

(2002) 06 KAR CK 0068

In the Karnataka High Court

Case No : Writ Petition No's. 34409-411 of 2001

Unnathi Projects Limited and Others

APPELLANT

Vs

Bangalore Development Authority and Others

RESPONDENT

Date of Decision : 12-06-2002

Acts Referred:

Constitution of India, 1950 — Article 226
Karnataka Town and Country Planning Act, 1961 — Section 22 (4), 69, 69 (2)
Land Acquisition Act, 1894 — Section 72

Citation : (2002) 4 KCCR 2173

Hon'ble Judges : A.V. Srinivasa Reddy, J

Bench : Single Bench

Advocate : G.V. Shantharaju, for M.V. Vedachala, for the Appellant; S.A. Nazeer, for Respondent 1, A.C. Yaduraya Gowda, for Respondent 2, N.G. Sreedhar, for Respondent 3, C.B. Srinivasan, for Respondents 4 to 8 and R. Gunasekhar, for Respondent 9, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Srinivasa Reddy, J.—In these petitions the Petitioners have sought for the following reliefs:

i) issue a writ in the nature of mandamus directing the B.D.A. to take possession and maintain a 60" permanent road from North to South in Sy.Nos. 99 and 100 of Cholanayakanahalli and in Sy.No. 6 of Hebbal, commencing from the Petitioners' land and passing through the 2nd Respondent's lands and joining the Anand Nagar main road as per the condition imposed by the BDA by its resolution dated 19.10.1992 of the BDA.

ii) issue a writ in the nature of mandamus directing the 1st Respondent to prevent any obstruction by the 2nd Respondent of the road leading from the Petitioners' land to the Anand Nagar Main Road from Sy.Nos. 99, 100 of Cholanayakanahalli and Sy.No. 6 of Hebbal.

iii) pass such other orders as this Hon'ble Court deems fit in the facts and

circumstances of the case in the interest of justice and equity.

iv) Direct the Bangalore Mahanagar Palike (9th Respondent) not to issue katha in respect of 60 ft. road and in respect of property bearing Survey Nos. 99 and 100 of Cholanayakanahalli and Survey No. 6 of Hebbal without the 2nd Respondent leaving a 60 ft. road running from North to South as contemplated under the BDA resolution and plan and also under the CDP and further direct the Corporation to remove any unauthorised structures put up on the road which has been earmarked on the CDP as a road and develop and maintain the said road.

2. Briefly stated, the Petitioners are stated to have purchased the land bearing Nos. 6, 99 and 100 of Cholanayakanahalli in all measuring 26 acres 25 guntas. The Petitioners case is that the second Respondent on 23.3.2001 attempted to put up a stone wall causing obstruction to the road which is the only road available for ingress and egress into the schedule property. It is the case of the Petitioners that the land of the second Respondent was initially acquired by the BDA but later on the same was denotified with a condition that the second Respondent should handover 60" road from north to south free of cost to BDA along with development charges. The second Respondent failed to hand over the land to the BDA and the 1st Respondent has not taken possession of the said land for development. Nor did the BDA took possession of the said land for development. The second Respondent having got their lands denotified are attempting to violate the condition imposed at the time of denotifying. Hence the present petitions are filed for the above stated reliefs.

3. The Respondent No. 2, a Trust, which is the contesting Respondent in this writ petition has filed the statement of objections inter alia contending that on their request for denotification of their lands citing the fact that the said land is being used for public purpose, the B.D.A. by its resolution dated 19.10.1992 resolved to denotify the lands and by its letter dated 25.1.1994 the BDA forwarded the resolution to the Government for acceptance. The Government on acceptance of the resolution of the BDA also issued a notification which was published in the Gazette dated 29.8.1994 denotifying the entire area of 17 acres and 37 guntas of land. The resolution passed by the B.D.A. and the notification issued by the Government do not impose any condition. The denotification was total and without any pre-conditions. Touching the assertion of the Petitioners in their writ petition that there is no access to their property and the only way to their lands is through the road that was earmarked in the O.D.P., the Respondent No. 2 has denied the same and it is also stated in that regard that even if the assertion of the Petitioners is assumed to be true the remedy lies elsewhere.

4. Therefore, the question that arises for my consideration is whether the Petitioners are entitled to a writ of mandamus as prayed for in the writ petition?

5. I have heard the learned Counsel on both sides.

6. At the hearing Mr. Shantharaju, learned Senior Counsel appearing for the Petitioners, limited his arguments to the first relief i.e. the relief of mandamus

directing the BDA to take possession and maintain a 60" permanent road.

