
(2011) 07 BOM CK 0209
In the Bombay High Court
Case No : Writ Petition No. 2381 of 2011

Vilas Sumersing Patil

APPELLANT

Vs

Special Land Acquisition Officer and another

RESPONDENT

Date of Decision : 28-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5
Constitution of India, 1950 — Article 227
Land Acquisition Act, 1894 — Section 18, 4

Citation : (2012) 4 ALLMR 747 : (2012) 2 MhLj 314

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

Bench : Single Bench

Advocate : R.M. Patil, for the Appellant; D.R. Kale, A.G.P., for the Respondent

Judgement

S.S. Shinde, J.—This Writ Petition is filed challenging the order dated 12-8-2007, passed by the Jt. Civil Judge, Senior Division, Jalgaon, thereby asking the petitioner for furnishing Bank guarantee while releasing the amount deposited by the respondents in Regular Darkhast No. 346/2006. Rule. Rule made returnable forthwith and heard finally with the consent of learned counsel for the parties.

2. The petitioner's land was acquired for the Anjani Medium project. On 28-2-1998 the notification u/s 4 of the Land Acquisition Act was published. On 28-7-2000 award came to be passed. The petitioner, being aggrieved by the amount awarded, preferred reference u/s 18 of the Land Acquisition Act. The said reference was referred by the Special Land Acquisition Officer to the Civil Court, which was registered as Land Acquisition Reference No. 156/2001.

3. On 20-4-2006, Reference Court, after hearing the parties and recording evidence, allowed the reference partly and enhanced the compensation.

4. The petitioners herein filed execution proceedings with the executing Court, for execution of the said decree and award. Thereafter the judgment debtor deposited the decretal amount in the executing Court. The petitioner herein filed

an application for withdrawal of the compensation. The executing Court heard the said application and according to the petitioner, respondents made a submission without any documentary evidence that appeal is filed against the judgment and order dated 20-4-2006, thereby partly allowing the reference of the petitioner. Relying on the statements of the respondents, the executing Court passed conditional order to withdraw the decretal amount subject to the condition that the petitioner shall furnish Bank guarantee as and by way of security for withdrawal of the said amount. The said order came to be passed on 12-10-2007.

5. The petitioner thereafter furnished Bank guarantee. It is the contention of the petitioner that the acquiring body has not served any notice regarding admission of the First Appeal or granting of stay or any other interim reliefs by the High Court even after lapse of 2/3 years. It is the contention of the petitioner that he is deprived of rightful compensation as awarded due to the condition of Bank guarantee imposed by the executing Court. It is further contention of the petitioners that, the award passed in the Land Acquisition Reference is a money decree and as far as money decrees are concerned, the condition put by the executing Court regarding furnishing Bank guarantee is contrary to law. Therefore, this petition is filed challenging the order passed by the executing Court thereby imposing the condition to furnish Bank guarantee while withdrawing the decretal amount.

6. The learned counsel appearing for the petitioner submitted that executing Court has no power or authority to ask for the Bank guarantee while executing the judgment and award passed by the Reference Court. It is further submitted that, when there is no any stay granted by the Appellate Court, in that case, imposing condition of Bank guarantee on the petitioner, has no any basis in law and, therefore, the impugned order to the extent of imposing condition to furnish the Bank guarantee is required to be quashed and set aside.

7. Learned counsel for the petitioner further submitted that, the award passed in the land acquisition reference is a money decree and as far as money decrees are concerned, the condition put forth by the executing Court regarding furnishing Bank guarantee is contrary to law and the provisions of CPC and same is harsh, unjust and nullified.

8. Learned counsel for the petitioner also submitted that there is no provision in law to obtain Bank guarantee from the decree holder by the executing Court. Learned counsel for the petitioner further submits that, the executing Court has not framed any time limit for the said Bank guarantee and it implies that the Bank guarantee will be in operation for indefinite period. Learned counsel for the petitioner, relying on the decision of this Court in Writ Petition Nos. 3452/2002 and 1103/2007, submits that, the condition imposed by the executing Court is unjust and contrary to law and the executing Court was not competent to direct the petitioner to furnish Bank guarantee.

