
(2011) 12 BOM CK 0058
In the Bombay High Court
Case No : First Appeal No. 84 of 2003

Mr. Romualdo Diniz (since deceased) alias Caetano Jose Diniz and Others APPELLANT

Vs

Executive Engineer, Works Division VI, P.W.D., Fatorda Margao, Mr. Emilio Filimeno Diniz and Mr. Antonio Nonato Diniz alias Antonio Nonato G. Diniz through his duly constituted attorney Mr. Romualdo Diniz RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

Land Acquisition Act, 1894 — Section 11, 18, 23(1A), 23(2), 28

Citation : (2011) 12 BOM CK 0058

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : R.G. Ramani, for the Appellant; G. Shirodkar, Government Advocate for Respondent No. 1 and Shri G. Nagvekar, Advocate for Respondents No. 2 and 3, for the Respondent

Judgement

U.V. Bakre, J.—This appeal is directed against the Judgment and Award dated 09/08/2002 passed by the learned District Judge, South Goa, in Land Acquisition Case No. 42 of 1997, a reference u/s 18 of the Land Acquisition Act, 1894 (for short "L.A. Act").

2. The reference was made at the instance of the original appellant and the respondents No. 2 and 3 and the same was rejected by impugned Judgment and Award. The original appellant died during the pendency of the appeal and his legal representatives have come on record. The original appellant and the respondents No. 2 and 3 shall hereinafter be referred to as the applicants whereas the respondent No. 1 shall hereinafter be referred to as the respondent.

3. Vide the Government Notification published u/s 4(1) of the L. A. Act in the official gazette dated 28/02/1991, land was acquired for construction and B/T of Vassuvado Bunder Vassuvaddo Sorim Tamdimati Mazilwado main road to old

Livramento Chapel of village Benaulim. This included an area of 350 square meters of the land, from survey holding No. 379/1 of village Benaulim, belonging to the applicants.

4. By Award made u/s 11 of the L.A. Act, the learned Land Acquisition Officer(L.A.O.) offered the market rate of Rs. 7/-per square meter to the acquired land. Not being satisfied with the said offer, the applicants filed application, before the L.A.O., u/s 18 of the L.A.Act, for reference, by which they sought enhancement of the compensation at the rate of Rs. 200/-per square meter. The L.A.O., thus made the reference to the Trial court.

5. The Applicants examined the applicant No. 1, namely Romualdo Diniz as AW-1, the Civil Engineer namely Shri Krishna Prabhudessai as AW-2 and one Shri Antonio Meyrelles as AW-3. The respondent did not examine any witness.

6. The valuation report prepared by AW-2 was not accepted by the learned Trial Judge as he had inspected land on 25/11/1997 which is about 6 years after the date of publication of section 4 Notification pertaining to the acquired land. The learned Trial Judge relied upon the principles laid down in the case of Sadguru R. Kolmule (1996 (1) G.L.T. 8), wherein this High Court has held that the valuation done five years after the notification would not be relevant. The evidence of the AW-3 pertaining to the Award in Land Acquisition Case No. 133 of 1993 was also not considered by the learned Trial Judge as the said Award was not produced on record and even otherwise it was ex-parte Award and no comparison between acquired property and the property concerned in the said Award was shown. The learned Trial Judge also refused to rely upon the Sale Deeds produced by the applicants holding that the plots concerned in the said sale transactions are not comparable to the acquired land which was encumbered not only with the existence of the kachha road but also mundkarial houses, Chapel etc. and there was no evidence to show as to what area remains, which could be developed. Consequently, the reference came to be rejected.

7. Heard arguments. Learned advocates Shri. Ramani and Shri Nagvekar argued on behalf of the applicants whereas learned Advocate Shri G. Shirodkar argued on behalf of the Respondent No. 1.

