

(2005) 09 BOM CK 0041

In the Bombay High Court

Case No : First Appeal No's. 817 and 870 of 1991

State of Maharashtra

APPELLANT

Vs

Ismile Abdul Gafur Patel since deceased through his LRs.
Maimuna Ismail Patel and Others

RESPONDENT

Date of Decision : 29-09-2005

Acts Referred:

Land Acquisition Act, 1894 — Section 11, 18, 4, 4(1)

Citation : (2006) 2 MhLj 323

Hon'ble Judges : V.M. Kanade, J; R.M.S. Khandeparkar, J

Bench : Division Bench

Advocate : G.P. Mulekar, AGP in F.A. No. 870 of 1991 and R.S. Datar, in F.A. No. 817 of 1991, for the Appellant; R.S. Datar in F.A. No. 870 of 1991 and G.P. Mulekar, AGP in F.A. No. 817 of 1991, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—Since both the appeals arise out of the common judgment and award passed by the reference Court, they were heard together and are being disposed of by this common judgment.

2. The First Appeal No. 870 of 1991 has been filed by the State of Maharashtra whereas the First Appeal No. 817 of 1991 has been filed by the claimants.

3. The claimants' land bearing Survey Nos. 40, 44/1, 39/1, 37/4C, 7/2/7/A, 37/1/A, 36/8, 37/40/68/8, 37/18 and 36/7 situated in village Taloja, Taluka Panvel, District of Thane, were sought to be acquired by a notification issued u/s 4 of the Land Acquisition Act 1894, hereinafter called as "the said Act", and published in Government Gazette on 4th February, 1970. The award in exercise of powers u/s 11 of the said Act was declared on 6th December 1985 thereby awarding compensation for the land of the claimants at the rate of Rs. 37- and Rs. 4/- per sq.metre. Being; dissatisfied, the claimants preferred reference application u/s 18 of the said Act claiming Rs. 157-p.s.m. which was thereafter by way of amendment enhanced to Rs. 257- and further to Rs. 307- p.s.m. The reference court after recording the evidence which comprised of testimony of the

claimants and their valuer, awarded compensation at the rate of Rs. 157- p.s.m. Being dissatisfied with the said award, the State of Maharashtra has filed the First Appeal No. 870 of 1991 whereas the claimants have filed the First Appeal No. 817 of 1991 claiming compensation at the rate of Rs. 407- p.s.m.

4. The learned advocate appearing on behalf of the State of Maharashtra, while assailing the impugned award submitted that the reference Court erred in enhancing compensation at the rate of Rs. 157- p.s.m. solely on the basis of the testimony of the claimants and the valuer ignoring the: fact that the said testimony nowhere assists the claimants to justify enhancement of the compensation. She further submitted that the reference court failed to take note of the fact that the testimony of the valuer was on the basis of his inspection carried out nearly 19 years after the publication of the notification u/s 4 and that the sale instances, which were sought to be relied upon by the valuer, were in relation to strips of land or pieces of land situated in the neighbourhood of the residents of the houses. The reference Court did not consider the issue regarding deductions to be made in case the land is to be considered as potential and suitable for construction activities. The valuation in relation to a large piece of land cannot be on the metre basis but it is to be on the hectare basis. In the absence of cogent evidence being produced on record by the claimants, the reference Court erred in granting enhancement to the extent of Rs. 15/- p.s.m. She relied upon the decisions in the matter of Viluben Jhalejar Contractor (D) by LR's. Vs. State of Gujarat, , P. Rajan and Another Vs. Kerala State Electricity Board and Another, , Kasturi and Others Vs. State of Haryana, , Administrator General of West Bengal Vs. Collector, Varanasi, , Ratan Lal Gupta and Others Vs. Union of India (UOI), and in the matter of Special Land Acquisition Officer, Bangalore Vs. V.T. Velu and Others, .

