
(2006) 03 BOM CK 0003
In the Bombay High Court
Case No : Writ Petition No. 8417 of 2003

Gram Panchayat	Vs	APPELLANT
Collector and Others		RESPONDENT

Date of Decision : 10-03-2006

Acts Referred:

Land Acquisition Act, 1894 — Section 11, 16, 4, 48, 48(1)

Citation : (2006) 4 MhLj 453

Hon'ble Judges : V.M. Kanade, J; R.M.S. Khandeparkar, J

Bench : Division Bench

Advocate : P.D. Dalvi, for the Appellant; A.A. Kumbhakoni, Associate A.G., V.S. Gokhale, AGP for respondent Nos. 1 to 5, N.V. Bandiwadekar and S.C. Prabhu, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—The petitioner by the present petition seeks to challenge the order dated 11th August, 2003 passed by the Collector, Kolhapur, and the order dated 23rd October, 2003 passed by the Divisional Commissioner, Pune purportedly in exercise of powers u/s 48 of the Land Acquisition Act, 1894, hereinafter called as "the said Act."

2. The Government constructed a Dam across Tulshi River at Radhanagari Taluka, District - Kolhapur, and as a result of construction of the said Dam, two villages were submerged in the back water of the said Dam. Consequently, in the year 1975, the area admeasuring about 12 acres and 11 gunthas of land was acquired under the said Act. Further, in the year 1977, an additional area from the property belonging to respondent No. 6 was acquired under the said Act for the purpose of rehabilitation of Tulsi Project affected persons for creation of new gaonthan. Out of the said land bearing No. 58/5 part, 58/6 Part, 59 part, 60/8 part and 71/2 totally admeasuring 8 hectares and 12 acres, the land bearing Survey Nos. 58 and 59 were converted into plots and the same were allotted to 36 project affected persons and thus the land admeasuring about 2 H and 57 R was utilised for that purpose. The remaining land remained without being utilised

for the said purpose.

3. The notification in relation to the said acquisition proceedings u/s 4 of the said Act was published in the Government Gazette on 9th February, 1977 which was followed by a declaration u/s 6 having been published in the Gazette on 14th December, 1978. The award u/s 11 was declared on 30th March, 1979 for the total compensation of Rs. 46,226/- which was paid to the respondent No. 6 on 24th March, 1979. The land was taken on 29th May, 1979 and the mutation entry in that regard was effected bearing No. 778 in the revenue records pertaining to the land in question. A portion of the acquired land was allotted to Grampanchayat for construction of its structure.

4. On or about 6th June, 2000, Jaywant, son of the respondent No. 6 applied for return of an area admeasuring about 13 acres of acquired land on the ground that the same was not utilised for the purpose for which it was acquired. The report which was called for, pursuant to the said application, was submitted by the respondent No. 1 on 28th August, 2000 which disclosed that an area of 12 acres and 11 gunthas acquired from the respondent No. 6 for Tulsi Project had submerged in the back water of that project. Additional 19 acres and 24 gunthas were acquired for resettlement purposes and only 7 Ares was found to have been put to use and the remaining area was not used for the purpose for which it was acquired. The report also recorded that in terms of the provisions of the Resettlement Act, 1976, the slab for acquisition was only 2 hectares and 0.2 acres and without applying the said slab, the area admeasuring 13 hectares and 40 acres was acquired from the respondent No. 6. It also recorded that the land to the extent of 6 hectares and 47 acres in excess of the said slab was acquired from the respondent No. 6. Besides, the land admeasuring 3 hectares and 40 acres had remained vacant. Subsequent to the report by the authorities, the 1st respondent recommended the land in question to be returned to the respondent No. 6 on the ground that the same was the land acquired in excess and the Divisional Commissioner agreed to the said report and recommended for dropping of the acquisition to the extent of an area of 5 hectares and 40 acres in terms of Section 48(1) of the said Act. Some clarifications were called for by the Government on 8th January, 2002 and according to the clarification submitted by the Collector on 23rd January, 2002, it was informed that by mistake, an area of 6 hectares and 40 acres of land was acquired from the respondent No. 6 and as the same was in excess it could be returned to the respondent No. 6. Accordingly, a final order came to be passed by the State of Maharashtra on 12th June, 2003 purportedly accepting the proposal for deletion of the land to the extent of 5 hectares and 27 acres and accordingly the Divisional Commissioner, Pune, by letter dated 17th June, 2003 directed the 1st respondent to recover from the respondent No. 6 the corresponding amount of compensation already paid and then restore the land admeasuring 5 hectares and 27 acres to Shri Bhosale. On 15th July, 2003, Shri Jawahar Yashwant Bhosale deposited Rs. 19,210/- towards the refund of compensation and the Collector on 11th August, 2003 issued order to correct the land record deleting

