
(2008) 07 BOM CK 0043

In the Bombay High Court

Case No : First Appeal No. 206 of 2000 and Cross Objection No. 14 of 2001

Assuncena do Rego (Mrs.)

APPELLANT

Vs

Simplicio P.C. Fernandes and Others

RESPONDENT

Date of Decision : 03-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 136, 226
Land Acquisition Act, 1894 — Section 11, 12(2), 18, 19, 26(2)
Land Revenue Code, 1968 — Section 105, 106

Citation : (2008) 5 ALLMR 49 : (2008) 6 BomCR 304

Hon'ble Judges : Britto N.A., J

Bench : Single Bench

Advocate : S.D. Lotlikar and P. Lotlikar, in F.A. No. 206/2000 and M.S. Sonak, in C.O. No. 14/2001, for the Appellant; S.D. Lotlikar and P. Lotlikar in C.O. No. 14/2001 and M.S. Sonak in F.A. No. 206/2000 for respondent No. 1 and R.G. Ramani in F.A. No. 206/2000, for the Respondent

Final Decision : Dismissed

Judgement

Britto N.A., J.—This appeal and cross objections are directed against the judgment dated 15/7/2000 of the learned Civil Judge, Senior Division at Panaji, by which the suit filed by the plaintiff has been dismissed.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the suit.

3. By notification issued u/s 4(1) of the Land Acquisition Act, 1894 and award dated 4/10/1985, the Government acquired vast land situated at Calapur and other villages. In that they included the land belonging to the Comunidade of Calapur/ defendant No. 3 of which the plaintiff and defendants No. 1 and 2 (defendants, for short) were the tenants. Compensation was paid to them on 50.50 basis i.e. to defendant No. 3/ Comunidade half of the amount and to the plaintiff and the defendants the remaining half. The said payment was done on

the basis of the survey records. Compensation relating to Survey No. 225 was taken by the plaintiff and Compensation relating to survey Nos. 226, 227 and 196 was taken by the defendants on 30.20 basis. In fact, the entire property claimed by the plaintiff as well as the defendants, as tenants of defendant No. 3/ Comunidade has been acquired and the dispute which now remains is only as regards the compensation.

4. The plaintiff on or about 21/7/1986 sent a notice to the defendants claiming that she was the tenant of the property of the said Comunidade known as Premeiro Lanco Cajuaria Por Sul" admeasuring 45.072 sq. mts. and that the plaintiff was in possession of the same and that by mistake an area of 19,600 sq. mts. was wrongly included in Survey No. 226 of village Calapur of which the said defendants claim to be the tenants, although the said area formed part of the property of the plaintiff and which was always in her possession. The plaintiff also stated that defendants had illegally and without having any right collected compensation of Rs. 1,20,756/- from the Land Acquisition Officer, being the compensation awarded for the said area of 19,600 sq. mts. and therefore called upon the defendants to pay the said compensation to the plaintiff.

5. The plaintiff then filed the suit on or about 30/9/1986 and thereafter got a surveyor appointed namely Shri Prazares Gonsalves/PW2 and on the basis of his opinion amended the plaint on or about 6/12/ 1995 and while maintaining that she was the tenant of the said property admeasuring 45,072 sq. mts., the plaintiff conceded that the plaintiff's property was not properly surveyed. She further stated that the property ought to have been surveyed as per the plan of Comunidade and that an area of 24,880 sq. mts. was wrongly included in Survey No. 226, 1,600 sq. mts. was wrongly included in Survey No. 227 and parts were also wrongly included in other neighbouring properties surveyed under Survey Nos. 223, 228, 226, 202 and 222, road and drain of the said village. It was also the case of the plaintiff that a part of the said entire property was surveyed under No. 225 but in a wrong name. The plaintiff also stated that a part of it was surveyed under No. 224 regarding which one Domingos Vincent Dias has collected the compensation. It was the case of the plaintiff that the total area of Survey No. 226 was 29,270 sq. mts. and total compensation paid was Rs. 3,60,812/- and similarly the total area of Survey No. 227 as shown in the award was 26,078 sq. mts. and the compensation awarded was Rs. 2,65,905.10 paise. As per the plaintiff, the amount corresponding to the area 24,880 of Survey No. 226 is Rs. 3,06,696.35 and the compensation of the area of 1,600 sq. mts. of Survey No. 227 is Rs. 16,314.45. As per the plaintiff, out of the said amount of Rs. 3,06,696.35, the Comunidade collected Rs. 1,53,348.17 while defendants No. 1 and 2 collected Rs. 1,53,348.17, and similarly out of the said amount of Rs. 16,314.45, the Comunidade collected Rs. 8,157.23 while defendants No. 1 and 2 collected Rs. 8,157.25. It was the case of the plaintiff that defendants No. 1 and 2 had no right to the said amount of Rs. 1,61,505.42 which she claimed with interest at the rate of 18% per year from the date of filing of the suit. The plaintiff claimed that the suit portion is part of the property known as "Primeiro

Lanco Cajuaria Por Sul" and she has been in possession of the same from the year 1971. The plaintiff also sought a declaration that the suit plot of land was part and parcel of the said property belonging to defendant No. 3 of which the plaintiff was the tenant.

