IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 89 OF 1999.
AND CROSS OBJECTIONS NO. 3/2000.

1. State of Goa,
   represented by
   Special Land Acquisition
   Officer, S.I.P.,
   Irrigation Department,
   Margao, Goa.

2. Executive Engineer,
   Works Division XI,
   Irrigation Department,
   Gogol, Margao, Goa. ... Appellants.

VERSUS

Kissan V. Gaonkar,
Nagarsham,
Canacona, Goa. ... Respondent.

Shri H.R. Bharne, Government Advocate for the Appellants.

Shri R.G. Ramani, Advocate for the Respondent.

CORAM: S.A. BOBDE &
N.A. BRITTO, JJ.

DATE OF RESERVING THE JUDGMENT: 14.06.2004
DATE OF PRONOUNCING THE JUDGMENT: 29.06.2004

J U D G M E N T: **(PER BRITTO, J.)**

Both the parties herein challenge the correctness of the Award dated 19.9.1998 of the learned Addl. District Judge, Margao, (Reference Court,for short) in LAC No.92/93.

2. Some more facts are required to be stated to dispose of the appeal and the Cross Objections.

3. By virtue of Notification issued under Section 4(1) of the Land Acquisition Act 1894 (Act, for short) and published on Gazette dated 21.7.1988 the Government acquired a large are of land admeasuring 6.36.175 sq.mts. for the purpose of construction of Minor Irrigation Tank at Chapoli village in Canacona taluka, and, by Award dated 3.9.1990 the Land Acquisition Officer (LAO, for short) awarded compensation at the rate of Rs.6/- per sq.m. for both paddy and barad land and Rs.2/- per sq.m. for pathway and nulla.

4. The LAO in fixing the said compensation did consider five sale instances from adjoining villages as he could not lay his hands on any sale instance from Chapoli village. He discarded two sale instances or sale deeds because he found that the price paid of Rs.1.30/- per sq.m. and Rs.2.85/- per sq.m. was too low. In another, he found price of Rs.50/- paid was too high. He discarded the other two sale deeds on the ground that the lands pertaining to the same had commercial potential.. He did not consider the sale deed dated 25.9.85 (Exh.AW1/B) as he found that the land covered by the

same was levelled land with no further development required and as it could be put to immediate use and because it was in no way comparable to the acquired land. Although the learned LAO had observed that the said sale deed dated 25.9.85 was a post-notification sale deed, it is admitted that the said sale deed was in fact dated 25.9.85 and not dated 25.9.89.

5. In this acquisition what was included was presumably an area of 25,240 sq.m. of land belonging to the respondent from survey No.66/1, 75/1, 78/1, 79/1, 80/2 and 80/3 of the same village, out of which an area of 3190 sq.m. from survey Nos.66/1, 78/1 and 80/2 was under dispute between the respondent and some other parties.

6. The respondent disputed the compensation awarded to him and by application dated 26.11.1990 got a reference made to the District Court in which the respondent sought enhancement of compensation at the rate of Rs.35/- per sq.m. for paddy and barad land and Rs.15/- per sq.m. for the land covered by pathway and nulla. In the reference the respondent examined himself and produced two sale deeds. The first was dated 21.9.87 (Exh.AW1/A) and the second was dated 25.9.85 (Exh.AW1/B) and also examined an agricultural expert by name Ganashyam Nagarcenkar

(AW.2). The respondent also examined the seller of the plot of sale deed dated 25.9.85 namely AW,3 Balkrishna Naik whose land was also acquired under the same notification and who was ordered to be paid by the learned Reference Court compensation at the rate of Rs.41/- per sq.m. in LAC No.92/93. The appellants examined their expert namely Neville Afonso.

7. The learned Reference Court discarded the evidence of both the experts and as far as discarding the evidence of AW.2 Ganashyam Nagarcenkar, the respondent has made no grievance about it. In fact, the rates mentioned by AW.2 were based on hearsay evidence and in any event, the evidence of AW.2 Nagarcenkar could not have been accepted because he had chosen not to rely upon the timber prices published by the Government every year but had chosen to ask someone for the rates and base his opinion on those rates. The person who gave the rates was not examined in the reference.

