

(2013) 04 BOM CK 0025

In the Bombay High Court

Case No : Writ Petition No. 4357 of 2012

Bhalchandra Shravan Patil

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-04-2013

Acts Referred:

Land Acquisition Act, 1894 — Section 4(1), 48(1)

Citation : (2013) 3 ABR 1202

Hon'ble Judges : Mridula Bhatkar, J; A.S. Oka, J

Bench : Division Bench

Advocate : A.V. Anturkar instructed by Sugandh B. Deshmukh and G.S. Godbole instructed by Prashant H. More, for the Appellant; V.S. Gokhale, AGP. and V.M. Thorat, for the Respondent

Judgement

A.S. Oka, J.—These petitions have been tagged together. The petitioner in Writ Petition No. 4357 of 2012 is one Shri Bhalchandra Shravan Patil. The said Bhalchandra was claiming to be the owner of the land bearing Survey No. 135, Hissa No. 6, admeasuring 17.4 gunthas situated at village Karave, Taluka and District Thane (hereinafter referred to as "the said property"). A notification u/s 4(1) of the Land Acquisition Act, 1894 (hereinafter referred to as "the Land Acquisition Act") was issued on 3rd February, 1970 by which the said property was notified for acquisition for the public purposes of setting up a satellite city of New Bombay. The award u/s 11 of the Land Acquisition Act was made on 13th July, 1982. The contention of the said Bhalchandra is that on the basis of the letter of No Objection dated 9th October, 2006 issued by the second respondent which is the Special Town Planning Authority for the City of New Bombay by an order dated 25th April, 2008 in the purported exercise of powers under sub-section (1) of Section 48 of the Land Acquisition Act, the Additional Commissioner, Konkan Division, released the said property from acquisition. According to the case of the said Bhalchandra, on 1st July, 2008, he executed a Development Agreement in respect of the said property with M/s. Well Wisher Construction and Finance Pvt. Ltd. (hereinafter referred to as "the said

Company"). The said Company is the petitioner in Writ Petition No. 5580 of 2012.

2. We may note here that on 9th October, 2006, the Chief Land and Survey Officer of the second respondent-special Planning Authority had issued aforesaid letter of No Objection recording that the said property has not been acquired by the second respondent and the same was in possession of the said Bhalchandra. In respect of the project affected persons whose lands were acquired for New Bombay Project, the State Government came out with a scheme of allotting developed plots having area of 12.5% of the area of the acquired lands to the project affected persons. On 12th December, 2008, the Chief Land and Survey Officer of the second respondent issued a show-cause notice to the petitioner alleging that the petitioner had taken benefit of allotment of land under the said 12.5% scheme and by suppressing material facts and by misleading the second respondent, the said Bhalchandra had filed false documents. The said Bhalchandra was called upon to submit written explanation and was informed that the letter of No Objection dated 9th October, 2006 was revoked. The said Bhalchandra was directed not to deal with the said property and not to carry on any construction thereon. The said Bhalchandra filed a writ petition in this Court. Similarly the said Company filed a writ petition in this Court. The writ petitions were disposed of by an order dated 7th December, 2009. This Court proceeded to set aside the direction given by the second respondent not to deal with the said property and recorded the statement of the said Bhalchandra and the said Company that till 10th January, 2010 they will not enter into any transaction in relation to the said property. This Court granted liberty to the second respondent-special Planning Authority to move the Competent Authority and to adopt appropriate remedy for seeking appropriate orders. The order of this Court records that if appropriate orders are passed by the Competent Authority or any other appropriate forum, the matter shall be governed by the said orders. Otherwise, after 10th January, 2010, the petitioners in the said petitions will be entitled to deal with the said property in accordance with law.