6. Defendant No. 3/Comunidade of Calapur did not contest the suit. The defendants contested the suit. It was the case of the defendants that the plaintiff was duly represented by an Advocate before the Land Acquisition Officer and necessary objections were filed but nowhere did the plaintiff mention or represent to the Land Acquisition Officer that a portion of the property bearing Survey No. 227 pertained to her plot and this shows that the defendant was making the present claim as the matter of afterthought. The defendants stated that the defendant No. 1 is in possession of the property surveyed under No. 226 and after the death of the father of defendant No. 1, in the year 1976, both the defendants were in exclusive possession of the said property as tenants of defendant No. 3 and the defendant No. 1 along with his father was in possession of the said property for the last about 35 years. The defendants stated that the new survey was done on the basis of title and possession held by the parties. The defendants stated that the plaintiff was duly represented before the Land Acquisition Officer and she had put her case before the Land Acquisition Officer in writing, but had raised no dispute of inclusion of area of the said property in other survey numbers nor raised the dispute that the defendants were not entitled for compensation of alleged encroached area. The defendants denied that any portion of the property was possessed by the plaintiff or wrongfully included in Survey No. 226 and in fact no property was surveyed in the name of the plaintiff, though she might have been awarded the property by defendant No. 2 in public auction and the records of defendant No. 3 might have shown her as tenant of the property. Defendants stated that there is a dispute pending between Ispiano Fernandes in relation to Survey No. 225 and in that suit it is not the case of either of the parties that any portion of that property has gone to defendant No. 1. The defendants denied that the area of the said property has been wrongly included in Survey No. 226 or 227 and further stated that no portion of the property possessed by the plaintiff was included either in Survey No. 226 or Survey No. 227.

7. The learned trial Court framed as many as 11 issues. The plaintiff examined herself in support of her case and produced several documents including certificate from the Comunidade in relation to her property as well as in relation to the property of Casiano Fernandes, presumably the father of defendant No. 1. The learned trial Court amongst the issues framed, framed issue No. 10 in relation to the plea taken by the defendants that the Court had no jurisdiction to entertain and decide the suit as the jurisdiction was barred u/s 9 of CPC and decided the said issue against the defendants and in the light of that the defendants have filed cross objections.

8. The learned trial Court observed that it was not understood as to exactly when

and how the plaintiff came to know of the alleged wrong inclusion of her area in Survey No. 226 and 227 and that it appeared that she came to know of the said wrong entry after she got her land surveyed with the help of private surveyor namely the said Shri Gonsalves/P.W. 2 but according to him he was engaged in the year 1988 which meant that he was engaged after the filing of the suit in the year 1986 and if that was so, it is not understood as to on what basis the plaintiff had filed the suit against the defendants No. 1 and 2 to collect the said amount of Rs. 1,61,505.42 when she herself did not know about the inclusion of the area in the suit property on the date of filing of the suit. The learned trial Court also noted that the survey of Village Calapur was promulgated in the year 1972 and the land was acquired in the year 1982 and the compensation was collected by the respective parties in the year 1986 and admittedly survey records were kept for public objection before their promulgation but it appeared that the plaintiff did not object to the same, reason being that she was illiterate which did not appear to be convincing. The learned trial Court observed that once the record of rights disclose that defendant No. 1 was the occupant of the suit plot of land, presumption u/s 105 of the Land Revenue Code would follow in favour of the defendants. Referring to the evidence of Danial Araujo/P.W. 3, the learned trial Court observed that the said evidence was not sufficient to rebut said presumption as the said witness had not thrown much light on the exact extent of the area of the property in possession of the plaintiff. The learned trial Court therefore came to the conclusion that the plaintiff had failed to prove that the area of a property was included either in Survey No. 226 or 227 as claimed by the plaintiff.

9. Admittedly, as of now there is no question of any declaration being granted in favour of the plaintiff that the property claimed by her is part and parcel of the property belonging to the Comunidade since the entire property now belongs to the Government. The relief that the plaintiff is the tenant could not be granted by the Civil Court. The only question is whether the plaintiff was entitled to receive the compensation which has been paid to the defendants.

