apply there is no other Article which can possibly be invoked on behalf of the collector and if must be held that no time is limited by law for making of an application by the heirs of a deceased applicant for bringing themselves on record in the reference. Some reference was made to article 181 which is a residuary Article providing a period of limitation for an application for which no period is provided

elsewhere in the first schedule but this Article provides a period of three years and even if it were applicable, the application of the petitioners in the present case for bringing themselves on record as heirs of Abbashai would be within time. The learned civil Judge was, therefore, in error in holding that the reference had abated by reason of the petitioners having failed to make an application for bringing themselves on record within a period of ninety days from the date of death of Abbasbhai and in dismissing the reference as having abated, he refused to exercise jurisdiction to entertain the reference which was vested in him by law.

(8) I, therefore, allow the Revision application set aside the order passed by the learned civil Judge dismissing the reference as having abated and remand the matter to the trial Court with a direction to grant the application of the petitioners to bring themselves on record as heirs and legal representatives of Abbashai and to proceed with the reference and to dispose it of in accordance with law. There will be no order as to costs of the Revision Application

(9) Revision allowed.