3. It appears that the second respondent filed an application before the Additional Commissioner, Konkan Division, Mumbai (the third respondent in Writ Petition No. 4357 of 2012) for staying the operation of the order dated 25th August, 2008 passed by him under subsection (1) of Section 48 of the Land Acquisition Act of releasing the said property from the acquisition. The order of status quo was passed by the third respondent. The said Bhalchandra filed an application on 25th January, 2010 to the third respondent for vacating the said order. On 20th August, 2010, the third respondent-additional Commissioner passed an order setting aside his own order dated 25th August, 2008 passed earlier of releasing the said property from acquisition and directing that a notification issued on the basis of the earlier order was withdrawn and set aside. Accordingly, a notification was published in the Government Gazette on 8th September, 2010. Being aggrieved by the aforesaid order, the said Bhalchandra as well as the said Company filed separate writ petitions in this Court. The said writ petitions came up before this Court on 16th November, 2011. This Court

disposed of the said writ petitions. This Court observed that the Application made by the Special Planning Authority for recall of the order dated 25th April, 2008 was allowed but the Application made by the said Bhalchandra for deleting the said property from acquisition was kept pending. While disposing of the petitions, this Court clarified that by the order impugned dated 20th August, 2010, the Application filed by the said Bhalchandra for deleting the said property from the acquisition has not been disposed of. It will be necessary to make a reference to the directions contained in the said order dated 16th November, 2011 passed by a Division Bench of this Court in Writ Petition No. 7863 of 2010 (filed by the said Company) and Writ Petition No. 7170 of 2010 (filed by the said Bhalchandra) and in particular Paragraph 6 thereof, which reads thus:

(6) Both the petitions are disposed off. However, it is clarified that by the order which is impugned in the petitions, the original application filed by the land holder for deletion of the land from acquisition has not been disposed off and that the Additional Commissioner, Konkan Division, Navi Mumbai can consider that application on merits on being satisfied by the land holder that possession of the acquired land has not been taken. It is also clarified that the entire material presently available on record save and except the no objection certificate issued by CIDCO but including any documents or affidavits that may be produced by CIDCO and the Land Acquisition Officer, the proceedings in these petitions shall be taken into consideration by the Additional Commissioner. It is also clarified that in case the petitioners in writ petition No. 7863 of 2010 apply to the Additional Commissioner for being heard in support of the application filed by the land holder, the Additional Commissioner shall grant an opportunity of being heard to the petitioners in writ petition No. 7863 of 2010 before disposing of the application. Considering that the matter is pending for quite some time, the Additional Commissioner is directed to hear and dispose off the application as expeditiously as possible and in any case within a period of six months from today. It is further directed that during the pendency of the proceedings before the Additional Commissioner, Konkan Division, Navi Mumbai, both the parties shall maintain status quo in relation to the land which is subject-matter of these petitions.

(Underline added)

4. In terms of the said order, the Divisional Commissioner passed an order dated 25th April, 2012 rejecting the Application made by the said Bhalchandra as well as the said Company. In the said order, the Divisional Commissioner observed that the possession of the said property was taken over on the basis of the Award of the year 1982. The Divisional Commissioner observed that along with an Application dated 8th August, 1994, the said Bhalchandra produced the Award of the said property and sought allotment of a plot under 12.5% scheme on account of acquisition of the said property. It is held that initially a Plot No. 40 was allotted to the said Bhalchandra on 10th October, 2002. By cancelling the said allotment, the Plot No. 21 admeasuring 450.14 sq. meters at Nerul was

allotted to him and an Agreement in respect of the said plot has been executed on 11th June, 2003. It was held that earlier order releasing the said property from acquisition passed on the basis of the No Objection Certificate issued by the Chief Land and Survey Officer of the second respondent-special Planning Authority has been set aside by the order dated 20th August, 2010. The Divisional Commissioner held that as the petitioner has taken the benefit of allotment of a developed plot on the basis of the acquisition of the said property, no question arises now of deleting the said property from the acquisition. The challenge in the present petitions is to the said order dated 25th April, 2012.

