

(2010) 05 BOM CK 0036

Bombay High Court (Goa Bench)

Case No: Writ Petition No. 385 of 2009

Mr. Ibaldo Alvito
Gomes and his wife ,
Mrs. Jacqueline M.A.
Gomes and Mrs.
Bernadita Gomes

APPELLANT

Vs

The State of Goa and
The Under Secretary
(Revenue), Revenue
Department,
Government of Goa

RESPONDENT

Date of Decision: May 3, 2010

Acts Referred:

- Goa, Daman and Diu Land Acquisition Rules, 1972 - Rule 4(2), 4(3)
- Land Acquisition Act, 1894 - Section 4, 5(A), 6

Citation: (2010) 3 BomCR 836

Hon'ble Judges: U.D. Salvi, J; S.J. Vazifdar, J

Bench: Division Bench

Advocate: M.S. Sonak and J. Supekar, for the Appellant; S.S. Kantak, General and A. Kamat, A.G.A., for the Respondent

Judgement

U.D. Salvi, J.

Heard. Rule, made returnable forthwith. By consent taken up for final hearing.

2. The petitioners - heirs of the agricultural tenants in respect of agricultural land bearing Survey No. 95/11, 95/3 and 95/4 of village Nuve are seeking writ of Mandamus commanding the respondents / the State and its officials to withdraw the notifications dated 5.9.2007 and 5.2.2009 concerning the acquisition of the said lands under Sections 4 and 6 of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") respectively.

3. Notification dated 5.9.2007 u/s 4 of the said Act admittedly declared the intention of the respondent / State to acquire all those pieces and parcels of land totally admeasuring 50675 square metres including the aforesaid lands at village Nuve for development of government village school playground at Nuve and to take steps in that regard at the instance Directorate of Sports and Youth Affairs, Panaji. The petitioners responded to the said notification with the objections dated 5.10.2007 to the proposed acquisition of the said land.

4. It is the case of the petitioners that the Land Acquisition Officer did not consider their detailed objections raised in terms of Section 5A of the said Act and after conducting a farce of the enquiry forwarded to the State a report u/s 5A of the said Act, and the respondent/ State thoughtlessly proceeded to issue the notification u/s 6 of the said Act in respect of the acquisition of the said lands.

5. Perusal of the representations / objections dated 5.10.2007 of the petitioner Nos. 1 and 2 in respect of the proposed acquisition of Survey No. 95/1 1 of village Nuve annexed to the petition at Annexure B reveals substance of the material objections as under:

a) No public purpose is involved in the acquisition in as much there is no government school needing playground in the vicinity of the proposed acquisition - nearest government school, Balwadi having strength of 22 to 30 students in the age group of 3 to 5 years being situate at a distance of approximately more than 1 Km. from the land under acquisition and the government aided schools situate at a distance ranging from 1 Km. to 2.5 Kms. have playgrounds of their own.

(b) The proposed acquisition exceeding 50000 square meters is excessive.

(c) Land notified for the purposes of acquisition is a fertile and well cultivated land, and would require filling up with mud to height of at least 2 meters at the considerable monetary expense and at the cost of adversely affecting the natural drainage of rain water; and barren lands situate on the east of National Highway No. 17, which are better suited for the alleged public purpose, are available for acquisition in close proximity of the said schools.

(d) The acquisition would render the petitioners without any means of livelihood.

(e) The Regional Plan of year 2001 for the State of Goa requires demarcation of good and potential agricultural land for the purpose of conservation and development. Almost identical objections were raised by the petitioner No. 3 in respect of the proposed acquisition of S. No. 95/3 and 4 of village Nuvem vide a representation dated 5.10.2007.

6. Perusal of the documents annexed to the petition further reveals that on 6.1.2009, the affidavits of (i) the petitioners (ii) Sunita Gomes (iii) Rita Fernandes (iv) Maria Collasso (v) Smt. Katrina Gorges (vi) Pidade Borges (vii) Vincy Gomes along with photographs of the fields, sketch, and the village map of Nuve village were produced before the Land

Acquisition Officer. It appears that the report u/s 5A of the Land Acquisition Act, 1894 was made soon thereafter on 07.01.2009 by the Deputy Collector and Land Acquisition Officer, Sub-Division Margao, Goa .