10. Shri Sonak, the learned Counsel on behalf of the defendant has submitted that the plaintiff participated in the proceedings before the Land Acquisition Officer and collected compensation from him. Learned Advocate further submits that the plaintiff did not raise any objection as to the measurement of the property claimed by her and therefore the plaintiff was not entitled to maintain a separate suit, since the questions raised could have been raised and settled before the Land Acquisition Officer. Shri Sonak has also submitted that the Act is complete Code in matters of dispute as regards area of land, compensation, etc. and the plaintiff not having raised any dispute before the Land Acquisition Officer, she is precluded to file a suit and raise the same. In support of his submission that the Act is a complete Code in matters relating to acquisition and the jurisdiction of the Civil Court is ousted, learned Counsel has placed reliance on several decisions of the Apex Court as well as of this Court.

11. On the other hand, Shri Lotlikar, the learned Senior Counsel, on behalf of the plaintiff, has submitted that the claim of the plaintiff was based on title and therefore the suit is maintainable. Learned Senior Counsel has further submitted that stray statements in the evidence cannot be taken to prove ouster of jurisdiction of the Civil Court. Learned Senior Counsel further submits that the objection as regards jurisdiction is not because the plaintiff had participated in the proceedings before the Land Acquisition Officer. Learned Senior Counsel has placed reliance on the decision in the case of Dr. G.H. Grant Vs. State of Bihar, and in the case of Asher Ali Vs. Sukhna Seikh (deceased by LR's) and Others, .

12. Issue No. 10 was framed in the light of the plea taken by the defendants that the Court had no jurisdiction as jurisdiction was barred as there was special procedure provided under the Act. I will deal with this issue first. Admittedly, the plaintiff had appeared before the Land Acquisition Officer and collected the compensation payable to her without any murmur or demur, either as regards the area of her land acquired or compensation to whom it was payable. There is no dispute that all the parties did appear before the Land Acquisition Officer and did collect the compensation payable to them in terms of the award. In other words, they accepted the award. It is only after the collection of the compensation that the plaintiff sent the said letter and then filed the suit. Was such a course open to her?

13. In the case of State of Mizoram Vs. Biakchhawna, referring to the Land Acquisition Act, 1894, the Apex Court stated that:

The scheme of the Act envisages that on making an application u/s 18, making a reference u/s 18 of the Act in the manner prescribed u/s 19 to the Court is mandatory and is sine qua non for the Court to proceed "thereupon" since it gets jurisdiction to issue a notice to the persons enumerated therein specifying the day to appear before it.

The Award is a decree and the statement of grounds of such award a judgment under Sub-section (2) of Section 26 of the Act for the purpose of appeal u/s 54. Since this is a special procedure provided in the Act, by necessary implication, the Civil Court u/s 9 of the CPC 1908 has been prohibited to take cognizance of the objections arising under the Act for determination of the compensation for the land acquired under the Act.

14. In State of Bihar Vs. Dhirendra Kumar and others, the Apex Court stated that:

The provisions of the Act are designed to acquire the land by the State exercising the power of eminent domain to serve the public purpose. The State is enjoined to comply with statutory requirements contained in Section 4 and Section 6 of the Act by proper publication of notification and declaration within limitation and procedural steps of publication in papers and the local publications envisaged under the Act as amended by Act, 68 of 1984.

Thus it could be seen that the Act is a complete code in itself and is meant to

serve public purpose We are therefore inclined to think, as presently advised, that by necessary implication the power of the Civil Court to take cognizance of the case u/s 9 of CPC stands excluded, and a Civil Court has no jurisdiction to go into the question of the validity or legality of the notification u/s 4 and declaration u/s 6, except by the High Court in a proceeding under Article 226 of the Constitution. So, the civil suit itself was not maintainable. When such is the situation, the finding of the trial Court that there is a prima facie triable issue is unsustainable.

15. In *Laxmi Chand and others Vs. Gram Panchayat, Kararia and others*, the Apex Court again observed that:

It would thus be clear that the scheme of the Act is complete in itself and thereby the jurisdiction of the Civil Court to take cognizance of the cases arising under the Act, by necessary implication, stood barred. The Civil Court thereby is devoid of jurisdiction to give declaration on the invalidity of the procedure contemplated under the Act. The only right an aggrieved person has is to approach the constitutional courts, viz., the High Court and the Supreme Court under their plenary power under Articles 226 and 136 respectively with self-imposed restrictions on their exercise of extraordinary power. Barring thereof, there is no power to the Civil Court.

