

(1986) 08 GUJ CK 0009
In the Gujarat High Court
Case No : First Appeal No. 222 of 1986

Hiraben and Others

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 07-08-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Land Acquisition Act, 1894 — Section 1, 4
Limitation (Amendment) Act, 1983 — Article 65

Citation : AIR 1987 Guj 225 : (1987) 1 GLR 317

Hon'ble Judges : R.J. Shah, J; D.H. Shukla, J

Bench : Division Bench

Advocate : V.J. Desai, for the Appellant; J.M. Panchal, Addl. Govt. Pleader, for the Respondent

Judgement

Shah, J.—The above appeal arises under the following circumstances :

Appellants-plaintiffs had filed Special Civil Suit, 114 of 1981, in the court of the Civil Judge (S.D.) Bharuch alleging that they had right, title and interest in S. No. 268/2 admeasuring 1 acre 3 gunthas situated in the sim of village Jadeshwar. It was alleged that out of the said land, 17 gunthas had been acquired for the purpose of the National Highway, near Narmada river near village Jadeshwar. It was further alleged that, the plaintiffs were having only 11 gunthas of land out of the total land of S. No. 268/2 and that, therefore, there was an encroachment by the defendants over the remaining land of the said survey number. The plaintiffs had, therefore, prayed in the said suit for vacant possession of the land so trespassed upon. Alternatively, plaintiffs had claimed Rs. 42,000/- from the defendants, in case a decree for possession of the said land was not passed in favour of the plaintiffs. Plaintiffs had also prayed for mesne profits of Rs. 900 up to the date of the suit and for further mesne profits from the date of the suit as well as for costs. The said suit was filed on 14-10-81.

2. The suit was resisted as per the written statement dated 5-7-82. After

recording evidence; the trial court was pleased to dismiss the suit with costs by judgment and order dated 28-2-85, as the trial court came to the conclusion that it had no jurisdiction and that the suit was barred by time. It is pertinent to note that the aforesaid issues relating to the above were not framed as preliminary issues and the whole suit was proceeded on merits and ultimately it resulted in dismissal as aforesaid.

3. Being aggrieved by the aforesaid judgment and order, plaintiffs have come in appeal.

4. The following points arise for determination in the above appeal :-

(i) whether the trial court was right in reaching the conclusion that it , had no jurisdiction to try the suit?

(ii) Whether the suit was barred by time?

(iii) Whether the trial court had erred in holding that the defendants had not trespassed upon the suit land?

(iv) To what reliefs the plaintiffs would be entitled to?

5. So far as the aspect of jurisdiction is concerned, it is to be appreciated that the plaintiffs are raising no contention regarding the land actually acquired by the defendants. On record is the copy of an award, Ex. 74, passed in LAQ/ SR/105/70 dated 4-3-1071. It shows that the notification under S. 6, Land Acquisition Act, was published on 24-9-1970. It further shows that the land acquired was 17 gunthas and 60 sq. meters of S. No. 268/2. It is clear from this award that the whole of S. No. 268/2 had not been acquired. On record, there is a document which had been produced at Item 2 of Ex.22. It is a certified copy of a public document. Mr. J. M. Panchal for the respondents has no objection to this document being exhibited as it is a certified copy of a public document. The said document is, therefore, given Ex.80. Ex.80 shows 17 gunthas of land, which were acquired for the purpose of the road. It also shows that the remaining land was 26 gunthas. It further shows that on actual measurement, the land covered by the said road was 32 gunthas and, it further shows that the remaining land of S. No. 268/2 other than the land covered by the said road, as stated above, was 11 gunthas. Not only the aforesaid has been stated in Ex. 80, but also it has been made clear in Ex.80 that some amendment was necessary in the said circumstances in the award itself. The date that is appearing in Ex. 80 under the signature of the Reserve Taluka Surveyor, Bharuch is 9-7-1980. Ex. 80, therefore, supports the case of the plaintiffs.

6. At Ex. 41, there is a copy from the record of rights pertaining to the said S. No. 268/2. It shows that originally the total land was 43 gunthas and 50 meters. It further shows that after acquisition of 17 gunthas, the remaining land is 26 gunthas. At Ex. 50, there is a certified copy of Hirs Form No. 4 pertaining to S. No. 268/2. It shows the original measurements of the said Survey number to be 1 acre and 3 gunthas. It further shows 32 gunthas as land covered by the road

and 11 gunthas as the remaining land. The aforesaid documentary evidence points in the direction that instead of 17 gunthas of land, which was the land actually acquired for the purpose of the said road, 32 gunthas of land has actually been covered for the purpose of the said road. It, therefore, seems that to the extent of 15 gunthas ($32 - 17 = 15$), there has been an encroachment on the land of the plaintiffs.