8. Shri Ramani, the learned counsel for the applicants contended that out of the three Sale Deeds produced by the applicants, one at Exhibit 16 which is dated 21/12/1989 and pertaining to the area of 443 square meters was regarding undeveloped plot which was only 1.2 Kms. away from the acquired land at Benaulim and the price was Rs. 148/-per square meter. He pointed out that the acquired land had an area of 350 square meters. Therefore, according to Shri Ramani, this Sale Deed at Exhibit 16 was comparable with the acquired land in all respects except the fact that the Sale Deed plot was a land meant for construction of house whereas the acquired land was used as road but was a part of the property belonging to the applicants. He pointed out from the evidence of the AW-2 that an area of 1750 square meters was available in the property of

the applicants even after excluding the area of mundkarial houses and other structure. He placed reliance upon the Judgment of the Division Bench of this Court in "First Appeal No. 176 of 2000 and Cross Objections No. 11 of 2000" and contended that deduction as made in the case supra could be made.

9. Learned Counsel Shri Ramani further argued that since the acquired land is from the applicants' property containing mundkarial houses and other structure, it can be certainly said that the balance area which was in possession of the applicants had the potential for construction. Therefore, he contended that the acquired land could have been compared even with the developed plot which is subject matter of the Sale Deed Exhibit 17. By this Sale Deed (Exhibit 17) dated 4/1/1991, an area of 487 square meters situated at Adsulim-Benaulim Village in Salcete Taluka, situated only at a distance of about 500 square meters from the acquired land was sold at the rate of Rs. 200/-per square meter. Admittedly, this was a developed plot and had roads on two sides. Learned Counsel Shri Ramani argued that appropriate deduction could be made in the price of the said developed plot in order to bring it at par with undeveloped land and after arriving at the price of the undeveloped plot, further deduction could be made since the acquired land is an existing road. He relied upon the Judgement in the case of State of Goa and Another Vs. Gopal Baburao Gaudo and Others, . Learned Advocate Shri Ramani has also relied upon the Judgement of the Division Bench of this High Court (Coram : A.S. Oka and F.M. Reis, JJ.) in "First Appeal No. 142 of 2007". Learned Advocate Shri Ramani, therefore, contended that the learned Trial Judge has wrongly rejected the reference and ought to have granted enhancement as prayed for.

10. On the other hand, Learned Advocate Shri G. Shirodkar, on behalf of the respondent No. 1, argued that it is an admitted fact that the acquired land is a narrow strip of land which was already being used as a road since prior to the acquisition and therefore it cannot be compared with the transaction of the Sale Deeds relied upon by the Applicants as there cannot be any similarity. He relied upon the case of Subh Ram and Others Vs. Haryana State and Another, . He argued that all the three Sale Deeds produced by the applicants are of developed plots which would require deduction of 66% for bringing them at par with the acquired land. He further argued that thereafter all the plus and minus points will have to be considered and after making deduction on this count, further deduction will have to be made since there was encumbrance on the acquired land in the form of use of the same as road. According to Shri G. Shirodkar, by doing all the above exercise, the market value will not be more than Rs. 7/-per square meter and therefore the impugned Judgment and Award cannot be interfered with.

11. I have gone through the entire material on record.

12. Following facts, as stated by AW-1, are not denied:

(i) There was public water tap, electricity and telephone facility in the property of

the applicant from which the land was acquired.

(ii) There was kutcha road of about three metres width from public road to come to the applicants' property.

(iii) Maria hall is at a distance of 300 metres and there is school and market here.

(iv) The Livramento Church of Benaulim is about 700 to 800 metres away and there is High School near this church.

13. The fact, as stated by AW-2, that the acquired land is about 700 metres away from Benaulim beach is also not denied. Admittedly, there were mundkarial houses and a small chapel in the applicants' property.

14. The above factors certainly go to establish that the applicants' property from which land was acquired was suitable for construction of residential house/houses and further it had the advantage of most of the facilities and civil amenities.

