

**(2017) 09 BOM CK 0176**  
**In the Bombay High Court**  
**Case No : 293 of 2008**

Jacinto Baretto Miranda

APPELLANT

Vs

Deputy Collector and Land Acquisition Officer, & Anr.

RESPONDENT

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**Date of Decision :** 01-09-2017

**Acts Referred:**

<a href=5681>Land Acquisition Act, 1894</a>, <a href=5681-4>Section 4</a>, <a href=5681-23>Section 23</a>, <a href=5681-24>Section 24</a>, <a href=5681-22>Section 22</a>, <a href=5681-18>Section 18</a>, <a href=5681-28>Section 28</a>, <a href=5681-23>

**Citation :** (2017) 09 BOM CK 0176

**Hon'ble Judges :** Nutan D.Sardesai

**Bench :** SINGLE BENCH

**Advocate :** M.B. D"Costa, K. Betquecar, P. Faldessai

**Final Decision :** Allowed

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## Judgement

1. This is an appeal at the instance of the original applicant challenging the Judgment and Award dated 05/08/2008 by virtue of which the learned Reference Court partly allowed the reference under Section 18 of the Land Acquisition Act, 1894 ( L.A. Act, for short) and held the applicant entitled to the interest on the amount of Rs.82,907/- @15% p.a. and costs while disallowing the claim for the enhanced compensation. Being aggrieved by the Judgment and Award, the original applicant is in appeal seeking the enhancement of the compensation apart from other benefits.

2. Shri M.B. D"Costa, learned Senior Counsel came to be heard on behalf of the appellant who submitted that the possession was taken of his land for construction of a road in 1985 while the Section 4 Notification was issued only on 08/01/1991. The Award was passed by the Land Acquisition Officer (L.A.O., for short) on 20/07/1994 and no notice thereof was served on the applicant. The notice under Section 12(2) of the Act was received in January, 2006 and only then the application was made under Section 18 to the Reference Court claiming

the enhanced compensation @Rs.1000/- per sq.mt. against Rs.52/- awarded by the L.A.O. and severance charges. He examined himself and an expert to show the location of the land and its proximity to the Margao City when there was great scarcity of the land apart from the steady increase in the prices in Margao. There were amenities like road, transport, telephone, electricity, water, shops, commercial places and hospital etc. within 80mts. from the acquired land. The Kadamba Bus Stand was 80 mts. away while the National Highway 17 was 70mts. away to the acquired land which was abutted by a public road on the southern side and located in the settlement zone.

3. Shri M.B. D'costa, learned Senior Counsel placed reliance on the Sale Deed dated 28/11/1990 which was prior to the Section 4 Notification where an award was drawn and settled at the Lok Adalat at Rs.115/- per sq.mt. This land was about 300 mts. away from the acquired land. He referred to the impugned Judgment apart from the Sale Deed and the evidence of the expert and showed the fallacies in the Judgment drawn by the learned Reference Court. He therefore contended that the appeal had to be allowed and the rate enhanced appropriately as claimed by the applicant. He placed reliance in Nelson Fernandes and others v/s. Special Land Acquisition Officer, South Goa and others [(2007)9 SCC 447], State of Goa and Another v/s. Gopal Baburao Gaudo and others [(2009) 10 SCC 686], C.R. Nagaraja Shetty (2) V/s. Special Land Acquisition Officer and Estate Officer and Another [(2009) 11 SCC 75] and Harish Loyalka and another v/s. Dilip Nevatia and others [2015(1) Bom.C.R. 361].

4. Shri P. Faldessai, learned Additional Government Advocate on behalf of the respondents submitted that the appellant had failed to establish the market value of the acquired land and what was relied upon by him i.e. the sale instance was not a comparable sale instance and therefore, he was not entitled to any enhanced compensation. Besides, there were two buildings located in the sale instance land unlike the acquired land. He adverted to the evidence and submitted that the compensation granted by the Reference Court was appropriate and there was no scope for interference with the Award or for the appellant to claim any enhanced compensation. In this backdrop, it would be appropriate to examine the evidence and consider whether the learned Reference Court was justified in awarding the compensation as it did or whether the appellant had made out a case for interference with the impugned Award and grant of the enhanced compensation.