the name of Collector and enter the name of Shri Bhosale. Further, on 4th November, 2003 the possession receipt of the land admeasuring about 5 hectares and 27 acres was prepared showing that the possession was restored to Shri Jawahar Yashwant Bhosale and the Mutation Entry No. 1177 was effected in the revenue records.

5. The learned advocate appearing for the petitioner while challenging the decision and the orders passed relating to return of the land to the respondent No. 6 submitted that neither Section 48 of the said Act nor the provisions of the Manual of Land Acquisition for State of Maharashtra by the Government of Maharashtra permit return of land or release of land from the acquisition proceedings after the payment of compensation and taking over of the possession of land acquired. Under the said Act, the property acquired and the possession thereof being taken it vests in Government free from encumbrances and the only mode which is available for disposal of the land thereafter is by way of public auction. Reliance was sought to be placed in the decision of the Apex Court in *State of Kerala and others Vs. M. Bhaskaran Pillai and another*, *Government of A. P. and Anr. v. Syed Akbar*, reported in AIR 2004 SCW 7125 as well as of this Court in the matter of *Vishnu Kumar and Others Vs. State of Maharashtra and Others*, and *Dattatraya Gopalrao Borkute (Dr.) Vs. State of Maharashtra and Others*, . He further submitted that the Government Resolution which has been referred to in the impugned order has no sanctity to the extent it permits release of land in contravention of the provisions of Section 48 of the said Act and in that regard, attention was drawn to the decision of Division Bench in *Dattatraya Gopalrao Borkute's case (supra)*. He further submitted that the action on the part of the respondents in directing the return of land is not only an abuse of powers under the said Act but also a mala fide action on the part of the respondents, and therefore, the same needs to be struck down.

6. Shri Kumbhakoni, the learned Associate Advocate General, appearing on behalf of the respondent Nos. 1 to 5 submitted that though, consequent to the taking over of the possession, the powers u/s 48 of the said Act cannot be exercised for release of land, however, in the facts of the case, as revealed from the affidavit filed on behalf of the respondents, it has been disclosed that the possession of land in question which was released in favour of the respondent No. 6 had all through out continued with the respondent No. 6 even after the completion of the land acquisition proceedings. Though the records which were prepared disclose taking over the possession of the land in question by the Government, in fact, the physical possession thereof continued with the respondent No. 6, and therefore, no fault can be found with the decision of the Government releasing the land in favour of the respondent No. 6. The attention was drawn to the decision in the matter of *B.A. Basavaiah and Others Vs. Bangalore Development Authority and Others*, *State Government Houseless Harijan Employees' Association v. State of Kamataka and Ors.* reported in (2001)1 SCC 610 , *Om Prakash and Another Vs. State of U.P. and Others*, , *M/s. Larsen and Toubro Ltd. Vs. State of Gujarat and Others*, and of this Court in

Krishi Utpanna Bazar Samiti, Aurangabad Vs. State of Maharashtra and Others, as also Murari and Others Vs. Union of India (UOI) and Others, . He further submitted that mere non-publication of notification regarding release of land would not vitiate the proceedings and such notification can be published even now and it would be a mere procedural lapse which can be cured.

7. The learned advocate appearing for the respondent No. 6 drawing attention to the order of panchanama which was stated to have been recorded on 11th April, 2001 submitted that it has been duly confirmed by the respondents that the property continued to be in possession of the respondent No. 6, and therefore, the decision to release the unutilised land u/s 48 of the said Act cannot be found fault with.

