

**(2006) 07 BOM CK 0048**

**In the Bombay High Court**

**Case No : Writ Petition No. 4858 of 2005**

Prakash Vishwanath Khute and Others

APPELLANT

Vs

Special Land Acquisition Officer and Others

RESPONDENT

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**Date of Decision : 10-07-2006**

**Acts Referred:**

Constitution of India, 1950 — Article 300A

Evidence Act, 1872 — Section 114

Land Acquisition Act, 1894 — Section 10, 11, 12, 13, 14

**Citation :** (2006) 6 ALLMR 245 : (2007) 2 BomCR 408 : (2006) 6 MhLj 295

**Hon'ble Judges :** S.R. Dongaonkar, J; R.M.S. Khandeparkar, J

**Bench :** Division Bench

**Advocate :** Anil Mardikar, for the Appellant; A.G. Mujumdar, Asst. Government Pleader for Respondent Nos. 1 and 2 and J.T. Gilda, for the Respondent

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## **Judgement**

R.M.S. Khandeparkar, J.—Heard. Rule. By consent, the rule is made returnable forthwith.

2. By the present petition, the petitioners challenge the award dated 4-11-2003 declared u/s 11 of the Land Acquisition Act, 1894, hereinafter called as "the said Act". The award is in relation to acquisition of the land which was sought to be acquired under the Notification issued u/s 4 of the said Act on 5-4-2001 for the purpose of construction of 7 to 11 km. Canal of Pentakli Medium Irrigation Project. The challenge is on the ground that the award is bad in law in view of the provisions of law comprised u/s 11-A(1) of the said Act, since it is declared beyond the period of two years from the date of publication of the declaration u/s 6 of the said Act.

3. The undisputed facts relevant for the decision are that the Notification u/s 4 of the said Act seeking to acquire the land of the petitioners was issued on 5-4-2001. The declaration u/s 6 of the said Act was published in the official gazette on 10-9-2001 and in the newspaper it was published on 15-9-2001. The award u/s 11 was declared on 4-11-2003.

4. It is the contention of the petitioners that the last date of publication of the declaration u/s 6 was 15-9-2001 when the same was published in the newspaper, as the said declaration was never published at Chawadi or anywhere else after its publication in the newspaper. On the other hand, it is the contention of the respondents that the declaration u/s 6 was published at Chawadi consequent to the letter issued in that regard to the Tahsildar on 5-11-2001. Since the last declaration was made subsequent to 5-11-2001 and as the award was declared on 4-11-2003, it was declared within the period of two years, as was required u/s 11-A of the said Act.

5. At this stage, it is also necessary to note that the petitioners had applied for advance payment of the compensation under their letters addressed to the Land Acquisition Officer and consequent to such letters, the petitioners were paid 80% of the compensation. It is also an admitted fact that in those letters, the petitioners had confirmed that the possession of the land under acquisition was delivered in March, 1999 to the Land Acquisition Officer.

6. While it is the contention of the petitioners that mere advance payment of compensation on request of the petitioners would not validate the acquisition proceedings in view of non-compliance of the mandatory provision of law comprised u/s 11-A. On the other hand, it is the contention of the respondents that the payment of compensation in response to the applications by the petitioners and confirmation of delivery of possession of land on account of the advance payment of the compensation would amount to compliance of the provision of Section 17(3) of the said Act and, therefore, it is too late for the petitioners to challenge the award by taking resort to the provision of Section 11-A of the said Act.

7. On behalf of the petitioners, reliance is placed in an unreported decision of this Court in Writ Petition No. 1372 of 2004, Kashinath s/o Ranappa Mitkari and Ors. v. Special Land Acquisition Officer (Maharashtra State), Buldana and Anr. dated 4-4-2005, as well as the decisions in the matters of Mahesh Shivaji Dighe and Another Vs. State of Maharashtra and Others, , Narayan Govind Gavate and Others Vs. State of Maharashtra and Others, and Jethmull Bhojraj Vs. State of Bihar and Others, , whereas the learned Advocate for the respondent No. 3 has sought to rely upon the decision in the matter of Satendra Prasad Jain and Others Vs. State of U.P. and Others, . The learned Assistant Government Pleader has also sought to rely upon the decision in the matter of Municipal Council, Ahmednagar and Anr. v. Shah Hyder Beig and Ors. reported in 2000 (3) Mh. L.J. 1.

