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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELATE JURISDICTION
FIRST APPEAL NO.1655 OF 2008

Dr.Anil Ganesh @ Ganpatrao Natu ...Appellant
vs.
Special Land Acquisition Officer No.16, Pune & Ors. ...Respondents

Mr.Girish Utangale i/b Utangale and Company for the Appellant
Dr.J.B.Kurup, AGP `B' Panel for the respondent No.1

CORAM : A.S.OKA, &
C.V.BHADANG, JJ.
DATE : FEBRUARY 11 and 12, 2016

ORAL JUDGMENT : (PER A.S.OKA,J.)

1 By this appeal, the appellant has taken an exception to the Judgment and Award dated 10th April 2008 made by the learned Adhoc District Judge-10, Pune. The impugned Judgment and Award is made in a Reference No.515 of 2000 under the Land Acquisition Act,1894 (for short `the said Act of 1894') which was made at the instance of the appellant.

2 The acquisition is in respect of the land bearing CTS No.343 admeasuring 1184 sq meters situated at Narayan Peth, Pune. The acquired land was reserved in a sanctioned development plan under the Maharashtra Regional and Town Planning Act,1966 (for short `the MRTP Act') for a high school. A declaration dated 20th May 1997 was issued under

Sub-section 4 of Section 126 of the MRTP Act read with Section 6 of the said Act of 1894 which was published in the Government Gazette on 29th May 1997. The Award under Section 11 of the said Act of 1894 was made on 18th June 1999. The Land Acquisition Officer offered a market value of the land bearing CTS No.343 @ Rs.8938/- per sq meter and the value of the structures thereon @ Rs.1510/- per sq meter. Compensation in respect of the land bearing CTS No.343 was made payable to the appellant as the owner and small amounts were made payable to the occupants of the structures. The appellant applied for a reference under section 18 of the said Act of 1894 and sought enhancement of market value in relation to the land bearing CTS 343. By the impugned Judgment and Award, the learned Adhoc District Judge-10, Pune came to the conclusion that the market value in respect of the acquired land bearing CTS 343 admeasuring 1184 sq meters was Rs.11200/- per sq meter. Therefore, enhancement was granted at the rate of Rs.2262/- per sq meter along with statutory benefits. The Reference Court granted statutory benefits under Section 23(1-A) and Section 28 of the said Act of 1894.

3 The learned counsel for the appellant pointed out that the sale instance relied upon by the appellant in respect of the land bearing CTS 349 admeasuring 2672 sq meters at Narayan Peth, Pune was accepted by the learned Trial Judge. However, while computing the market value on the basis of the sale instance, he proceeded on assumption that the

acquired land had only 1.50 FSI, though as per the relevant Development Control Regulations, the appellant would have been entitled to FSI of 2.00. He pointed out that on the basis of the agreement executed on 29th December 1992 in respect of the CTS 349, proceedings were initiated under Sub-section 1 of section 269 UD of the Income Tax Act,1961 (for short `the Income Tax Act'). He relied upon the order dated 29th December 1993 passed by the appropriate Authority under the Income Tax Act at Ahmedabad in respect of the land bearing CTS 349 which was an order made in exercise of power under Sub-section 1 of Section 269 UD of the Income Tax Act. He pointed out that the market value of the land fixed under the said order was Rs.14,031/- per sq meter. He urged that this market value was as on 29th December 1993 whereas in the present case, the relevant date for determining the market value was 29th May 1997. He submitted that by taking yearly increase at the rate of 15% cumulatively for the period of 29th December 1993 and 29th May 1997, the market value would have been much more than Rs.14,031/-. He submitted that the land bearing CTS No.349 is at a close distance of the acquired land and was in all respects comparable to the acquired land.

4 He submitted that even the transaction relied upon by the appropriate Authority in respect of the CTS No.601 and 602 of Sadashiv Peth, Pune is a transaction in respect of a comparable land. He submitted that rate of Rs.10,245/- per sq meter is