8. Section 48(1) of the said Act clearly provides that the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken. Obviously, therefore, there is a wide discretion to the Government to release any land from the acquisition provided that the possession thereof has not been taken. Section 16 of the said Act clearly provides that when the Collector has made an award u/s 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances. Conjoint reading of these Sections would therefore disclose that once the possession of land which is sought to be acquired in respect of which the award is made u/s 11 is taken over by the acquiring body, certainly such land vests absolutely in the Government free from all encumbrances.

9. The Apex Court in M. Bhaskaran Pillai's case (supra) as well as the recent decision in the matter of Syed Akbar's case (supra) has clearly held after taking note of the above two provisions in the said Act that once the land is acquired for the public purposes, the Government could withdraw from the acquisition of any land provided the possession thereof has not been taken and once the possession is taken, the Government cannot withdraw their acquisition or release the unutilised land to the erstwhile owner of such land. Once the land is acquired, it vests free from encumbrances in the Government, and therefore, it is not open to the Government to transfer or assign the unused or unutilised land to its original owner of such land. Such assignment, if necessary, has to be in accordance with the provisions of law. The Land Revenue Code in force in the State makes detail provisions for disposal of Government land. Once the land having been acquired and the possession thereof taken, it becomes Government property, and disposal thereof on the ground that the acquired land is not necessary for the purpose for which it was acquired could be only by adhering to the provisions of Land Revenue Code and not otherwise. The decisions of this Court in Vishnu Namdeo Kumar's case (supra) as well as in Dattatraya Gopalrao Borkute 's case (supra) are on the same lines.

10. It is to be noted that the Apex Court in Amarnath Ashram Trust Society and Another Vs. Governor of U.P. and Others, had clearly ruled that the Government is not entitled to withdraw from the acquisition based on a misconception of the

correct legal position and in spite of the same, if the Government withdraws land from the acquisition, it could be regarded as arbitrary and not bona fide. The exercise of powers u/s 48 has necessarily to be bona fide and not arbitrarily. The discretion of the State cannot be permitted to be exercised in arbitrary manner. When a decision to withdraw from acquisition is challenged on the ground of exercise of powers being mala fide or being an abuse of power, the State has to disclose the reason for withdrawal. The discretion of the State Government in that behalf, though absolute, has to be justifiable one.

11. In the case in hand, though it is sought to be contended that the possession of land even after conclusion of the acquisition proceedings continued with the respondent No. 6, the records placed before us including the affidavit-in-reply filed on behalf of the respondents apparently disclose that the contention is contrary to the records and therefore is totally devoid of substance. The affidavit filed by Shri Krishna S. Vatsa, the Secretary (Revenue-relief and Rehabilitation) for State of Maharashtra, on behalf of the respondent No. 4 discloses that on 29th May, 1979, a possession receipt was prepared showing that the possession of the land in question was obtained from the respondent No. 6. It also discloses that the mutation entry was effected in the land revenue record under Mutation Entry No. 778 in relation to the said property thereby disclosing that the property had been conveyed and transferred in favour of the Government. The documentary record therefore apparently discloses that the possession of land was taken over by the Government. Undisputedly, the award u/s 11 was declared and the compensation was paid much prior to 29th May, 1979. The award was declared on 30th March, 1979 whereas the compensation was paid on 24th March, 1979 to the respondent No. 6. All the pre-requisition to enable the Government to take the possession were completed much prior to 29th May, 1979, the date on which the possession of the property was taken.