7. The aforesaid discussion makes it clear that the subject matter of the suit was not the aforesaid 17 gunthas which was acquired as aforesaid, but 15 gunthas of land of S. No. 268/2 which was trespassed upon by the respondents while constructing the said road. It has, therefore, been urged on behalf of the plaintiffs that since that was the subject matter of the suit, the trial court had jurisdiction to try and decide the suit.

8. In support of the aforesaid contention, learned Advocate for the appellants has invited our attention to the case of Harish Chunder Neogy, Claimant Vs. The Secretary of State for India in Council . One of the contentions raised in the said case was regarding the site of the road on the east of the southern plot in question. The Municipal Corporation claimed the road site and it had pleaded that it had vested in it under the provisions of the Land Acquisition Act (X of 1894). On the other hand, the appellant before the court claimed it as his land and the road a "bustee" road for his tenants only and constructed on his own land by himself. It was observed that the Collector and the Special Judge under the said Act had limited jurisdiction and that they were bound by the official declaration in the local gazette. In terms, it was held that the Collector could not acquire or give possession of any land beyond the boundaries given in the declaration and if he did so, he committed an act of trespass. It was further held that it was the duty of the Collector to find out the precise quantity of land notified for acquisition within specified boundaries, value the same, under the provisions of the Act and give possession accordingly, and that the Special Judge had to make similar enquiries. It was clearly held that if the land acquired be for Government purpose and if the Government took possession of the land beyond the limits prescribed by the declaration or in excess of the area for which compensation was paid, it trespassed on private land and was liable under the law of the country. It was ultimately ruled that the claimant might have other remedies in respect of such land, but had no remedy before the Collector or Special Judge concerning the land which was not the subject matter of acquisition.

9. The ratio of the above decision clearly applies to the facts of the present case and the learned trial Judge was clearly in error in reaching a conclusion that he had no jurisdiction to try and decide the suit before him.

10. As against the aforesaid, Mr. Panchal for the respondents, had invited our attention to the case of Bhandi Singh v. Ramadhin Roy (1906) 10 Cal WN 991. The facts in this case were that the plaintiffs-appellants had instituted a suit for declaration that certain lands specified in the plaint were their "khudkast" property; that the defendants who claimed to have acquired a "raiya" therein

had no such right, and they had, therefore, asked for a decree against the defendants for a refund of Rs. 61/- which the latter had withdrawn from the Collectorate being the amount awarded as compensation for the land which were acquired by the Government under Act No. 1 of 1894 for the purposes of Railway. The defendants objected that the suit was not maintainable having regard to the provision for a reference to the Civil Court made under S. 18, Land Acquisition Act. On the facts of the said case, the plaintiffs, other than plaintiffs 3 and 6, were parties to the land acquisition proceedings and the reference to the court under S. 18 had been made at their instance, but on the matter coming on for hearing, same was struck off by reason of their non-appearance. The Munsif decreed the suit, but the District Judge on appeal held that the suit was not maintainable and he dismissed the suit. The plaintiffs had, therefore, preferred the second appeal. The Division Bench reversed the judgment of the District Judge and had the case remanded to him for further consideration on the lines indicated in the said judgment. Mookerjee J. had given a separate concurring judgment. After examining the scheme of the Land Acquisition Act and its various provisions, Mookerjee J. concluded that three propositions were established beyond the possibility of dispute, namely: (i) that the Statute created a right in the local Government to acquire land needed for public and other purposes; (ii) that it conferred upon the private individual whose land was thus compulsorily acquired a corresponding right to receive compensation; and (iii) while the Act provided for a summary determination by the Collector of the area and the value of the land and of the apportionment of the compensation, it also provided for a judicial determination by a special Civil Court of the measurement of the land, of the amount of the compensation, of the persons to whom it was payable and of its apportionment among the persons interested. Mookerjee J. had thereafter proceeded to consider several authorities and had stated that if the principles contained in those authorities were applied to the case before them, the inference was obvious that any of the four questions, which might be raised upon the award of the Collector under S. 18(1) must be tried by the principal civil court of Original Jurisdiction or by the special Judicial Officer possessing jurisdiction-to deal with the reference made by the Collector. It was pointed out that a difference however arose between the objection relating to the measurement of the land or the amount of the compensation and an objection relating to the person to whom the compensation was payable, or its apportionment among the persons interested and that distinction was founded on the third proviso to S. 31(2) which saved the liability of a person who might have received the whole or any part of the compensation awarded under the Act, to pay the same to the person lawfully entitled thereto. It was further clarified that the effect of the said proviso was that whereas an objection as to the measurement of the land or the amount of the compensation payable there of must be determined exclusively by a reference to the Civil court under S. 18(1), a question relating to the persons to whom the compensation was payable or, its apportionment among the persons interested might be determined either under a reference as contemplated by S. 18(1) or by a suit at the instance of a person