5. The appellant had primarily to discharge the burden of proving the market value of the acquired land being Rs.1,000/- at the time of issuance of the Section 4 Notification, that the valuation of the trees was not done appropriately, that he was entitled for severance charges on account of the acquisition and that he was entitled to additional compensation since the compensation of the land was taken much prior to the Section 4 Notification. In that context he examined himself on oath reiterating that he was the owner of the acquired land where the L.A.O. had fixed the market value @Rs.52/-per sq.mt. as on the date of the Section 4

Notification. The land was situated in Maddel, Margao city in a residential and commercial area falling within the Municipal limits and its value at the relevant time was not less than Rs.1000/- per sq.mt. It was a coconut grove and a level land, situated in the settlement zone and suitable for construction purpose. He next spelt out the various amenities and facilities such as water, electricity and telephone being available much prior to the Section 4 Notification and the very existence of the hospital, residential houses, restaurants, commercial buildings, Kadamba Bus Stand and National Highway apart from the District Court being within a radius ranging from 80mts. to 100mts.

6. The appellant was relying on the sale instance dated 28/11/1990 in respect of the plot admeasuring 1126 sq.mts. which was sold for the consideration of Rs.6,15,000/- i.e. @ Rs.546/- per sq.mt. and it was bounding his property from which the land had been acquired by the respondents. It was similar to the acquired land, level in nature, abutting the road and suitable for the construction purpose. The learned Reference Court in Land Acquisition Case No.161/1989 by its Judgment and Award dated 12/07/2001 held the market value of the land in that case being Rs.267/- per sq.mt. in 1981 which was bearing the Chalta No.12 of P.T. Sheet No.99 of Margao city and acquired for the construction of multi-purpose stadium at Fatorda in 1981. The respondents in that case had preferred an appeal before this Court which was settled in the Lok Adalat proceedings and the market rate was fixed @Rs.115/- per sq.mt. This land was barely 300 mts away from the acquired land which was a part of the bigger property admeasuring 3000 sq.mts. and abutting the road and suitable for construction unlike the acquired area being a narrow bund, admeasuring 112 sq.mts. and not abutting any road nor possessed of any building potential.

7. The appellant also stated in his affidavit that he was paid much less for the trees as compared to the valuation given by him. Moreover, he was claiming compensation on the ground of severance as his property was severed into two parts. He had produced the Survey Record and Survey Plan, the Award in the L.A.C. No.161/1989 as also in the First Appeal No.18/2002. He stated during his cross-examination that the acquired land was around 55 mts. long and 5 mts. wide and possession was taken from him in 1992. He relented that he had stated in his application that the possession of the acquired land was taken on 31/01/1985 but that was an oral permission for the construction of the road in his property at the instance of the local MLA. In the next breath he admitted that no physical possession was taken and that the same was taken only after the year 1991. There was also an admission at his instance that there was two buildings of flats, shops and garages in the sale instance relied upon by him. At one time he admitted that there were no continuity in the road lying from near Dr. Rebello's hospital to the accesses lying on the southern side of the land and yet maintained that the acquired land was similar to the sale land. Otherwise, there was no rebuttal of his testimony on the existence of various facilities and amenities to the acquired land and more particularly that the land in the L.A.C. No.161/1989 being situated at a distance of 300 mts. from the acquired land.

8. He had examined a Civil Engineer in support of his case who corroborated his version stated that he was acquainted with the property from which the land was acquired for the construction of a road being a level land falling in the settlement zone and suitable for construction. A strip of land admeasuring 287 sq.mts. in the middle of the applicant's property had been acquired severing his property into two pieces, one lying to the East admeasuring 1618 sq.mts. and other lying to the West admeasuring 1435 sq.mts. On account of the said acquisition, the applicant would have to keep a setback area, as well as road widening area on both sides of the road in respect of both pieces of his property for development. He further admitted that neither the applicant had asked him to draw the plan showing the setback areas to be kept for the acquired area i.e. the proposed road severing the land of the applicant nor had he felt it necessary to draw a plan to substantiate his case.

9. In C.R. Nagaraja Shetty (supra), the appellants application for enhancement under Section 18 of the Act was partly allowed by the Reference Court which enhanced the compensation to Rs.27.50 per square feet apart from the other statutory entitlement. The Reference Court accepted that it was a non-agricultural land, situated adjacent to the Highway and thus had potential for being used for commercial purpose. The public purpose for which the land was acquired, was for widening of the National Highway. The High Court in appeal set aside the order of the Reference Court as it had erred in enhancing the compensation giving rise to the appeal by special leave at the instance of the original applicant. The Apex Court set aside the Judgment and remanded the matter to the High Court to consider the matter afresh which heard the matter again, partly allowed the appeal and enhanced the compensation amount at Rs.75/-per sq.feet but deducted Rs.25/-per sq.feet for development charges and did not award the compensation towards the yielding coconut trees, barbed fencing wire etc. giving rise to the appeal at the instance of the appellant again.