5. On the other hand, the learned Advocate for the claimants while assailing the impugned award submitted that the reference Court erred in taking note of the fact that the evidence produced on record clearly justified the enhancement of compensation for more than Rs. 30/- p.s.m. He further submitted that the testimony of the valuer in support of the claim of the claimants for enhancement of compensation has gone unchallenged and it clearly established the justification for enhancement of compensation at least to the tune of Rs. 40/-p.s.m. This Court had occasion to deal with the acquisition proceedings in different cases of land acquisition in respect of five different villages in the district of Thane and particularly in Taluka of Panvel. The judgment in that regard was delivered on 16th March, 2000 in different appeals arising in those cases and considering the valuation done in the earlier decision in First Appeal No. 875 of 1986 in respect of the acquired land in the village Taloja and considering the location of the different pieces of land in comparison with the location of Mumbai-Pune National Highway as well as Thane-Pune Highway, had awarded compensation in the range of Rs. 14/- to Rs. 257- p.s.m. Considering the same, certainly the compensation awarded by the reference Court at the rate of Rs. 15/- is to be considered at a very lower rate and needs to be enhanced at least to the extent

to Rs. 251- p.s.m., if not, as claimed by the claimants. He has placed reliance in the said decision dated 16th March, 2000 delivered by the Division Bench of this Court in First Appeal No. 382 of 1984 and various other first appeals. Relying upon the decision of the Apex Court in the matter of Bhim Singh and Others Vs. State of Haryana and Another, , he has submitted that such reliance on the decision already given by this Court in different matter relating to the land in the same village is relevant for the purpose of decision regarding market value of the land in question. Drawing attention to the decision in Tanaji Abaso Pawar and Others Vs. State of Maharashtra and Another, All India Land Acquisition and Compensation Cases , the learned advocate submitted that bearing in mind the scheme under the said Act merely because the valuer had visited the land nearly 19 years after the date of issuance of the notification u/s 4, that by itself cannot be considered to be sufficient to discard the testimony of such valuer as it cannot be presumed that every landowner had knowledge about the fact that he had to establish market value with the help of the expert valuer. Shri Kulkarni, who was examined as expert valuer, had been the Valuer in various other cases in the locality and the judicial notice of the said fact should be taken and that itself should be considered to be sufficient to give due credence to his testimony.

6. Plain reading of the impugned award discloses that the reference Court, while heavily relying upon the testimony of the valuer Shri Kulkarni and on consideration of the location of the land in question and its situation based on the evidence led by the claimants, has held that the market value of the acquired land to be Rs. 15/- p.s.m. as on 3rd February, 1970. The impugned award nowhere discloses any analysis of the testimony of the valuer and it merely proceeds on the basis that the testimony of the valuer has not been contradicted or disproved either by way of cross-examination or examination-in-chief of any efficient valuer by the Government. In fact, failure in that regard on the part of the Government has been considered as justification to rely upon the testimony of the valuer, who had been examined on behalf of the claimants, without any analysis of such testimony and that too without any effort on the part of the reference Court to ascertain upto what extent, the testimony of the valuer could justify the claim for compensation even at the rate of Rs. 15/- p.s.m. The reference Court has nowhere referred to the issue regarding comparability of the land in question with the lands which were subject-matter of the sale instances which were sought to be relied upon by the valuer or that the pieces of land which were subject-matter of the land under reference stated to have been considered by the valuer. The reference Court has also not considered the fact that the valuer had no occasion to inspect the land in question in the year when the notification u/s 4 was issued and the fact that the land had been inspected by the valuer only in the year 1989 whereas the notification u/s 4 was issued in the year 1970. Considering all these aspects, therefore, the judgment having been delivered without the analysis of the evidence on record in the manner it was required to be analysed and the reference Court having proceeded on mere assumptions and presumptions regarding credibility of the testimony of the

valuer without addressing itself to the relevant issues which were required to be considered while dealing with the matter pertaining to the market value of the acquired land and in particular, bearing in mind the law laid down by the Apex Court in *The Special Land Acquisition Officer, Bangalore Vs. T. Adinarayan Setty*, , the impugned award cannot be sustained.

7. The first point which arises for our consideration is whether the valuation of the land under acquisition can be simply on the basis of the decision delivered by this Court in relation to another land acquired in the same village?