5. The learned counsel appearing for the said Bhalchandra submitted that in terms of the order of this Court dated 16th January, 2011, there is no finding recorded by the Additional Commissioner in the impugned order as to whether the possession of the said property was taken over on the basis of the acquisition. He urged that the Divisional Commissioner proceeded on the assumption that the possession was taken over. He submitted that unless a clear finding was recorded that the possession was taken over u/s 16 of the Land Acquisition Act, the Application under sub-section (1) of Section 48 of the Land Acquisition Act ought to have been considered on merits. He submitted that once an order was passed releasing the said property from the acquisition, there was no power to review the said order. He urged that no power was vesting in the Divisional Commissioner of recalling the said order. He submitted that once the said property was released from the acquisition in exercise of the power under sub-section (1) of Section 48 of the Land Acquisition Act, there was no question of recalling the said order. He urged that even assuming that the plot under 12.5% scheme was allotted to the said Bhalchandra, the same is not sufficient to prove that the possession of the acquired land was taken over under the Land Acquisition Act. He submitted that there is no material on record to show that any fraud was practiced by the said Bhalchandra and in any case no such evidence was available before the Additional Commissioner.

6. Learned counsel appearing for the said Company submitted that even going by the impugned order, apart from the said property, certain other properties held by the said Bhalchandra were acquired for New Bombay Project and there was nothing on record to show that the allotment of the developed plot was made by the Special Planning Authority to the said Bhalchandra specifically on account of acquisition of the said property. He urged that there was no documentary evidence on record to that effect. Apart from this submission, he adopted the submissions made by the learned counsel appearing for the said Bhalchandra. On facts, he pointed out that on 25th April, 2008, the said property was denotified and on 1st July, 2008, the said Bhalchandra entered into a Development Agreement with the said Company in respect of the said property. He submitted that when the said Agreement was executed, the said property was already released from the acquisition. He submitted that the rights of the petitioner cannot be defeated by recalling the order of release of the said property from the acquisition inasmuch as the order is without jurisdiction. He pointed out that a

sum of Rs. 1,75,00,000/- has been paid by the said Company at the time of execution of the said Agreement. He submitted that when the Agreement was entered into, the title of the said Bhalchandra was clear.

7. The learned AGP as well as the learned counsel appearing for the Special Planning Authority opposed the petitions. It was pointed out that the allotment of a developed plot was made in lieu of the said property. It was also pointed out that a building consisting of a ground plus four floors has been already constructed by the said Bhalchandra on the plot allotted in lieu of the said property. The learned counsel for the Special Planning Authority placed reliance on several documents in relation to the allotment.

8. We have given careful consideration to the submissions. As we have pointed out earlier, a Notification under sub-section (1) of Section 4 of the Land Acquisition Act was issued on 3rd February, 1970 in respect of the said property bearing Survey No. 135, Hissa No. 6, admeasuring 17.4 situated at Village Karave, Taluka and District-Thane. The Award u/s 11 of the Land Acquisition Act was made on 3rd July, 1982. On 11th September, 2006, the said Bhalchandra made an Application to the Chief Land and Survey Officer of the second respondent-special Planning Authority stating therein that he was in possession of the said property and the same has not been taken over by the second respondent. The said Bhalchandra requested that as his family was using the said property, a "No Objection Certificate" be issued. On 9th October, 2006, Chief Land and Survey Officer of the second respondent-special Planning Authority issued a letter of "No Objection" to the said Bhalchandra recording that a Notification in respect of the said property has been issued. It is stated further that the said property has not been acquired by the second respondent and the Notification has lapsed. It is also recorded that the petitioner was in possession. It appears that on the basis of the said letter, the said Bhalchandra applied to the Additional Commissioner, Konkan Division, Mumbai, under sub-section (1) of Section 48 of the Land Acquisition Act. An order was passed on 25th April, 2008 by the Additional Commissioner recording that the Award has been already made but the said property has not been acquired by the second respondent and the possession thereof was not taken over. Therefore, he proceeded to release the said property from the acquisition. On 12th December, 2008, by a communication, the Chief Land and Survey Officer of the second respondent-special Planning Authority informed the said Bhalchandra that the letter of "No Objection" dated 9th October, 2006 has been cancelled. It is stated therein that in lieu of the said property, the said Bhalchandra had taken benefit of allotment of a plot under 12.5% scheme. It is, therefore, alleged that the said Bhalchandra has misled the second respondent. He was called upon to explain as to why action should not be initiated against him. The said Bhalchandra was directed not to deal with the said property and not to carry on construction thereon. The said Bhalchandra filed Writ Petition No. 4933 of 2009 challenging the said communication dated 12th December, 2008. Another Petition was filed by the said Company being Writ Petition No. 1177 of 2009. The said writ petitions were