10. In C.R. Nagaraja Shetty (supra), it was contended on his behalf that the land was on the outskirts of Bangalore City, had a great commercial potential and the High Court was bound to give enhanced compensation, at least @ Rs.100/- per sq. feet and the same was the land was on the National Highway. In any event, the High Court should not have deducted Rs.25/- per sq. feet for development charges. It was contended on behalf of the LAO that the High Court had given much more compensation than what was actually deserved by the appellant by enhancing the compensation from Rs.27.50/- per square feet to Rs.75/- per square feet. The High Court had observed that the acquired land was abutting the National Highway, within 15 kilometres from Bangalore City Corporation limit and that all-round development had taken place as industries had come up thereby and accordingly awarded Rs.75/- per sq. feet after relying upon the the Division Bench Judgment passed by it where the value of the land nearby was Rs.62.50/- per sq. feet and considering the proximity of this land, awarded a better rate than that given in the earlier Judgment.

11. In C.R. Nagaraja Shetty (supra), the Apex Court was satisfied with the finding of the High Court as the learned Counsel had not been able to show anything from the record to hold that the concerned land would deserve a higher price than the one awarded by the High Court. At the same time it observed that the High Court unfortunately had not discussed the reason for this deduction of Rs.25/- per sq. feet nor it relied on any piece of evidence for that purpose. The Apex Court observed that it was true that where the lands are acquired for the public purpose like setting up of industries or housing colonies or other such allied purposes, the acquiring body would be entitled to deduct some amount from the payable compensation on account of development charges. However, it had to be established by positive evidence that such development charges were justified but no discussion was found in the order of the High Court and in the circumstances held that the High Court erred in deducting Rs.25/- per sq. feet out of the ordered compensation and allowed the appeal holding him entitled to the compensation at the rate of Rs.75/- per sq. feet with all the statutory benefits including interest.

12. In Gopal Baburao Gaudo (supra), the acquisition proceedings were initiated with regard to the several lands including that belonging to the respondents under a preliminary Notification dated 14/02/1991. The Land Acquisition Officer awarded compensation at Rs.7/- per sq. mt. which was increased by the Reference Court to Rs.154/- per sq. mt. The High Court did not disturb the amount awarded by the Reference Court as it found that in an appeal arising from the award in Land Acquisition Case No.48/1995 relating to a comparable land, compensation at a higher rate had been awarded of Rs.200/- per sq. mt. dismissing the appeal of the State giving rise to the leave to challenge the said judgment. The main plank of the arguments on behalf of the petitioner State was that the acquired land admeasuring 2715 sq. mts. was a narrow strip which fell within the 40 mts. margin from the centre of the highway where constructions were prohibited and that as the acquired land could not be used for construction, it had to be considered as not having any development potential and could not be compared with the land which was the subject matter of the Land Acquisition Case no.48/1995.

13. In Gopal Gaudo (supra), the Hon"ble Apex Court held at para 5 as below:

"5. The contention that a land adjoining the highway should be treated as having no development potential (and therefore as land without much value except as ordinary agricultural land), while considering the lands to its rear which are farther away from the road, or other adjoining lands of the same extent, but having more depth (so as to extend beyond the 40 mts. margin) as having potential for development, is illogical and cannot be accepted."

14. Their Lordships further went on to demonstrate the absurdity of such a contention with reference to an illustration and observed at paras 6 & 7 as below :

"6. Let us take the example of a residential plot of land measuring 60" x 100". Let us assume that the municipal bye-laws require a front (roadside) set-back of 20" for construction of houses in a plot of that size. Therefore, the owner would leave a twenty feet wide front strip in the said plot free of any construction while putting up the construction in the plot. Obviously, he cannot thereafter construct in that front strip. Let us further assume that the front strip is acquired for road widening. Can the acquiring authority deny compensation to that strip on the ground that the said 20" strip acquired for road widening could not in any event be used for any construction purpose and therefore, was not of any value? Obviously not.

7. Therefore, the determination of the market value of the acquired land with reference to the value of the comparable land cannot be faulted."