who might be lawfully entitled to it as against another, who had withdrawn the compensation money either without any right or in excess of his just dues. It was observed in this connection that that distinction was based and might be justified upon a broad and intelligible principle. As regards a dispute relating to the measurement to the land and the amount of compensation to be paid therefor, the Collector, as representing the authority for whom the acquisition was made, would be the opposing party; his rights and liabilities were entirely statutory and he might justly claim that they, should be determined in the forum specially created for the purpose. On the other hand, in the event of a dispute as to the persons to whom the compensation was payable or its apportionment amongst them proportionate to their respective interests, the Collector would not have any concern whatsoever; and, even without the Statute if, when land which belongs to A and B has been converted into money. A takes more than his share of the proceeds, B would be entitled according to the rule of justice, equity and good conscience to demand restitution from A. It was, therefore, held that in the case of a dispute as to the persons among whom the compensation was to be apportioned or the extent of their interests, the Land Acquisition Judge and the ordinary Civil Court have practically concurrent jurisdiction, by reason of the third proviso to S. 31(2) read with S. 18 of the Act. That, however, necessarily led to the position, that if a litigant had made his choice and availed himself of a reference to the court under S. 18, he could not again ask for an opportunity to litigate the same matter in the ordinary court, On the other hand, if there had been no reference to the court under S. 18, a suit would be maintainable for the adjudication of the rights of the claimants inter se because S. 12 made the award of the Collector final and conclusive only as between himself on the one hand and the persons interested on the other and not as between the claimants inter se.

11. The aforesaid contents of the said judgment clearly show that jurisdiction of ordinary courts is not always ousted even where the provisions of the Land Acquisition Act to an extent apply. As noted above, Mookerji J. himself has stated that in given situations, there are concurrent jurisdictions as well, All that has been stated in the judgment in this connection is that if a person chooses one forum, then he would not be permitted to resort to a different forum since he has made his choice between the two concurrent jurisdictions. Mookerjee J. has stated this in the context of two rival claimants to the compensation amount under the award passed under the provisions of the Land Acquisition Act. The present is not even such case. The facts of the present case put it on still higher footing, as the dispute raised by the plaintiffs is that their 15 gunthas of land covered by S. No. 268/2 were never a subject matter of any acquisition proceedings. The above decision, therefore, is totally unhelpful to the cause of the respondents.

12. Mr. Panchal had also invited our attention to the case of *Narayana Pillay Daivasen v. State of Kerala* AIR 1971 SC 2287, The relevant facts were that on 22-9-1959 a notification for acquisition of the land was issued under S 4, Land Acquisition Act. The same was followed by a notification under S, 6 on

21-6-1960, The Deputy Collector awarded compensation at the rate of Rs. 100/- per cent, calculating the total amount on the basis that the area was 4 acres 15 cents. The appellant asked for a reference under S. 18 of the Act. In that application, he did not challenge the extent of the area acquired but made a grievance of the market rate having not been awarded. Before the Additional Subordinate Judge, the appellant had raised the contention at the hearing of the reference that the actual area which had been acquired was 4 acres 15 cents and not 4 acres and 15 cents. That part of the appellant's claim was negated by the Additional Subordinate Judge. We are not concerned with, the other aspect that was before the Subordinate Judge, which was regarding the amount of compensation. Dealing with the said contention regarding measurement, Supreme Court stated that since in the application for reference under S. 18 of the Act it was accepted that the area was 4 acres and 15 cents, the Supreme Court was unable to see as to how it was open to the appellant to agitate that matter. We do not see the relevance of this judgment in the context of the present case. The question of measurement of the land acquired is not the subject matter of the present suit, the subject matter being the aforesaid parcel of 15 gunthas of land, which never was the land in question in any acquisition proceedings. This decision, therefore, does not further the case of the present respondents.

13. It, therefore, seems that the trial court had erred in reaching the conclusion that it had no jurisdiction over the subject matter of the suit before it. In the view that we are taking, the said conclusion of the trial court cannot be sustained and deserves to be reversed.

