

(2009) 03 BOM CK 0063

In the Bombay High Court

Case No : Writ Petition No. 3031 of 2004

Pimpri Chinchwad New Town Development Authority

APPELLANT

Vs

The State of Maharashtra and Others
 In Re: Alfa Abaji
Kalate and Shri Bajirao Abaji Kalate

RESPONDENT

Date of Decision : 24-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, Order 21 Rule 36, Order 21 Rule 95, Order 21 Rule 96

General Clauses Act, 1897 — Section 17(1), 21

Land Acquisition Act, 1984 — Section 11, 16, 36, 4, 48

Maharashtra Regional and Town Planning Act, 1966 — Section 113, 113(2), 4, 48, 6

Citation : (2009) 111 BOMLR 1939

Hon'ble Judges : J.H. Bhatia, J;Bilal Nazki, J

Bench : Division Bench

Advocate : C.J. Sawant and Vijay Patil, for the Appellant; C.R. Sonawane, AGP for Respondent Nos. 1 and 3 to 5, G.S. Godbole, G.H. Keluskar and S.S. Hadikar, for the Respondent

Judgement

Bilal Nazki, J.—The State Government decided to set up a new town in terms of Chapter VI of the Maharashtra Regional Town Planning Act and for that purpose a Notification was issued in the year 1972 u/s 113 of the Maharashtra Regional Town Planning Act (for short "MRTP Act"). The State Government designated a total area of about 4323 Hectares land for the site of proposed new town. The said Notification created the petitioner as an Authority u/s 113 Sub section 2 of the MRTP Act. Thereafter, proceedings under the Land Acquisition Act were initiated for the purpose of acquisition of land. The area of about 2400 Hectares of land were sought to be acquired through this Notification. This land falls in 10 villages in and around Pimpri Chinchwad and Nigadi. The petitioner authority gave a draft development plan under the provisions of the MRTP Act to the Government of Maharashtra for sanction in the year 1974. The Plan was finally sanctioned on 8th September, 1977. The land bearing Survey No. 209 admeasuring 6 H. 46 Ares at Village Wakad was notified for acquisition for

`public purpose" u/s 4 of the MRTP Act on 9th March, 1970 and was gazetted in the Government Gazette on 12th March, 1970 along with the other lands. The Notification u/s 6 of the MRTP Act was issued on 9th November, 1972 and was gazetted on 23rd November, 1972. The Award was passed in respect of the land on 23rd September, 1986. The Special Land Acquisition Officer handed over possession, according to the petitioner, to them on 23rd August, 1989. The lands fall in Sector No. 38 of the sanctioned Development Plan. The lands surrounding the present lands, which have also been acquired by the petitioner authority, have already been developed. As per the lay out of Sector 38, plots have been allotted to the erstwhile owners whose lands have been acquired as per the Policy of the State Government to allot 12.5% of the acquired land in lieu of acquisition. The petitioner contends that they received letter from the Revenue Department to the effect that respondent No. 6 had filed an application with the Government for withdrawal of land from acquisition u/s 48 of the MRTP Act and the petitioner authority was called upon to submit its view to the said application to the Government. Respondent No. 6 had claimed that the members of the Society had purchased plots from the original owners under registered Sale Deed executed at different times between 1998 to 1997. The plots were situated within the area of the petitioner Authority and were located in residential zone. The Respondent No. 6 further contended before the Government that though the award was made in the year 1986, possession of the lands had not been taken. The respondent No. 6 further contended that the purpose of acquisition was utilisation of land for residential purpose, and if the members of respondent No. 6 Society were allowed to built their houses, the purpose would be met. On 10th September, 2003 the petitioner filed its written reply and opposed the application for withdrawal of lands from acquisition. On 18th September, 2003, the petitioner filed further affidavit opposing the deletion. On 14th February, 2003 the Collector, Pune submitted his view and according to the petitioner, as far as their knowledge goes, the Collector opposed the deletion of the land. On 5th February, 2003 the Special Land Acquisition Officer informed by a letter to the Collector that possession of the land has been taken over and handed over to the petitioner. Respondent No. 2, who was the Revenue Minister, heard the matter on 18th September, 2003 and petitioner received a copy of the order dated 23rd January, 2004 with forwarding letter dated 23rd January, 2004. By this order the Minister allowed the application of respondent No. 6 and deleted from acquisition the lands bearing Survey No. 209/1 to 6 at Wakad as demarcated in the map by red boundary u/s 48(1) of the Land Acquisition Act, 1984. The writ petition challenges this order of the Minister.

