

(2000) 04 BOM CK 0069

In the Bombay High Court

Case No : Writ Petition No. 330 of 1991, W.P. No. 36 of 1992 and W.P. No. 141 of 1992

Shri Minguél Martins

APPELLANT

Vs

M/s. Sucedede Fomento Industries Pvt. Ltd. and others

RESPONDENT

Date of Decision : 25-04-2000

Acts Referred:

Land Acquisition Act, 1894 — Section 16, 3, 4, 40(1), 41

Citation : (2000) 4 BomCR 448

Hon'ble Judges : R.M.S. Khandeparkar, J; R.K. Batta, J

Bench : Division Bench

Advocate : M.S. Sonak and Ms. Norma Alvares, for the Appellant; M.S. Usgaonkar, Sr.A., H.R. Bharné, Government Advocate, Ms. Ameera Razak, A.P. Lawande and S.S. Kantak, for the Respondent

Judgement

R.K. Batta, J.—The issues involved in all these petitions are similar and as such the petitions are heard together and are being disposed off by common judgment.

2. The petitioner in Writ Petition No. 330/91 is a plot holder in Machados Cove surveyed under No. 792 (old) and the challenges in this petition are four fold. The first challenge relates to the agreement dated 26-10-1983 between the President of India and Fomento Hotels and Resorts Limited formerly called Gomantak Land Development Pvt. Ltd. (hereinafter called the hotel), the second challenge relates to the access through the land surveyed under No. 246/1 (old 787), which is also the subject matter in Writ Petition No. 284/91 and 37/92, and the third challenge is that the said Survey No. 787 and 803 (246/2 new) fall within C.R.Z. Regulation and as such no development can be carried out therein. In so far as the third challenge is concerned the learned Advocate for the petitioner has submitted that the petitioner does not press this challenge in this petition since this challenge in elaborate form is the subject matter of a separate petition filed by Goa Foundation which is pending. The fourth challenge in this petition is relating to sewage treatment plant but the same is also not pressed

and no arguments have been advanced in that connection.

3. The petitioner in Writ Petition No. 36/1992 is Goa Foundation and basically it has raised the same challenge which correspond to challenge No. 1 in Writ Petition No. 330/91. The second challenge in this petition relates to claim of public access through Survey No. 246/2 (803 old) to the Vanguinim beach.

4. In Writ Petition No. 141/92, the petitioner has also substantially raised the same challenges. This petitioner has in fact filed a Special Suit No. 313/ 1978 for pre-emption in relation to Survey No. 246/1 (old 787) which property is subject matter of other two Writ Petitions No. 37/92 and 284/91. This petitioner has also challenged the acquisition of Survey No. 246/2 and 245/ 2 by filing a writ petition and ultimately he had compromised the matter with the said hotel.

5. The basic facts in all these petitions may be narrated first. M/s. Fomento Hotels and Resorts Limited addressed a letter dated 15-11-1978 to the Government of Goa seeking acquisition of Survey No. 246/2 (old 803) and Survey No. 245/2 (old 804) so as to provide facilities such as health centre, sports facilities and swimming pool to the hotel residents and the residents of this territory in the said acquired land. It was stated in the said letter that facilities provided by the hotel will be open for use on membership to non-residents also. The hotel had to approach the Government since efforts made by it to purchase the said properties from the owners thereof did not bear any fruits. On either sides of this plot, the land belonged to the hotel and in Survey No. 246/1 (old 787) hotel known as Cidade de Goa had already been constructed. The acquisition was sought for the expansion of the project so that land under Survey No. 245/1 (old 805) which was beyond the acquired land could be utilised for setting up Yoga Centre, Health Club and Water sports facilities for promoting tourism. The Government accepted the request of the hotel and acquired Survey No. 246/2 (old 803) and 245/2 (old 802) under Land Acquisition Act and agreement dated 26-10-83 was entered into between the President of India and M/s. Fomento Hotels and Resorts Limited. Under the said agreement, the acquired land was handed over to M/s. Fomento Hotels and Resorts Limited on 26-3-1985. The acquired land was handed over with certain conditions and the case of the petitioners is that these conditions have not been complied with and as such the acquired land is required to be resumed in the terms of the said agreement. In this connection, the petitioners' case is that no construction is permissible under the said agreement in the acquired land and that at any rate the constructions which have been carried out in the acquired land have no nexus to the purpose for which it was handed over to the hotel and that no sport and recreational facilities/amenities have been provided to the public thereunder.