15. The property of applicants bearing Survey No. 379/1 totally admeasured 10,000 sq. metres, prior to acquisition of an area of 350 sq. metres, from the same. A suggestion was put to AW-1 that his property is not best for construction. This means that it is suitable for construction, though not best. No suggestion has been put to AW-1 that after exclusion of the area of mundkarial houses and the chapel, there was no balance land suitable for sale as the plot or plots. AW-2 has specifically stated that the balance area with the owner is 1750 sq. metres and after exclusion of acquired land of 350 sq. metres, the balance area is 1400 sq. metres. The learned Trial Judge has refused to accept the above statement of AW-2 since AW-2 could not state the total area of survey holding No. 379/1, the area occupied by the structures and by kutcha road and the area transferred to mundkars. But the fact remains that the statement on oath made by AW-2, that the balance area is 1750 sq. metres has not at all been denied by the respondent in the cross-examination of AW-2 and respondent has not led any evidence to prove anything to the contrary. Therefore, the Court is bound to accept the fact that after exclusion of all encumbrances, there was balance area of 1750 sq. metres in the applicants' property which could have been utilised for construction, etc. The Trial court, in my view, therefore, has erred in holding that there is no evidence to show that any area remains after excluding the mundkarial houses and structure and the area transferred to the mundkars.

16. It is true that the acquired land is a strip on the northern and western border of the applicants' property, acquired for the construction of road. There is evidence on record to establish that a kutcha road was already existing in the applicants' property. AW-1 has specifically stated in his cross-examination that the present acquisition is not to construct a road on the said existing kutcha road. The conclusion of the learned Trial Judge that what has been acquired was previously the kutcha road, does not appear to be correct. A suggestion has been put by the respondent itself to AW-2 that in order to avoid severance of the

applicants" property, the road has been taken along the border and right angle, of the applicants" property. Thus, it is more probable that the existing kutchra road was not acquired but for advantage of the applicants, land on the northern and western boundary was acquired for construction of road. In other words, the existing road was shifted to the boundary of the property.

17. Though it is established that there was existing way used by public in the property of the applicants, however, there is no evidence to suggest that any right of way was created either over the said existing way or over the acquired land, in favour of the public. The use of the old existing road would be given up after the construction of the new road on the acquired land. Since the acquired land is at the border of the property, the same could have been used as FAR while carrying on construction on the remaining land of the applicants.

18. In the case of State of Goa and Another Vs. Gopal Baburao Gaudo and Others, , a long strip of land measuring two third of acre, adjoining the Highway was acquired. The Apex Court has held that it cannot be treated as land without value or without any potential for development, merely on the ground that law relating to highways prohibited construction on either side of the highway, upto a depth of 40 metres from centre of highway. It has been held that potential of such land could be realized by annexing or merging said strip of land with land to its rear, in which event, the strip of land would become "access" to rear side land from main road and would also become frontage of the aggregate land, thereby enhancing potential and value of rear side land, as also creating a potential for its own use. In the present case, though the acquired strip of land is not adjoining any highway, however it is the border of the applicant"s property and is acquired for road and its potential could be realized by annexing of land to its rear.

19. In the case of State of Goa and another vs. Antonio Almeida and others First Appeal No. 176 of 2000, a road which was left by the Claimants in connection with the development of the plots carried out by them was subsequently asphalted by P.W.D. and then it was acquired by the Government. The question was as to what was the value to be given to the claimants who had remained to be the owners of the land under the said road. The Division Bench of this Court (Coram : S.A. Bodbe and N.A. Britto, J.J.) observed that what has been acquired is the nominal or naked right of ownership of the claimants in the said road which was subsequently asphalted by the Government. The Division Bench held that in such a case, the market value to be given for such land ought to be 20% of the value fetched by the owners of the surrounding or adjacent land.