8. Section 11-A of the said Act deals with the period within which the award u/s 11 can be declared. It provides that the Collector shall make an award u/s 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse. The explanation to the said section provides that in computing the period of two years referred to in this section, the period

during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a Court shall be excluded. The said provision of law, therefore, makes it abundantly clear that the authorities have to conclude the land acquisition proceedings, as far as the determination of the area to be acquired, the compensation to be paid and the interested persons to be identified for the purpose of payment of compensation within a specified period thereunder. In case of failure to do so, the entire proceedings for acquisition of the land would lapse. It is well-settled principle of law that when a statutory provision for exercise of power requires compliance of certain conditions and such provision also provides for consequences for non-compliance of those conditions, then such provision of law is to be construed as mandatory one. The mandate under such statutory provision cannot be ignored. Indeed, this aspect has been duly considered in detail in the decision delivered by this Court to which one of us had been a party (R.M.S. Khandeparkar, J.) in Mahesh Shivaji Dighe's case (supra). In the said decision, relying upon the decision of the Apex Court in State of Karnataka Vs. A.B. Nagaraj and Another, , it was held that:

it is mandatory for the authorities to make an award u/s 11 within the period of two years as specified under the provision of law comprised u/s 11A of the said Act and, in case of failure to make such award, the entire proceedings for acquisition stand lapsed. Secondly, it follows that the period of two years has to be counted from the date of the last declaration of the notification u/s 6. Thirdly, that for the purpose of publication and declaration of notification all the three modes as prescribed under the law and clarified by the decision of the Apex Court are required to be followed strictly in consonance with the provisions of law. Any failure in that regard on the part of the authority may prove fatal to the acquisition proceedings and penal consequences may follow.

Apparently, therefore, when there is challenge to the award on account of failure on the part of the authorities to declare such award within the period of two years as specified u/s 11-A, it is obligatory for the respondents to produce cogent materials before the Court disclosing the last date of publication of the declaration u/s 6 and to establish that the award was declared within a period two years from such date. Failure in that regard will result in lapsing of the entire proceedings for acquisition of the land.

9. In the case in hand, undisputedly, the award was declared on 4-11-2003 and the declaration u/s 6 was undoubtedly published in the newspaper on 15-9-2001. Considering the last date of publication of declaration u/s 6, evidently the award was declared beyond the period of two years. However, it is the contention of the respondents that the last date of publication of the declaration u/s 6 was after 5-11-2001 and in that regard the affidavit filed by the respondents discloses a categorical statement to the effect that "the Chawadi Publication of Notification u/s 6 was published on 5-11-2001. The last publication u/s 6 (Chawadi Publication at Gram-Panchayat) was made on 5-11-2001.". As the affidavit did not disclose the basis for such statement, the respondents were directed to file proper