6. In this respect, the case of the hotel is that constructions are permissible under the said agreement; that sports and recreational facilities have already been provided and the details of the same have been given by it to which we shall refer to at a later stage and that there is no case made out for resumption.

7. In respect of the second challenge, the case of the petitioners is that the agreement dated 26-10-1983 recognises the existence of access; in fact the hotel in written statement filed in Special Civil Suit No- 313/78, which was filed by the petitioner in Writ Petition No. 141/92, had admitted the existence of an access coming from Machados Cove and passing through Survey No. 246/2 (old 803) and in this connection not only a plan showing the access had been filed by the hotel in the civil suit but an affidavit had been filed by one Avdhoot Kamat in support of the said stand of the hotel.

8. The case of the hotel in this respect is that though an access existed along the nullah yet an alternate access which is the subject matter of Writ Petition No. 37/92 and 284/91 had already been provided. The hotel had also tried to deny the existence of any access through the acquired land. It is also pointed out that access referred to by the hotel in written statement filed in Special Civil Suit No 313/78 was in fact denied by the plaintiff in the said suit who is petitioner in Writ Petition No. 141/1992.

9. We shall now deal with the two challenges one by one in greater detail. Arguments were advanced before us and rulings were quoted on the question of public purpose and also as to under which clause of section 40 the acquisition would fall. Learned Advocate Shri Sonak took us through the definition of the expression "public purpose" as contained in section 3(f) of the Land Acquisition Act and urged before us that the public purpose for which the land in question was acquired would fall u/s 40(1)(b) since the land in question could not be acquired u/s 40(1)(a) or (aa). In this connection it was pointed out that section 40(1)(b) does not speak of construction of any building and referring to various clauses of the agreement dated 26-10-83, it was urged that no construction whatsoever is permissible in the acquired land. Learned Advocate Shri Sonak relied upon paragraph 12 of the judgment in State of West Bengal and Others and Ramakrishna Mission, Howrah Vs. P.N. Talukdar and Others and Abdul Kadar Laskar and Others, which reads as under :

"Generally speaking the appropriate Government would not state in so many words whether it was proceeding under Clause (a), or Clause (aa) or Clause (b). The question whether consent has been given under one clause or the other or more than one clause has to be decided on the basis of the agreement entered into u/s 41 and the notification u/s 6. It is open to the appropriate Government to give consent on being satisfied as to one of the three clauses only or as to more than one clause. The question as to which clause of section 40(1) was acted upon by the State Government to give consent is important because on that will depend the nature of the agreement which has to be made u/s 41. There are bound to be differences in the terms to be embodied in an agreement u/s 41 depending Upon whether the consent was given. Therefore the Court has to scrutinise the agreement to find out under which clause of section 40(1) the consent was given,"

It lays down that the question whether the consent had been given under one

clause or the other or more than one clause has to be decided on the basis of the agreement entered into u/s 41 and the notification u/s 6 of the Act.

10. Learned Advocate Ms. Norma Alvares argued on similar line and on the question of public purpose relied upon the judgment of the Apex Court in Srinivasa Cooperative House Buildings Society Ltd. Vs. Madam Gurumurthy Sastry and Others, which lays down that the purpose should be connected with public utility and it should be beneficial to the general public and not to private persons.