2. Briefly, the learned Counsel for the petitioner has submitted that respondent No. 2 should have not allowed the application of respondent No. 6 society as the petitioner had become absolute owner of the property. Award had been passed in the year 1986 and on their own showing, respondent No. 6 had purchased the plots between the year 1998/1997 i.e. more than the decade after the acquisition had been completed and after completion of the acquisition

respondent No. 2 had no authority to exercise powers u/s 48(1) of the Land Acquisition Act. This argument is countered by respondent No. 6 saying that the possession had not been taken and the Special Land Acquisition Officer and the acquiring body had not initiated any action u/s 16 of the Land Acquisition Act to take possession of the land in respect of which the said Award came to be passed. Therefore, the land owners validly partitioned their shares and caused revenue records corrected before making of the award by the Special Land Acquisition Officer, Pune. It is further submitted that since the process of deleting the lands from acquisition, before award and withdrawal of some lands after the award continued, the erstwhile owners continued in possession of the lands and sold out small plots from the land to various needy persons and put them in possession thereof. Thereafter, these plot owners subsequently promoted a cooperative housing society and got it duly registered under the Maharashtra Cooperative Societies Act. The members of respondent No. 6 have been and are still in undisturbed and peaceful possession of the lands in question.

3. Now in order to appreciate this argument, a look at Section 48(1) of the Land Acquisition Act, 1984 is necessary, which reads thus:

Except in the case provided for in Section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.

Section 48(1) lays down that the Government has powers, except in cases provided in Section 36 of the Land Acquisition Act, to withdraw from acquisition of any land. But this does not mean that whenever some third party comes with an application that the Government should pass such an order, the Government should pass such an order. The section further postulates that the Government can exercise its powers before the possession of the land under acquisition has been taken. In order to appreciate the power that the Government enjoys u/s 48 of the Land Acquisition Act, one has to go through the scheme of the Land Acquisition Act. Section 4 of the Act gives power to the Government to acquire lands which are likely to be needed for any public purpose. So the whole power of the Government to acquire land is based upon its need to acquire such land for public purpose. Therefore, it must be understood that the power u/s 48 of the Act can be utilised for withdrawing from acquisition if the public purpose for which the land was sought to be acquired is vanished or the acquisition is not going to serve any public purpose. There is nothing on record to show that the public purpose for which the land was acquired in the year 1986, for which the proceedings were initiated in the year 1972 and the public purpose was mentioned in Section 4 Notification specifically, it was the development of new township had been served. It must also be remembered that once land is acquired by the State Government, the State Government becomes absolute owner in terms of Section 16 of the Land Acquisition Act, which lays down that "When the Collector makes an award u/s 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all

encumbrances".

4. Now, the Minister did not take any evidence as to whether the possession was taken or the possession was not taken. He took into consideration the panchnama which was relied upon by the petitioner as well as the State Authorities and analysed the panchnama to come to the conclusion that possession had not been taken. The said panchnama reads thus:

PANCHANAMA

We the undersigned panch witnesses, residents of Wakad, Taluka Mulshi, District Pune, are present in person and record the Panchanama as follows.

Lands at Village Wakad, Taluka Mulshi, District Pune have been acquired for Pimpri Chinchwad Nagnagar Vikas Pradhikaran and notices were served on 21.8.1989 to the concerned owners of the land to remain present in person on 23.8.1989 for the purpose of taking possession. As the owners of land who have either accepted the notice or not accepted and are not ready to voluntarily deliver possession by remaining present or absent on the day on which possession was taken the possession of their acquired land has been taken from them and delivered to the representative of Pimpri Chinchwad Navnagar Pradhikaran in the presence of us panch witness as under:

Possession has been taken as above and as Bombay High Court has stayed possession of two lands bearing Survey Nos. 210 and 211, possession thereof has not been taken. Order of the Bombay High Court staying possession is enclosed herewith. Panchanama recorded on 23.8.1989.