reflected from the said transaction as on 29th December 1992. He urged that the said rate is based only on calculation of FSI and even taking into consideration the said sale instance, market value would be much more than what is granted by the Reference Court. He submitted that even assuming that the sale instance which is referred in the order of the appropriate Authority cannot be considered, as there is no sale instance produced in the form of any sale deed, the evidence in the form of the order of the appropriate Authority at Exh.20 ought to have been taken into consideration. He also tendered across the bar a copy of the Agreement dated 29th December 1992 and urged the Court to look into the same though the same is not on record and though there is no application made for grant of leave to adduce additional evidence. He relied upon the decisions of the Apex Court which lay down well settled law regarding the determination of the market value under Section 23 of the said Act of 1894. The said decisions are in the case of Radha Mudaliyar Vs. Special Tahsildar (Land Acquisition), Tamil Nadu Housing Board[1], Chimanlal Hargovinddas Vs. Special Land Acquisition Officer and another[2], and the Judgment dated 20th April 2011 in the case of Gajanan and others vs. State of Maharashtra[3] of the Apex Court. Lastly, he relied upon the decision of the Division Bench of this Court in the case of Himalaya Builders and Developers and others Vs.

1 (2010) 13 SCC 384

2 (1988) 3 SCC 751

3 Civil Appeal No.2432 of 2005 dated 20th April 2011

Union of India and another[4]. The learned AGP relied upon the statements made in the cross examination of the Land Acquisition Officer examined by the Reference Court.

5 We have considered the submission. The law is well settled. Reference under section 18 is not an appeal against the Award under section 11 made by the Land Acquisition Officer. An Award under section 11 is in the nature of an offer given by the State Government. A Reference under Section 18 of the said Act of 1894 is an original proceeding like a suit and the claimant is in position of a plaintiff. The burden is always on the claimant is to establish that the market value offered by the Award under the said Act of 1894 is inadequate.

6 The learned counsel appearing for the appellant relied upon a decision of the Apex Court in the case of ***Chimanlal Hargovinddas (Supra)***. The principles governing references under Section 18 of the said Act on 1894 have been laid down in the said decision and in particular in paragraph (4) thereof. The Apex Court reiterated that a reference under Section 18 is not an Appeal against an Award made under Section 11 and the Court cannot take into account the material relied upon by the land acquisition officer in his Award unless the said material is produced and proved before the Court. The Court has to treat a reference as an original proceedings and determine the market value afresh on the basis of

4 (1996) 2 Bombay Cases Reporter 108

material produced before it. As far as determination of market value is concerned, clause (6) of paragraph 4 of the said decision is relevant which reads thus:

> *"4. The following factors must be etched on the mental screen:*
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> *(1)...*
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> *(2)...*
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> *(3)...*
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> *(4)...*
>
> *(5)...*
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> *(6) The determination has to be made standing on the date line of valuation (date of publication of notification under Section 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that he vendor is willing to sell the land at a reasonable price."*

7 The decision of the Apex Court in the case of ***Radha Mudaliyar Vs. Special Tahsildar (Land Acquisition) Tamil Nadu Housing Board*** also lays down the same principle. The Apex Court held in the said decision that comparable sale instances are the best piece of evidence in a reference under Section 18 of the said Act of 1894. The Apex Court reiterated the

position of law that the ready reckoner value fixed for the purposes of computing the stamp duty is only for fiscal purposes and cannot be relied upon for determination of market value. The tests laid down by the Division Bench of this Court in the case of Himalaya Builders & Developers & Ors. are no different. In the resent decision of the Apex Court dated 20th April, 2011 in the case of ***Gajanan & Ors. Vs. State of Maharashtra & Another, t***he same principles have been reiterated by the Apex Court.

8 Now turning to the impugned judgment, it appears to us that the reference Court has only relied upon the order passed by the appropriate authority under Sub-section (1) of Section 269 UD(1) of the Income Tax Act. We have carefully perused the said order. The order records that the apparent consideration reflected from the agreement dated 29th December, 1993 which is a development agreement is Rs.2.25 crores. The apparent consideration is defined by clause (b) of Section 269 UD of the Income Tax Act. The appropriate authority observed that out of the apparent consideration shown in the agreement, the net land value works to Rs.2,17,47,529/- and, therefore, the land value was at the rate of Rs.9354/- per square metre of FSI. The appropriate authority relied upon a transaction of sale dated 29th December, 1992, in respect of the land bearing CTS Nos. 601 and 602 at Sadashiv Peth, Pune and came to the conclusion that the rate reflected from the said transaction works out to Rs.11,474/- per square metres of FSI. Therefore, a conclusion was recorded