11. On public purpose, learned Senior Counsel Shri Usgaonkar appearing on behalf of the said hotel placed before us two judgments of the Apex Court in R.L. Arora Vs. State of U.P., and State of West Bengal and Another Vs. Surendra Nath Bhattacharya and Another, . Referring to paragraph 13 of the judgment of the Apex Court in R.L. Arora Vs. State of U.P., it was pointed out that the land should be acquired through the coercive machinery of the Act only for the restricted purpose mentioned in sections 40 and 41 which would also be a public purpose within the ambit of section 4 of the said Act. Relying upon the judgment in State of West Bengal and another v. Surendra Nath Bhattacharya (supra) it was pointed out that acquisition of land for construction work for a company manufacturing sodium silicate and Plaster of Paris would be public purpose within the meaning of section 40(1)(aa) of the Act.

12. Looking into the purpose for which the 3and was acquired and the agreement under which the acquired land was handed over to the hotel, it is clear that land was acquired for tourism development project which work was likely to prove useful to the public for the purpose of sports and recreation facilities/amenities. In this agreement certain restrictions were put and besides other things which were contemplated, the hotel was required to create sports and other recreational facilities/amenities within one year from the date of handing over. It is pertinent to note that the acquisition was pursuant to letter dated 15-11-78 of the hotel wherein it was contemplated that the facilities such as health centre, sports facilities and a swimming pool are very useful to the public in general and the facilities could be availed by the hotel residents and the residents of this territory/public at large. The land in question was handed over on 26-3-85. Looking into all these facts, it is obvious that the acquisition is u/s 40(1)(b) of the said Act.

13. This agreement dated 26-10-83 casts certain statutory obligations on the hotel and as such it would be necessary at this stage to look into the agreement in detail since the interpretation of the agreement vis-a-vis the question whether construction is permitted or not in the acquired land will depend upon the terms incorporated in this agreement. Clause 3 of the agreement provides that the acquired land when so transferred to and vested in the company shall be held by the company as its property to be used only in furtherance of and for the purpose for which it is required.

Clause 4 provides that the company shall not use the acquired land for any purpose other than that for which it is acquired and it is necessary at this stage to reproduce Clause 4(ii) and (viii) which read as under :

(ii) The company shall undertake the work of creation of sports and other recreational facilities/amenities within one year from the date on which the possession of the said land is handed to the company and complete the same within three years from the aforesaid date.

(This period can be extended under Clause (iii) by Government upto maximum of six years for reasons beyond control of the company.)

(viii) The company shall never construct any buildings or structures in the acquired land. Prior approval of Eco-Development Council of the Government of Goa, Daman and Diu will be obtained before undertaking activities for the development, besides other statutory requirements under the existing laws.

14. Though Clause 4 (viii) states that the company shall never construct any buildings or structures in the acquired land without prior approval of the Eco-Development Council, besides other statutory requirements under the existing laws, yet on reading of Clause 4 as a whole, we find it difficult to accept the contention of the petitioners that no construction whatsoever can come in the acquired land. Nevertheless, it must be pointed out that construction works which can be done on the acquired land must have relation and direction connection with the sports and recreational facilities/amenities which were required to be carried out by the hotel within a period of one year from the handing over of the possession. The Government has not filed any return nor it appears that it bothered to look into the matter after the execution of the said agreement, whether the purpose for which the land was acquired was being carried out and whether the terms of the said agreement including creation of sports and recreational facilities/amenities within the time limit or within the extended time period have been carried out in the land or not. Learned Government Advocate Shri Bharne could not throw any light on this aspect.

15. The question to be examined therefore, is whether constructions which have been made by the hotel have connection with the purpose for which the land was acquired and was handed over to the petitioners under the said agreement dated 26-10-83. The petitioners have stated that no such sports and recreational facilities/amenities have been provided for the public in the acquired land. On the other hand, the hotel has filed return stating that the sports and recreational facilities have been provided. It is the case of the hotel that acquired land surveyed under No. 246/2 (old 803) and 245(2) (old 804) has been converted in garden and other recreational activities such as tennis courts, putting green have been provided. It is also stated that children's park was also located in Survey No. 246/2 (old 803) and 245(2) (old 804) till 1991. However, on account of complaints from the guests the same was shifted and brought nearer to the old building and at present there are hammocks and chairs and dance floor besides

