

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1667 OF 2002

Gopaldas Bhagwandas and Others. .. Petitioners
Vs
The Union of India and Others. .. Respondents

—
Shri Rafiq A. Dada, Senior Counsel with Shri D.H. Mehta with Shri N.M. Shah with Shri Arvindkumar for the Petitioners.

Shri S.R. Rajguru with Shri Dhanesh R. Shah for the Respondent No.1- Union of India.

Shri U.S. Upadhye, AGP for the Respondent Nos.2 to 4.

--

CORAM : A.S. OKA &
REVATI MOHITE DERE, JJ
DATED : 31ST JULY 2015

ORAL JUDGMENT (PER A.S. OKA, J)

1. The submissions were heard on the earlier date. The challenge in this Petition under Article 226 of the Constitution of India is to the acquisition proceedings under the Land Acquisition Act, 1894 (for short “the said Act”). Brief reference to the facts will be necessary.

2. The Petitioners are claiming to be the legal representatives of one Rajabahadur Bhagwandas Haridas, who was the owner of the land bearing Survey No.120 Hissa No.2 (Part) of Village Malad, Mumbai. An order was made by the Defence Co-ordination Department of the Government of India on 19th February 1943 of requisition of the

said land bearing Survey No.120 Hissa No.2 (Part). In fact, under the said order, an area of 4 Acres and 34 Gunthas of the land bearing Survey No.120, Hissa No.2 (Part) was requisitioned. On 27th July 1949, the Collector of Thane passed an order of derequisitioning an area of 2253 sq. meters from the said land.

3. A Notification under Sub-section (1) of Section 4 of the said Act was issued on 24th October 1975. The said Notification was in respect of the area of 10,876 sq. meters (for short “the acquired land”) out of the larger area of the land bearing Survey No.120, Hissa No.2 (Part). An award was made on 23rd September 1986. Several lands were acquired apart from the said acquired land under the same Notification under Sub-section (1) of Section 4 of the said Act and the same award. The persons who are claiming to be the owners of the land bearing Survey No.119/3 of village Malad which was covered by the same Notification and Award filed a Writ Petition in August 1987 for challenging the acquisition. The said Writ Petition was dismissed by this Court mainly on the ground of delay. It is pointed out in the Petition that the owners of the said land bearing Survey No.119/3 preferred a Special Leave Petition before the Apex Court. We must note here that during the pendency of this Petition, the Appeal preferred by the owners of the land bearing Survey No.119/3 has been allowed by the Apex Court. The decision of the Apex Court is in the case of

Kulsum R. Nadiadwala v. State of Maharashtra and Others¹. In the said decision, the Apex Court held that the mandatory requirements of Sub-section (1) of Section 4 of the said Act were not followed and the Notification dated 24th October 1975 was published only in the Official Gazette. Therefore, the Apex Court held that the entire acquisition proceedings were required to be declared as null and void. The present Petition was filed on 24th June 2002 for setting aside the acquisition in respect of the said acquired land.

4. An affidavit-in-reply has been filed by one Shri Manoj Shankarrao Gohad, the Special Land Acquisition Officer (4), MSD, dated 25th November 2002. There is an affidavit dated 10th January 2003 filed by one Shri Sourav Ray, the Defence Estate Officer on behalf of the Union of India. There is another affidavit filed by Smt. Rachel Koshy, the Defence Estate Officer on behalf of the Union of India which has been affirmed on 27th November 2013. As far as the affidavit filed by the Special Land Acquisition Officer is concerned, it is stated therein that as the Union of India was already in possession of the said acquired land, only a notional possession was taken over on 6th January 1987. In the affidavits filed on behalf of the First Respondent Union of India, the first stand taken is of delay in filing the Petition. It is also contended in the second affidavit that the aforesaid decision of the Apex Court in the case of Kulsum is per incuriam on the ground that the Union of India

1 AIR 2012 SC 2718

was not represented before the Apex Court and, therefore, the correct position of law could not be pointed out to the Apex Court.

5. The learned senior counsel appearing for the Petitioners has taken us through the judgment of the Apex Court in the case of ***Kulsum R. Nadiadwala***. He urged that admittedly the said judgment is in respect of the same Notification under Sub-section (1) of Section 4 of the said Act which is the subject matter of the challenge in this Petition. He pointed out that it is held by the Apex Court that the mandatory requirements have not been complied with and, therefore, the entire acquisition proceedings are required to be declared as null and void. He also pointed out specific averments made in this Petition that there is no personal service of notices under Sub-section (1) of Section 4 of the said Act to the Petitioners. He pointed out that the said case made out in the Petition has not been controverted. He urged that in view of the decision of the Apex Court, the acquisition of the acquired land in the present case is null and void.