affidavit disclosing the basis on which the said statement was made. Undisputedly, along with the affidavit dated 1-3-2006, the respondents had not produced any supporting material to justify the statement that the Chawadi publication at Gram Panchayat was made on 5-11-2001. The respondents thereupon filed further affidavit stating that the statement about the Chawadi publication was made on the basis of the letter dated 5-11-2001 by the Land Acquisition Officer to the Tahsildar, Mehekar asking him to publish the declaration u/s 6 on the notice board and in the Gram Panchayat as well. Apart from a mere statement that such a letter was addressed to the Tahsildar, Mehekar, the respondents have not produced any material in support of the actual publication of such declaration u/s 6, either on the notice board or in the Gram Panchayat. There is not even an assertion in the affidavit of 24-6-2006, consequent to the direction by this Court under the order dated 20-4-2006 requiring the respondents to disclose the basis on which they claim such publication at Chawadi, that in fact consequent to the letter 5-11-2001 the Tahsildar, Mehekar had taken proper steps to ensure due compliance of the direction issued under the said letter. There is no panchnama produced on record disclosing the actual publication of such declaration in the Gram Panchayat on or after 5-11-2001. There is no record produced to disclose that such a letter dated 5-11-2001 was actually received by the Tahsildar, Mehekar or that the declaration was displayed in the office of the Gram Panchayat or on the notice board of the Tahsildar's office. Obviously therefore, apart from making mere claim that the letter dated 5-11-2001 was addressed to the Tahsildar, Mehekar by the Land Acquisition Officer for the publication of the declaration u/s 6 at Gram Panchayat and on the notice board, there is nothing on record to substantiate such claim on the part of the respondents. We are aware of the provision of Section 114 of the Evidence Act which gives presumption for official acts performed in the course of the performance of official duties. However, it is to be noted that whenever there is a specific denial about the performance of a particular act, it becomes obligatory for the concerned officer to produce cogent materials before the Court to disclose and establish the performance of the act. The Section 114 of the Evidence Act will not come to the aid to the officer who fails to perform this obligation when the matter is under challenge before the Court. It is more so, when the conduct of the respondents is sufficient to raise doubt about the bona fide regarding such claim. It is pertinent to note that the respondents have not produced any material on record even to show that the letter dated 5-11-2001 was actually and factually sent to the addressee of the said letter and the same was received by the addressee.

10. It is to be noted that undisputedly similar challenge was thrown in another Writ Petition being Writ Petition No. 1372 of 2004 (supra). And this fact is further confirmed by the respondents themselves in their affidavit dated 24-6-2006. While disposing the said Writ Petition under the order dated 4-4-2005, the respondents had unequivocally admitted that there was no publication of the declaration u/s 6 of the said Act after 15-9-2001, and further that the award

declared u/s 11 was hit by the provision of Section 11-A of the said Act. The relevant portion of the said order dated 4-4-2005 reads thus:

Civil Application No. 2392 of 2005 has been filed in Writ Petition No. 5456 of 2004 by the Land Acquisition Officer. Along with said Civil Application, a communication dated 8th February, 2005 has been filed on record in the said petition. In the said communication it has been admitted in unequivocal terms that the award passed u/s 11 has been passed after lapse of period of two years from the date on which a notification u/s 6(2) of the said Act was made by the Commissioner....

It is thus admitted position on record that the award passed by the respondent-authority u/s 11 is hit by the provisions of section

11(a) of the said Act....

Therefore, it being an admitted fact that the award in question was passed after the lapse of the period of two years from the date of publication of the declaration u/s 6(2) of the said Act, the respondents having failed to place on record cogent materials regarding the actual communication of the letter dated 5-11-2001 to the Tahsildar, Mehekar and further about due compliance of the directions under the said letter by the Tahsildar, Mehekar, including the actual publication of the declaration u/s 6 at the Gram Panchayat on or after 5-11-2001, the inevitable conclusion, and the only conclusion, which can be drawn is that the last date of publication of declaration u/s 6 was 15-9-2001 i.e. the day on which the same was published in the newspaper and that the impugned award was declared after the expiry of the period of two year from the last date of publication of the declaration u/s 6 of the said Act. Consequently, the consequences as contemplated u/s 11-A of the said Act have to follow. The consequences are none other than that such an award is to be declared as bad in law, resulting in lapsing of the entire acquisition proceedings in question.

11. A feeble attempt was made to contend that the lapsing will relate only to the land which was the subject-matter of the Writ Petition No. 1372 of 2004 as the possession of the land was not taken in respect of the plot of land which was the subject-matter of the said petition and that, therefore, there was no admission in general as such about non-publication of declaration on 5-11-2001 in Writ Petition No. 1372 of 2004. The submission is totally devoid of substance. The Section 11-A clearly states that the lapsing of the acquisition proceedings would be of "the entire proceedings for the acquisition of the land". The expression "the entire proceedings" would relate to acquisition of the land which was the subject-matter of the declaration u/s 6 read with the Notification u/s 4 of the said Act. Referring to the term "the land" following the expression "the entire proceedings for the acquisition of in Section 11-A of the said Act, it was sought to be contended that it will restrict to "the land" which is the subject-matter of dispute and possession of which has not been taken. No such exception can be made only in relation to the land of which possession is not taken or which is the