5. Respondent No. 5 has filed an affidavit and has admitted the assertion made by the petitioner in paragraph 10 of the writ petition with respect to the report sent by him to the Collector on 5th February, 2003 that the possession had been delivered to the petitioner. The Minister, while considering the question of handing over of possession to the petitioner, came to the following conclusion:

24. Applicant's Advocate Shri Mohanrao Patil mentioned that looking to the defects in the panchnama in the present case even by no stretch of imagination a prudent person will believe that actual physical possession of all Pot Hissas of the land admeasuring 18H 75.2 Are (approximately 47 acres) was taken simultaneously under such a Panchanama.

The Minister found the following errors in the panchnama:

a) Though the "Pot Hissas" of the lands bearing Survey Nos. 208 and 209 have been noted in the revenue records prior to date of possession, the same have not been mentioned.

b) Time of commencing the Panchanama and time of concluding the same have not been mentioned.

c) Physical features of the land like existing houses, wells, trees, compound wall

or standing crops at the time of taking possession of land in question have not been mentioned.

d) The land/S. No. and PotHissa No. in which the Panchanama was recorded have not been mentioned.

e) Names of the landholders who were present on the spot and who refused to deliver possession as well as the landholders who were absent inspite of service of receipt have not been mentioned in the Panchanama.

The Panchanama was executed when respondent No. 6 Society was nowhere in the picture. Their sale deed came into existence after 10 years after the award was passed. The erstwhile owners did not dispute even before the Minister that they had not parted with possession of the land. Reliance may be placed on the judgement of the Supreme Court in the case of Navnit R. Kamani and Others Vs. R.R. Kamani, . The High Court in this case had not believed the panchanama. A three Judge Bench of the Supreme Court discussed the issue as follows:

Affidavits of the panchas filed in the High Court which contained statements contrary to what was recorded in the panchnama and against the revenue entries are quite meaningless and in our opinion the High Court unnecessarily put undue reliance on the same. The High Court could not convert itself into a revenue court and hold that in spite of the panchnama and the revenue records actual physical possession of the acquired land had not been handed over to the acquiring body. The High Court, in our opinion had not correctly analysed the two judgments of this Court in Balmokand Khatri Educational and Industrial Trust v. State of Punjab and Balwant Narayan Bhagde v. M.D. Bhagwat to come to the conclusion that actual physical possession of the land was not taken over by the State.

6. None of the errors mentioned by the Minister could establish that possession had not been taken as a matter of fact. The official record otherwise has a presumption of proof and onus of proving this official record to be wrong or imaginary was on respondent No. 6, who have not discharged that onus. On the other hand, it appears that the acquisition of the land in terms of Section 16 of the Land Acquisition Act was complete on 23rd August, 1989. At this point of time, the erstwhile owners had lost all interest in the property and the Sale Deed executed a decade ago by those erstwhile owners in favour of respondent No. 6 would not transfer any right or title to respondent No. 6. The fact that owners were allotted 12.5% of the land in lieu of acquisition and the fact that erstwhile owners never complained, were sufficient to establish that erstwhile owners had given up possession and even received compensation of 12.5% of developed land without protest.

7. It has been brought to our notice that a Bench of this Court has already allowed the writ petition raising the similar question being Writ Petition No. 142 of 2005 (Pimpri Chinchwad New Town Development Authority v. The State of Maharashtra and Ors.) decided on 24th August, 2005. The said writ petition

pertained to the land bearing Gat No. 1130 admeasuring 2 Hectares situated at Village Chikhali. The award had been passed on 13th August, 1986. In the said case also the power u/s 48 of the Land Acquisition Act has been exercised by the Minister and the Minister had passed an order on 27th August, 2004. The High Court, noted about the panchanama, in paragraph 9 of the said order, as under:

9. It must be also noted here that in the affidavit in reply which is filed on behalf of the Government, the Special Land Acquisition Officer Nayana Bondarde has not controverted the factual averments which are made in the Petition and has also not given any justification for the order passed by the respondent No. 2.