20. In the case of Jacinto Barreto Miranda Vs Special Land Acquisition Officer and Ors. First Appeal No. 142/2007, the acquired land was being used by people as a road for approaching the fair price shop which was existing from 1972. The road through the acquired land was constructed in the year 1989-90. Considering the above aspects, it was contended that no willing buyer would have purchased the acquired land. It was also pointed out that a part of the acquired land was in

road widening area and it had no building potential. The sale instances produced were in respect of the lands having building potential. The Division bench of this court, in the case supra, has observed that what has been established is that the acquired land may have been used by the members of public for approaching the said structure and the well. However, it is not established that any right of way was created over the acquired land in favour of the members of public. It was held that the fact that the acquired land was being used by the members of the public and especially the occupants of the structures on the property of the Appellant will be a factor to be considered. However the same would not have affected the use of FAR of the acquired land while carrying on construction on the remaining land of the Appellant. The High Court, after considering the other negative factors, held that the deduction at the rate of 66% will have to be made.

21. In the case of Subh Ram and Others Vs. Haryana State and Another, , the Hon"ble Apex Court has held that the percentage of deduction may vary between 20% to 75% depending on several circumstances mentioned in the case of Lal Chand Vs. Union of India (UOI) and Another, . Let us see the illustrations of circumstances mentioned in the said case of "Lal Chand" (Supra).

22. In paragraphs 13 to 22 of "Lal Chand"(Supra), it is observed as follows:

13. The percentage of "deduction for development" to be made to arrive at the market value of large tracts of undeveloped agricultural land (with potential for development), with reference to the sale price of small developed plots, varies between 20% to 75% of the price of such developed plots, the percentage depending upon the nature of development of the layout in which the exemplar plots are situated.

14. The "deduction for development" consists of two components. The first is with reference to the area required to be utilised for developmental works and the second is the cost of the development works. For example, if a residential layout is formed by DDA or similar statutory authority, it may utilize around 40% of the land area in the layout, for roads, drains, parks, playgrounds and civic amenities (community facilities), etc.

15. The development authority will also incur considerable expenditure for development of undeveloped land into a developed layout, which includes the cost of levelling the land, cost of providing roads, underground drainage and sewage facilities, laying water lines, electricity lines and developing parks and civil amenities, which would be about 35% of the value of the developed plot. The two factors taken together would be the "deduction for development" and can account for as much as 75% of the cost of the developed plot.

16. On the other hand, if the residential plot is in an unauthorised private residential layout, the percentage of "deduction for development" may be far less. This is because in an unauthorised layout, usually no land will be set apart for parks, playgrounds and community facilities. Even if any land is set apart, it is likely to be minimal. The roads and drains will also be narrower, just adequate

for movement of vehicles. The amount spent on development work would also be comparatively less and minimal. Thus the deduction on account of the two factors in respect of plots in unauthorised layouts, would be only about 20% plus 20% in all 40% as against 75% in regard to DDA plots.

17. The "deduction for development" with reference to prices of plots in authorised private residential layouts may range between 50% to 65% depending upon the standards and quality of the layout.

18. The position with reference to industrial layouts will be different. As the industrial plots will be large (say of the size of one or two acres or more as contrasted with the size of residential plots measuring 100 sq m to 200 sq m), and as there will be very limited civic amenities and no playgrounds, the area to be set apart for development (for roads, parks, playgrounds and civic amenities) will be far less; and the cost to be incurred for development will also be marginally less, with the result the deduction to be made from the cost of an industrial plot may range only between 45% to 55% as contrasted from 65% to 75% for residential plots.

19. If the acquired land is in a semi-developed urban area, and not an undeveloped rural area, then the deduction for development may be as much less, that is, as little as 25% to 40%, as some basic infrastructure will already be available. (Note: The percentages mentioned above are tentative standards and subject to proof to the contrary.)

20. Therefore the deduction for the "development factor" to be made with reference to the price of a small plot in a developed layout, to arrive at the cost of undeveloped land, will be far more than the deduction with reference to the price of a small plot in an unauthorised private layout or an industrial layout. It is also well known that the development cost incurred by statutory agencies is much higher than the cost incurred by private developers, having regard to higher overheads and expenditure.