8. In *Bhim Singh's case* (supra), the Apex Court observed that in some of the judgments the High Court had taken note of the fact that in respect of earlier acquisitions some matters had come to the Apex Court and the Apex Court had approved the rate fixed by the High Court in those matters, and in that context, it was held that:-

It was rightly held that when this Court had fixed rates in respect of earlier acquisitions for the same purpose, it was better to adopt those rates with suitable increases than to rely upon sale instance.

The decision is on the point that when the Apex Court had approved certain rates for a particular area, the same has to be taken as the basis rather than referring to sale instances from another villages. The decision nowhere lays down that the value so fixed should be blindly applied to the subsequent acquisitions of land. It specifically states that the rates so fixed in respect of earlier acquisitions for the same purpose, could be adopted as the basis for fixing the rates with suitable variations to the subsequent acquisition of land from the same village. Bearing in mind the said decision, if one peruses the decision of the Division Bench of our Court delivered on 16th March, 2000 in First Appeal No. 875 of 1985 and others (unreported), undoubtedly, it is in relation to various lands which were sought to be acquired by issuance of notification u/s 4 in the year 1970 from the village Taloja and the Court preferred to rely upon the earlier judgment of the Division Bench in First Appeal No. 382 of 1984 which was delivered in March, 1987 and had a map and the valuation report submitted on behalf of claimants therein which was not disputed by the State, to justify enhancement on the basis of rates fixed in the said Appeal No. 382 of 1984.

9. The Apex Court in *T. Adinarayan Setty's case* (supra) had in clear term laid down the law as regards the method to be adopted for assessment of compensation in relation to the lands acquired under the said Act. It was held therein that it is not disputed that the function of the Court in awarding compensation under the Act is to ascertain the market value of the land as on the date of the notification u/s 4(1) and the valuation should be made on the basis of (1) opinion of experts, (2) the price paid within a reasonable time in bona fide transactions of purchase of the lands acquired or the lands adjacent to the lands acquired and possessing similar advantages and (iii) a number of years purchase of the actual or immediately prospective profits of the lands acquired. The said

decision has been reiterated by the Apex Court in number of decisions delivered after the decision of T. Adinarayan's case, Besides, it has been time and again clarified by the Apex Court that, while relying upon any other material including the decisions of the Court or sale instances, the issue regarding comparability cannot be ignored. It is absolutely necessary to ascertain whether the land which had been the subject-matter of a decision of the Court is comparable with the land which is a subject-matter of the valuation in the case before the Court.

10. The Apex Court in Viluben Jhalejar Contractor's case (supra) had ruled that the market value is ordinarily the price the property that may be fetched in the open market if sold by a willing seller unaffected by the special needs of a particular purchase. It was also observed that one of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefor, and it is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not. It was also held that "where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification u/s 4(1) or otherwise, other sale instances as well as other evidences have to be considered." However, it was further ruled that "the amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition, suitable adjustment has to be made having regard to various positive and negative factors vis-a-vis the land under acquisition by placing the same two in juxtaposition." The Apex Court has identified the positive factors to be, smallness of size; proximity to a road; frontage on a road; nearness to developed area; regular shape, level vis-a-vis land under acquisition and special value for an owner of an adjoining property to whom it may have some very special advantage, while the negative factors have been identified as largeness of area; situation in the interior at a distance from the road; narrow strip of land with very small frontage compared to depth; lower level requiring the depressed portion to be filled up; remoteness from developed locality; and some special disadvantageous factors which would deter a purchaser. The said ruling clearly holds that the blind application of any earlier decision to the facts of the case under consideration would be an abuse of power by the Court in relation to the evaluation of the market value for the purpose of determination of compensation under the said Act. In order to apply such decision, it is equally necessary to determine the issue of comparability of the land which was subject-matter of the earlier decision with the land in question before the Court. In the absence of such exercise being done, merely because in the earlier case, certain rates were awarded for the land even in the vicinity of the land which is the subject-matter of the decision before the Court, that itself would not be a justification to ascertain the market value of the land in question, at that rate, nor the decision