tennis Court and putting green. It is nowhere disclosed by the hotel whether the said facilities/amenities are available to the general public or any scheme has been put into operation by the hotel in order to make such facilities/amenities available to the public at large/residents of this territory. No such scheme is placed before us. This means that these facilities will be restricted only to the occupants of the hotel alone. Not only that, no sports and recreational facilities have been made available to the public but on the contrary, the hotel has constructed many structures on the acquired land which have absolutely no connection with the sports or recreational facilities which were required to be provided to the public under the said agreement dated 26-10-83. The said construction include the extension to the hotel building which is now projecting in Survey No. 246/2 (old 803) and this projected structure is said to be used by the hotel as telephone exchange. This extension admeasures 1000 sq.mtrs. These facts have been admitted by the hotel in the return. The other structures which are found in the acquired land are laundry building, boiler room, laundry extension, store-rooms, kitchen, food service platform, cluster of open air bars, sheds for the purpose of sitting. All these constructions prima facie are not connected to the sports or recreational facilities and obviously these constructions would not be permissible within the acquired land taking into account the purpose for which the land was acquired. For the extension of the building in the acquired land no permission had been taken initially though subsequently it seems to have been regularised. It is rather unfortunate that the Government has not taken proper safeguards while drafting the agreement and certain things were left vague and even subsequently there does not appear to be any follow up in order to ensure that the terms of the agreement had been complied with. At least nothing has been placed before us in this connection. All these buildings, structures and extension of building into Survey No. 246(2) (803 old) which have come up in the acquired land are, therefore, required to be demolished, since the buildings are not connected with the purpose for which the land was acquired in pursuance of letter dated 15-11-1978 and thereafter handed over to the hotel in terms of agreement dated 26-10-1983.

16. Coming to the second challenge namely the question of access claimed by the petitioners, the case of the petitioners is that the access to the beach existed prior to the said agreement and the existence of the access appears in the agreement itself under Clause 4(ix) of the said agreement which reads as under :

(ix) The public access/road to the beach shall not be affected or obstructed in any manner.

This access/road which is referred to in Clause 4 (ix) has reference to the acquired land which has been handed over to the hotel under the said agreement. In addition the petitioners have relied upon the written statement filed by the hotel in Civil Suit No. 313/78 wherein the access through the acquired land surveyed under No. 246(2) (old 803) is admitted by the hotel. In this written statement the stand of the hotel is as under ;

2-G. That the beach existing at the south of property 803 and 787 is a public resort and it is visited by members of the public from all parts of Ilhas Taluka. For this purpose there is a ramp (stone construction) built on the ground in property 803 as a means of access to the beach. There is also a similar ramp in the property 787. The existence of the ramps and the date of their construction is lost in antiquity but has been known to exist at least from the last seventy years.

2-H. In order to have access to the portion of the beach existing in the property 803, there is a footpath starting from the ramp and going towards north upto the culvert linking property 803 with property 792 of Machado and therefrom after crossing the property of Machado in the same direction it touches the public footpath going from Dona Paula to Calapur. At present the said footpath touches the Panaji-Dona Paula Bambolim road and crosses the property of Machado.

2-I. The way mentioned in the preceding para 2-H is being used by members of the public living in the village Calapur and also by other members of the public coming from different parts of Taluka Ilhas. This way is clearly visible on site.

2-S. The ways mentioned in para 2-G, 2-H and 2-P have been used by members of the public and villagers from immemorial times, openly, peacefully, continuously in order to come to the beach and they are public ways and have been so dedicated as is evidenced by the long and continuous user." Petitioners crave leave to rely upon the said written statement as and when it is required.