8. The learned Reference Court used the said sale deed dated 25.9.1985-Exh.AW.1/B and enhanced the compensation payable at the flat rate of Rs.28/- per sq.m. after giving an increase of 10% per year by way of increase in price since the said sale deed was

about three years prior to the date of notification and after making certain deductions which include Rs.5/- per sq.m. towards conversion, 20% towards spaces required for roads, etc. 33% for the purpose of actual development and thereafter Rs.25/- per sq.m. as the acquired land was lying in the interior where there was no public transport, no water and electricity facilities, etc. available as compared to the land of sale deed – Exh.AW1/B.

9. In the appeal filed, the appellants contend that the impugned Award of the learned Reference Court ought to be set aside and the award of the LAO be restored. In the Cross-Objections, the respondent contends that the appeal be dismissed and the cross objection be allowed and Rs.35/- per sq.m. as initially claimed, be awarded to the respondent.

10. We have heard both the parties at length. We are inclined to consider two aspects which have been totally overlooked by the learned Reference Court. The first is whether the acquired land had at all any building potential and for that matter the location of the acquired land vis-a-vis the plot of sale deed dated 25.9.85 and the said National Highway had to be seen. In the award of the LAO (RW1/A) the LAO had stated that the land under acquisition was lying deep

in the interior where there were no residential houses except a very few houses on the slope of a nearby hill and besides the area needed lot of development to put into immediate use and there were no infrastructure facilities like tap water, telephone, though a pathway or a rough road passed through the acquired area.

11. How deep in the interior was the acquired land ? No finding has been given by the learned Reference Court on this aspect. RW.1 Shri Afonso had stated that the acquired land, from centre of the project, was about 3 to 3-1/2 kms. from Chaudi and was about 2-1/2 kms. from 'Char Rasta'. These statements of RW.1 Shri Afonso were not challenged by the respondent. On the contrary, the distances given by AW.1 Kissan and AW.3 Balkrishna were conflicting. For example AW.1 Kissan had stated that the land of AW.1/B was about 2-1/2 km. from Chaudi while AW.3 had stated that the same was about 100 m. from Caudi. In any event, AW.1 Kissan had admitted that the Church and temple were at 3 kms. away from the acquired land and therefore the learned Reference Court ought to have concluded that the acquired land was at a distance of about 3 to 3-1/2 kms. away from Chaudi, by road. Again, AW.1 Kissan had stated that the petrol pump near the National Highway was at a

distance of 150 m. However, it could be seen from the award of the LAO – Exh.RW.1/A that this petrol pump was situated at a distance of about 2-1/2 kms. from the acquired land. It is obvious that AW.1 Kissan and AW.3 Balkrishna, who were both interested in enhancement of compensation had tried to shorten the distances with a view to obtain enhancement of compensation. Apart from the said petrol pump there was no acceptable evidence of any signs of development at a distance of 2-1/2 kms. in that direction from the acquired land AW.1 Kissan did state that there were about 8 residential houses at the same distance of 150 metres but he was unable to say nor produce any evidence to support his statement whether the said houses were existing on the date of notification under section 4(1) of the Act or were built subsequently. The learned reference court therefore ought to have seen that the acquired land from another point from the said National Highway was at a distance of about 2-1/2 kms. RW.1 Afonso had also confirmed that the acquired land was at a distance of about 2-1/2 kms. from another place known as Char Rasta which statement was again not controverted by or on behalf of the respondent. From the evidence on record the learned Reference Court ought to have seen that the acquired land as far as Chaudi was concerned, was at a distance of about 3 to

3-1/2 kms. away, as far as Char Rasta was concerned, it was at a distance of about 2-1/2 kms. and as far as the said petrol pump was concerned, was again at another distance of 2-1/2 kms. away, all the said three points being in relation to the said National Highway. The learned Reference Court also did not pay attention to the fact that the plot of the sale deed dated 25.9.85 was not only adjacent to the said National Highway at Chaudi but was also within the Municipal limits while the acquired land was in village Chapoli which village was accessible only after crossing another village known as Nagorcem. At this stage it may be noted that AW.1 Kissan had also stated that in case there were houses in the acquired land that the people residing in the said houses, for their daily necessities, would not be required to come to Chaudi but they could go to another place known as Colem which is about 500 metres from Chapoli. It appears that the habitation of village Chapoli proper was further to the north/east after crossing Nagorcem and the acquired land. AW.1 Shri Kissan had admitted that there was no public transport available in the acquired land and had impliedly admitted that there was no water or electricity facilities, as well. All that could be seen from the award is that the acquired land were paddy fields and barad lands dependent only on

monsoon water for their cultivation far away from the National Highway.

12. Considering the above location of the acquired land, it could not be said that the acquired land, had any building potential because no development by way of any construction activity would have reached to that place in the near or foreseeable future.