subject-matter of dispute. The Section 11-A does not make any such exception in relation to any such land. On the contrary, it relates to the entire proceeding of the acquisition of the land which was the subject-matter of declaration u/s 6 of the said Act. The period specified u/s 11-A specifically refers to publication of the declaration u/s 6 and the consequences contemplated u/s 11-A are on account of the expiry of the specified period from the date of publication of the declaration u/s 6. Being so, the term "the entire proceedings" in the said Section 11-A has necessarily to relate to the publication of the declaration u/s 6 of the said Act. The Section 6 declaration being not related to only land, the possession of which is not taken, but to the entire land which is the subject-matter of the Notification u/s 4, consequently, the term "the entire proceedings" will relate to all such pieces of land covered by the declaration u/s 6 read with the Notification u/s 4 of the said Act, unless it is shown that there are different awards in respect of different pieces of land, some of them being within the period of limitation.

12. As regards the contention that the compensation was paid consequent to the application by the petitioners and the possession was accordingly taken, and that therefore, the provision of Section 17(3-A) are attracted, it is to be seen that Section 17 of the said Act deals with the special powers in case of urgency. The Sub-sections (1) and (2) thereof speak of two different types of eventualities in which urgency clause can be invoked in the land acquisition proceedings. The Sub-section (1) thereof provides that in cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the Notice mentioned in Section 9, Sub-section (1) take possession of any land needed for a public purpose and such land shall thereupon vest absolutely in the Government, free from all encumbrances.

13. The Sub-section (2) of Section 17 provides that whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a riverside or ghat station, or of providing convenient connection with or access to any such station, or the appropriate Government considers it necessary to acquire the immediate possession of any land for the purpose of maintaining any structure or system pertaining to irrigation, water supply, drainage, road communication or electricity, the Collector may, immediately after the publication of the notice mentioned in Sub-section (1) and with the previous sanction of the appropriate Government enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances.

14. The Sub-section (3-A) of Section 17, on which heavy reliance is placed to contend that no fault can be found with the impugned order, reads thus:

(3-A) Before taking possession of any land under Sub-section (1) or Sub-section (2), the Collector shall, without prejudice to the provisions of Sub-section (3), -

(a) tender payment of eighty per centum of the compensation for such land as estimated by him to the persons entitled thereto, and

(b) pay it to them, unless prevented by some one or more of the contingencies mentioned in Section 31, Sub-section (2),

and where the Collector is so prevented, the provisions of Section 31, Sub-section (2), (except the second proviso thereto) shall apply as they apply to the payment of compensation under that section.

Plain reading of Sub-section (3-A) of Section 17 would disclose that it merely provides the mode of payment of 80% of the compensation in cases where the possession of land is required to be taken either under Sub-section (1) or under Sub-section (2) of Section 17 and in case of any difficulty arising in making such payment on account of contingencies mentioned in Section 31 or otherwise, the appropriate action to be taken in that regard. The Sub-section (3-A) nowhere empowers the authority to take possession. The power in that regard is spelt out in the Sub-section (1) and Sub-section (2) of Section 17. The Sub-section (3-A) only speaks of the mode and the manner of payment to be made when such possession either in terms of Sub-section (1) or Sub-section (2) of Section 17 is to be taken. Evidently, Sub-section (3-A) nowhere empowers the authorities to take possession of the land under acquisition. Undisputedly, in the case in hand, at no point of time, urgency clause u/s 17 was applied to the land acquisition proceedings nor such urgency powers were ever invoked. Being so, the delivery of the possession of the land in question stated to have been confirmed by the petitioners in their applications cannot be held to be one under any of the provisions of Section 17 of the said Act. Even the payment of alleged 80% of the compensation has not been made in terms of Section 17(3-A) of the said Act, and therefore even such payment will not transform the delivery of possession to be lawful.

