
(2013) 05 BOM CK 0063
In the Bombay High Court
Case No : Writ Petition No. 8377 of 2012

Deelip

APPELLANT

Vs

The Special Land Acquisition Officer and The Executive
Engineer

RESPONDENT

Date of Decision : 06-05-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5
Land Acquisition Act, 1894 — Section 4, 6

Citation : (2013) 4 ABR 427 : (2013) 4 ALLMR 669 : (2013) 4 BomCR 598 :
(2013) 5 MhLj 243

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : Vinod Prakash Patil, for the Appellant; K.J. Ghute Patil, A.G.P. for
Respondent No. 1 and Mr. S.D. Dhongade, Advocate, for the Respondent

Final Decision : Allowed

Judgement

S.S. Shinde, J.—Rule. Rule made returnable forthwith. Heard finally with the consent of the parties. The Writ Petition Nos. 8377, 8379, 8392 and 8395 of 2012 take exception to the impugned orders dated 30th April, 2009 passed by the Joint Civil Judge, Senior Division, Jalgaon below Exhibit-1 in Regular Darkhast Nos. 497 of 2008 arising out of L.A.R. No. 147 of 2006, R.D. No. 494 of 2008 arising out of L.A.R. No. 140 of 2006, R.D. No. 159 of 2009 arising out of L.A.R. No. 146 of 2006 and R.D. No. 410 of 2008 arising out of L.A.R. No. 141 of 2006 respectively.

2. It is the case of the petitioners that, the petitioner in W.P. No. 8377 of 2012 is the owner of land Gat No. 11/2/3 admeasuring 1 Hectar 0 Are, petitioner in W.P. No. 8379 of 2012 is the owner of land Gat No. 11/2/1 admeasuring 3 Hectar 92 Are, Gat No. 113/B admeasuring 2 Hectar 15 Are, and land Gat No. 113/A admeasuring 1 Hectar 33 Are and potkharaba 0.02, the petitioner in W.P. No. 8392 of 2012 is the owner of land Gat No. 11/2/4 admeasuring 2 Hectar 46 Are

and the petitioner in W.P. No. 8395 of 2012 is the owner of land Gat No. 113/B admeasuring 2 Hector 15 Are and Gat No. 113/A admeasuring 1 Hector 33 Are and 0.02 potkharaba, situated at village Hingne. The land of the petitioners was acquired by the State Government for Waghur Project. Notification u/s 4 of the Land Acquisition Act was published on 30th October, 1997, notification u/s 6 was published in Government Gazette on 5th November, 1998, the possession of lands were taken on 28th June, 2001, Award is passed by the S.L.A.O. on 21st December, 2000. It is further case of the petitioners that, being aggrieved by the compensation awarded by the S.L.A.O., the Reference Applications are preferred before the trial Court for enhancement.

3. It is further case of the petitioners that, L.A.R. Nos. 147 of 2006 and 141 of 2006 were filed in respect of the land of the petitioner in W.P. No. 8377 of 2012, L.A.R. Nos. 140 of 2006 and 141 of 2006 were filed in respect of the land of the petitioner in W.P. No. 8379 of 2012, L.A.R. No. 146 of 2006 was filed in respect of the land of the petitioner in W.P. No. 8392 of 2012 and L.A.R. No. 141 of 2006 was filed in respect of the land of the petitioner in W.P. No. 8395 of 2012. It is further case of the petitioners that, on 16th November, 2006 the Joint Civil Judge, Senior Division, Jalgaon allowed the above mentioned Land Acquisition References by common judgment and order and held the market value of the land acquired on the date of publication of notification i.e., @ Rs. 2,50,000/- per hector for Bagayat land.

4. It is further case of the petitioners that, the petitioner in W.P. No. 8377 of 2012 approached the executing Court by way of Regular Darkhast No. 497 of 2008, the petitioner in W.P. No. 8379 of 2012 approached the executing Court by way of Regular Darkhast No. 494 of 2008, the petitioner in W.P. No. 8392 of 2012 approached the executing Court by way of Regular Darkhast No. 159 of 2009 and the petitioner in W.P. No. 8395 of 2012 approached the executing Court by way of Regular Darkhast No. 410 of 2008 for recovery of the amount. The amount came to be deposited by the respondents. It is further case of the petitioners that, the executing Court has passed the order below Exhibit-1 and on application Exhibit-30 on 30th April, 2009 and permitted the petitioner to withdraw amount of Rs. 2,41,870/- in W.P. No. 8377 of 2012, Rs. 28,39,271/- in W.P. No. 8379 of 2012, Rs. 4,17,381/- in W.P. No. 8392 of 2012 and Rs. 14,73,874/- in W.P. No. 8395 of 2012, on condition to obtain bank guarantee of any Nationalized Bank in the like amount after due verification and identification till expiration of six months period after disposal of the appeal in the Hon''ble High Court and also sought undertaking in that regard.

