(2014) 04 MAD CK 0154

In the Madras High Court

Case No : Writ Appeal (MD) No. 726 of 2013

Madurai Bar Association — APPELLANT

Vs

The State of Tamil Nadu — RESPONDENT

Date of Decision : 28-04-2014

Acts Referred:

Land Acquisition Act, 1894 — Section 11, 11A, 16, 31, 31(1)
Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 — Section 24(2)

Citation : (2014) 6 CTC 270 : (2014) 4 LW 892

Hon'ble Judges : V.M. Velumani, J;V. Ramasubramanian, J

Bench : Division Bench

Judgement

V. Ramasubramanian, J.—The appeal arises out of the dismissal of a writ petition filed by the appellants herein, challenging the entire proceedings for acquisition of the lands belonging to the appellants 2 to 8, in terms of the provisions of the Land Acquisition Act, 1894 (in short "the Act"). We have heard Mr. D. Selvam, learned counsel appearing for the 1st appellant, Mr. G.R. Swaminathan, learned counsel appearing for the appellants 2 to 8, Mr. A.K. Baskarapandian, learned Special Government Pleader appearing for respondents 1 and 2 and Mr. S. Nagarajan, learned counsel for the 3rd respondent.

2. The land of a total extent of about 90.85 in Survey Nos. 94/1B, 94/1C, 94/1D, 94/1E, 94/1F, 94/1G, 99/1H and 99/11, Uchapatti Village, Tirumangalam Taluk, Madurai District, was sought to be acquired by the Government of Tamil Nadu for the formation of Madurai South Neighbourhood Scheme. Two Notifications under Section 4(1) of the Land Acquisition Act, 1894, were issued under G.O. Ms. Nos. 933, Housing and Urban Development Department, dated 06.06.1991 and G.O. Ms. No. 989, Housing and Urban Development Department, dated 14.06.1991. These Notifications were published in the Tamil Nadu Government Gazette on 03.07.1991. Paper publications were made on 19.07.1991. The declaration under Section 6 of the Act was published on 28.07.1992. Two Awards came to be passed, one in Award No. 7/1994 on 25.07.1994 and another in Award No.

15/1994 on 28.07.1994.

3. The aforesaid lands belonged to one Mr. K. Shenbagamoorthy, his wife S. Jaya, his sons Surendran, Mahendran, Ramanathan and Ravindran and his three daughters. Mr. Shenbagamoorthy, his wife Jaya and two sons Surendran and Mahendran filed one writ petition in W.P. No. 16039 of 1994 seeking a declaration that the entire land acquisition proceedings, initiated under the Notification under Section 4(1), dated 14.06.1991 and the Declaration under Section 6, published on 28.07.1992, in respect of the lands in Survey Nos. 94/1B, 94/1C and 94/1D, had lapsed by virtue of Section 11-A of the Act. Similarly, they filed another writ petition in W.P. No. 17050 of 1994, challenging the other Notification under Section 4(1), issued under G.O. Ms. No. 989, Housing and Urban Development Department, dated 14.06.1991 and the Declaration under Section 6, published on 28.07.1992, in respect of the lands in Survey Nos. 94/1E, 94/1F, 94/1G and 94/1H, measuring an extent of 53.45 acres.

4. As could be seen from the affidavits filed in support of both the writ petitions, the challenge of the petitioners to the entire acquisition proceedings in those two writ petitions was primarily on the ground that the awards had not been passed within the time stipulated under Section 11-A of the Act.

5. Both the writ petitions were dismissed by this Court by separate orders, dated 05.02.2002, on the short ground that the award was passed within two years of the publication of the Declaration under Section 6 of the Act.

6. As against the dismissal of both the writ petitions, those writ petitioners filed two writ appeals in W.A. Nos. 769 and 770 of 2002. Those two writ appeals were taken up, along with one more writ appeal in W.A. No. 768 of 2002, filed by S. Jaya against the order passed in W.P. No. 17051/1994, and all the writ appeals were dismissed by a Division Bench of this Court, by order dated 14.07.2006. While dismissing the writ appeals, this Court gave a small leverage by making an observation to the effect that the appellants were free to make appropriate representation to the Government, highlighting their grievances. The Government was also directed to consider any such representation and to take a decision within 12 weeks.