12. The star document on which reliance is placed by the respondents to contend that the possession of the property continued with the respondent No. 6 is the so called panchanama dated 11th April, 2001. Plain reading thereof discloses that it is a tailor-made panchanama and not the panchanama disclosing the true facts. In spite of that, even the panchanama on the face of it discloses that the actual possession was not with the respondent No. 6 after its acquisition. All the three properties to which the panchanama refers to, i.e. Survey Nos. 58/3-c. 58/5/C and 59, described the land to be a waste land. The land bearing Survey No. 59 has been described as being a totally uneven land and that it was fallow and that the additional 3 acres of land comprised of uncultivable land. Curiously, there is also a statement in the panchanama that the land being a waste land is in the possession of Shri Bhosale and the said Shri Bhosale cultivates the land. The panchanama also records that Shri Bhosale derives crops from the said pieces of land. The panchanama nowhere records having seen any crop being grown at the time of inspection of land. It is pertinent to note that the land was inspected on 11th April, 2001. The panchanama nowhere discloses the types of crops those were either grown or seen to have been grown. If the land was waste and

uncultivable land, one fails to understand as to how the panchanama could record that Shri Bhosale was cultivating the land and was deriving crops from such land. This itself discloses that the panchanama was merely a tailor-made panchanama to suit the purpose and to support the incorrect and unacceptable claim regarding the alleged possession of land with the respondent No. 6.

13. Once the records disclose that consequent to the land acquisition proceedings, a panchanama was drawn taking over the possession of a waste land, a presumption will be to the effect that the officers have performed their functions in accordance with the provisions of law, and therefore, have taken possession of the property. Taking over the possession of a property would depend upon the nature of the property. In cases where the land is waste land, mere panchanama of taking over the possession of the property itself would be a proof of taking over the possession of such property. It may be different thing in the case of enclosure or a structure occupied by some person or persons in which case unless there is physical entry in the enclosure or the physical possession of such structure is taken it may not amount to taking over the possession of such area or premises by the Government. That is not the case in the matter in hand. Undisputedly, the land in question is a waste land and uncultivable land, and therefore, mere recording of panchanama disclosing taking over of the possession of the land by the authorities, consequent to the conclusion of the land acquisition proceedings including the payment of compensation, would be a proof of taking over the possession of such land by the Government, and vesting thereof in the Government.

14. Though the respondents have strenuously sought to contend that the possession continued with the respondent No. 6 contrary to the possession receipt dated 29th May, 1979, the affidavit filed by Shri Vatsa speaks to the contrary and it discloses that the possession of the acquired land was with the Government till 4th November, 2003. The paragraph 4(23) of the said affidavit of Shri Vatsa reads thus :

4(23) 4-11-2003. The possession receipt of the land admeasuring about 5 Hector and 27 Ares was prepared showing that possession was restored to Shri Jawahar Yashwant Bhosale and an mutation entry No. 1177 was effected to that effect in the revenue record.

Obviously, the question of preparation of possession receipt of 4th November, 2003 would not have arisen if the possession was not with the Government. This very statement discloses that the possession was taken by the Government on 29th May, 1979 and was sought to be restored on 4th November, 2003 to Shri Jawahar Yashwant Bhosale. The impugned orders and the affidavit consistently disclose that the land was sought to be returned to the erstwhile owner on the ground that it was in excess for the purpose for which it was sought to be acquired. It is not in dispute that the acquisition was in terms of the said Act. It is also not in dispute that the inquiry u/s 5A of the said Act was conducted in the matter. Being so, the authorities must have applied their mind about the need of

the properties and then proceeded to acquire the entire land in the case in hand. Merely because, subsequently, certain part of the land was found to be not useful for the purpose for which it was acquired, neither it empowers nor justifies return of the land to the erstwhile owner by the Government u/s 48 of the said Act. The Apex Court in M. Bhaskaran Pillai's case (supra) as well as in Syed Akbar's case (supra), in no uncertain terms, has ruled that no such release is possible on the ground that the property is found to be not useful for the purpose for which it was acquired. Section 48(1) of the said Act does not empower the Government to exercise its discretion in that regard. Once the possession is taken over, the property vests in the Government.

15. It is also to be noted that though the acquisition of land is from the respondent No. 6 to whom it belonged to, the impugned orders as well as the affidavit-in-reply disclose the return of land in favour of his son by name Shri Jaywant Bhosale. It is not understood as to how the authorities could have returned the land to the son of the erstwhile owner. Even if it was in exercise of the powers u/s 48, release of land could be in favour of the erstwhile owner and not in favour of his son Shri Jaywant or his relation. Merely because the owner gives a power of attorney to act on his behalf, neither release nor delivery of possession can be to the power of attorney in his individual capacity but it has to be on behalf of the erstwhile owner.