7. Relying on the judgments in [Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and Others](#), learned Advocate Sonak for the petitioners submitted that right to make objection u/s 5A of the said Act is akin to a fundamental right and as such the acquisition must be for a public purpose, and hearing of the objections u/s 5A must be effective and not mere formality, and must involve application of mind by the appropriate government. He further submitted that the report u/s 5A made by the Land Acquisition Officer in the present case reveals no application of mind by him to the objections raised by the petitioners.

8. The respondents joined the issue with the affidavit-in-replies of the Under Secretary (Revenue)- Mr. Dashrath Redkar and Deputy Director of Sports and Youth Affairs, Government of Goa - Mrs. Juliana Collasso as well as additional affidavit of Mr. Pandharinath Naik, Under Secretary (Revenue). Learned Advocate General Kantak drawing strength from the said affidavits argued that the objections, particularly making reference to the availability of the alternate lands were vague and the Land Acquisition Officer had considered the said objections and had observed that there was no other suitable land in the proximity of the land sought to be acquired. He further submitted that it was not expected of the Land Acquisition Officer to go on hunting for the "barren suitable land" unless a specific reference to it was made by any of the petitioners or the persons supporting them.

9. On this background, it will be of interest to examine the report u/s 5A of the Act which apparently, if averments at para 4 of the affidavit dated 28.1.20 10 of Mr. Pandharinath Naik, Under Secretary (revenue) are to be believed, had influenced the decision of the government to issue the impugned declaration u/s 6 of the Act. The said report makes reference to issuance notice for hearing u/s 5A on 29.12.2008 to the interested parties/ petitioners and the said interested parties filing their affidavits on the adjourned date i.e. on 05.0 1.2009. Significantly, there is no mention of the documents tendered with the said affidavits in the said report.

10. At this juncture, it would be worthwhile to look into the Goa, Daman and Diu Land Acquisition Rules, 1972 framed mainly for regulating the procedure for hearing the objections u/s 5A of the Act. Rule 4 therein mandates the Collector meaning thereby any officer specially appointed by the appropriate government to perform the functions of the Collector under the said Act, firstly, to record the objections in his proceedings and secondly, to consider whether the objection is admissible according to Sub-rule 2 of the said rule.

11. Sub-rule 2 of Rule 4 reads as under:

(2) To be admissible, an objection shall have been made within 30 days after the issue of the notification or within such further period as may be fixed by the Collector and shall allege some specific objection such as:

(i) the notified purpose is not genuinely or properly a public purpose;

(ii) the land notified is not suitable for the notified purpose;

(iii) the land is not so well suited as other land;

(iv) the area proposed is excessive;

(v) the objector's land has been selected maliciously or vexatiously; or

(vi) the proposed acquisition will destroy or impair the amenity of historical or artistic monuments and places of public resort or will take away important public rights of way or other convenience or will desecrate religious buildings, graveyards and the like.

12. A glance at the objections is sufficient to reveal that the objections substantially fulfilled admissibility criteria as prescribed in the said Sub-rule, particularly at 2(i) to 2(iv) and, therefore, could not have been summarily rejected.

13. Sub-rule 3 of Rule 4 reveals the procedure which the officer enforcing the said Act is required to follow. Copies of the objections and the affidavits of the petitioners tendered before the said Land Acquisition Officer reveal that the petitioners were seeking permission to lead oral and documentary evidence specifically in terms of the said rule in order to substantiate the objections raised by them. It was, therefore, incumbent on the said Land Acquisition Officer to consider and decide the request made by the petitioners for permission to lead oral or documentary evidence. Sub-rule 3 of Rule 4 mandates such decision on the issue as to whether it is desirable to take oral or documentary evidence. There is nothing before us to reveal that the Land Acquisition Officer had taken any such decision.

14. What is presented presumably as a part of the enquiry undertaken by the said Land Acquisition Officer is note of site inspection dated 7.1.2009 made by the said Land Acquisition Officer. A fact that the site inspection of the land to be acquired for development of the said playground at Nuve was taken on 07.01.2009 at about 11.00 a.m. in the presence of representative of the Acquiring Department i.e. Directorate of Sports and Youth Affairs, Panaji is found recorded in the said Note. It further speaks of (i) location and proposed area of the land to be acquired (ii) nature and use of the said land as low lying paddy field which is also used for cultivation of other seasonal vegetables (iii) Demarcation of the said land by putting boundary stones. Curiously, there is no reference to such site inspection in the affidavit-in-replies filed in this proceedings on behalf of the respondents. Assuming such inspection was done, it fails to reveal inspection of the alternative barren land referred to by the petitioners in their objections, more particularly