7. Accordingly, those writ petitioners filed a representation, dated 31.07.2006, to the Government. But, the Government rejected the request by a letter bearing No. 46855/LA-III 91)/02-19, dated 20.12.2006. It is seen from the representation made by the writ petitioners on 31.07.2006 and the order of rejection passed by the Government that the petitioners actually wanted exemption of their lands from the acquisition proceedings. The Government rejected the request on the ground that no re-conveyance is possible, in terms of Section 48(B) of the Act.

8. After the rejection of their representation by the Government, those persons filed review applications in Rev. A. Nos. 13 to 15 of 2007 for a review of the order of the Division Bench, dated 14.07.2006 in W.A. Nos. 768 to 770 of 2002.

Though we are unable to decipher the grounds on which the review was actually sought, it appears that the grievance projected by the appellants was that the amount of compensation had not been deposited. Therefore, in a brief order, dated 23.02.2007, rejecting the review applications, the Division Bench of this Court recorded the statement of the Standing Counsel for the Housing Board to the effect that the entire amount of compensation, as awarded by the Tahsildar, had been forwarded on 16.02.2007 itself and that the review applicants were entitled to withdraw the said amount.

9. After having thus lost the first round of litigation and after having obtained an order of rejection on their request on 20.12.2006 for re-conveyance, the appellants initiated the second round of litigation, without even challenging the order dated 20.12.2006. They did this by filing a fresh writ petition in W.P. (MD) No. 2296 of 2010. The prayer in the writ petition was for a mandamus to direct the State of Tamil Nadu to consider their representations, dated 25.04.2008 and 18.02.2010, seeking re-conveyance under Section 48(B) of the Act, on the ground that the acquired lands had not been put to use for the purpose for which they were acquired. Unfortunately, the said writ petition was disposed of by a learned Judge on 25.02.2010, directing the appellants to give a detailed representation under Section 48(A) of the Act and directing the Government to consider the same and pass orders within three months. This order was passed under a mistaken impression that no orders had been passed by the Government on the request of the appellants for re-conveyance. Taking advantage of the said order, the appellants gave a representation afresh on 22.03.2010, by injecting fresh blood into a dead cause of action. But, the said representation was rejected by the Government, by a fresh order, dated 07.09.2010, with sufficient reasons.

10. After the rejection of their representation by the Government, the second appellant herein, who is an Advocate, appears to have entered into an agreement with the Madurai Bar Association, agreeing to sell the land to them, if the Government re-conveyed the land to the owners. The second appellant also obtained a general power of attorney on 04.03.2011 from the other appellants, for the purpose of dealing with the Government also for proceeding with the sale of the land to the Madurai Bar Association. Thereafter, the Madurai Bar Association and the land owners joined together and filed a fresh writ petition, initiating a third round of litigation in W.P. (MD) No. 9759 of 2012, praying for quashing the awards, bearing Nos. 7 of 1994 and 15 of 1994, dated 25.07.1994 and 28.07.1994 and for quashing the entire acquisition proceedings. Subsequently, the appellants got their prayer in the writ petition amended by an order dated 30.07.2012. The amended prayer is for quashing the Notifications under Section 4(1) and the Declarations under Section 6 as well as both the awards passed in Award Nos. 7 and 15 of 1994.

11. By a final order dated 27.03.2013 (reported in 2013-4-L.W. 122), a learned Judge of this Court dismissed the writ petition, on the ground that the present writ petition is barred by res judicata and that the third round of litigation in

respect of the same subject matter was not maintainable. Aggrieved by the order of the learned Judge, dismissing the third writ petition, the appellants are before us.

12. At the outset, we wish to point out that the 1st appellant has no locus standi to seek the reliefs sought in the writ petition. The 1st appellant is one who jumped into the fray only by virtue of a Memorandum of Understanding entered into with the erstwhile owners on 09.03.2011, after the fate of the claim of the original owners got sealed, in two rounds of litigation. The 2nd appellant, who is a member of the Bar, appears to have entered into an agreement purportedly with charitable intentions, just for the purpose of mustering support in their battle for getting the lands re-conveyed. We do not think that we need to cite any authority to hold that a person who enters into an agreement just for the purpose of retrieving an acquired land, has no right to challenge the acquisition proceedings that had attained finality, a long time ago. Therefore, we hold that the 1st appellant has no locus standi to be a part of this litigation.