that the apparent consideration was undervalued by more than 15%. The reference Court seems to have relied upon the said transaction dated 29th December, 1992 which is referred in the said order of the appropriate authority at Exhibit-20. We must note here that the said agreement dated 29th December, 1992 in respect of the land bearing CTS No.601 and 602 has not been admittedly produced and proved before the Reference Court. There is no evidence adduced to show that the lands subject matter of the said transaction were comparable to the acquired land. Therefore, the transaction dated 29th December, 1992 ought to have been kept out of consideration. Secondly, the finding recorded in the order at Exhibit – 20 is that the rate reflected from the agreement subject matter of the said order has been undervalued. The finding of undervaluation is based on the said agreement dated 29th December, 1992. Even taking the order dated 29th December, 1993 as correct, there is no adjudication made on the question as to what was the market value of the land subject matter of the said order as on 29th December, 1993. Appropriate authority was dealing with the issue whether the apparent consideration shown in the agreement was undervalued. That was the only scope of enquiry before the appropriate authority. The appropriate authority has not decided as to at what rate a bonafide purchaser would have purchased the acquired land or a land comparable to it in open market.

9 There is one more aspect of the matter. After

the aforesaid order dated 29th December, 1993 of compulsory purchase was passed, the property was put to auction by the Income Tax Authorities. On this aspect, it will be necessary to make a reference to the evidence of Rajendra Raghunath Balwade, Income Tax Officer examined by the appellant before the Reference Court. He was examined to prove the signature on order at Exhibit-20. In the cross-examination, he admitted that due to litigation, auction of the property could not be made. The claimant himself has produced a certified copy of the auction notice published in June 1994 in daily newspaper "*Sakal*" along with list at Exhibit-15. Perhaps he is relying upon the reserved price of Rs.2.6 crores mentioned in the said notice. However, the fact remains that there were no takers to the property at the time of auction.

10 Therefore, in our considered view, the order at Exhibit-20 under section 269 UD (1) was no evidence of the market value of the land subject matter of agreement dated 29th December, 1992 which is referred in the order at Exhibit-20. The same could not have been relied upon by the Appellant as the same is not produced and proved before the Reference Court. According to us, the Reference Court could not have determined the market value of the acquired land on the basis of the said instance referred in the order at Exhibit-20 as the same was not produced and proved before the Court. In paragraph 17 of the impugned Judgment, the Reference Court has also considered a sale instance considered by the Special

Land Acquisition Officer in respect of the land bearing CTS No.357. The said sale instance was not produced and proved before the Court. The learned Trial Judge seems to have taken average of the price reflected from the said sale instance and the price reflected from the order at Exhibit-20. Even this approach was completely erroneous. The learned AGP invited our attention to the cross-examination of the Land Acquisition Officer, examined before the Reference Court in which he has admitted that there were tenants in the acquired land. Even this aspect has been ignored by the Reference Court.

11 Though there is no application made for leading additional evidence, even assuming that we could have taken into consideration the agreement dated 29th December, 1992 (on the basis of which the order at Exhibit-20 was passed) tendered across the bar by the learned counsel appearing for the Appellant, we find that it is a development agreement. None of the parties to the agreement have been examined as witnesses to prove that it was a fair bargain. Section 51A of the said Act of 1894 will not apply to the said document as the same is not a registered document.

12 As noted earlier, under the impugned Award, a substantial enhancement has been granted by the Reference Court by fixing a market value at the rate of Rs.11,200/- per sq. meters. Though the said market value cannot be supported by the evidence on record, there is no cross Appeal or cross-objection filed by the respondents.

13 Hence, no case is made out for enhancing the market value. However, we find that solatium under Sub-section (2) of Section 23 of the said Act 1894 has not been granted by the Reference Court. To that extent, the Appeal must succeed.

14 Hence, we pass the following order:

:: **O R D E R** ::

(i) The market value fixed under the impugned judgment and Award dated 10th April, 2008 is confirmed;

(ii) Clause (3) of the operative part of the impugned judgment and award is modified by directing that in addition to the statutory benefits under Section 23(1A) and Section 28 of the Land Acquisition Act, 1894, the Appellant will be entitled to solatium under Sub-section (2) of Section 23 of the said Act of 1894;

(iii) Needless to state that interest under Section 28 of the said Act of 1894 will have to be computed on the basis of three components:- market value, interest under Section 23(1A) and solatium under section 23(2);

(iv) Additional amount payable in terms of modified clause (3) of the judgment and award shall be deposited by the respondents with the Reference Court within a period of four months from today;

(v) Appeal is partly allowed on the above terms;

(vi) There will be no order as to costs.

(C.V.BHADANG,J.)   (A.S.OKA,J.)