16. In the case of (*Shyamali Das v. Illa Chowdhry and Ors.*) 2006(12) S.C.C. 300 the Apex Court has again reiterated that:

The Act is a complete code by itself. It provides for remedies not only to those whose lands have been acquired but also to those who claim the awarded amount or any apportionment thereof.

A Land Acquisition Judge derives its jurisdiction from the order of reference and is bound thereby. His jurisdiction is to determine adequacy or otherwise of the amount of compensation paid under the award made by the Collector. It is not within his domain to entertain any application of pro interese suo or in the nature thereof.

17. In the case of *Asher Ali v. Sukhna Seikh* (dec. by L.R''s.) and Ors. (supra), the learned Single Judge of Gauhati High Court held that:

It is well accepted proposition of law that the Civil Court has jurisdiction to try all suits of civil nature except those expressly or impliedly barred. So far as the exclusion of jurisdiction is concerned, it is equally well-settled that such exclusion is not be readily inferred. It must be explicit or clearly implied. Even in cases where the jurisdiction of the Civil Court is excluded there are circumstances under which a Civil Court may entertain a suit. So also, the mere fact that a special statute provides for certain remedies does not by itself necessarily exclude the jurisdiction of the Civil Court to deal with the case brought before it in respect of some of the matters covered by the same statute. The Court therefore observed that a person claiming a part of the compensation awarded

by the Collector in Land Acquisition Proceedings under the Land Acquisition Act, 1894 is entitled to file a Civil Suit.

18. The cases of *State of Bihar v. Dhirendra Kumar and Ors.* (supra) and *Dr. G.H. Grant v. The State of Bihar* (supra) were considered by this Court in the case of *(Comunidade of Bambolim v. Manguesh Beta Kankonkar)* 2001(Supp.) Bom.C.R. 99(P.B.) : 2000(2) G.L.T. 374. In this case, the Court was faced with the question as to whether the suit, at the instance of a person, who claims entitlement to compensation awarded or to a part thereof in acquisition proceedings, to which he was not a party, is maintainable and the said question was answered in the affirmative. In other words, a person who claimed entitlement to compensation, if he was not a party to the acquisition proceedings, he could file a suit. Nevertheless, this Court referred to the Division Bench judgment of this Court in the case of *Deo Sansthan Chinchwad and Others Vs. Chintaman Dharnidhar Deo and Another*, wherein it was observed as follows:

Unless the claim of a person who is lawfully entitled to a share in the compensation money, is already adjudicated upon under the provision of the Land Acquisition Act or such person having had notice of such proceedings, appears therein and fails to assert and prosecute his claim to a share in accordance with the provisions of that Act, he would be entitled u/s 31(2) Proviso 3, to file a Suit to recover his share from the person who may have received the whole or any part of the compensation amount awarded under the Act.

19. Referring to *Dr. G.H. Grant v. The State of Bihar* (supra), this Court observed that it was clear that the Apex Court while dealing with the scheme of the Land Acquisition Act in general and in the light of Section 30 of the Act, in particular, specifically held that a separate suit was maintainable.

20. Section 18 of the Land Acquisition Act, 1894 provides that:

(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 measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested. Sub-section (2) further provides that:

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made,:

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector u/s 12, Sub-section (2), or within six months from the date of the Collector's

award, whichever period shall first expire. Section 30 of the Act deals with dispute as to apportionment and it provides that:

When the amount of compensation has been settled u/s 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof, is payable, the Collector may refer such dispute to the decision of the Court.

21. Admittedly, the plaintiff did not raise any issue before the Land Acquisition Officer as regards the measurements of the land acquired or the amount of the compensation which was paid to her or to the defendants but accepted the award and compensation paid without any protest. When a special statute has created a machinery for granting reliefs which are awardable under the statute, the jurisdiction of the Civil Court u/s 9 of the CPC cannot be invoked for the same relief. As stated by this Court in *Comunidade of Bambolim v. Manguesh Beta Kankonkar* (supra), a Civil Suit for enhancement of compensation is not maintainable in case the amount is not accepted by the party under protest and reference u/s 18 is not prayed. The second proviso to Sub-section (2) of Section 31 of the Act makes it clear that if a person has received compensation without registering his protest, he is not entitled to make an application u/s 18 and the remedy provided by the statute is barred. Needless to say the general remedy by recourse to the Civil Court is also barred. To receive compensation for the land compulsorily acquired is a right created by the Land Acquisition Act and will have to be exercised by following the procedure laid down by the statute.