shown in the sketch therewith, and affidavits. There is nothing to show that any thought was given to the expenditure that would be required to be incurred for filling up the said low lying paddy fields for making them suitable for the purposes for which the fields were to be acquired and to the effect such acquisition would have on natural drainage of the rain water in village Nuve. Considering the nature of the objections raised by the petitioners and the need to understand the gravity of those objections, we feel, it was all the more necessary for Land Acquisition Officer to consider and decide the requests made by the petitioners for leading oral or documentary evidence in order to substantiate the objections raised.

15. In this context, it is necessary to understand the impact of judicial precedents cited by the rival camps in the present case namely Sesa Goa's case (reported in (1989)2 GLT 27 - Sesa Goa Limited v. State of Goa and 2 Ors. and George Fernandes's case (reported in (2009)2 GLT 176 - George L. Fernandes v. State of Goa.)

16. In Sesa Goa Ltd.'s case (supra), the objection to the acquisition of house property for establishing the State Government's guest house was taken on the ground of large scale expenditure that would have been involved while adopting or renovating the property for the said public purpose; and the Division Bench of this Court had ruled that the costs of the acquisition was one of the factors to be taken into account whether one property is to be acquired instead of another. The Division Bench, however, declined to apply this rationale in Sesa Goa Ltd.'s case (supra) to the facts and circumstances in the case of George L. Fernandes's case (supra) cited on behalf of the respondent / State for the simple reason that in Sesa Goa Ltd.'s case, the project undertaken and the subject of acquisition were one and same and inseparable from one another unlike the project of constructing a bridge across the rival Sal and the subject of acquisition i.e. the land needed for connecting roads to the said bridge in George L. Fernandes's case. However, in the instant case, the project of developing playground and the subject of acquisition i.e. the land needed for playground are one and same and inseparable from one another. The objection also hinted at the barren land along the national highway No. 17 abutting Nuve cemetery and Carmel College. On this background the expenditure involved while adopting the said land - low lying paddy fields for the said public purpose- Development of playground by 2 meters mud filling therefore becomes relevant factor to be taken into account vis-a-vis the alternative barren land. The Land Acquisition Officer was, therefore, under obligation to consider the specific objections raised by the petitioners in that regard.

17. Perusal of the report u/s 5A reveals that the Land Acquisition Officer had completely ignored the said specific objections in as much as made no reference to them and had proceeded to reveal his mind in the following words:

I have perused the objection and heard them as above.

The main objection is that it is a low lying paddy field and cultivated by the landowners till date two times in a year. It is true that it is a low lying area and paddy field is cultivated

but only in the rainy season as there is no irrigation facilities. However there is no other suitable area in the vicinity.

The people in the village have also given representation opposing the Land Acquisition with the Resolution taken in the Gram Sabha which is on record.

Another objection is that there are no schools in the vicinity and playground is not required. However it is noticed that there is one school "Maedospobres High School Nuvem" about 100 mts from the site.

There is no doubt that acquisition of land will deny the people their right to property, their livelihood etc., but there is no alternative suitable land in the vicinity.

Therefore, I recommend the acquisition of the above said land for development of Government village school playground at Nuvem in Salcete taluka.

18. Examination of the petitioners could have possibly relieved the Land Acquisition Officer of the trouble to launch himself on "hunting expedition" in search of alternatives. Unfortunately, no thought was given by the Land Acquisition Officer to this tool of examination in the enquiry which he was obliged to conduct u/s 5A of the Act. The facts in the present case clearly demonstrates that the Land Acquisition Officer rushed to the conclusions thereby reducing the said enquiry to a farcical level as contended by the petitioners. Obviously, therefore, such procedural impropriety must have deemed to have impaired the decision making process of the Government involved in issuance of notification u/s 6 of the Act.

19. As a reminder to the authorities concerned, we may quote the words of the Hon"ble Apex Court; "It is trite that a hearing given to a person must be effective one and not a mere formality." For further guidance, it will be sufficient to reiterate few lines from the Sesa Goa Ltd."s case as under:

That when the Land Acquisition Officer proceeds to hold an enquiry u/s 5A and receives objections, he has got three courses to follow : (i) he may reject the objection as not being material (ii) he may after examining the objection find it necessary to hold an enquiry and, therefore, he will hold an enquiry; or (iii) he may accept the objection and make a suitable recommendation on the same to the Government.

