(2008) 10 KAR CK 0076

In the Karnataka High Court

Case No : Miscellaneous Second Appeal No. 26 of 2007

Sunandamma (since deceased by LRs. M.V. Padmanabha Shetty and M.V. Manjunatha) APPELLANT

Vs

Special Land Acquisition Officer, Karnataka Industrial Area Development Board RESPONDENT

Date of Decision : 14-10-2008

Acts Referred:
Land Acquisition Act, 1894 — Section 11, 18 (1) (a), 4 (1), 54

Citation : (2008) 10 KAR CK 0076

Hon'ble Judges : A.N. Venugopala Gowda, J

Bench : Single Bench

Advocate : S.P. Shankar for Mamata G. Kulkarni, for the Appellant; P.V. Chandrashekar, for the Respondent

Final Decision : Dismissed

Judgement

A.N. Venugopala Gowda, J.—Claimant in the Reference Court is the appellant. She was the owner of land to an extent of 1 acre 5 guntas in Sy. No. 90/1 and an extent of 1 acre 10 guntas in Sy. No. 90/2 of Kelagote Village, Chitradurga Taluk, which were acquired pursuant to a preliminary Notification dated 16.9.82 issued u/s 28(1) of Karnataka Industrial Areas Development Act 1966, which is analogous to Section 4(1) of Land Acquisition Act, 1984 (for short ''the act''). After the final declaration, the possession of the acquired property was taken by the competent authority on 27.7.85. The Land Acquisition Officer, passed the award u/s 11 of the act at the rate of Rs. 10,000/- per acre on 24.12.87. On an application filed u/s 18(1)(a) of Land Acquisition Act by the claimant, seeking reference to the Civil Court, for determination of the market value of the acquired property, a reference was made. The Reference Court in exercise of its jurisdiction u/s 18 of the Act, fixed the compensation amount at Rs. 45,000/- per acre and passed an award. It allowed additional market value @ 12% from 16.9.82, the date of preliminary Notification, till the date of award and solatium @ 30% on the enhanced market value u/s 23(2) of the Act and further ordered for payment of Interest at 9% for the first year from the date of taking possession and at 15% thereafter, till the award amount is paid or deposited. However, Reference Court ordered that, the claimant shall not be entitled to interest on solatium and additional market value. An appeal u/s 54 of the Act was filed by the appellant in the District Court at Chitradurga. The Appellate Court has allowed the appeal in part, affirming the determination of market value of the acquired land at Rs. 45,000/- per acre and setting aside the refusal to order payment of interest on solatium and additional market value. It has ordered and decreed that, the claimant shall be entitled to interest on solatium and additional market value on the compensation amount determined at Rs. 45,000/- per acre. Questioning the Judgment and Award passed in M.A. No. 7/01 dated 5.3.03 and to modify the same and award market value at Rs. 80,000/- per acre, together with all statutory benefits as per law, this second appeal has been filed.

2. I have heard Sri. S.P. Shankar, learned senior Counsel for the appellant and Sri. P.V. Chandrashekar, learned Counsel for the respondent.

3. Learned senior Counsel for the appellant contended that, the lower Appellate Court has erred in not allowing I.A. filed under Order 41 Rule 27 CPC seeking permission of the Court to produce the sale deed of an adjacent land which was converted for non-agricultural use. He contended that, in respect of the neighbouring land of the appellant, acquired by the City Municipal Council, compensation was determined by this Court in MFA No. 7970/02 dated 28.09.06 at Rs. 75,000/- per acre and in not awarding the compensation on the basis of the converted land covered under Ex.P3, the Courts below have committed an error. He contended that, the property was acquired, for being used for industrial purpose and that the land in question had the potentiality for the industrial use, being situated in a developed area with all the amenities. He contended that, the determination of the market value at Rs. 45,000/- per acre is on a lower side and the market value of the property when calculated on the basis of Ex.P3 will be Rs. 1,01,175/- and however, the appellant has restricted the claim to Rs. 80,000/- per acre which being the reasonable sum, has to be awarded along with statutory benefits and costs.