22. Considering the law laid down by the Apex Court, particularly in *State of Mizoram v. Biakchawna* (supra) the Division Bench of this Court as well as the learned Single Judge of this Court in the case of *Comunidade of Bambolim v. Manguesh Betu Kankonkar* (supra), the plaintiff having raised no dispute as regards measurement of land or the compensation or the persons to whom it was payable, before the Land Acquisition Officer, would not be entitled to maintain a separate suit as regards the same. Viewed thus, the Civil Suit filed by the plaintiff after accepting the award as to the measurements of her acquired land as correct, and not having raised any dispute as regards the same the suit was clearly barred for want of jurisdiction.

23. Coming to the merits of the case, it could be broadly stated that Lote No. 633 claimed by the plaintiff and known as "Premeiro Lanco Cajuaria Por Sul" admeasured 45,072 sq.mts. and was located to the South of Lote No. 634 known as Segundo Lanco Cajuaria admeasuring about 34,622 sq. mts., as can be seen from the certificates produced by the plaintiff, though the defendants have claimed the property in their possession to be known as "Chowat". However, it does not at all appear that the plaintiff ever came in possession of the said property claimed by her to the extent of the area shown on the records of the Comunidade. The plaintiff's case has always been inconsistent. The plaintiff has not even stated as to how much compensation she received and of what area. Presumably, she received compensation as regards survey Nos. 224 and 225.

The plaintiff in her notice dated 21/7/ 1986 stated that an area of 19,600 sq.mts. was included in Survey No. 226 of Village Calapur but in her plaint she further stated that an area of 1,600 sq.mts. was also included in Survey No. 227. In addition, she also claimed that the area of Lote No. 633 was also included in survey Nos. 223, 228, 226, 202 and 222 besides a road and a drain. However, according to the surveyor Shri Gonsalves/P.W. 2, the area of Lote No. 633 of 120 sq.mts. was shown in Survey No. 197/ 0, 1,880 sq. mts. in Survey No. 202/0, 9,000 sq.mts. in Survey No. 224/0, 6,400 sq. mts. in Survey No. 225/0, 24,880 sq.mts. in Survey No. 226/0 and 1,600 sq. mts. in Survey No. 227/0 and 50 sq.mts. in 228/0 and 1, 142 sq. mts. of the nalla. The plaintiff claimed that her property was demarcated at site. The plaintiff also stated that the lessees and tenants of the properties have to enjoy and possess their respective properties as per the plan of defendant No. 3/Communidade. At the same time, she stated that she was in possession of the said property (of Lote No. 633) from the year 1971, but in cross-examination she stated that her plea that she had obtained the property in auction in the year 1971 was not correct and that she also could not explain as to why it was so mentioned. Regarding the notice, she stated that it was not as per her say. She considered that she was not taken to the site to show the property, presumably after the auction in her favour. On the contrary, she admitted that she had form No. III and form No. I and XIV in her possession since long and this shows that she was fully aware about the area of the property claimed by her. The plaintiff's witness Danial Araujo/P.W. 3 has not at all advanced her case. On the contrary, the defendant No. 1/D.W. 1 has stated that his property is bounded on all four sides by a cactus (niwal kanti) plants and that the property to the South of his property was being enjoyed by the plaintiff and in between the two there is a said fence like on other three sides. He also stated that whiles granting the said property to his late father in the year 1951, the attorney of defendant No. 3/ Comunidade had granted it at site. Moreover, the case set out by the defendant is supported by the promulgated survey records which carried a presumption in the favour of the defendants that they were in possession of the suit property. It is more than probable that the defendants came in possession of the area subsequently surveyed in their name, in the year 1951 or there about much before Lote No. 633 was taken on auction by the plaintiff and the defendants continued to be in possession of the said area until its acquisition by the Government. On behalf of defendants reference is also made to the Notification No. 1/1/93/RD published on Gazette dated 9/11/2006 by which the records prepared under Land Revenue Code, 1968 shall be deemed to be service made and maintained under the provisions of Goa, Daman and Diu Agricultural Tenancy (Revenue Survey and Record of Rights) Rules, 1967.

24. Plaintiff has failed to rebut the pre-sumption available to the defendants by virtue of Section 106 of the Land Revenue Code and now under the said Goa, Daman and Diu Agricultural Tenancy (Revenue Survey and Record of Rights) Rules, 1967.

25. The defendants being in possession of the property of the Comunidade

were rightly paid half share of the compensation and in between themselves as agreed by them in the ratio of 30.20.

26. I find there is no merit in this appeal and, consequently, the same is hereby dismissed.