17. In paragraph 2-G, it is admitted that the beach existing at the south of property under No. 246/2 (old 803) is a public resort and it is visited by members of the public from all parts of Ilhas Taluka and for that purpose there is a ramp built on the ground in property 803 (246/2 new) as a means of access to the beach. The ramp exist for at least for the last seventy years from the date of filing the written statement in the year 1978. In paragraph 2-H, it is stated that in order to have access to the beach, existing in the property 803, there is a footpath starting from the ramp and going towards north upto the culvert linking property 803 with property 792 of Machado and therefrom after crossing the property of Machado in the same direction it touches the public footpath going from Dona Paula to Calapur and at present the said footpath touches the Panaji-Dona Paula-Bambolim road and crosses the property of Machado. In paragraph 2-I, it is categorically admitted by the hotel that the way referred to in paragraph 2-H is being used by members of the public living in Calapur and also coming from different parts of Ilhas taluka and that this way is clearly visible at the site. Paragraph 2-S states that the ways have been used by the members of the public and villagers from immemorial times, openly, peacefully, continuously in order to come to the beach and they are public ways and have been so dedicated as is evidenced by the long and continuous user. In support of these averments an affidavit was filed by Avdhoot Kamat, Civil Engineer on behalf of the hotel alongwith a plan which was prepared on instructions from the said hotel and on the plan he has shown the existing pathways by red pencil lines. In Writ Petition

No. 141/92 these facts have been categorically stated, in paragraph 3 wherein it is stated that Sucedede Fomento had filed written statement with affidavit of Avdhoot Kamat with plan showing traditional accesses. The petitioner in said Writ Petition No. 141/92 has placed the copy of the said affidavit alongwith the plan (the plan is traced from Xerox certified copy issued by the Civil Court showing the relevant pathways) which are collectively marked as Exh. A to the petition. The said affidavit of A. Kamat and the plan have been filed on record. This plan is to the scale and in this plan the access is shown at point A-B which starts from the ramp at point B and further goes beyond point A towards Machado Cove. The learned Senior Counsel appearing on behalf of the hotel has tried to urge that none of the petitions filed can be said to in public interest since the petitioners in Writ Petition No. 141/92 and 330/91 have an axe to grind against the hotel and that Goa Foundation has not filed any petition claiming further access which goes towards Machado Cove. In so far as Goa Foundation is concerned, we do not find any merit whatsoever in the submissions of the learned Counsel as Goa Foundation is espousing the cause of the public at large which was admittedly using the said access A to B. The hotel in written statement in Civil Suit No. 313/78 had categorically admitted the existence of the access A-B passing through the acquired land from the beach and proceeding further towards Machado Cove. It is also pertinent to note that the contents of paragraph 3 in Writ Petition No. 141/92 have been admitted by the hotel in its return dated 30-3-1992 in paragraph 15 at page 91 of Writ Petition No. 141/92. The existence of the way through 803 is, therefore, established beyond any doubt whatsoever.

18. Learned Senior Counsel argued before us that in terms of section 16 of the Land Acquisition Act when the Collector has made an award u/s 11, he may take possession of the land, which shall thereupon vest absolutely in the Government free from all encumbrances. Therefore, the contention of the learned Senior Counsel is that if any encumbrances including the way existed, the same stands wiped out in accordance with section 16 of the said Act. First of all, we may say that the traditional public right of way cannot be said to be strictly encumbrance. Secondly, the existence of way which was in use from time immemorial by the public openly, peacefully and continuously would not be affected. Moreover, in the agreement itself, the access through Survey No. 246/2 (803) is acknowledged by clause 4 (ix) of the agreement which states that the public access/road to the beach shall not be affected or obstructed in any manner. Therefore, the right of public access/road to the beach is categorically saved under the said agreement. The claim of the petitioner in relation to the access is therefore, well founded.

19. Even though it was repeatedly submitted by Senior Counsel for the hotel before us that the Vainguinim beach in question is a public beach, yet we find that the hotel has tried to create all sorts of obstructions relating to the access to the said beach in order to privatize the said beach. The hotel had advertised that it has a private beach. The explanation given by the hotel in this respect is totally unacceptable. Even though the existence of access was denied by the hotel

through the acquired land yet it was admitted that access was available near the nullah which was also obstructed by constructing walls/barbed wire fence. In this respect it was also stated that alternate access was provided. This alternate access first was between Survey No. 246/ 1 and 246/2 for some period which is marked as yellow on plan and it was later on shifted to purple access which is the subject matter of other two petitions. Even attempt to block the purple access by constructing gates was made by the hotel in respect of which P.P.D.A. issued notice dated 4-6-90 which is on record of Writ Petition No. 284/91 at page 223 which is also referred in affidavit of Member Secretary, C.P.D.A. in para 7 at page 187 in Writ Petition No 330/91. In the letter dated 17-12-1991 at page 29 of Writ Petition No. 36/92 the Deputy Collector has written a letter to the B.D.O. forwarding the representation of Goa Foundation with directions to instruct the Sarpanch of Village Panchayat to take necessary action against the illegal construction and wall raised by Cidade de Goa.