15. The High Court had rightly decided the matter with reference to the facts of the case and the judgment did not call for any interference. The Special Leave Petition was therefore dismissed as having no merit.

16. In *Nelson Fernandes (supra)*, the land under acquisition was situated adjacent to the land already acquired for the same purpose i.e. for laying a railway line. The party had relied on the two sale instances which were 8 months prior to the Section 4(1) Notification pertaining to an area sold at Rs.250/- per sq. mt. The co-owners had developed the property by making roads, drainage etc. as required under the standing laws. The appellant had got the land admeasuring 11,875/- sq. metres which was a joint property which was abutting the public road and situated in the settlement zone with all the amenities and facilities within a range of 1km valued by the valuer who had fixed the market value @Rs.5/- per sq.mt. However, the Award was made granting the compensation @Rs.4/- per sq.mt. and the reference under Section 18 by an Additional District Judge by taking the average of two Sale Deeds made a deduction @ 33% towards the development charges and awarded market value of the land @Rs.192/- per sq. mt. being reasonable. The first appeal preferred by him was dismissed and that filed by the respondent L.A.O. was allowed revising the compensation @Rs.37.50 per sq.mt. The High Court held that the District Judge was not justified in principle in taking an average of the price of the two Sale Deeds and applying the same for fixing the compensation. The High Court observed that to carry out the development of such land which was not at one level he would have to spend a considerable amount towards the development, namely, level terracing roads etc. and considering the nature of the land being hilly. The Additional District Judge should have allowed the deduction of 65%. The District Judge ought to have made a further deduction of 10% since the distance between the acquired land and the plots was about 3 kms. and that the prices fetched from small plots cannot be applied to the lands covering large area and should have made a further deduction and all that process computed the price of the acquired land to Rs.37.50 i.e. Rs..38/- per sq. mt.

17. In *Nelson Fernandes (supra)*, the Hon"ble Apex Court held that in

determining the amount of compensation, the L.A.O. should be guided by the provisions of Sections 23 and 24 of the Act. As per Section 22 of the Act, the market value of the land had to be determined on the date of publication of Section 4 Notification. The L.A.O. in terms of Section 24 had to exclude any increase in the value of land likely to accrue from use to which it will be put once acquired. The market value of the land means the price of the land which a willing seller is reasonably expected to fetch in the open market from a willing purchaser. In other words, it is the price of the land in hypothetical market. The appellant had relied on two Sale instances which were about 8 months prior to the Section 4 Notification where the property was sold @250/- per sq. mt. Their Lordships found that the property in the first Sale Deed was sold at Rs.385/- per sq.mt. which was developed by the owner by making roads, drainage etc. as required under the planning law. The appellant had also examined the Valuer who had assessed the market value @Rs.500/- per sq.mt. Considering all the amenities and facilities and that nothing was elicited from her in the cross-examination in regard to her statements made in the chief examination and taking into consideration the location of the property amenities available and the cost of similar properties in the locality, she had arrived at the fair market rate at Rs.500/- per sq. mt. The Additional District Judge had considered the two Sale Deeds and after making 33% deduction fixed the market rate Rs.192/- per sq.mt. by taking an average of the two Sale Deeds.

18. In *Nelson Fernandes (supra)*, the Apex Court observed in its opinion that the High Court had adopted a rough and ready method for making deductions which was impermissible in law. No reason whatsoever was given by the Reference Court or by the High Court as to why the report of the valuer and her evidence could not be relied on. The compensation awarded by the High Court in their opinion had no basis whatsoever and was not supported by cogent reasons and that it did not consider the future prospect of the development of the land in question. The High Court also did not assess the injury that the appellant is likely to sustain due to loss of his future earnings from the said land and also did not assess the damage already suffered due to diminution of the profits of the land between the time of publication of the notice and time of the Collector taking possession. The Apex Court held that both the Special Land Acquisition Officer, the District Judge and High Court had failed to notice that the purpose of acquisition was for laying railway lines and therefore the question of development would not arise. The order passed by the High Court was liable to be set aside and in view of the availability of basic civic amenities such as school, bank, police station, water supply, electricity, high way, transport, post, petrol pump, industry, telecommunication and other businesses, the claim of compensation should reasonably be fixed @ Rs.250/- per sq. mt. with the deduction of 20% and disposed off the appeal.

19. In *Harish Loyalka (supra)*, the learned Single Judge of this Court held at para 5 as below :

"10. The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated."