disposed of by an order dated 7th December, 2009 by a Division Bench of this Court. Paragraph 6 of the said judgment and order shows that the first question was raised whether the second respondent could have cancelled the earlier No Objection Letter and the second question canvassed was whether the second respondent can direct the said Bhalchandra not to deal with the said property and not to carry on construction thereon. The operative part of the order of this Court of the Judgment and Order dated 7th December, 2009 reads thus:

1. The direction issued by the CIDCO restraining the petitioners in both the petitions from further dealing with the land is set aside. The learned counsel appearing for the petitioners in both the petitions have stated before us that till 10-1-2010 they will not enter into any further transaction in relation to the land which is the subject-matter of the writ petitions. The statement is accepted.
2. In the mean time, the CIDCO shall be at liberty to move the Competent Authority or to adopt any other appropriate remedy for seeking appropriate orders. In case, the appropriate orders are passed by the Competent Authority or any other appropriate forum, the matter shall be governed by those orders. Otherwise, after 10th January, 2010 the petitioners shall be free to deal with their land in accordance with law. Before the Competent Authority or the Court where validity of the order passed u/s 48(1) is questioned. all contentions according to both sides are kept open.
3. The learned counsel for the CIDCO has stated before us that before moving any application before any Authority including the Competent Authority, copy of the application will be served on both the petitioners. Statement made by the learned counsel is accepted. Rule made absolute accordingly. No order as to costs.

(Underlines added)

9. From the said order, it is clear that, that part of the communication dated 12th December, 2008 by which the Letter of No Objection dated 9th October. 2006 was cancelled was not at all disturbed by the Division Bench of this Court. Only the direction against the said Bhalchandra not to deal with the said property was set aside. On the basis of the liberty granted by this Court, the second respondent applied for recall of the order dated 25th April, 2008 passed by the Additional Commissioner of releasing the said property. By an order dated 20th August, 2010, the Additional Commissioner, Konkan Division, Mumbai allowed the said Application. The operative part of the said order passed by him reads thus:

The Revision Application filed by CIDCO is hereby allowed. Impugned order dated 25.4.2008 denotifying the impugned land bearing survey No. 135/6 admeasuring 0-17-4 hectares of Bhalchandra Shravan Patil u/s 48(1) of Land Acquisition Act is hereby set aside. The consequential notification is also hereby recalled, withdrawn and set aside.

10. The Additional Divisional Commissioner came to the conclusion that the said Bhalchandra suppressed the fact that in lieu of the acquisition of the said property, a plot being Plot No. 21 was allotted to him by the second respondent on which he has already constructed a residential/commercial complex. Therefore, the Additional Commissioner recorded that the earlier order dated 25th April, 2008 was obtained by the said Bhalchandra by fraud and by suppressing the relevant facts.

11. Now we may note here that the said Bhalchandra as well as the said Company filed Writ Petition Nos. 7170 of 2010 and 7863 of 2010 respectively for challenging the said order dated 20th August, 2010. In the earlier paragraphs, we have already quoted Paragraph No. 6 of the judgment and order dated 16th November, 2011 by which the said Petitions were disposed of. Perusal of the entire order of this Court shows that the order dated 20th August, 2010 by which earlier order of releasing the said property from acquisition was recalled, was maintained. Only clarification issued was that the original application made by the said Bhalchandra for deleting the said property from acquisition was not decided by the Additional Commissioner. In short, it was held that as a consequence of recall of the order dated 25th April, 2008, the original application of the said Bhalchandra of releasing the said property from acquisition was restored which was not decided. Therefore, this Court directed the Additional Commissioner to decide the said Application and granted liberty to the said Company to file an Application for being heard in support of the said Application. Thus, the order dated 20th August, 2010 by which the earlier order of release of acquisition dated 25th April, 2008 was set aside or recalled has attained finality. Therefore, only issue to be considered by the Additional Commissioner while passing the impugned order dated 25th April, 2012 was whether the said Bhalchandra and the said Company have made out a case for release of the said property from acquisition. The said question will have to be examined by this Court. Another issue which will have to be gone into is whether the allotment of a plot being Plot No. 21 to the said Bhalchandra was made on account of acquisition of the said property.