4. Per contra, learned Counsel for the respondent contended that, the land in question is an agricultural land and has no similarity for the land acquired and covered under Ex.P3. He contended that, the award in MFA No. 7970/02 is in respect of a later acquisition, also for a different purpose and the same cannot be the basis for determination of market value of the property involved in this appeal. Learned Counsel pointed out that, the appellant had valued the acquired property in M.A. No. 7/01 before the lower Appellate Court at Rs. 65,000/-per acre and had claimed the compensation amount accordingly, and hence, the claim now made at Rs. 80,000/- per acre is untenable. He contended that, the Reference Court and the lower Appellate Court have concurrently found that, the market value of the acquired land based on its potentiality is Rs. 45,000/- per

acre and It is not a case of ignoring any material evidence on record or a case of perversity in appreciating the evidence on record, to call for interference in this appeal. Learned Counsel contended that, possession was taken on 27.7.85 and the award was passed later i.e., on 24.12.87. Hence, interest @ 12% applicable in terms of Section 23(1-A) of the Act is payable only up to 27.7.85 and not till the date of passing of the award on 24.12.87. He contended that, since the awarding of interest after 27.7.85 till the date of award on 24.12.87 is contrary to the statute, is null and void and the same may be modified. Learned Counsel pointed out that, there was delay of 972 days in filing the appeal, which was condoned conditionally on 23.7.07 and even if any enhancement is called for, the interest for the delayed period of 972 days cannot be allowed, in view of the order passed on 23.7.07. He made submissions in support of the impugned award passed by the lower Appellate Court, in all other respects.

5. In view of the rival contentions and on perusal of the record of the case, the points that arise for my consideration are:

(i) Whether the appellant/claimant having valued and claimed the market value of the acquired property at the rate of Rs. 65,000/- per acre in the Court below, can claim the compensation at Rs. 80,000/- per acre, in this appeal?

(ii) Whether the appellant has proved that, the market value of the acquired property is worth more than Rs. 45,000/- per acre on the date of issue of preliminary Notification and if so, what amount she is entitled to?

(iii) Whether the lower Appellate Court is justified in rejecting I.A. filed under Order 41 Rule 27 CPC, to take into consideration the sale deed said to be of an adjacent land?

(iv) Whether the impugned judgment and award calls for interference & modification?

6. Re. Point No. (1): Appellant had filed M.A. 7/01 u/s 54(1) of the Act in the First Appellate Court against the Award passed by the Reference Court. In the said appeal memorandum at para 10, it has been stated as follows:

Under the above circumstances, the appellant respectfully prays to call for the records from the Trial Court and to enhance and fix the market value of the acquired land at Rs. 65,000/- per acre to meet the ends of justice.

For the purpose of payment of Court fee in the valuation slip annexed to the said appeal memorandum, the property was valued at Rs. 65,000/- per acre and the Court fee was paid accordingly.

7. There is no dispute that, in the appeal filed by the appellant before the First Appellate Court, she claimed for fixing the market value of the property at Rs. 65,000/-per acre and the Court fee was paid accordingly. Despite the same, she has now claimed fixation of market value at Rs. 80,000/- per acre. The basis for making the present claim, appears to be the award dated 28.9.06 passed in MFA

No. 7970/02. As already noticed, this appeal was filed with a delay of 972 days, may be, taking into consideration the amount awarded in MFA No. 7970/02, wherein, the compensation was awarded at Rs. 75,000/- per acre. The appellant having valued the property at Rs. 65,000/- per acre in M.A. 7/01, cannot claim higher compensation after the disposal of the said appeal, by taking advantage of the award passed thereafter, that too, in respect of a subsequent acquisition which was also for a different purpose. The appellant had made a conscious calculation and fixed the valuation in the appellate Court and Court fee was paid and hence, it would be impermissible to change the valuation in the second appeal, when no reasons or explanation of whatsoever nature has been offered.

8. In the case of M. Govinda Raju v. Special Land Additional Land Acquisition Officer and Anr. reported in AIR 1996 SC 2660, the facts that fell for consideration was, a certain land was acquired, for which, the Land Acquisition Officer made the award in the range from Rs. 10,000/- to Rs. 16,000/- per acre. The Reference Court enhanced the compensation to Rs. 45,000/- per acre. Claimants filed appeals valuing the property at Rs. 75,000/- per acre and paid the court fee at Rs. 60,000/- per acre. Since value had been restricted and Court fee paid, subsequently taking into consideration the award passed in respect of some other lands at Rs. 75,000/- per acre and on that basis they made applications to pay the difference of the amount and to pass the award at Rs. 75,000/- per acre. Division Bench of the High Court held that, since the appellants had restricted their claim only to Rs. 60,000/- and paid the Court fee accordingly, they are not entitled to compensation at Rs. 75,000/-. The point considered by the Hon''ble Supreme Court was, whether, the High Court was justified in refusing to permit the appellants to pay the deficit court fee and to enhance the compensation at Rs. 75,000/- per acre? The same was held in the negative. In the appeal before the Hon''ble Supreme Court, the question considered was, whether, the party could be permitted to pay the deficit court fee at a later stage on the difference of the amount claimed in the appeal. Considering the same, it was held as follows:

As indicated earlier, party makes a conscious decision and fixes the valuation and the court-fee paid; it would be unhealthy practice and it will not be conducive to encourage the practice to keep on changing the valuation and then to pay deficit court-fee thereon. As seen, after the appeal was filed by the appellants they claimed compensation @ Rs. 75,000/- but paid the court-fee at Rs. 60,000/-per acre. After the Civil Judge in another case had enhanced the compensation, they came forward to claim higher compensation on the basis of that judgment, it will not be conducive to permit the parties to go on changing the valuation and giving permission to pay the deficit court-fee for higher compensation. The Division Bench, therefore, was right in refusing to permit them to pay the deficit court-fee to award enhanced compensation @ Rs. 75,000/- per acre.

(Emphasis supplied by me)

9. In the case of Ujjain Vikas Pradhikaran Vs. Tarachand and another etc., , the

material facts were that; land of the claimant was acquired and compensation at Rs. 27,500/- per Hectare was awarded by the Land Acquisition Officer. On reference, the District Judge enhanced the compensation to Rs. 50,000/- per Hectare. On appeal, the High Court enhanced the compensation to Rs. 1,25,000/- per Hectare which worked out to Rs. 26,125/- per bigha and the beneficiary of the acquisition challenged the award passed by the High Court contending that, the claimants having confined their claim to enhancement of compensation at Rs. 20,000/- per bigha in the grounds taken in the appeal, the High Court was clearly in error in awarding compensation at Rs. 26,125/- per bigha i.e., at Rs. 1,25,000/- per Hectare. The contention was opposed on behalf of the claimants contending that, there is no prohibition to claim higher compensation after amendment Act 68 of 1984, has come into force and the High Court was justified in enhancing the compensation. The contentions advanced for the claimants was held to be devoid of merit. Even taking into account the amendment made to Section, it was held as follows:

7. ...Nonetheless, it would always be open to a party to claim a particular amount and having claimed at the rate, the question arises: Whether the Court could grant compensation higher than that claimed by the party? It would be obvious that when a party claims compensation at a particular rate, he assesses the market value of the land at that particular rate and seeks compensation on that basis. Having assessed the compensation at that particular rate, the question emerges: whether the Court could grant higher compensation than was assessed by the party? We find the answer in the negative. This principle squarely applies to the facts in these cases. The party having limited the compensation to Rs. 20,000/- perbiaha in the memorandum of appeal filed in the High Court, it would be obvious that the respondents claimed that they were entitled to the maximum of the compensation @ Rs. 20,00/- per bigha, Thereby the Court was precluded to award compensation beyond the amount claimed by the party and award in excess thereof would be obviously illegal. The power of the Court would be confined to the difference of the amount awarded by the reference Court and the amount claimed in the memorandum of the appeal but not in excess thereof.

8. Considered from this perspective, we hold that the High Court was clearly in error in awarding compensation in excess of the amount claimed by the respondents.

(emphasis supplied by me)

10. Since the appellant had fixed in the first appellate Court, the market value of the property at Rs. 65,000/- per acre, she cannot, in the second appeal, claim the compensation over and above the amount, claimed in first appellate Court. The point is answered accordingly.

11. Re. Point No. (ii): Before the Reference Court, PW-1 and PW-2 have deposed regarding the market value of the property. The documents produced by them

with regard to determination of market value have been marked as Exs.P2 to P4. Ex.P2 is a Judgment and Award passed in MFA No. 910/96, which pertains to a land comprised in Sy. Nos. 90/10 and 90/10P measuring 7 acres 6 guntas of Kelagote Village. The said properties were acquired pursuant to preliminary notification dated 1.9.1983. Considering the evidence on record, this Court determined the market value at Rs. 43,000/- per acre. Though reliance was placed on Ex.P3 - the sale deed executed by the City Municipal Commissioner in favour of Telecom Department, which took place three years after the present acquisition, the same was rightly not relied upon, considering the fact that the said sale deed is long after the acquisition of the property of the appellant and in between developmental activities might have taken place. Ex.P4 is the certified copy of the judgment in LAC No. 24/85 dated 27.11.85 by the Civil Judge, Chitradurga which also pertains to a later acquisition, i.e., 1.9.1983 in respect of 6 acres and 24 guntas of land bearing Sy. No. 91/1B situated at Kelagote village, wherein the Reference Court has determined the market value of the property acquired at Rs. 38,000/- per acre. In the absence of any direct evidence of sale, the Court, however, may take recourse to other known methods, such as awards passed in respect of lands made in the same or adjoining village. Hence Ex.P2 and P4 produced by the appellant are material pieces of evidence. The Courts while determining the amount of compensation for acquisition of land would be bound to take into consideration only the materials brought on record. Both the Reference Court and the First Appellate Court have considered the oral and documentary evidence placed on record by the appellant.