14. This leads us to the aspect of limitation. The date of the award in the present case is 4-3-71. The notification under S. 4 of the Act is dated 11-2-70 and was published on 5-3-70. The suit has been filed on 15-10-81, that is to say, obviously within 12 years even if the publication date, namely, 5-3-70, is to be the starting point of limitation. The possession of the land could not have been, taken before the publication of the S. 4 Notification. Article 65, Limitation Act, 1963, provides a period of 12 years if the suit for possession of immovable property or any interest therein is based on title, the starting point being when the possession of the defendant becomes adverse to the plaintiff. The trial court has found that the suit was barred by limitation. A perusal of the judgment of the trial court does not bring out as to how the court had come to a conclusion that the suit was barred by time. All that the trial court seems to have stated in this connection is that the land acquisition proceedings had taken place in the year 1970-71 and so the plaintiffs should have filed the case within three years. We are unable to comprehend the basis of the said conclusion reached by the trial court since none is named by the trial court in its judgment in the context of the provisions of the Limitation Act, 1963. In the light of the facts stated hereinabove, it is evident that the suit is clearly within time and so the conclusion reached by the trial court in this connection can not be sustained.

15. Apart from what has been observed on the aspect of trespass while discussing the aspect of jurisdiction hereinabove, there is further material on record which strengthens the submission of the plaintiffs that the defendants have committed trespass on their aforesaid 15gunthas of land while constructing the road in question. At Ex. 64, plaintiffs have examined one Dahyabhai Keshavlal, who has worked as a Court Commissioner in the suit In question, His evidence shows that after informing the parties, he had gone to the site and had prepared a map, which is at Ex. 66, There is no reason to discard the evidence of the said Commissioner, more particularly when it gets support from the documentary evidence as discussed hereinabove. The map, Ex. 66, brings out the position of S. No, 268/2 as it originally stood, as also the total land which is covered by the road in question. The contents of" the said map clearly show that in the said road, over and above 17 gunthas of acquired land, more land has been covered. According to this map, the total land which has been covered by the road is 33 gunthas, which would mean that over and above the acquired land, it has covered 16 gunthas of land. According to the plaintiffs, their 15 gunthas of land has been trespassed upon. In view of the aforesaid documentary and oral evidence, the conclusion is irresistible that the defendants have encroached upon at least 15 gunthas of land of the plaintiffs. Mr. Panchal has not been able to show from the evidence on record that a different conclusion is possible. It, therefore, becomes necessary to reverse the judgment of the trial court even on this count. Taking into consideration all the aforesaid, we find that respondents have encroached upon 15 gunthas of land forming part of S. No. 268/2 while constructing the road in question.

16. At this stage, Mr. V. J. Desai, the learned Advocate for the appellants-plaintiffs, states that he would like to give an option to the respondents to the effect that if the respondents pay or deposit in Court Rs. 25,000/- (Rupees twenty five thousands only) in respect of the entire suit claim of the plaintiffs, inclusive of costs, interest and mesne profits throughout, then the plaintiffs would not execute the decree for possession of the land encroached upon. Mr. Desai makes it clear that the aforesaid amount will have to be paid or deposited within four months from the date of the order and further that if the said amount is not so paid or deposited, then the plaintiffs would be at liberty to execute not only the decree for possession, but also the entire decree inclusive of mesne profits, interest if any, and costs.

17. In the result, the appeal is allowed and the judgment and decree passed by the trial-court are set aside and it is ordered as under : -

(a) Defendants to hand over vacant possession of 15 Gunthas of land forming part of S. No. 268/2 and which have been, encroached upon while constructing the road in question, within four months from the date of this order. Defendants have an option in view of the concession given by the plaintiffs to pay Rs. 25,000/- within four months from the date of this order in full and final settlement of the entire suit claim inclusive of mesne profits, interest if any and

costs. It is made clear that if the defendants fail to avail of the said option within the time specified, then the plaintiffs would be at liberty to execute the decree for possession, as also the decree for mesne profits and costs as hereinafter provided. In case of any difficulty in separating the aforesaid encroached portion, the plaintiffs will be at liberty to seek for appointment of a Commissioner in execution proceedings that may be taken out pursuant to this order;

(b) A decree is passed in favour of the plaintiffs and against the defendants in the sum of Rs. 900/- being the amount of mesne profits up to the date of the suit;

(c) A decree is hereby passed under O. 20 R. 12 (c), Civil P.C., directing an enquiry as to mesne profits from the date of the institution of the suit until the delivery of possession of the land encroached upon to the decree holders;

(d) Defendants to pay costs of the plaintiffs throughout and bear their own.

18. Order accordingly.