7. The entire case of the Petitioners rests on Section 69 of the Karnataka Town and Country Planning Act, 1961 (hereinafter called the "Act") which provides that the planning Authority shall take steps to acquire the land either by an Agreement or by taking resort to the provisions contained in the Land Acquisition Act for acquiring the land belonging to an individual in order to put such land to use for the designated purpose. It is submitted that the property belonging to Respondent No. 2 has been designated under the Comprehensive Development Plan ("CDP" for short) prepared and published in the year 1995 for purposes of a road. The thrust of the submission advanced is that, in the light of such designation of Respondent No. 2's land for purposes of a road, the B.D.A. is under a legal obligation to implement the provisions of the Act especially with regard to the CDP. Referring to the use of the word "may" in Section 69 of the Act, it is submitted that though the word employed is "may", in the light of the fact that power is bestowed on the statutory authority and the power so bestowed is coupled with a duty to act in furtherance of the CDP and to give effect to it by ensuring that a road is laid in consonance with the plan, the word "may" ought to be read as "shall" and any other interpretation of the said provision would be bad in law.

8. Touching the right of the owner of the land so designated, it is submitted, the designation of the land as road takes away his right to employ that piece of land for any purpose other than the one for which it was prescribed.

Per contra learned Counsel for the second Respondent basing his arguments on Section 69(2) of the Act submitted that if the designated land is not acquired within five years from the date the CDP is published under sub-section (4) of Section 22 of the Act or if the proceedings under the Land Acquisition Act are not commenced within such period, the owner or any person interested in the land may serve notice on the Planning Authority and if within six months from the date of service of such notice, the land is not acquired or no steps commenced for its acquisition, the designation shall be deemed to have lapsed.

10. In the light of the relief sought in the writ petitions and the submissions made at the Bar, let me now consider whether the Petitioners are entitled to the relief of mandamus sought for by them.

11. The sine qua non for mandamus is the existence of a statutory or a public duty incumbent upon the person against whom mandamus is sought with a corresponding right in the Petitioner entitling him to claim enforcement of such public duty. It can be granted only where the public duty is clear, unqualified and specific but not in cases where the claim of the Petitioner has to be established. No writ or direction can be issued to change the decision of a body so as to suit the Petitioner. The Petitioner who seeks for a writ in the nature of mandamus directing the B.D.A. to take possession and maintain a 60" permanent road from North to South in Sy.Nos. 99 and 100 of Cholanayakanahalli and in Sy.No. 6 of

Hebbal, through the lands of the second Respondent does not have any right, either fundamental or legal, to demand such a road in a writ petition under Article 226 of the Constitution. The mere existence of the road in the CDP does not give him such a right. The only right recognised in law in relation to the right of way is the easementary right which is available to any person on proof that he has no access to his property except through another's property. The mere fact that the access that the Petitioners already have to their property is inconvenient does not give them the right to demand the authority to form a road through another's property to suit his convenience. Law does not recognise such a right. Therefore, in the case of the Petitioners the essential requirement of a right to lay a claim under Article 226 of the Constitution is absent.

12. No doubt the B.D.A. has the power to form a road over a stretch of land belonging to a private party, and the inclusion of the road in the C.D.P. also exemplifies that it did have the intention to form such a road. But, mere earmarking of a portion of a private property for laying a road would not bestow any right in the Petitioner as the intention was not acted upon. If only the intention was acted upon by the authority by doing the things required of it to give effect to such intention then that right would accrue under the statute to the Petitioner to demand for a road. The question is one of legal duty and a legal right. The Petitioner clearly does not have any right to demand a road from the authority merely because the available road is inconvenient to him nor does the existence of CDP assuming it to be so gives him such a right.

13. Let me now consider whether there is a duty incumbent upon the authority. It is urged by Petitioner that Section 69 of the Act imposes a duty on the planning authority to acquire land for the purpose of laying roads. In order to better understand the import of Section 69, it is extracted below:

69. Acquisition of land designated for certain purposes in a development plan.-
(1) The Planning Authority may acquire any land designated.-

(i) in an Outline Development Plan for a purpose specified in clause (b), (c), or (d) of sub-section (1) of Section 12, or for any public purpose out of those specified in clause (a) of sub- section (1) of Section 12; or

(ii) in a comprehensive Development Plan for public purposes, by agreement or under the Land Acquisition Act, 1894 (Central Act I of 1894), as in force in the State. If the land is acquired under the Land Acquisition Act, 1894, the provisions of the said Act as amended by Section 72 of this Act shall apply to the determination of compensation for the acquisition of such land.

(2) If the designated land is not acquired by agreement within five years from the date the comprehensive Development Plan is published under sub-section (4) of Section 22, or if the proceedings under the Land Acquisition Act, 1894, are not commenced within such period, the owner or any person interested in the land may serve notice to the Planning Authority and if within six months from the date of the service of such notice, the land is not acquired or no steps as aforesaid are

commenced for its acquisition, the designation shall be deemed to have lapsed.

14. A careful reading of Section 69 of the Act goes to show that land may be acquired for a purpose mentioned in Section 12 of the Act. Section 12 of the Act states what the contents of an Outline Development Plan should be. It reads:

Contents of Outline Development Plan.-

(1) An Outline Development Plan shall generally indicate the manner in which the development and improvement of the entire planning area within the jurisdiction of the Planning Authority are to be carried out and regulated. In particular it shall include,-

(a) ...

(b) proposals for roads and highways and widening of such roads and highways in congested areas;

(c) ...

(d) ...

(e) ...

(2) ...