12. The reliance placed by the learned senior Counsel on the Judgment and Award dated 28.9.06 passed in MFA 7970/02 cannot be the basis to determine the market value of the property in question. Admittedly, the land which was acquired and which became subject matter of the consideration in MFA 7970/02 was under preliminary notification dated 1.9.1983 i.e., a later acquisition. The basis for fixing the market value of the property in the said Judgment is the sale deed of a property executed by the City Municipal Council in favour of the Telecom Department, which was executed three years after the acquisition of the land in question. Since this Court had already determined the market value of the property in the immediate vicinity, which was acquired almost at the same point of time (Ex.P2), the Judgment and Award passed therein has been rightly applied and the market value has been determined by both the Reference Court and the First Appellate Court. Compensation payable for a land acquired under the Act is determined by taking into account the market value of the land so acquired. The most reliable way to determine the market value is to rely on the instances of sale of portions of same land as has been acquired or adjacent lands made shortly before or after the preliminary notification. No such evidence is placed on record. The appellant had produced Ex.P2 Judgment, in the reference Court, which pertains to acquisition of adjoining land acquired almost at the same point of time. This Court fixed the market value at Rs. 43,000/- per acre. The appellant also produced Ex.P3 sale deed, which is later in point of time to

the acquisition. The reference Court and appellate Court, chose not to rely on Ex.P3 on the ground that it was at later point of time and that, it was not a willing purchase and for other reasons and is also not comparable. While determining the market value of land, it must be with reference to a land which was comparable to the acquired land. It must be similar in potentiality and nature. The Courts below have considered Ex.P3 and have assigned reasons for not accepting the same, which can not be termed as illegal. Therefore the Courts below were right in not relying on Ex.P3 and fixing market value of the property on that basis.

13. Section 23 of the Act provides that, in determining the amount of compensation to be awarded for land acquisition under the Act, the Court shall interalia take into consideration, the market value of the land at the time of publication of the Notification u/s 4 of the Act. Market value as held by various pronouncements of the Hon''ble Apex Court and this Court, means, the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing conditions with all its existing advantages and its potential possibilities, when laid out in most advantageous manner excluding any advantages due to the carrying out of the scheme for which the property is compulsorily acquired and that, there is an element of guess work inherent in most cases involving determination of the market value of the acquired land, but this, in the very nature of things cannot be avoided. The essential thing is to keep in view the factors prescribed by the Act.

14. Judged in the said background, the Reference Court and the First Appellate Court, have taken into consideration the relevant factors and the assessment of the market value of the acquired property being in conformity with Exs.P2 and P4, does not call for interference. The appellant has not pointed out from the record any evidence, which persuades me to accept the market value of the acquired property higher than the amount of Rs. 45,000/- per acre, determined and fixed by the Courts below. There is no perversity or illegality committed in fixing the market value of the acquired property at Rs. 45,000/- per acre, by the Courts below.

15. Re: point (iii): Appellant had filed I.A. I seeking permission of the lower Appellate Court to produce additional evidence i.e., a sale deed dated 7.12.81. In the affidavit in support of the application, it was stated that the said sale deed was not within the knowledge of the appellant and she came to know of it while giving evidence in LAC 63/86. The Appellate Court has rejected I.A. I on the ground that the property covered In the said sale deed being a part of the land bearing Sy. No. 139/10 and 139/2A of Kelegote, was converted into house sites. Since PW-1 has admitted in her cross-examination that acquired land is a dry agricultural land, not converted for non-agricultural use and the extent of acquired land is 2 acres 15 guntas, the sale deed sought to be produced as additional evidence was not received on record, since sufficient ground to produce additional evidence also was not made out. Thus, after consideration,

the lower Appellate Court has disallowed the prayer made in I.A.I.

The point for consideration is:

Whether the lower Appellate Court has committed any error in disallowing production of additional evidence sought to be produced along with I.A. I?