20. The learned Reference Court was seized of the fact that the appellant had examined himself and an expert witness unlike the respondent who had examined none and moreover he had stated that the land was level and situated in the Settlement Zone. The learned Reference Court was equally seized of the fact that the applicant had been unrebutted in his testimony that there was a scarcity of land available in Margao and prices of the land were rising and amenities like water, electricity etc. apart from important development were close to the acquired land. The learned Reference Court had observed that the statement of the applicant was not at all disputed and still on examining the sale instance at Exhibit-17 where the land was sold @Rs.546/- per sq.mt. held that it did not bear any similarity to the acquired land and found favour with the contention on behalf of the respondents that it did not depict the true market rate of the land in the year 1990 and brushed it aside. The learned Reference Court also did not consider the fact as borne out from the evidence that there was severance of the property and that he would suffer a loss when he undertook development. The learned Reference Court ignored the sale instance on the specious premise that the vendors in that deed had transferred the undivided right in the land on which the buildings had been constructed by the confirming party in favour of the purchasers and chose to ignore the Deed as a reference for computing the market rate of the acquired land. It was completely lost on the learned Reference Court that the parties had agreed to the price of the land and subsequent construction of the building had no bearing thereon and hence the learned Reference Court was in error to ignore the sale instance.

21. The learned Reference Court therefore ought to have considered the said sale instance in respect of the land sold in 1990 which was pursuant to an agreement of the previous year i.e. 1989 as the basis for computing the market value of the

acquired land which it failed to do. For that matter the learned Reference Court could also have looked into the award in respect of the land acquired much earlier where an award was made on 12/07/2001 where the market value of the acquired land was fixed @Rs.267/- per sq.mt. in 1981 and acquired for the construction of multipurpose stadium at Fatorda in 1981. The learned Reference Court ought to have relied on the said instance in particular in respect of an area of 1126 sq.mts. unlike the property of the applicant which was around 3000 sq.mts. and a portion admeasuring 227 sq.mts. had been acquired for the stated purpose. Therefore considering the sale instance of 1990 viz-a-viz the areas of the acquired land and after making necessary deductions towards development @30%, the market value is worked out at Rs.382/- per sq.mt. Further, giving 10% escalation the rate would work out to Rs.420/- per sq.mt. as on the date of the Section 4 Notification. i am fortified in this conclusion that even the strip of land had potential for construction looking into the Judgment in Gopal Baburao Gaudo (supra). Accordingly, it is held that the appellant is entitled to the compensation fixed on the basis of the market value of the acquired land on the date of the Section 4 Notification @Rs.420/- per sq.mt.

22. It was also the case of the appellant that the acquired property was a part of the bigger property admeasuring 3000 sq.mts. and which was severed on account of the acquisition into two pieces. He had also stated that one severed portion was admeasuring 1618 sq.mts. and the other lying to the West was admeasuring 1435 sq.mts. Although no separate plan was prepared by the expert showing the severance of the applicant's property, nonetheless, there was no serious rebuttal of his testimony that his property was severed which was lost on the Reference Court while awarding severance charges in his favour. The learned Reference Court was conscious of the fact that the property of the applicant was severed but was unduly swayed by the statement of the appellant that he intended to do construction in the remaining portion of his property. For that matter, the Reference Court had considered the statement of the expert who had stated that he would have to keep setback areas as also the road widening areas on both the sides as also the severed portion and yet the learned Reference Court in her wisdom hastily concluded that there was no material to prove that by reason of the acquisition, the remaining land was injuriously affected and denied the severance charges. This view of the learned Reference Court calls for an interference in the face of the evidence led by the appellant and that of his expert and hence he is entitled to the severance charges to the extent of 20% of the market rate fixed in his favour, once again necessitating a reversal of the findings rendered by the learned Reference Court holding against the appellant.

23. Since, the appellant did not press for the issue no.2 qua the valuation of the trees, the same would not arise for consideration in this appeal, having addressed myself to the material issues on the enhancement of the market value and the compensation towards the severance charges. Hence, in view of the earlier discussion, i pass the following: ORDER

The appeal is partly allowed whereby the impugned Judgment and Award is modified to the extent that the applicant is held entitled to the compensation on the basis of the enhanced market value of the acquired land on the date of the Section 4 Notification @Rs.420/- per sq.mt. He is also held entitled to the severance charges and all the other statutory benefits in terms of Section 23(1-A), 23(2) and 28 of the Act and the costs of the appeal.