of the Apex Court in Bhim Singh 's case (supra) lays down any law to the contrary. Being so, merely because in the First Appeal No. 875 of 1985, the rates within the range of Rs. 14/- to 25/- per sq. metre were awarded for various pieces of land in the village Taloja, that itself may not be the rates to be applied to the land in question without deciding the comparability between the land in question and the pieces of land which were subject-matter of the said appeals. Undisputedly, there is no evidence led in that regard before the Court. Mere reliance in the decision in the First Appeal No. 875 of 1985 and others (unreported), therefore, will be of no help to the claimants to justify enhancement of compensation or to justify the enhancement granted by the Reference Court.

11. The next point which arises for our consideration is whether the valuation could have been on metre basis or ought to have been on the acre basis. Undisputedly, the land which is acquired in the case in hand admeasures 63490 sq.metres in area. In other words, 6 hectares and 3490 sq.metres or 15 acres, 34 acres and 90 sq.metres.

12. In Pitambar Hemlal Badgujar's case (supra), it was held therein that it is settled by a series of the Apex Court's judgments that determination of the compensation in respect of the lands acquired on the square foot basis is an obvious illegal principle being adopted by the courts only to inflate the market value and no reasonable prudent purchaser would be willing to purchase the land on the square foot basis when large extent of land is offered for sale and the same rule will apply in the case of the land acquired for public purpose. It was also observed that the Courts are required to consider, sitting in the armchair of the prudent purchaser acting in normal conditions prevailing in the open market, whether, when offered to purchase the land by a willing vendor, he would purchase the same in an open market and the Court on that touchstone should evaluate the market value. The law on the point as to whether the evaluation of the market value in case of pieces of land could be on the metre basis or it should be on the acre basis, is therefore clearly laid down by the Apex Court in Pitambar Hemlal Badgujar's case (supra). Similar was the decision in P. Rajan's case (supra) wherein it was held that when a large extent of land is acquired, determination of compensation on the basis of a cent, square yard or square foot is a wrong principle and the principle of fixation on acreage basis should be considered as the correct principle.

13. It is to be noted that the land which was acquired in Pitambar's Hemlal Badgujar's case (supra) was 2 acres of land covered in Survey No. 339/B and 1 acre and 34 gunthas from different Survey No. 339/A-2. In P. Rajan's case (supra), the area which was acquired was 7 acres and 8 cents. Considering the said ruling of the Apex Court, the area of 15 acres and above can, by no stretch of imagination, be held to be a small piece of land. It squarely falls within the expression "large extent of land" or "large piece of land". Being so, the learned advocate for the Government is justified in contending that the valuation should

have been not on the basis of the metre but on the basis of acre. Undisputedly, the valuation by the land acquisition officer was on the hectare basis and for the purpose of claiming enhancement of compensation, the claimants had shown the same with arithmetical calculation that the compensation offered by the Land Acquisition Officer was at the rate of Rs. 2/- and Rs. 4/- per sq.metre. Being so, the reference Court clearly erred in ignoring the law laid down by the Apex Court in the matter of ascertaining the market value of large extent of land.

14. The next point which arises for consideration is whether the sale instances which were sought to be relied upon are of any assistance to the claimants to justify the enhancement of compensation? The learned advocate appearing for the claimants has fairly submitted that those sale instances refer to smaller pieces of land. Considering the same and bearing in mind the ruling by the Apex Court in Administrator General of West Bengal v. Collector, Varanasi's case (supra) as well as Ratan Lal Gupta's case (supra), those sale instances in relation to the smaller plot of land could be of no help to determine the compensation in relation to the large extent of land. Besides, the testimony of the claimants as well as the valuer nowhere discloses any evidence comparing the nature and the location of the land in question with the pieces of land which were subject-matter of those sale instances. In other words, there is no evidence to deal with the issue of comparability between the land in question with the pieces of land which were subject-matter of those sale instances and on that count also those sale instances are of no help to determine the market value of the land in question.