9. Learned counsel for the petitioner also submits that, the imposition of condition of furnishing Bank guarantee for indefinite period without knowledge of filing any appeal by the State or the acquiring body or any stay or interim relief by this Court is contrary to the provisions of law and unsustainable, unjust and unwarranted.

10. On the other hand, learned A.G.P. appearing for the respondent submitted that, since the appeal is filed by the respondents and, therefore, the Jt. Civil Judge, Senior Division, Jalgaon has rightly imposed the condition to furnish Bank guarantee while withdrawing the decretal amount, therefore, no interference is warranted under extraordinary jurisdiction of this Court under Article 227 of the Constitution of India.

11. I have heard the learned counsel appearing for the respective parties. The perusal of the impugned order would clearly show that, the submission of the respondent - State before the executing Court was that, the appeal proposal has been sent to the Law & Judiciary Department, Aurangahad. It was further stated that, the judgment debtor has no objection to pay the amount to decree holder on furnishing Bank guarantee. The Court has also observed that the concerned Darkhast Clerk has given report that there is no entry of stay order in the concerned register. Moreover, the decree holder has submitted affidavit at Exh. 11 with regard to the fact that appeal has been preferred by the State, however, there is no stay to the execution till date. After recording the aforesaid facts, the executing Court relying on the statement of the A.G.P. that the appeal proposal has been submitted to Law & Judiciary Department for permission to file appeal against the order of the Reference Court and the decree holder himself has stated that the appeal is pending in the High Court, the Court was of the opinion that, there is likelihood of modification of order, which was passed in reference by the High Court. Therefore, the Jt. Civil Judge, Junior Division, Jalgaon, i.e. executing Court ordered the payment of the amount on execution of the Bank guarantee in the like amount and accordingly, the applicant was permitted to withdraw the amount of Rs. 1,53,277/- on proper and due identification and verification on furnishing Bank guarantee of a Nationalized Bank in the like amount.

12. From careful reading of the impugned order passed by the executing Court, it is crystal clear that there was no any stay in appeal to the decree passed by the Reference Court. It is also not in dispute that, being aggrieved by the meagre amount received in award, the petitioner, who is agriculturist/ farmer, filed reference with the Collector, and Special Land Acquisition Officer referred the said reference to the Civil Court and after recording the evidence and hearing the parties, the Reference Court has partly allowed the reference filed by the petitioner. The decree passed by the Reference Court was put for execution by the petitioner. In execution proceedings, the amount was deposited by the respondents. In absence of any stay to the decree passed in reference, the executing Court thought it fit to impose onerous condition of furnishing Bank

guarantee by the petitioner, who is agriculturist/ farmer and in whose favour the decree is passed by the Reference Court. It is true that the appeal is continuation of suit, however, in absence of any stay to the money decree, in my opinion, the Jt. Civil Judge, Senior Division, Jalgaon was not justified in imposing onerous condition of furnishing Bank guarantee while withdrawing the amount which was deposited by the respondents.

13. 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.

14. 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.

15. 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. Though this Court had issued notice in this Writ Petition to the respondents as back as on 8-4-2011 and notice was also issued for final disposal, the respondents did not bother to file any reply. Therefore, the net position which emerges is that, the respondents have preferred appeal against the decree passed by the Reference Court before the Appellate Court, however, there is no stay in appeal. It is true that the petitioner has already issued the Bank guarantee. Therefore, so far order passed by the Jt. Civil Judge, Senior Division, Jalgaon allowing the petitioner to withdraw the decretal amount stands confirmed. However, while withdrawing said amount, the condition of furnishing Bank guarantee imposed by the Jt. Civil Judge, Senior Division. Jalgaon stands quashed and set aside. The petitioner to file undertaking before the concerned Court that, in case appellant State Government succeeds in appeal, the petitioner will bring back the amount. Rule made absolute in terms of prayer clauses (B) and (C). The petition is disposed of on above terms.