5. The W.P. No. 8377 of 2012 is filed being aggrieved by the part of the order by which the petitioner is asked to furnish the bank guarantee for withdrawal of the amount of Rs. 2,41,870/-. The W.P. No. 8379 of 2012 is filed being aggrieved by the part of the order by which the petitioner is asked to furnish the bank guarantee for withdrawal of the amount of Rs. 28,39,271/-. The W.P. No. 8392 of 2012 is filed being aggrieved by the part of the order by which the petitioner is

asked to furnish the bank guarantee for withdrawal of the amount of Rs. 4,17,381/- and the W.P. No. 8392 of 2012 is filed being aggrieved by the part of the order by which the petitioner is asked to furnish the bank guarantee for withdrawal of the amount of Rs. 14,73,874/-.

6. The learned Counsel appearing for the petitioners submits that, the condition of furnishing bank guarantee of Nationalized Bank for withdrawal of the amount is very harsh. The entire land of the petitioners is acquired by the respondent State. It is submitted that, there is no any statement on behalf of the respondents that, they have preferred the appeals challenging the judgments and orders in the Reference Applications and the stay is granted by the appellate Court. Therefore, relying upon the pleadings in the petitions, grounds taken thereto, the learned Counsel appearing for the petitioners submits that, all these writ petitions may be allowed.

7. The learned A.G.P. appearing for the State or the learned Counsel appearing for the respondent No. 2 have not brought to the notice of this Court that, the judgments and orders under Reference were challenged before the appellate Court and the appellate Court has granted stay to the execution of the judgments and orders passed by the Joint Civil Judge, Senior Division, Jalgaon. The learned Counsel appearing for the respondent No. 2 fairly concedes that, the point raised in these writ petitions is no longer res integra and same is answered by this Court by various judgments.

8. I have given careful consideration to the submissions of the Counsel appearing for the parties. With the able assistance of the learned Counsel appearing for the parties, perused the pleadings in the petitions, grounds taken thereto and the entire material placed on record. It appears that, this Court issued notices to the respondents on 9th October, 2012 which were made returnable on 23rd October, 2012. Thereafter, the petitions were listed for hearing at least on four to five dates, however, no reply is filed by the respondents. Therefore, this Court has to proceed on the footing that, there is no stay to the common judgments and orders passed by the Joint Civil Judge, Senior Division, Jalgaon dated 16th November, 2006 in L.A.R. Nos. 145 of 2006 to 148 of 2006 in W.P. Nos. 8377 of 2012 and 8392 of 2012, in L.A.R. Nos. 140 of 2006 and 141 of 2006 in W.P. Nos. 8379 of 2012 and 8395 of 2012.

9. The point raised in this petition is no longer res integra and covered by the reported judgment of this Court in the case of Vilas Sumersing Patil Vs. Special Land Acquisition Officer and another, . In that case, this Court has taken a view that, if there is no stay to the award passed by the Reference Court, in that case, the petitioners are justified in making a prayer for revocation of the bank guarantee and for quashing of the order passed by the Executing Court seeking bank guarantee from the petitioners, as a condition for permitting the withdrawal of the amount deposited in the Court. Paragraph Nos. 14 to 16 of the judgment in the case of Vilas Sumersing Patil (supra) reads thus:

14. The provisions of Order 41 Rule 5 of the CPC reads thus:

5. Stay by Appellate Court.--(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

Explanation.--An order by the appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

(2) Stay by Court which passed the decree.--Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied-

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Subject to the provisions of sub-rule (3), the Court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.

15. Bare perusal of provisions of Rule 5 of Order 41 of the CPC would show that, an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed for reason only of an appeal have been preferred against the decree. The mandate of Rule 5 of Order 41 of the CPC provides that the appellate Court may for sufficient cause order stay of execution of such decree.

16. Therefore, in absence of any stay in appeal, to impose onerous condition of furnishing of Bank guarantee by the executing Court was not proper. The decree

which is passed in favour of the petitioner, who is agriculturist, could not have been frustrated by imposing the condition of furnishing Bank guarantee while withdrawing the decretal amount by the petitioner which was deposited by the respondents in pursuant to the decree passed by the Reference Court. It follows from Rule 5 of Order 41 of the CPC that unless reasons are recorded and stay is granted by the appellate Court, merely filing of appeal should not be taken as stay in appeal.

10. In the present case, as stated earlier though notices are issued to the respondents on 9th October, 2012, no reply is filed on behalf of the respondents. Nothing is brought to the notice of this Court that, award is challenged by the respondents and there is stay order granted by the High Court. Therefore, in absence of any reply in the writ petitions or any document brought on record to show that, the respondents have preferred the appeals challenging the award and further in the said appeals, the stay is granted by the High Court. Therefore, it will have to presume that, it is admitted position that, there is no stay to the award by the High Court.

11. In that view of the matter, in view of the judgment of this Court in the case of Vilas Sumersingh Patil (*supra*), the petitioners are very well justified in making the prayer for revocation of the bank guarantee and for quashing of the order passed by the Executing Court seeking bank guarantee from the petitioners, as a condition for permitting for withdrawal of the amount deposited in the Court. The petitioners to file undertaking before the concerned Court that, in case the appellant State Government in appeal succeeds, if any, the petitioner will bring back the amount. The writ petitions are allowed in terms of prayer clause (B). Rule is made absolute on above terms.