15. The next point which arises for consideration relates to the testimony of the valuer. Perusal of the testimony of the valuer apparently discloses a clear statement to the effect that he had inspected the site on 4th May, 1989 to assess the market value as on 4th February, 1970 i.e. the date of notification. In other words, the land in question was sought to be inspected nearly 19 years after the date of issuance of notification. Obviously, the valuer had no personal knowledge about the situation in loco in the year in which the notification u/s 4 was issued in relation to the land in question. Undisputedly, the valuer had not disclosed any documentary material regarding the situation in loco in the said year, either in his testimony or in his valuation report. His testimony regarding the factual situation at the site in relation to the plot in question in the year 1970 is purely hearsay evidence, which cannot be given any credibility.

16. As regards the sale instances and other decisions which are stated to have been considered by the valuer to ascertain market value, apart from the claim that he had considered the comparability between the land in question with the pieces of land which were subject-matter of those decisions and the sale instances, no evidence regarding such actual consideration of the issue of comparability has been placed on record. Mere claim of consideration by the valuer is different from the evidence regarding such comparability between the land in question with the pieces of land which were subject-matter of the sale

instances and those decisions. Being so, we wonder what evidentiary value can be attached to such a testimony of the valuer. In the absence of cogent material being disclosed by the valuer which could have been the basis for arriving at a particular figure to be the market value of the land, and bearing in mind the decision of the Apex Court which leaves us with no option than to hold the testimony of the valuer to be without any credibility, it is to be held that the testimony of the valuer is of no help to ascertain the market value of the land in question.

17. The learned advocate for the claimants however has submitted that the testimony of the valuer has gone unchallenged, and therefore, the same cannot be totally discarded. In the land acquisition proceedings, it is for the claimant to establish that his claim regarding enhancement of compensation is well justified and this has to be done by the claimant by adducing cogent evidence in support of his claim for enhancement. The burden in that regard essentially lies upon the claimants. No doubt, the normal rule is that in case of the burden of proof is discharged by the party, the onus would shift upon the opposite party. It is also a normal rule of evidence that once a statement of fact is not challenged by the opposite party, it can be deemed to have been established. However, in the case of proceedings under Land Acquisition Act, there is an exception to this rule inasmuch as that mere weakness in the defence by the State or failure on the part of the Government advocate to cross-examine the claimants' witnesses effectively, that by itself cannot be sufficient to conclude about the establishment of the facts alleged by the claimants and their witnesses in the course of their testimony. Such facts which are necessary to be established for discharging the burden of proof regarding the claim for enhancement of compensation are to be proved with necessary materials in support of such statement of fact. Any decision in that regard, if required, one can safely rely upon the one in the matter of *P. Ram Reddy and Others Vs. Land Acquisition Officer, Hyderabad Urban Development Authority, Hyderabad and Others*, wherein the Apex Court, while reiterating its earlier decision in *Chaturbhuj Pande and Others Vs. Collector, Raigarh*, and while answering the question as to whether the statements of the witnesses in such proceedings which are not subjected to cross-examination or effective cross-examination or that no contrary evidence is adduced, is the Court obliged to accept such statements to be true in determining the market value of the lands acquired, held thus, it is, no doubt true, that whenever oral evidence is adduced by parties on certain matters in controversy, it may become difficult for the court to overlook such evidence, if it is not shown by effective cross-examination of such witnesses who have given such evidence or by adducing contra-evidence, that the oral evidence was unreliable or the witnesses themselves are not creditworthy. But, in land acquisition references before civil courts, when witnesses give oral evidence in support of the claims of claimants for higher compensation, the ineffective cross-examination of such witnesses, is not an uncommon feature if regard is had to the manner in which claims for enhanced compensation in land acquisition cases are defended in courts on

behalf of the State. Indeed, when a question arose before this Court whether the court is bound to accept the statements of witnesses only because they have not been effectively cross-examined or evidence in rebuttal has not been adduced, it was observed by this Court in *Chaturbhuj Pande v. Collector* thus :-

It is true that the witnesses examined on behalf of the appellants have not been effectively cross-examined. It is also true that the Collector had not adduced any evidence in rebuttal; but that does not mean that the court is bound to accept their evidence. The Judges are not computers... they are bound to call into aid their experience of life and test the evidence on the basis of probabilities.