13. Before proceeding to consider the claim of the appellants 2 to 8, we wish to bring on record one more fact. It is that the appellants 2 to 8 appear to have mortgaged these properties with the State Bank of India and obtained a loan in 2006-2007. As we have indicated in the sequence of events, the Notification under Section 4(1) was published on 03.07.1991, the Declaration under Section 6 was published on 28.07.1992 and the two awards were passed in July, 1994. But the appellants 2 to 8 dared to obtain a loan from the State Bank of India to the tune of about Rs. 48,50,000/- and deposited the title deeds relating to the properties on 18.03.2006 with an intent to create an equitable mortgage. Subsequently, a Memorandum of Deposit of Title Deeds was executed on 13.06.2006 and also registered in the Office of the Joint Sub-Registrar-IV, Madurai, as Document No. 4633/2006. After coming to know of the acquisition proceedings, the State Bank of India had lodged a claim with the Acquisition Officer on 26.07.2007, requesting the Officer not to disburse the compensation amount to the appellants 2 to 8. Thus the appellants 2 to 8 appear to have taken the State Bank of India for a ride and also suppressed this crucial information in the affidavit filed in support of the writ petition in W.P. (MD) No. 9759 of 2012. This itself is sufficient for us to dismiss the writ appeal, even without considering any of the contentions raised. It is too well settled that a person who does not come to Court with clean hands need not be given an audience at all on merits. But, nevertheless, we would also consider the contentions raised by the appellants, to show that the entire claim is nothing but frivolous. This is for the simple reason that it was held by the Supreme Court in Special Land Acquisition Officer, Bombay and Others Vs. Godrej and Boyce, that till vesting takes place, the land continues to be with the original owner and he is also free to deal with the land just as he likes. However, this will hold good only in case there is no specific legislation to the contrary. Therefore, we would deal with the contentions on merits also.

14. Mr. G.R. Swaminathan, learned counsel appearing for the appellants 2 to 8, raised the following contentions:

(i) Patta in respect of the lands still stands in the names of the appellants 2 to 8 and possession is also with the appellants 2 to 8. The respondents could not take possession, even after 20 years of the award and hence the land cannot be said to have vested with the Government under Section 16 of the Act. If the land had not vested with the Government and if the appellants had not received even a single penny towards compensation, the whole proceedings are a nullity.

(ii) the order of the learned Single Judge holding that the writ petition is barred by res-judicata is clearly contrary to law, since the cause of action for the present proceedings is entirely different from the cause of action for the previous one.

(iii) In any case, under the provisions of Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (Central Act 30/2013), all proceedings for the acquisition of land initiated under 1894 Act shall be deemed to have lapsed, if an award had been passed more than 5 years ago and if the physical possession had not been taken. In this case, the award was passed in 1994, much before the commencement of Central Act 30/2013 and possession had not so far been taken. Therefore, under Section 24(2) of Act 30/2013, the proceedings had lapsed.

(iv) The recent trend in the jurisprudence relating to land acquisition shows that there is a shift from the policy of eminent domain to the policy of protection of property rights. Therefore, the present proceedings will have to be viewed in the context of the development of law.

15. We have carefully considered the above contentions. We shall deal with them one after another.

Contention No. 1:

16. The first contention revolves around the claim that the appellants 2 to 8 still have patta in their names and that actual physical possession is still with them. As per Section 16 of the Land Acquisition Act, 1894, a land acquired for a public purpose vests with the Government, after an award had been passed and possession taken. Therefore, it is claimed by the learned counsel for the appellants 2 to 8 that since patta stands in favour of the appellants and since the appellants have retained possession till date, no vesting had taken place under Section 16 of the Act.