21. Even among the layouts formed by DDA, the percentage of land utilised for roads, civic amenities, parks and playgrounds may vary with reference to the nature of layout?whether it is residential, residential-cum-commercial or industrial; and even among residential layouts, the percentage will differ having regard to the size of the plots, width of the roads, extent of community facilities, parks and playgrounds provided.

22. Some of the layouts formed by the statutory development authorities may have large areas earmarked for water/sewage treatment plants, water tanks, electrical substations, etc. in addition to the usual areas earmarked for roads, drains, parks, playgrounds and community/civic amenities. The purpose of the aforesaid examples is only to show that the "deduction for development" factor is a variable percentage and the range of percentage itself being very wide from 20% to 75%.

23. The evidence of AW-2 can be looked into only for the purposes of knowing the technical and factual aspects like area, distances from various amenities, facilities etc. which cannot change over passing of years. However, the valuation done by him and the valuation report(Exh.21) cannot be considered since he had inspected the acquired land on 25/11/1997 which is after about six years from the date of publication of notification u/s 4 of the L.A. Act. Relying upon the case of "Sadguru R. Kolmule" (1996 (1) G.L.T. 8), the learned Trial Judge has rightly refused to accept the opinion of the valuer.

24. AW-3 does not appear to be conversant with the property of the applicants as he never visited the same and has wrongly stated that on account of construction of road, the applicants' property is divided into two parts. The Award in LAC 133/93 which pertains to the land acquired from the property of AW-3 also cannot be considered as the Award has not been produced and otherwise also, it is an ex-parte Award.

25. That leaves me with the three Sale Deeds produced and relied upon by the applicants. They may be better understood by following table:

Date

Area

Price

Distance

Survey No.

1

Exh.15

26/06/90

442sq.m.

Rs.250/

1.0km

211/1 Benaullim

2

Exh.16

21/12/89

443sq.m.

Rs.148/

1.2km

180/3 Benaulim

3

Exh.17

04/01/91

487sq.m.

Rs.200/

0.5km

9/1 Benaulim

It is not necessary that all the sale instances should be considered. The one which is best suited is to be preferred. From the above table it can be understood that the Sale instance at Exh.17 is closest to the date of notification and is nearest to the acquired land, as compared to other sale instances. The plot of the Sale Deed Exh. 17, measuring 487 sq. metres, is out of sub-divided property and is meant for construction. The acquired land measuring 350 sq. metres is from property wherein mundkarial houses were existing and is admittedly suitable for construction. Therefore, there is similarity in the nature of the land. The Sale Deed plot is out of an authorised private residential layout, wherein roads, open space and trenches have been kept but no community facilities like parks, play grounds, swimming pool, gymnasium, etc. are kept. Therefore, by following the principles in "Lal Chand" (supra), the deduction for the "development factor" need not be 75% but could be taken at 50%. The price of the Sale Deed plot is Rs. 200/-per square metre. Making deduction of 50%, the said price becomes Rs. 100/-. Though the Sale Deed plot has road on two sides, which is a plus factor for it, however, the acquired land is itself acquired for road and is much closer to Maria hall and the beach as compared to the Sale Deed plot, which is plus factor for the acquired land. Hence, I feel that there is no need of making any deduction towards plus and minus factors, as was argued by Shri G. Shirodkar. According to me the said factors strike the balance due to which I am not inclined to make any deduction on this count. Since, the acquired land is only a strip of land at the border of the property, meant for construction of road, which was existing at some other place as katcha road in the applicants' property, the appropriate market value for the same could be taken at 20% of the said price of Rs. 100/-, which comes to Rs. 20/-. The appellants are entitled to enhancement to that extent. Interference with the impugned judgment and Award is, therefore, warranted.

26. Hence the Appeal must succeed in part and therefore following Order is passed.

ORDER

(a) The impugned Judgment and Award is quashed and set aside.

(b) The market value of the acquired land is fixed at the rate of Rs. 20/- per sq. metre.

(c) The appellants will be entitled to the statutory benefits u/s 23(1-A), section 23(2) and section 28 of the L.A.Act, on the said market value.

(d) Parties to bear respective costs.