(Underlining by me)

Sub-clause (b) of sub-section (1) of Section 12 states that it shall include proposals for roads and highways and widening of such roads and highways in congested areas. The contents of the CDP are, therefore, mere proposals which may or may not be acted upon. It is keeping in view the limited scope of Section 69 that the Legislature has thought it fit to use the word "may" in Section 69 and not "shall". The intention of the Legislature to not impose on the authority the duty to acquire the land while giving it the power is also apparent from sub-section (2) of Section 69 which deals with a situation wherein the proposal for acquisition may not be acted upon. If it were to be the intention of the Legislature to impose on the authority the duty to acquire the lands designated for a purpose stipulated in Section 12, then there was no need for enacting sub-section (2) of Section 69. Such a provision which merely invests the authority with power without compelling it to perform the concomitant duty cannot invest in a third person a right to demand the authority to perform its duty which it may decide against performing even after the designation of the land for a particular purpose. The provision does not invest in a citizen any right to the detriment of the owner of the lands. In fact it does not account for the right of a private individual and it only relates to performance of a public duty by the authority only if it chooses to do so. As there is no compulsion on the part of the authority to go ahead with the acquisition of the land after its designation u/s 69 for converting it to a public use, the word "may" in sub-section (1) of Section 69 of the Act cannot be read to mean "shall". As the provision does not vest in the

Petitioners a right to have a road over the property designated for a public purpose, the Petitioners are not entitled to compel the authority to give effect to the CDP. Section 69 of the Act does not therefore impose on the authority any duty to be performed mandatorily. Thus, I find that the essential requirements of an existing legal right and a legal duty both of which serve as the foundation for an application under Article 226 are absent in the present case.

15. Apart from that, the authority having failed to acquire the land within five years from the date of publication of CDP, certain consequences follow as a matter of course in terms of sub-section (2) of Section 69 of the Act. In *Nithyananda v. Member Secretary, Town Planning Authority, Udupi and Ors.* 1997 (7) KLJ 249B (DB) this Court had occasion to deal with sub-section (2) and in that connection it observed:

In the present case, the Planning Authority for the development of the area in question has published the CDP only on 29.12.1992 and the concerned authorities have still time to initiate acquisition proceedings. In case they fail to do so, the owner or the person interested in the land has been given a statutory right to serve notice on the Planning Authority and if, within six months from the date of service of notice, steps are not commenced for acquisition of the land in question, then the designation assigned to the land in the CDP shall be deemed to have lapsed thereby authorising the owner or the person interested to put the land in proper use as per his plans subject to other regulatory provisions.

It should be noted that Section 69 of the Act is a restriction on the enjoyment of the owner's right to property. Normally an owner is entitled to enjoy his property as he likes subject to the restrictions imposed by law. An indefinite compulsory postponement of the enjoyment of the property by the owner cannot be countenanced in law. It is to overcome this mischief that the Legislature has found it necessary to enact sub-section (2) of Section 69.

16. In the present case the C.D.P. was published on 5.1.1995 and the five years period drew to a close on 5.1.2000. It is only thereafter, on 28.9.2001 the second Respondent had issued the necessary notice under sub-section (2) of Section 69 of the Act. From the undisputed facts of the case and the documents produced by the Authority, I find that the second Respondent has already exercised his right under sub-section (2) of Section 69 of the Act. It is submitted by Mr. Shantharaju, learned Senior Counsel, that even before the second Respondent could exercise his right under sub-section (2) of Section 69 of the Act, a writ petition was filed in this Court and, therefore, even if an order is made by the Authority in pursuance of sub-section (2) of Section 69 it would not enure to the benefit of the second Respondent. I am not able to agree with the submission made by learned Senior Counsel for the reason that a mere filing of a petition or an appeal would not have the effect of holding the order or postponing the effect thereof until the decision of the appeal.

17. In *Sita Ram Goel Vs. The Municipal Board, Kanpur and Others*, , the Apex

Court was dealing with a time-barred appeal. In that case an officer of a Board being aggrieved by the order of dismissal passed by the Board instead of preferring an appeal provided under the statute filed a suit in the Civil Court to establish the ultra vires or the illegal character of the order of dismissal. In dealing with the question whether the appeal was time barred, the Apex Court observed:

The mere filing of an appeal has not the effect of holding the order of the Board in abeyance or postponing the effect thereof until the decision of the appeal.

In my opinion, this principle is applicable here also and it must be held that the relief to which the second Respondent became entitled to in pursuance of sub-section (2) of Section 69 of the Act, could not be held in abeyance or its effect cannot be postponed until the decision in the writ petition, unless there is something in the provision providing for suspending the order petitioned against or rendering it ineffective by reason of filing of the petition or pendency of the petition. There is no such provision made in Section 69 of the Act for either suspending the order or for postponing its effect if any aggrieved party filed a petition against such an order.

18. Therefore, the second Respondent herein who is the owner of the property would be entitled to use the property as he likes as there is no restriction as of now. Thus examined, I find that the Petitioner is not entitled to any relief in this petition and it is liable to be dismissed.

In the result, for the reasons stated above, there is no merit in the writ petition and it is, accordingly, dismissed.