Considering the decision of the Apex Court, and taking into consideration the testimony of the valuer, as stated above, therefore, it does not deserve any credibility for the purpose of ascertaining the market value of the land in question.

18. Yet another issue which is sought to be raised is regarding failure on the part of the reference Court to consider the point regarding necessity of the deduction being made while applying the price of developed land to the land acquired in undeveloped form. Undoubtedly, the decisions relied upon disclose the necessity of consideration of the said aspect of the matter. However, in the case in hand, it is not necessary to deal with the said issue in the facts and circumstances of the case.

19. Undoubtedly, the learned advocate appearing on behalf of the claimants contended that the evidence on record justifies the grant of compensation at the rate of Rs. 25/- and not at the rate of Rs. 40/- as is asked for by the claimants. However, as already stated above, there is no cogent evidence produced by the claimants in support of any such claim. Even there is no cogent material on record to justify the claim for enhancement of compensation at the rate of Rs. 15/- per sq.metre.

20. The last point which arises for our consideration is what should be the just and appropriate compensation payable to the claimants. In that regard, the claimants themselves have stated and the records also disclose that the land in question is situated at a place of walking distance from Mumbai-Pune National Highway. The claimants claimed that the distance between Taloja Railway Station and the acquired land is about 7 minutes walking distance, and 4 minutes walking distance to the Bombay Poona Highway. The gaathan area of the village Taloja lies at a distance of about 6 minutes walk from the said land in question. The acquired land has a levelled ground and since the year 1970, it has the water facility. The electricity facility is also available in the area. The land is clearly approachable by a bullock cart road and the S.T. stop lies at a distance of about 5 minutes walk from the plot in question. Considering all these aspects, therefore, though the land is an agricultural land, it has the potentiality for construction activities therein and therefore the same is having NA potentiality cannot be disputed. Though, the testimony of the valuer is of no much assistance

for ascertaining the market value of the land, certainly the description of factual situation at the time of his inspection of the land in the year 1989 to the extent it disclosed different from the situation which existed in the year 1970, can be of help to ascertain the market value of the land in the year 1970. The report prepared by the valuer also discloses certain facts which are clearly otherwise borne out from the record. It is also a matter of record that in land acquisition cases, relating to the acquisition of the land by the side of national highway in the year 1966, the compensation at the rate of Rs. 4.78 ps. per square metre was awarded. Undoubtedly, the said compensation by itself cannot be a basis for ascertaining the market value of the land which was acquired in the year 1970. However, the same can be taken into consideration to ascertain what could be the market value in the year 1970 bearing in mind the increase in the land prices in the locality. To that extent, certainly, the decisions which are sought to have been relied upon by the learned Advocate for the claimants throw some light. Taking into consideration all these materials, certainly the market value of the land in question in the year 1970 could not be at the rate of Rs. 3/- or Rs. 4/- per square metre. At the same time, as already observed above, it cannot justify the market value at the rate of Rs. 15/- per square metre. Taking into consideration the large extent of land and bearing in mind the evidence on record and the decisions referred above, in our considered opinion, the just and appropriate market value of the land in the year 1970 ought to have been calculated at Rs. 32,000/- per acre i.e. Rs. 8/- per sq.metre. We therefore hold that the market value of the land in question on the date of issuance of the notification u/s 4 was at Rs. 32000/- per acre. The compensation payable to the claimants ought to be calculated accordingly along with the other statutory benefits available under the said Act. The impugned judgment and award is to be modified accordingly.

21. The First Appeal filed by the State therefore partly succeeds and the impugned judgment and award stands modified accordingly. The First Appeal filed by the claimants is hereby dismissed. There shall be no order as to costs.

22. In case, the amount has already been disbursed in terms of the enhancement granted by the Reference Court, the claimants shall refund the same in terms of this judgment within a period of 12 weeks from today along with the interest thereon at the rate of 6% per annum, from the date of collection of amount till the date of repayment.