8. Learned Counsel for the petitioner has relied on the Judgment of the Supreme Court in the case of Balwant Narayan Bhagde Vs. M.D. Bhagwat and Others, , to suggest that the delivery of possession was not given as is contemplated under the law. Shri Justice Untwalia was of the view that "No further notice beyond that u/s 9(1) of the Act is required. When possession has been taken, the owner or the occupant of the land is dispossessed. Once possession has been taken the land vests in the Government". But in paragraph 27 the two Judges though concurred with Justice Untwalia but also recorded a distinctive note. The said paragraph 27 reads as under:

27. We agree with the conclusion reached by our brother Untwalia, J., as also with the reasoning on which the conclusion is based. But we are writing a separate judgment as we feel that the discussion in the judgment of our learned brother Untwalia, J., in regard to delivery of `symbolical" and `actual" possession under Rules 35, 36, 95 and 96 of Order XXI of the CPC is not necessary for the disposal of the present appeals and we do not wish to subscribe to what has been said by our learned brother Untwalia, J. in that connection, nor do we wish to express our assent with the discussion of the various authorities made by him in his judgment. We think it is enough to state that when the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, 1894, it must take actual possession of the land, since all interests in the land are sought to be acquired by it. There can be no question of taking `symbolical" possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard and fast rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. But here, in our opinion, since the land was lying fallow and there was no crop on it at the material time, the act of the Tehsildar in going on the spot and inspecting the land for the purpose of

determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tehsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it.

This judgment was considered by the subsequent Bench of three Judge of the Supreme Court in the case of Navnit R. Kamani and Others Vs. R.R. Kamani, . In paragraph 14 the Supreme Court held as under:

14. In Balwant Narayan Bhagde v. M. D. Bhagwat, a three Judge Bench of this Court was considering the question of taking possession of the acquired land under the Act. Bhagwati, J. (as he then was) delivered judgment for himself and A. C. Gupta, J. He said he agreed with the conclusion reached by Untwalia, J. (who was the third Judge) as also with the reasoning on which the conclusion was based. He, however, said that a separate judgment was being written as he felt that it was not necessary to consider the question of delivery of "symbolical" and "actual" possession as provided in Rules 35, 36, 95 and 96 of Order XXI of the CPC as that was not necessary for the disposal of the appeal before the Court. Bhagwati, J. said as under:

There can be no question of taking `symbolical" possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard and fast rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. But here, in our opinion, since the land was lying fallow and there was no crop on it at the material time, the act of the Tehsildar in going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tehsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be

given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper possession, without the occupant or the owner ever coming to know of it.

Another Judgment to which reference is made in the said judgment is the Judgment in the case of T.N. Housing Board v. A. Viswam reported in (1996) 8 SCC 25. Paragraph 9 of the judgment reads as under:

9. It is settled law by series of judgments of this Court that one of the accepted modes of taking possession of the acquired land is recording of a memorandum of panchnama by the LAO in the presence of witnesses signed by him/them and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. It is common knowledge that in some cases the owner/interested person may not cooperate in taking possession of the land.

9. Even if it is accepted that the actual physical possession must be taken in order to complete the acquisition, even then we do not find anything on record whereby respondent No. 6 could have established that the possession was not with the petitioner but possession was with them. They have also relied upon the Judgment of the Supreme Court in the case of Special Land Acquisition Officer, Bombay and Others Vs. Godrej and Boyce, . This judgement came altogether in a different factual position. This was the case where the Government did not go ahead with the acquisition and the owners insisted that the Government should go on with the acquisition. The question arising now in this petition did not arise in the matter before the Supreme Court. There are other judgments on which reliance has been placed by the petitioner. One of them is the Judgment in the case of State of Kerala and others Vs. M. Bhaskaran Pillai and another, . This judgment is a short judgment. Paragraph 4 of the judgment needs to be reproduced, as under:

4. In view of the admitted position that the land in question was acquired under the Land Acquisition Act, 1894 by operation of Section 16 of the Land Acquisition Act, it stood vested in the State free from all encumbrances. The question emerges whether the Government can assign the land to the erstwhile owners? It is settled law that if the land is acquired for a public purpose, after the public purpose was achieved, the rest of the land could be used for any other public purpose. In case there is no other public purpose for which the land is needed, then instead of disposal by way of sale to the erstwhile owner, the land should be put to public auction and the amount fetched in the public auction can be better utilised for the public purpose envisaged in the Directive Principles of the Constitution. In the present case, what we find is that the executive order is not in consonance with the provision of the Act and is, therefore, invalid. Under these circumstances, the Division Bench is well justified in declaring the executive order as invalid. Whatever assignment is made, should be for a public purpose.