15. It is settled law that the said Act, is a complete Code by itself, dealing extensively and elaborately in relation to the proceedings pertaining to acquisition of land whenever such land is sought to be acquired for any public purpose. It enumerates the procedures to be followed for such acquisition. It specifies the powers to be exercised by the concerned authorities in the process of such acquisition proceedings. It identifies the persons to whom the hearing to be given, the compensation to be paid as well as at whose instance the claim for enhancement of compensation or dispute relating to the area under acquisition or regarding apportionment of compensation is to be dealt with and the manner and procedure to deal with all the inquiries in that regard. It also specifies the obligation of the authorities for prompt completion of the acquisition proceedings within the specified period. It also provides for the consequences in case of failure on the part of the authorities to comply with their obligations regarding completion of the land acquisition proceedings within the specified period. It leaves no room for any discretion as such and it makes it obligatory for the authorities seeking to exercise their powers under the said Act to acquire any

land to complete the acquisition proceedings within the specified period. Rather, the provisions in that regard are very strict in nature and gives clear mandate to the concerned authorities for due compliance of their obligations thereunder and also prescribes for consequences in case of their failure to do so. The provisions of the said Act are to be read along with Article 300-A of the Constitution of India. No person can be deprived of his landed property save by authority of law. Obviously, it requires due compliance of the statutory provisions dealing with the acquisition of such properties. That is the mandate of Article 300-A of the Constitution. The said Act having prescribed elaborate procedure for such acquisition of land, and considering the phraseology of Section 11-A of the said Act, it leaves no room for the doubt that the mandate thereunder is to be strictly complied with by the concerned authority and in case of failure, the consequences contemplated thereunder should follow.

16. It is pertinent to note that u/s 41, Part-VII of the said Act, the Collector is empowered, on satisfaction of the Government, to enter into an agreement in relation to the land to be acquired for the company and in that regard there are certain provisions in the said Part-VII which may permit the concerned authorities to arrive at consensus with the landowners in relation to the compensation to be paid for acquisition of their land. Nevertheless, Section 39 of the said Part specifically states that even in such cases, unless the previous consent of the appropriate Government is obtained, the applicability of the provisions of Sections 6 to 16 of the said Act cannot be excluded. This gives a clear indication that the Legislature has made specific procedure for acquisition of the land and has not left it to the whims and fancies of the bureaucrats to follow the procedure of their choice for acquisition of land. The said Act nowhere empowers the authorities to adopt the procedure unknown to the said Act for acquisition of land. In fact, no other procedure is permissible for the purpose of acquisition of land. Merely because the authorities entered into private negotiations, entertained applications by the owners, gets confirmation from them in writing for the delivery of possession and agreement for acceptance of 80% of amount during the completion of the acquisition proceedings, either without following the procedure prescribed under the said Act or in contravention of the mandatory provisions like Section 11-A of the said Act will not validate any such unauthorised act, nor would validate the acquisition of land.

17. It is also to be noted that there was no occasion for the respondents to entertain such applications or to make such payments in advance as, undisputedly, the provisions of Section 17 were never invoked in the matter in hand and there is a clear observation to that effect in the award declared by the Land Acquisition Officer u/s 11 itself. That is a clear admission on the part of the Land Acquisition Officer about non-invocation of the power u/s 17. It clearly disclose that merely because de hors the provisions of the said Act, the authorities had made payment of 80% of the compensation on alleged delivery of possession of the land by the petitioners to the respondents, that by itself will not ipso facto validate the impugned award which is statutorily deemed to have

been invalid for non-compliance of the mandate u/s 11-A of the said Act.