17. But, we are least impressed with the said argument. It is true that the appellants 2 to 8 have managed to obtain patta from the Headquarters Deputy Tahsildar, Tirumangalam. But we are shocked to note that these pattas were issued on 24.04.2012 and 23.01.2013 after 18 years of the passing of the awards. We do not know how the Taluk Office issued patta at this distance of

time. Going by the fact that the appellants 2 to 8 had gone to the extent of borrowing a huge amount from the Bank by creating a mortgage in favour of the Bank, it is very clear that the patta obtained by the appellants 2 to 8, is also a product of the very same design. Therefore, we do not wish to attach even the least credibility to the patta relied upon by the appellants 2 to 8.

18. Insofar as the question of possession is concerned, the Revenue Divisional Officer had sworn to a counter affidavit in the writ petition to the effect that the Tamil Nadu Housing Board itself had taken possession of the lands, part by part, on 12.05.2008, 03.08.2009 and 03.08.2009. In other words, there is a positive assertion on the part of the respondents that they have taken possession.

19. Section 16 of the Land Acquisition Act, 1894, lays down that once the Collector has made an award under Section 11, he can take possession of the acquired land and that upon taking possession by the Collector, the acquired land shall vest absolutely in the Government free of all encumbrances. Therefore, in terms of the plain language of the Section, vesting takes place as soon as possession is taken after passing the award.

20. The question as to what constitutes the act of taking possession, came up for consideration on several occasions and the Courts had to dabble with various probabilities ranging from symbolic possession to actual physical possession. In Balwant Narayan Bhagde Vs. M.D. Bhagwat and Others, , the Supreme Court held that there can be no hard and fast rule for deciding what would constitute taking of possession of land. In Balmokand Khatri Educational and Industrial Trust, Amritsar Vs. State of Punjab and others, , the Supreme Court held the retention of possession by the land owners, long after the completion of the acquisition proceedings, to tantamount to illegal and unlawful possession. In Banda Development Authority, Banda Vs. Moti Lal Agarwal and Others, , the Supreme Court took a survey of all the earlier decisions and laid down five principles, which can be summarised as follows:

(i) that there can be no hard and fast rule;

(ii) that if the acquired land is vacant, it is sufficient if the concerned State Authority goes to the spot and prepare a panchnama;

(iii) that if there is standing crop or any building or structure, possession has to be taken in the presence of independent witnesses and it will not be sufficient for the authority merely to go to the spot and prepare panchnama;

(iv) that if the acquisition is of a large tract of land, it will be sufficient for the authority to take symbolic possession by preparing appropriate document in the presence of independent witnesses; and

(v) if the beneficiary of the acquisition is an agency or instrumentality of State and 80% of the compensation is deposited and substantial portion of the acquired land had been utilised in furtherance of the particular public purpose, then the Court can reasonably presume that possession had been taken.

21. The principles laid down in Banda Development Authority were followed by the Supreme Court in Prahlad Singh and Others Vs. Union of India (UOI) and Others, . But, it was found in that case, on facts, that as per the documents produced before the Court, the actual physical possession was with the land owners. Therefore, the Supreme Court allowed the appeal filed by Prahlad Singh and others. However, the principles laid down in Banda Development Authority were not diluted.

22. In Raghbir Singh Sehrawat Vs. State of Haryana and Others, , the Supreme Court again traced the law relating to Section 16 of the Land Acquisition Act, 1894, right from Balwant Narayan Bhagde upto Prahlad Singh and reiterated the five principles laid down in Banda Development Authority. Therefore, it is clear that the contention of the appellants 2 to 8 to be tested with due regard to the five principles laid down in Banda Development Authority.

23. If so tested, it is clear that the Tamil Nadu Housing Board, which is the beneficiary, has deposited the compensation and this fact is recorded even in the decision rendered in the first round of writ petitions. In the review applications arising out of the writ appeals in the first round of litigation, the Division Bench directed the appellants even to withdraw the amount. There is no dispute about the fact that the Housing Board has developed the land and utilised a substantial portion in furtherance of the public purpose for which the land was acquired. As a matter of fact, by G.O. Ms. No. 260, Housing and Urban Development Department, dated 21.10.2013, the Government had actually granted, in principle, administrative sanction, for the implementation of the Integrated Satellite Township at Thoppur and Uchampatti Village in Madurai. The Satellite Township is to comprise of 19500 plots of various categories such as LIG, MIG, HIG and Economically Weaker Sections. Therefore, the case on hand will fall under the 5th category as enunciated in Banda Development Authority.