Otherwise, the land of the Government should be sold only through the public auction so that the public also gets benefited by getting a higher value.

This judgment lays down that when the acquisition of the land is complete and if the Government does not feel any need to utilise it for the purpose for which it was acquired, the Government can utilise the land for any other public purpose. If no public purpose can be served by utilising the land, the land should be sold by public auction and should not be assigned to erstwhile owners. Similarly, in the case of *Lt. Governor of Himachal Pradesh and Another Vs. Avinash Sharma*, , the Supreme Court held in paragraph 6 as under:

Power to cancel a notification for compulsory acquisition is, it is true, not affected by Section 48 of the Act; by a notification u/s 21 of the General Clauses Act, the Government may cancel or rescind the notification issued under Sections 4 and 6 of the Land Acquisition Act. But the power u/s 21 of the General Clauses Act cannot be exercised after the land statutorily vests in the State Government.

Then in the same judgment in paragraph 8 the Supreme Court held as under:

It is clearly implicit in the observations that after possession has been taken pursuant to a notification u/s 17(1) the land is vested in the Government, and the notification cannot be cancelled u/s 21 of the General Clauses Act, nor can the notification be withdrawn in exercise of the powers u/s 48 of the Land Acquisition Act. Any other view would enable the State Government to circumvent the specific provision by relying upon a general power. When possession of the land is taken u/s 17(1), the land vests in the Government. There is no provision by which land statutorily vested in the Government reverts to the original owner by mere cancellation of the notification.

These observations were quoted by the Supreme Court in the later judgment in the case of *Bangalore Development Authority and Others Vs. R. Hanumaiah and Others*, The same view was taken in the case of *Pratap and Others Vs. State of Rajasthan and Others*, In *Bangalore Development Authority (supra)*, the Supreme Court in paragraph 47 further said as under:

47. the High Court also erred in holding that land acquisition process and the vesting process became incomplete since the land owners were asked to redeposit the amount of compensation. The High Court failed to take notice of Section 31 of the Land Acquisition Act. Section 31 contemplates that on making of an award u/s 11 the Collector shall tender amount of compensation awarded by him to the person interested and entitled thereto according to the award and shall pay to them unless prevented by any one or more of the contingencies mentioned in the subsequent clauses. None of those contingencies arose in the present case. Thus, once the amount was tendered and paid the acquisition process was complete. After making the award u/s 11 the Collector can take possession of the land u/s 16 which shall thereupon vest absolutely in the Government free from all encumbrances. In the instant case, after making the payment in terms of the award, possession was taken. The acquisition process

stood completed. The subsequent development will not alter the fact that the acquisition was complete.

Similar view is taken by the Supreme Court in the case of P.K. Kalburqi v. State of Karnataka and Ors. reported in (2005) 12 SCC 489 Paragraph 9 of the said judgment reads thus:

A plain reading of the said section would indicate that the power conferred on the Deputy Commissioner is enabling in nature, and if such a notification is issued it shall be evidence of the fact that possession was taken, though not conclusive. Such a notification would be a piece of evidence which may establish that possession of the lands was in fact taken. It is not as if in the absence of such a notification the Court cannot consider the other evidence on record which has a bearing on this question. We are, therefore, satisfied that the High Court was right in coming to the conclusion that possession of the lands was taken by the State and there was therefore no authority in the State Government to issue a notification denotifying the lands u/s 19(7) of the Karnataka Urban Development Authorities Act, 1987.

Similarly, in the case of State Government Houseless Harijan Employees Association v. State of Karnataka and Ors. reported in AIR 2001 SC 437 the Supreme Court held that even in an application u/s 48 the beneficiary has a right to be heard as it was contended by the petitioner that they were given a notice and they replied but they were not heard. Had they been given a chance they could have even proved panchnama through oral testimony.

10. For all these reasons given by us hereinabove, we do not find that respondent No. 2 was right in passing an order u/s 48(1) of the Land Acquisition Act to withdraw from acquisition of the land in question. Therefore, the impugned order dated 23rd January, 2004 passed by respondent No. 2 is hereby quashed and set aside.

11. Rule made absolute, accordingly.

12. In the circumstances of the case, there shall be no order as to costs.