S.J. Vazifdar, J.

20. I have had the benefit of reading my Brother"s judgment. While agreeing that the petition ought to be allowed, I would state a few reasons of my own, as well.

21. The notification u/s 4 expressly stated that the acquisition of the petitioners" land was "for development of Government village school playground at Nuvem in Salcete taluka".

22. In the objections u/s 5A, the petitioners raised various contentions which have clearly not been dealt with in the report prepared u/s 5A. It was contended for instance that there is no public purpose involved in the acquisition as there is no Government school in the vicinity; that the nearest Government school is a "Balwadi" consisting of only about 20 to 30 students in the age group of 3 to 5 years; that the Balwadi is at a distance of approximately 1 km.; that there are no transport facilities to take such children from the Balwadi to the said land and that the acquisition of 50,675 sq. metres, revised to 48,500 sq. metres was excessive for the said purpose. It was also stated by the petitioners that there were only three Government aided Schools/High Schools/ Colleges which were at a distance of 1 km. to 2.5 kms. It was further stated that the said institutions had play grounds of their own and did not require an additional play ground. The photographs of the schools were enclosed along with the representation. It is important to note that one of the institutions mentioned in the application was "Mae Dos Pobres High School". Lastly, in this regard, it was stated that none of the institutions had made a request to the Government to acquire the land.

It is also important to note that the petitioners had, in detail, in paragraph 8 of their application u/s 5A, stated that while their's was agricultural land and furnished the details of the agricultural activities thereon, there was a portion of land located on the eastern side of the national highway which was more suitable for developing as a play ground and that such a land was close to the Balwadi and the Government aided Schools.

23. The report u/s 5A does not deal with these important aspects raised by the petitioners. This is all that it says:

I have perused the objection and heard them as above.

The main objection is that it is low lying paddy field and cultivated by the landowners till date two times in a year. It is true that it is a low lying area and paddy field is cultivated but only in the rainy season as there is no irrigation facilities. However there is no other suitable area in the vicinity.

The people in the village have also given representation opposing the Land Acquisition with Resolution taken in the Gram Sabha which is on record.

Another objection is that there are no schools in the vicinity and playground is not required. However it is noticed that there is one school "Maedospobres High School Nuvem" about 100 mts from the site.

There is no doubt that acquisition of land will deny the people their right to property, their livelihood etc., but there is no alternative suitable land in the vicinity.

Therefore, I recommend the acquisition of the above said land for development of Government village school playground at Nuvem in Salcete taluka.

24. Firstly, it is difficult to understand how and what basis it is held that there is no other suitable area in the vicinity. There are no reasons given in this regard. The plan annexed clearly indicates the area suggested by the petitioners. It is important to note that the Section 5A report does not state that the petitioners did not indicate any alternate area. It is also important to note, in view of the learned Advocate General's submission that the petitioners may not have indicated the alternate area that the report does not even state that in view of the application u/s 5A, the Land Acquisition Officer, called upon the petitioners to indicate the area. Thus, a material aspect has been totally ignored in the Section 5A report.

25. With respect to the petitioners' contention regarding the purpose of acquisition, all that is said is : "However it is noticed that there is one school `Maedospobres High School Nuven' about 100 mts from the site".

26. In the objections u/s 5A, the Government aided school and not Government Village School and that the said school had a playground facility of its own. The LAO has not even dealt with this aspect of the matter. He failed to consider either of these aspects.

27. Faced with this difficulty, the learned Advocate General relied upon a judgment of the Division Bench of this Court, to which my Brother was a party, in the case of Santan Fernandes and Ors. v. State of Goa and Anr. reported in 2009(1) G L.R. 291. He placed considerable emphasis on the fact that the land therein also pertained to the same scheme. He relied upon paragraph 17 of the judgment, which reads as under:

17. In our view, simply because in the notification u/s 4 & 6 of the Act, there is a reference about the acquisition of the land for Government school playground and though the Government school is not functioning in the area, it cannot be said that there is no public purpose as no such public school is functioning in the village. It is required to be noted that on the basis of the recommendations of the Sports Authority of State of Goa, the Director of Sports and Youth Affairs, ultimately decided to acquire the land in question for the purpose of Government Village Playground. It cannot be said that there is no public purpose involved in such acquisition. Simply because some private club might have some playground, it would not mean that there is no public purpose involved in acquiring the land in question. It is for the State Government to consider whether any additional ground is required to be acquired so that all the village people can take benefit by using the said playground. In our view, the Land Acquisition Officer has considered whatever objections raised before him and he is not expected to write a judgment like a Judicial Officer. It is not possible to take out one or two lines from the notifications for coming to the conclusion that the purpose mentioned in the notifications was not existed and there is no public purpose involved. Considering the affidavit-in-reply and the submissions of the learned Advocate General, we are of the opinion that on the basis of the recommendations of the Director of Sports, ultimately it was decided to acquire the land for establishing football ground under the said Scheme. Simply because name of the scheme is not mentioned in the notification, cannot be treated as a ground that there is no

public purpose involved. We do not find any substance in the arguments of Mr. Sonak that there is no public purpose involved in acquiring the land in question.

28. I will assume at this stage to be well founded, the learned Advocate General's submission that as the playground will be available to the village people in general, the mere fact that in the notice u/s 4 it is stated that the acquisition is for the purpose of development of Government village school playground at Nuvem in Salcete Taluka would not render the acquisition bad. However, the aspects which I have referred to earlier are different from those considered by the Division Bench in that case. The judgment does not conclude the petitioners in this case merely because the acquisition is with respect to the same scheme propounded by the Government. The validity of the acquisition would depend upon the facts of each case, although it may be pursuant to the same scheme. This is obvious as the existence of a scheme is not the only relevant factor to be considered while deciding the validity of a proposed acquisition. The judgment is, therefore, clearly distinguishable.

29. Mr. Sonak relied upon an earlier unreported judgment of a Division Bench of this Court in the case of Ramdas Thanu Dessai and Ors. v. State of Goa and Ors. dated 13.8.2008 in Writ Petition No. 323/2006, wherein the Division Bench in paragraph 8 held thus:

8. The appropriate Government u/s 4 read with Section 3(ee) is that Government which takes decision to acquire the land for its purpose. In the case in hand, once it is not in dispute that pursuant to the proposal by the State Government it was the decision of the Union and its Department of Railways to acquire a particular land for construction of the terminal to be constructed and maintained by the respondent Nos. 2 and 5, it cannot, in the same breath, be said that the acquisition is also for any other purpose. The purpose of acquisition is clearly specified in the notification. Once a particular purpose is specified in the said notification, it cannot be sought to be stated by way of an affidavit that the real purpose is something different from the one disclosed in the notification nor such additional benefits which may accrue on account of acquisition of land to the residents of the locality could be said to be the purpose for which the land is sought to be acquired.

30. Mr. Sonak submitted that there is a conflict between the judgment in the case of Santan Fernandes and others and the above judgment and that as the unreported judgment was delivered earlier, the subsequent judgment ought not to be followed. This aspect would normally require serious consideration. I, however, do not think it necessary in the present case, in view of my above findings, to deal with this aspect.

31. The reliance upon a judgment of the Supreme Court in [Ramniklal N. Bhutta and another Vs. State of Maharashtra and others](#), is of no assistance to the respondents, in the facts of the present case. The petitioners, in their objections, u/s 5A set out, in detail, the validity of an alternate site. Had the alternate site been found suitable, public interest could well have been served by adopting proceedings for the acquisition thereof. I do not

suggest that the other land ought to be acquired. Suffice it to state that this is an aspect which ought to have been considered by the LAO, which he failed to do. In these circumstances, the petitioners can hardly be faulted for the alleged public purpose not being served. Further, as noted earlier, even the very public purpose is in question. The petitioners' contentions in this regard, which I have referred to earlier, have not been considered. The report u/s 5A cannot, therefore, be sustained.

32. For the above reasons also, in my view, the petitioners are entitled to succeed and the rule be made absolute in terms suggested by my learned Brother.

33. In the result, rule is made absolute in terms of following order:

(i) The notification issued by the Government of Goa u/s 6 of the Land Acquisition Act, bearing No. 22/24/07/RD dated 5.2.2009 is set aside;

(ii) The Land Acquisition Officer will be free to hold a fresh enquiry u/s 5A of the Land Acquisition Act, 1894 in accordance with law.

(iii) No order as to costs.