13. In the case of **P. Ram Reedy and others v. Land Acquisition Officer, Hyderabad** (1995) 2 SC. **305** to which the learned Reference Court had also made reference, the Hon'ble Supreme Court had observed that building potentiality meant the possibility of user of acquired land for building purposes and this can never be wholly a matter of conjecture or surmise or guess. But it has got to be a matter of inference to be drawn based on appreciation of material placed on record to establish such possibility and material so placed on record or made available, inter alia, had to include facts such as the situation of the acquired land vis-a-vis the city or the town or village which had been growing in size because of its commercial, industrial, educational, religious or any other kind of importance etc. and the building potentiality which was required to be considered was

the availability of the land being put to better use in the immediate or near future (emphasis supplied).

14. In the case of **Land Acquisition Officer, Eluru and others v. Jasti Rohini (Smt) and another** (1995) 1 S.C.C. 717 the Supreme Court had again stated that in fixing the market value on the basis of its potentiality for use for building purposes, it must be established by evidence aliunde that the potential purpose must exist as on the date of acquisition by other possible purchasers in the market conditions, prevailing as on the date of the notification. Existence of constructed house or construction activity in other similar lands in the locality for the purpose contended for or of purchase for such purposes as on the date of proposed acquisition prima facie indicates that there is demand for and the possibility of the immediate user of the land and it is a reasonable possibility to infer that the acquired lands also were possessed of potential value and that the demand for and a market at the time of acquisition for potential use must be established as a fact from reliable and acceptable evidence to show that if the acquired land has been thrown into the market, others would have bought it for the special purposes or for building activity which would show the demand for and a market to

purchase the land possessed of potential value for the purpose of building activity at that time.

15. In the case of **State of Maharashtra and others v. Digamber Bhimashankar Tandale and others** (1996) 2 S.C.C., 583 the Hon'ble Supreme Court found hat on the date of notification the lands were agricultural and were also situated within the Municipal limits. The Supreme Court also found that there was evidence that the lands were converted for non-agricultural purposes but there was no development in that area and although oral evidence was adduced and it was shown that upto a distance of 3/4 km. to the acquired land there was some development by way of some illegal constructions yet the Hon'ble Supreme Court held that there was no potential value for the lands to be converted into non-agricultural lands and therefore the determination of compensation on the basis of potential value was illegal.

16. In the case of **L.A.O., Hyderabad v. Male Pullamma and others** (1996) 8 S.C.C. 247) the acquired agricultural land, part of it was used for poultry purpose, there was no development in the area or in the neighbourhood as on the date of notification and in such a situation the Hon'ble

Supreme Court again held that the High Court was not justified in determining the market value treating the acquired lands as possessing potential value and that the next question of deduction would arise only when the lands are found to have potential value and there is evidence of development in the neighbourhood (emphasis supplied).

17. In the case of **P. Rajan and another v. Kerala State Electricity Board and another** (1997) 9 S.C.C. 330 the lands covered by sale transaction was situated within the Municipal limits in a developed area and at a distance of 2-1/2 km. from the acquired land and yet the Hon'ble Supreme Court held that such sale transaction could not be relied on.

18. There is absolutely no description given by the respondent or his witnesses regarding the nature of acquired land and it has been stated by RW.1, a fact which has not been denied on behalf of the respondent, that the acquired land was paddy land as well as hilly. The respondent had not even led evidence to show that the paddy fields were such that they could have been put to construction activity or for that matter the hilly area could have been put to construction activity. As stated before, the acquired land was an area which was situated far away

from Chaudi where basic civic amenities were available and much further from the three points of the National Highway to which reference has been made hereinabove and were paddy fields in midst of paddy fields where development had not reached on the date of Notification and would not have reached in the near future.

19. On behalf of the respondent reliance has been placed on the case of **Hasanali Walimchand (dead) by LRs. v. State of Maharashtra** (1998) 2 S.C.C., 388. In this case the Supreme Court referring to the said case of **P. Ram Reddy v. Land Acquisition Officer, Hyderabad** (supra) and other cases has stated that future potentiality also ought to have been taken into account. But as already stated the future potentiality has got to be of the near or foreseeable future and not of remote or distant future. As far as the future is concerned, one day even the lands on Mars may have building potentiality. We are therefore of the opinion that the acquired land having been situated right in the interior, as observed by the LA.O., did not have building potentiality for it to have been assessed by the learned Reference Court as land having building potentiality.