24. In Patasi Devi Vs. State of Haryana and Others, , the Supreme Court again reiterated the five principles developed in Banda Development Authority and followed in Prahlad Singh and Raghbir Singh. It must be pointed out that in Patasi Devi, the Supreme Court found that under the guise of public purpose, the Government acquired a land for handing it over to a private coloniser. Therefore, the acquisition was eventually set aside.

25. In any case, the first contention of the appellants that no vesting had taken place under Section 16 of the Act, in view of the appellants continuing to retain possession, is a contention that was available to the appellants, even in the first round of litigation, when they challenged the acquisition proceedings on the ground that the awards were not passed within two years. But, they failed to raise the contention even at that time. They did not raise this contention even in the second writ petition. This takes us to the second contention of the appellants that revolves around res-judicata.

Contention No. 2.

26. The first set of writ petitions filed in 1994 did not proceed on the footing that there was no award at all. They proceeded on the footing that awards were not passed within two years.

27. Assuming for a minute that the contention based upon Section 16 of the Act and retention of possession, was not available in the first round of litigation to the appellants, it was available atleast in the second round of litigation filed in W.P. (MD) No. 2296 of 2010. In that writ petition, the appellants merely sought re-conveyance under Section 48(B) of the Act. After the request for re-conveyance was rejected by order dated 07.09.2010, the appellants did not even challenge the said order. Therefore, the two orders of rejection, one passed on 20.02.2006 and another passed on 07.09.2010 went unchallenged by the appellants.

28. Be that as it may, the first contention now raised was very much available to the appellants atleast in the second round of litigation. Having chosen not to raise it at that time, the appellants cannot now raise it for the first time. If a ground of attack was available in the first or second round of litigation, but a litigant chooses not to raise it at that time, the same contention cannot be raised in the next round of litigation as the same will be barred by the principle of constructive res-judicata.

29. The appellants attempt to get over this obstacle, by raising the theory of different cause of action. But it is only a clever bogey. The bundle of facts constituting the whole of the cause of action for the appellants, to challenge the acquisition proceedings commenced on 03.07.1991 and ended on 28.07.1994. The only different cause of action that arose later was the rejection of the request for re-conveyance. Since the rejection of the request for re-conveyance happened first in 2006 and again in 2010, the second writ petition challenging the same may not have been barred by res-judicata. But, the third writ petition challenging the very same Notification under Section 4(1), the very same Declaration under Section 6 and the Awards passed in 1994, is clearly barred by res-judicata, as the ground of challenge was very much available in the first round. Therefore, the contentions 1 and 2 of the appellants are rejected.

Contention No. 3.

30. The third contention revolves around Section 24(2) of the Central Act 30/2013. Section 24(2) reads as follows:

"24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases:

(1) .....

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been

taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act.

....

31. A careful look at the above provision would show that the proceedings initiated under the 1894 Act shall be deemed to have lapsed, if two conditions are satisfied. They are:

(i) An award under Section 11 of 1894 Act should have been made five years or more, prior to the commencement of Act 30/2013; and

(ii) either physical possession had not been taken or the compensation had not been paid.

32. In the case on hand, awards were passed in July, 1994. The Act 30/2013 came into force on 01.01.2014. Therefore, the first condition stipulated in Section 24(2) is satisfied. The second condition has two alternatives, namely, that either physical possession had not been taken or the compensation had not been paid. Neither of these two stipulations is satisfied in this case. As we have recorded in our finding to the first contention, the respondents claim to have taken actual physical possession. In any case, we have found that the contention regarding possession is not available to the appellants any more, in view of what had earlier happened.