18. The view that we are taking in the matter is clearly fortified by the decision of the Apex Court in Jetmull Bhojraj's case (*supra*). Therein the Apex Court had held that from the provisions of Section 17(1), it is clear that the Collector cannot take possession of the land unless the Government directs him to do so. The Government can direct him to do so only in cases of urgency. Even when the Government directs the Collector to take possession, he cannot do so until expiration of 15 days from the publication of a notice u/s 9(1) of the said Act. When there is no material on record to show that the Government had given to the Collector any such direction u/s 17(1); nor is there any material to show that any notice u/s 9(1) was issued and pursuant thereto, the possession was taken nor the possession of the land in question had been taken by the Collector u/s 17(1), the land cannot be said to have vested in the Government u/s 16 of the said Act. The contention sought to be raised about the vesting of the land on account of possession having been already taken was specifically rejected by the Apex Court in the said decision. The facts of the case in hand are in no way different from the case of Jetmull Bhojraj's in the sense that the possession of the land was never taken in terms of any of the provisions of the said Act. This is apparent from the records, as the possession is said to have been delivered to the Land Acquisition Officer de hors the provisions of the said Act and this fact has been confirmed in the applications filed by the petitioners claiming 80% compensation. Obviously, the possession has not been taken either u/s 17 or under any of the provisions of law. Being so, the arguments based on the provisions of law comprised u/s 17(3-A) of the said Act to the effect that pursuant to taking over of possession, the land vested in the Government and that therefore the challenge to the award is not maintainable is to be rejected as being totally devoid of substance. Once neither the award is passed in accordance with the provisions of law nor the possession is taken in the manner as is required under the statutory provisions, the benefit u/s 17(3-A) cannot be claimed.

19. As a result of the award being declared *ab initio* bad in law and the possession having not been taken in accordance with the provisions of said Act, while quashing the said award in the normal course, the respondents ought to have been directed to revert the possession of the land to the petitioners. However, in the case in hand, it is an undisputed fact that after obtaining the possession of the land, the same has been utilised for the purpose of completion of the project for which the land was sought to be acquired. In other words, the land in question has already been put to the use for which it was proposed to be acquired. Though in terms of the provision of law comprised u/s 11-A of the said Act, the acquisition proceedings cannot be said to have been validly concluded and, therefore, it would lapse, at the same time, the land having already been put to use for which it was proposed to be acquired, the question of directing the reversion of possession of land to the petitioners at this stage does not arise. At the same time, it is also an undisputed fact that certain amount of compensation

had already been received by the petitioners in relation to the land in question. In this peculiar facts of the case, we are left with no alternative than to direct the respondents to take appropriate steps in accordance with the provisions of law to compensate the petitioners, bearing in mind the provisions of the said Act read with Article 300-A of the Constitution. Needless to say that while taking appropriate steps in that regard the authorities will have to take into consideration the amount already paid to the petitioners and lying with them, as also the benefit enjoyed by the petitioners on account of such amount having been received by them from the date of the receipt of such amount till the date of the payment of the entire compensation.

20. It pains us to note that this is not only one case which has come before this Court regarding an unusual procedure being adopted by the concerned authorities for taking over the possession of the land for the public purpose as well as in relation to the payment of compensation therefor, in spite of the fact that a detail procedure in that regard has been enumerated under the said Act. The procedure followed by the authorities is patently contrary to those provisions of the said Act. It is not understood as to what prompted the authorities to follow such an unusual procedure. Be it as it may, however, adoption of such procedure cannot be allowed to result in unwarranted burden on the public exchequer. In case on account of such unusual procedure being adopted by the Government authorities, which is patently contrary to the provisions of the said Act, and on that count additional burden is cast upon the public exchequer as a result of fresh acquisition proceedings being required to be initiated and the compensation to be calculated on the basis of the date of issuance of fresh Notification u/s 4, it will be the liability of all those officers/persons responsible for such additional burden to make it good to the public exchequer and certainly in that regard the Government will have to fix the responsibility of the officers/persons responsible for such additional burden being cast on the public exchequer and to take appropriate steps to recover such amount from those officers/persons. We expect appropriate steps in that regard from the Government in the case in hand.

21. In the result, therefore, the petition succeeds; the impugned award is hereby quashed and the land acquisition proceedings in question are held to have been lapsed in terms of Section 11-A of the said Act. However, the respondents shall take appropriate steps for compensating the petitioners in respect of their land already utilised for the project. The respondents in that regard are required to take appropriate steps within a period of twelve weeks from today, bearing in mind the observations made hereinabove. The respondents are also expected to take necessary action against the officers/persons responsible for the additional burden being cast upon the public exchequer on account of fresh proceedings which are required to be taken in the matter and in that regard also the above observations to be borne in mind. The rule is made absolute in above terms, with costs.