16. Sub-rule (1) of Rule 27 of Order XLI CPC stipulates that, parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary, in the Appellate Court. However, the Appellate Court may allow such evidence or documents to be produced in three circumstances, namely,

(a) The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted;

(aa) The party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed;

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

The case of the appellant does not fall under Clauses (a) and (b). The application of the appellant can only be considered under Clause (aa) i.e., the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed. The document which was sought to be produced as additional evidence is a sale deed dated 7.12.81. The respondent in the objections filed to the said application in the lower Court has contended that, the averments made in the affidavit in support of the application are false, that the claimant is not diligent and has not made any efforts and he had taken sufficient opportunity to give evidence in the Reference Court. The lower Appellate Court after raising a point for consideration namely, whether the claimant has made out sufficient ground for producing additional evidence as prayed for in I.A. I and after taking into consideration the record of the case, including the admission of PW-1, has held that, the claimant has not made out sufficient grounds to grant the prayer in I.A. I and has rejected the same. The twin principles of satisfaction to allow the application for additional evidence being that, the applicant should show that:

(i) she has exercised due diligence and

(ii) the additional evidence proposed to be produced was not within the knowledge or it could not be produced by her at the time when the award under the appeal was passed.

Since there is want of due diligence on the part of the applicant, the lower

Appellate Court has rejected I.A.I. I have perused I.A.I and objections to it. Affidavit in support of I.A.I is bald. Having examined the reasons assigned in the impugned Judgment, I am satisfied that there is no illegality committed by the lower Appellate Court in rejecting I.A.I.

17. Re. Point No. (iv): The Courts below on proper appreciation of Exs.P2 to P4, have determined the market value. The appellant has failed to prove from any acceptable evidence placed on record that, the acquired property is worth more than Rs. 45,000/- per acre on the date of issue of preliminary Notification for acquisition of the land. Hence, no interference or modification is called for, with regard to the determination of market value of the acquired property is concerned.

18. The contention of the learned Counsel for the respondent that the awarding of interest @ 12% p.a. till the date of passing of the award on 24.12.87 is illegal and without authority of law requires to be considered. There is no dispute that the possession of the acquired property was taken on 27.7.85 and that, the award was passed later i.e., on 24.12.87. Section 23(1-A) of the Act provides that, in addition to the market value of the land, the Court shall in every case award an amount calculated @ 12% p.a., on the market value for the period commencing on and from the date of publication of the Notification u/s 4, Sub-section (1), In respect of such land, to the date of award of the Collector or the date of taking possession of the land whichever is earlier. The claimant was entitled to be awarded interest u/s 23(1-A) of the Act, till the date of taking possession of the land. As against the statutory provision, interest has been awarded beyond 27.7.85 and up to 24.12.87 which is illegal and is without authority of law. No doubt, the respondent has not filed an appeal or cross-objection with regard to the granting of Interest @ 12% beyond 27.7.85 i.e., up to 24.12.87, but, Order XLI Rule 33 CPC empowers the Appellate Court to grant relief to a party who has neither preferred an appeal nor filed cross-objection under certain circumstances. A Division Bench of this Court, in the case of Jay Karnataka News Printers Ltd. and Ors. v. Syndicate Bank and Ors. reported in ILR 2001 Kar 312, has held as follows:

he power vested in the appellate Court under Order 41 Rule 33 has to be sparingly used and only in cases where the decree passed by the Court below Is so patently erroneous that the appellate Court cannot countenance the same, even In the absence of an appeal filed against it. In other words, something more than the mere possibility of a second view alone would justify resort to that power.

In the case of Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another, , Hon''ble Supreme Court has held that the order awarding additional benefit without jurisdiction is a nullity and such nullity can be assailed at any stage including at the execution or in collateral proceedings, since, it is outside the jurisdiction and authority of the Court.

19. Since the award of interest beyond 27.7.85 i.e., the date of taking possession of the acquired property, is contrary to the statutory provision itself and the award In that regard being patently illegal, I am unable to countenance the same. Hence to the extent of awarding interest beyond 27.7.85 u/s 23(1-A) of the Act, is liable to be set aside, so that, the award passed by the Courts below will be in conformity with the statutory provision.

20. In the result and for the foregoing reasons, the appeal fails and is hereby dismissed, subject to the modification that, the interest @ 12% p.a. applicable in terms of Section 23(1-A) of the Act, Is payable by the respondent to the appellant only up to 27.7.85.

In the circumstances, no order is made as to costs.