20. The second aspect which has not been considered by the learned Reference Court is whether the sale deed dated 25.9.85 was a comparable sale instance. It might have been true that the acquired land as well as the said plot of the sale deed might have been once upon a time agricultural lands. The evidence on record clearly showed that the plot of the sale deed dated 25.9.85 sold by AU.3 Balkrishna was almost a developed plot situated at Chaudi very close to the said National Highway where all basic, civic amenities were available and not only that, it was also a plot accessible by another road where he purchaser had even constructed a compound wall. In other words in all respects it was a plot well suited and ready for construction of a house. No doubt it was a small plot admeasuring 570 sq.m. which was sold at the rate of Rs.80/- per sq.m. The question therefore was whether such a plot could have been compared with the acquired property of the respondent of which even the exact nature was not known. The Supreme Court in the case of **Shaji Kuriakose and another v. Indian Oil Corpn. Ltd. and others** (2001) 7 S.C.C., 650 has stated that comparable sales method of valuation is preferred because it furnishes the evidence for determination of the market value of the acquired land at which a willing purchaser would pay for the acquired land if it is sold in open

market at the time of issue of notification under Section 4 of the Act. But before comparable sales method is adopted there are certain factors to be fulfilled and on fulfilment of those factors the compensation can be awarded according to the value of the land reflected in the sales. The factors, inter alia being :- (1) the sale must be a genuine transaction, (2) that the sale deed must have been executed at the time proximate to the date of issue of notification under Section 4 of the Act, (3) that the land covered by the sale must be in the vicinity of the acquired land, (4) that the land covered by the sales must be similar to the acquired land, and (5) that the size of plot of the land covered by the sale be comparable to the land acquired. The Supreme Court further had stated that if all these factors are satisfied then there is no reason why the sale value of the land covered by the sales be not given for the acquired land and if there is dissimilarity in regard to locality, shape, site (size) or nature of land between land covered by sales and land acquired, it is open to the court to proportionately reduce the compensation for acquired land than what is reflected in the sales depending upon the disadvantages attached with the acquired land. In our opinion the plot of sale deed which was almost a developed plot which was located within the Municipal

limits and where all basic civic amenities were available could not be used as a guide to fix the market value of the land which was situated in a far off village of which exact nature was not known. Moreover, it could also be said that the respondent had led no evidence to show that the acquired land was at all similar to the plot of the sale deed. As far as this aspect is concerned, AW.1 Kissan, it appears, was not at all conversant with the acquired land. AW.1 Kissan has not given what is the total area owned by him which consisted of paddy land, barad land or for that matter hilly land, the area of the road, nulla, etc. In fact, AW.1 Kissan did not give the exact area of the acquired land and it was submitted on his behalf that he was an Engineer. Aw.1 Kissan did not even know what were the survey numbers owned by him which were involved in the present acquisition and he also did not know the area of each of the survey numbers or for that matter the area occupied by the pathway or the kacha road or by the nulla. Aw.1 Kissan stated that in survey No. 75 there were 260 trees and in survey no. 80 there were 6 trees. But it can be seen from the report of AW.2 Nagorcencar that there were no trees in survey no.75/1 and 80/2 which confirms the fact that AW.1 Kissan was not at all conversant with the acquired property. There is no doubt that the court is

required to assess the market value of the acquired land sitting on an arm chair of a willing purchaser in normal market conditions. But we must hasten to add that the materials to do that exercise must be produced by the applicant seeking enhancement of compensation and for this reason the Hon'ble Supreme Court has held in the case of **Special Deputy Collector and Anr. v. Kurra Sambasiva Rao and others** (A.I.R. 1997 S.C., 2625) that the burden of proof that the amount awarded by the LAO is not adequate is always on the claimant. The burden is to adduce relevant and material evidence to establish that the acquired land is capable of fetching higher market value than the value awarded by the LAO or that the LAO proceeded on a wrong premise or applied a wrong principle of law. In our opinion unless the respondent had led some evidence regarding the acquired land so as to compare the same at least in certain aspects with the land of the sale deed dated 25.9.85 there was no question of the learned Reference Court using the said sale deed as a guide to enhance the compensation payable to the respondent.

21. In view of the above, the appeal is bound to succeed and the cross-objections are bound to fail. Consequently, we allow the appeal and dismiss the

cross-objections. The parties are left to bear their own costs.

S.A. BOBDE, J.

N.A. BRITTO, J.

sl.