12. The second respondent-Special Planning Authority has filed a reply in Writ Petition No. 4357 of 2012. Exhibit R1 to the said Reply is the Application dated 8th August, 1994 made by the said Bhalchandra for allotment of a plot of land in Gaothan Extension Scheme. The said Bhalchandra has specifically relied upon the acquisition of the said property under the Award No. 14 of 1982 by which the said property was acquired. Exhibit R2 is the statement of the said Bhalchandra recorded by the second respondent in which he has again relied upon the said Award No. 14 by specifically referring to the said property bearing Survey No. 135 Hissa No. 6. On 11th June, 2003, an Agreement to Lease was executed by and between the said Bhalchandra and his wife Vithabai on one hand and the second respondent-Special Planning Authority on the other hand as regards the allotment of Plot No. 21 in Section 44A of Village Karave under 12.5% scheme. On 11th June, 2003, the said Bhalchandra took over the possession of the said

plot under a possession receipt which has been annexed to the reply. Photographs of the newly constructed building on the Plot No. 21 have been annexed to the said reply which show that a building consisting of ground plus four floors has been constructed and on the ground floor, there are shop premises. In a bond/undertaking executed by the said Bhalchandra on 25th August, 2002 which is Exhibit R6 to the Reply, it is specifically stated that in lieu of the land acquired, the allotment of plot was made to the said Bhalchandra. The said bond as well as letter dated 10th October, 2002 which are annexed to the Reply show that initially the Plot No. 40 was allotted which was substituted by the said Plot No. 21.

13. To the Reply at Exhibit R7, a photocopy of the Application dated 11th September, 2006 made by the said Bhalchandra has been annexed. On the basis of the said Application, the letter of "No Objection" dated 9th October, 2006 was issued to the said Bhalchandra. There is no reference to any acquisition in the said letter in which it is merely stated that the said property bearing Survey No. 135 Hissa No. 6 was in the possession of the great grandfather and grandfather of the petitioner. It is stated that the said property has not been taken over by the second respondent and that the family of the said Bhalchandra was in possession. It is pertinent to note the remark put up by the Assistant Survey Officer of the second respondent on the said Application. It is stated therein that the said property has been notified for acquisition. It is stated that the second respondent was not in possession of the said property. On the basis of such letter that No Objection Letter dated 9th October, 2006 was issued by the Chief Land and Survey Officer of the second respondent. However, we find that in the said letter, the Officer purported to state that the said property has not been acquired and the Notification has lapsed. Therefore, there was every justification for the second respondent to withdraw and cancel the letter of "No Objection" especially when the fact that the said Bhalchandra had obtained possession of Plot No. 21 from the second respondent on 11th June, 2003 has been suppressed in the said application of Bhalchandra. In any case, we have already observed above that the letter dated 12th December, 2008 by which the letter of No Objection was cancelled has become final to that extent. The part of it revoking letter of "No Objection" has not been disturbed by this Court.

14. We have already pointed out that even the order dated 25th April, 2008 by which the said property was purportedly released from the acquisition has been recalled and set aside by order dated 20th August, 2010. We have already held that the Division Bench in the petitions filed by the said Bhalchandra and the said Company has not interfered with the said order. The Division Bench merely directed the Additional Commissioner to decide the request of the said Bhalchandra made under sub-section (1) of Section 48 of the Land Acquisition Act.