20. At this stage we would like to refer to the judgment of the Apex Court in *M.C. Mehta Vs. Kamal Nath and Others*, wherein the Apex Court has laid down in paragraph 34 and 35 that the State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. These resources meant for public use cannot be converted into private ownership. It is further pointed out that in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources.

20-A. After executing the agreement dated 26-10-83, the Government totally abandoned its duty and did not care to see whether the terms of the agreement were complied with or not. In this connection we may also refer to the judgment of the Calcutta High Court in *Pramatha Nath Talukdar Vs. State of West Bengal and Others*, wherein the Calcutta High Court found that though the details of the terms and conditions on which the public would be entitled to use or enjoy the benefit of the constructions sought to be made on the acquired land should be specifically set out in the agreement the fact that the agreement is couched in general terms and does not contain any detailed scheme as to the extent of the actual user by the public leaving the determination of the conditions on which the public will be entitled to have the benefit of the establishment to the discretion of the company, does not make the agreement or the proceedings for acquisition bad. However, if the rules and regulations of the company which are subsequently framed after the establishments contemplated are set up, do to confer sufficient benefit on the public and are not directly useful to the public or if the rules framed are such as to make the benefit intended to be conferred on the public of an illusory nature, the Government will be entitled to take

possession of the property acquired and to put an end to the interest of the company. We have already pointed out that no scheme prepared by the hotel had been produced before us from where it could be said that the benefits of the acquired land have been extended to the public under the said agreement dated 26-10-83.

21. In so far as resumption of land is concerned, the agreement provides for a due notice. In the circumstances, we are prima facie of the view that a notice is required to be issued by the Government for resumption of the land in accordance with the proviso to Clause 6 of the agreement dated 26-10-83.

22. The challenge relating to yellow access and shifting the same to purple access which is raised in Writ Petition No. 330/91 has been exhaustively dealt with in separate judgment in connected Writ Petitions No. 284/91 and 37/92 and the order passed therein shall govern the said challenge and as such it is not necessary to deal with the same once again.

22-A. For the aforesaid reasons, the writ petitions are allowed with the following order :

(1) The constructions which have come up in Survey No. 246/2 (old 803) are required to be demolished and the concerned authorities shall take action in this respect, within a period of eight weeks from today and file compliance report within two weeks therefrom.

(2) A notice for resumption of the land as required under proviso to Clause 6 of the agreement dated 26-10-83 shall be issued within ten weeks by the Government to the hotel to show cause as to why, in the circumstances, the acquired land should not be resumed. The Government shall then take appropriate decision in accordance with law.

(3) The access which is shown in plan Exh. A colly which is at page 33 of Writ Petition No. 141 of 1992 shall be kept open without any obstruction of any kind from point A-B in order to come from Machado Cove side from point A to 803 (246/2 new) and then to go to the beach beyond point B. We have already pointed out that this plan is to the scale.

(4) The challenge relating to yellow access and shifting the same to purple access which is raised in Writ Petition No. 330/91 has been exhaustive and dealt with in separate judgment in connected Writ Petitions No. 284/91 and 37/92 and the order passed therein shall govern the said challenge.

Rule is made absolute in the aforesaid terms. Costs in these petitions shall be borne by the hotel M/s. Fomento Resorts and Hotels Limited.

At this stage, Learned Senior Counsel prays for stay. Stay is granted in relation to demolition of construction for eight weeks. Stay in so far as the access is concerned is refused.

23. Rule made absolute.