33. Insofar as the contention regarding non-payment of compensation is concerned, the appellants have an insurmountable task. In the order passed by the Division Bench of this Court on 23.02.2007 in Review Application Nos. 13 to 15 of 2007, this Court clearly permitted the appellants to withdraw the compensation amount. It will be useful to extract the order of the Division Bench, dated 23.02.2007, which reads as follows:

"The learned counsel appearing for the Tamil Nadu Housing Board informs that even as early as on 16.02.2007, the Board has forwarded the entire amount as awarded to the Special Tahsidlar (Land Acquisition) Madurai South Neighbourhood Scheme Unit II, Madurai. The above statement is hereby recorded. The review petitioners are permitted to withdraw the said amount."

34. Apart from the above obstacle, the appellants have one more. They borrowed money from the State Bank of India to the tune of Rs. 48,50,000/-, by mortgaging these properties, perhaps without disclosing the acquisition. Therefore, the Bank served a notice upon the Acquisition Officer, not to disburse the compensation amount to the appellants. Therefore, if the appellants had not actually received even a single penny as compensation, it is their own making. A person who creates a situation that makes his opponent unable to comply with the requirement of law cannot take advantage of the same. In view of the fact that the appellants had borrowed money by mortgaging the very same property,

the Bank alone has a claim to receive compensation and hence the second prescription contained in Section 24(2) of Act 30/2013 will not be satisfied. Therefore, the 3rd contention also deserves to be rejected.

35. Mr. G.R. Swaminathan, learned counsel for appellants 2 to 8, relied upon a decision of the Supreme Court in Pune Municipal Corporation and Another Vs. Harakchand Misirimal Solanki and Others, , in support of his contention that mere deposit of compensation amount in Government Treasury is of no avail. In the said case, the land owners challenged the acquisition proceedings, in the first instance, on the ground of non-compliance with the provisions of Section 5-A and lapsing of proceedings under Section 11-A of the Act. The High Court quashed the acquisition Proceedings. When the matter was taken to the Supreme Court by the Pune Municipal Corporation, the Central Act 30/2013 came into force. Therefore, it was argued on behalf of the respondents/land owners before the Supreme Court that they are entitled to have the benefit of Section 24(2) of the Central Act 30/2013. This claim was contested by the Municipal Corporation and the Special Land Acquisition Officer on the ground that the land owners did not come to the office to receive the compensation, despite notices being served on them. Therefore, the Corporation claimed that the amount was deposited in Government Treasury. But, the said contention was rejected by the Supreme Court, on the basis of the meaning to be assigned to the phrase "compensation has not been paid", appearing in Section 31 of 1894 Act.

36. But, the said decision is of no avail to the appellants 2 to 8 for the simple reason that Section 31(1) of 1894 Act obliges the Collector to tender payment to the persons interested, entitled thereto. Apart from having agreed to receive the compensation before this Court way back in February, 2007, when their review applications were rejected, the appellants have now created a situation where the State Bank of India has become a person interested and entitled to receive compensation. They have already lodged a claim before the Land Acquisition Officer. Therefore, the appellants 2 to 8 cannot contend any more that the respondents did not tender payment and that therefore the proceedings are vitiated. Contention No. 4.

37. It is true that the law relating to acquisition of land has undergone a sea change in the past 30 years. In Greater Noida Indusl. Devt. Auth. Vs. Devendra Kumar and Others, , the Supreme Court reiterated that the acquisition of land is a serious matter and that land is like the mother of people living in the rural areas of the country. It is the only source of sustenance and livelihood for the land owner and his family and that if the land is acquired, not only the person but the future generations of the land owner are deprived of their livelihood and the only social security. Therefore, the Supreme Court cautioned against mindless acquisition of fertile and cultivable land, driving the landless to migrate to urban areas and forced to live in slums. After the judgment of the Supreme Court in Greater Noida, the focus has shifted from the previous policy of eminent domain to the valuable rights of the land owners. It is this trend that actually led

the Parliament to enact the Central Act 30/2013. This is very clear from the Statement of Objects and Reasons of Act 30/2013 itself.

38. But, Act 30/2013 cannot be used as a magic wand to resurrect the ghosts of the past. In cases where the acquisition proceedings had attained finality 20 years ago, this Court has nothing to interfere, by taking note of the shift in the focus. Therefore, the 4th contention is also rejected. Therefore, in fine, we find no reasons to interfere with the order of the learned Judge. Hence, the writ appeal is dismissed. No order as to costs.