15. We have extensively referred to the documents annexed to the reply of the second respondent-Special Planning Authority. There is no rejoinder filed by the

said Bhalchandra for denying the documents produced along with reply. In the application made by the said Bhalchandra as well as his statement recorded by the second respondent for the purposes of allotment of a plot under 12.5% scheme, the Bhalchandra has specifically referred to the Award u/s 11 of the Land Acquisition Act in relation to the said property and has claimed allotment of a plot in lieu of the acquisition of the said property and other properties. Accordingly, Plot No. 21 was allotted to the said Bhalchandra in the year 2003 and the possession thereof was also taken over by him in the year 2003.

16. At this stage, it will be necessary to make a reference to the Writ Petition No. 4933 of 2009 filed by the said Bhalchandra. In the said petition, the Bhalchandra has not specifically raised a contention that the allotment of Plot No. 21 was not in lieu of the acquisition of the said property but it was in lieu of some other acquired land. It is contended that obtaining benefit under the 12.5% scheme is altogether different from the fact that the possession of the said property was not taken over after acquisition. It will be also necessary to make a reference to the Writ Petition No. 1170 of 2009 which was filed by the said Company. Even in the said Petition, we find that no ground has been specifically taken that the Plot No. 21 was allotted on account of acquisition of some other property held by Bhalchandra. These contentions have been belatedly taken up in these petitions of 2012. Therefore, the contention that the Plot No. 21 was not allotted to the said Bhalchandra in lieu of the acquisition of the said property is clearly an afterthought and the same deserves to be rejected. In any event, the documents annexed to the reply of the second respondent do establish that in the Applications seeking allotment of Plot under 12.5% scheme made by Bhalchandra, he relied upon the Award in respect of the said property.

17. Even assuming that there was no proper finding recorded by the Additional Commissioner as to whether the possession of the said property was taken over u/s 16 of the Land Acquisition Act, the fact remains that as per the policy of the State Government, the petitioner had obtained allotment of Plot No. 21 in the year 2003 on the ground that the said property has been acquired for the public purpose. As per the 12.5% scheme, the allotment of a developed plot is made virtually as an additional compensation on account of acquisition. After having obtained the benefit of allotment of Plot No. 21 way back in the year 2003 on the basis of the acquisition of the said property, the said Bhalchandra could not have applied in the year 2008 for release of the said property from acquisition. But for the acquisition of the said property, the said Bhalchandra could not have obtained the allotment of Plot No. 21 which has been fully exploited by the said Bhalchandra by constructing a multi-storeyed building thereon. The said Bhalchandra never offered to hand over the vacant and peaceful possession of the said Plot No. 21 to the CIDCO in the event of release of the said property from acquisition. After having obtained the substantial benefit by way of allotment of a plot on account of acquisition of the said property without offering to return the benefit, the Bhalchandra could not have applied for release of the said property from the acquisition. Thus, he wants release of the said property

from acquisition and at the same time, wants to retain the Plot No. 21 which was allotted on account of the acquisition of the said property. Considering these factual aspects and the conduct of the said Bhalchandra, the Additional Commissioner committed no error in passing the order under sub-section (1) of Section 48 of the Land Acquisition Act. The remedy under Article 226 of the Constitution of India is a discretionary remedy. It is an extraordinary remedy which is not available as a matter of course. Considering the conduct of the litigant who seeks that remedy, the writ Court can always decline to grant relief. The conduct of the said Bhalchandra is such that he cannot be allowed to invoke extra-ordinary jurisdiction of this Court. Moreover, if the said property is ordered to be released from acquisition, the same will amount to permitting the said Bhalchandra to take undue advantage of allotment of Plot No. 21. The said Bhalchandra was not entitled to the allotment of the said plot but for the acquisition of the said property. The said Company entered into a transaction with the said Bhalchandra on the basis of an order of release of the said property from acquisition which was vitiated by a fraud practiced by the said Bhalchandra. Therefore, no writ can be issued even in this writ petition filed by the said Company. The remedy of the said Company, if any, is to proceed against the said Bhalchandra for appropriate relief. There is no merit in both the writ petitions and we pass the following order.

ORDER

We reject the petitions. Ad interim relief granted on 9th May, 2012 in Writ Petition No. 4357 of 2012 will continue to operate for a period of eight weeks from today.