16. The facts of the case obviously disclose that though the land was acquired and even the possession was taken over and consequently the property vested in the Government free from encumbrances, the authorities had illegally allowed the respondent No. 6 to utilise the said land without any authority and without any compensation payable to the Government. Thus, the Government property was allowed to be utilised by private person illegally, without ensuring proper return to the Government on account of such utilisation of land by private person. To a specific query by the Court as to whether there are any other instances in the State of Maharashtra where the land is acquired and already vested in Government, yet is allowed to be utilised either by the erstwhile owners or strangers, the learned Associate Advocate General merely stated that this is a normal practice to keep the land acquired in the Collector's pool and as and when the applications are made for grant of land, such land is allotted, out of such pool. Meanwhile, the erstwhile owners are allowed to utilise the land. However, no compensation is recovered from them for such utilisation. No specific information could be placed on record about the total area of such land which is being allowed to be utilised illegally by erstwhile owners without any compensation to the Government.

17. Once it is brought to the notice of this Court that the acquired land which has vested in Government free from encumbrances is being unauthorisedly and illegally allowed to be utilised, either by erstwhile owners or strangers, without any payment of compensation for utilisation of such land and since this is said to be a practice followed throughout the State, this Court is compelled to take

judicial notice of such illegal activities on the part of the Government authorities and to issue necessary directions to stop such illegal activities and utilisation of public property to the detrimental of public exchequer.

18. Once the property vests in Government, the utilisation of such property has to be in accordance with the provisions of law. No person can be allowed to use such public property without any compensation being paid to the Government and without following the procedure prescribed for allowing utilisation of such land. Any procedure adopted contrary to the one laid down in law in that regard would be illegal on the part of the Government and its officers and the same having been brought to the notice of this Court, it cannot be allowed to be continued and has to put to an end as the continuation thereof is bound to cause great prejudice to the tax-payers and public in general.

19. In the circumstances, therefore, it would be necessary to issue direction to the Government to take immediate steps to stop such illegal activities and encroachments on the Government land. The Government should immediately take steps to take possession of land which is being not utilised for the purpose for which it was acquired but which is being illegally utilised by private persons, either by erstwhile owners or the strangers, and to take immediate steps to restrain them from illegally utilising such acquired land which is vested in Government. The Government shall in that regard issue necessary directions to the Collector of each District to take steps within time-bound programme and publish a list of such acquired lands which are yet to be utilised for the purpose for which they were acquired and action taken against the persons who are illegally occupying or utilising the same, and to publish this information in the Government Gazette as well as at the office of the Collector of each District as also the office of Tahsildar of each Tahsil within a period of three months from this date and in any case on or before 30th July, 2006. The Government should also through the Secretary (Revenue) file compliance report of this direction with the Registry of this Court in the third week of August, 2006 and the Registry shall place the same before this Court in the second week of September, 2006.

20. As far as the case in hand is concerned, for the reasons stated above, the order directing return of land in question cannot be sustained and both the impugned orders in that regard are liable to be quashed and set aside and accordingly the same are hereby quashed and set aside. The respondent Nos. 1 and 5 shall take appropriate steps to recover compensation towards utilisation of land in question from the respondent No. 6 from the date of taking over of the possession of the said land i.e. from 11th April, 2001 till the date of recovery of possession of the land in accordance with the provisions of law and also file compliance report of the said directions by third week of August, 2006 and consequently the matter should be placed before this Court in the second week of September, 2006 for consideration of the compliance report.

21. The respondent Nos. 1 to 5 are directed to take over the possession of land in question in the case in hand as early as possible and in any case within a

period of four months and to file compliance report thereof in this Court in the third week of August, 2006 which shall be placed before this Court for consideration thereof in the second week of September, 2006.

22. The rule is made absolute in above terms. The respondent No. 6 shall pay costs of Rs. 3,000/- to the petitioners.