6. The submissions of the learned counsel appearing for the First Respondent are based on the gross delay in filing this Petition and on the ground that one of the Petitioners had filed a Reference under Section 18 of the said Act. The first contention is that for challenging the Notification issued on 24th October 1975 and for challenging the award dated 23rd September 1986, the present Petition has been

belatedly filed in June 2002. He urged that there is absolutely no explanation for the delay. He relied upon the decisions of the Apex Court in the case of *Abhey Ram (Dead), By Lrs and Others v. Union of India and Others*² and *Leelawanti and Others v. State of Haryana and Others*³. He urged that in the case of *Kulsum*, though it was found that there was no compliance with the mandatory requirements, as far as the present Petition is concerned, it is in respect of the acquired land which was not the subject matter of the Appeal before the Apex Court and, therefore, the present case will have to be considered on facts. He urged that the personal notices were served to the persons whose names were appearing on the relevant record. He placed reliance on the additional affidavit containing the additional documents. His submission is that on the ground of delay as well as on the merits, the challenge to the acquisition cannot be entertained in this Petition. The learned AGP appearing for the State Government supported the impugned award and the impugned Notification. The learned senior counsel appearing for the Petitioners pointed out that in the case of *Kulsum*, a Review Petition was filed which was rejected on the grounds of both delay and merits. He also pointed out that a curative Petition filed by the Union of India was dismissed by an order dated 3rd February 2015.

2 (1997)5 SCC 421

3 (2012)1 SCC 66

7. We have given careful consideration to the submissions. It is not in dispute that the same Notification under Sub-section (1) of Section 4 of the said Act and the same award which is the subject matter of challenge in this Petition was subjected to a challenge by the said *Kulsum and others* by filing the Writ Petition No.2699 of 1987. The said Writ Petition related to the land bearing Survey No.119/3 (Pt) situated at Village Malad which is the subject matter of the same Notification under Sub-section (1) of Section 4 of the said Act and the same award. This Court dismissed the said Writ Petition. We have carefully perused the decision of the Apex Court in the case of *Kulsum*. In Paragraph 8 of the judgment, the submission of the Appellants has been recorded that the mandatory requirement of publication of the Notification under Sub-section (1) of Section 4 of the said Act was not complied with. A contention was raised that the possession of the acquired land was not taken over in accordance with Section 16 of the said Act. Submission of the State Government before the Apex Court was that the Petition filed by the Appellants was rightly dismissed by the High Court on the ground of delay and laches. Thereafter, the Apex Court proceeded to consider the provisions of Sub-section (1) of Section 4 of the said Act. In Paragraph 10 of the said judgment, after considering the provisions of Sub-section (1) of Section 4 of the said Act, the Apex Court relied upon its earlier decision and observed that

the requirement of publishing the Notification in the Official Gazette and the requirement of giving a public notice are mandatory. Paragraph Nos.11 and 12 of the said decision in the case of **Kulsum** are material which read thus:

“11. In the instant case, the respondents before the High Court had filed their reply affidavit. They did not dispute the contentions of the appellants that they had not issued any public notices as required under Section 4 of the Act. They only reiterated that such notification was published in the Official Gazette.

12. Since the mandatory requirement as required under Section 4(1) of the Act is not complied with by respondents, while acquiring the lands in question, in our opinion, the entire acquisition proceedings requires to be declared as null and void. This Court in J&K Housing Board v. Kunwar Sanjay Krishan Kaul, (2011)10 SCC 714 : (AIR 2012 SC (Cri) 141: 2011 AIR SCW 6709), has observed that all the formalities of serving notice to the interested person, stipulated under Section 4 of the Act, has to be mandatorily complied with in the manner provided therein, even though the interested persons have knowledge of the acquisition proceedings. This Court further observed thus:

32. It is settled law that when any statutory provision provides a particular manner for doing a particular act, the said thing or act must be done in accordance with the manner prescribed therefor in the Act. Merely because the parties concerned were aware of the acquisition proceedings or served with individual notices does not make the position alter when the statute makes it very clear that all the procedures/modes have to be strictly complied with in the manner provided therein. Merely because the landowners failed to submit their objections within 15 days after the publication of notification Under Section 4(1) of the State Act, the

authorities cannot be permitted to claim that it need not be strictly resorted to.”

(Underlines added)

8. On careful perusal of the said findings in the case of *Kulsum*, it clearly appears to us that the findings recorded by the Apex Court are not restricted only to the land subject matter in the Appeal before it. The first finding is as regards the failure to make compliance with the mandatory requirements of Sub-section (1) of Section 4 of the said Act of making publication of the same Notification dated 24th October 1975. The second finding of the Apex Court is that the entire acquisition proceeding is required to be declared as null and void. In Paragraph 12, the Apex Court rejected the argument of the State that as the owner failed to submit objections within 15 days from the date of publication of the Notification, the provision regarding publication need not be strictly complied with. Notwithstanding the issue of delay and laches raised, the Apex Court proceeded to set aside the acquisition and directed restoration of the possession of 50% of the land under acquisition.

9. It will be necessary to make a reference to the decision of the Apex Court in the case of *Leelawanti and Others*. Firstly, it was an Appeal arising out of a Petition filed in the High Court where a prayer was for issuing a writ of mandamus for return of the acquired land. We

have perused the decision of the Apex Court. Apart from dealing with the issue regarding return of the acquired land, the Apex Court in the facts of that case held that considering the long time gap of more than three decades between the Notification issued under Sub-section (1) of Section 4 of the said Act and the date of filing of the Writ Petition, the High Court was justified in rejecting the prayer. We have also perused the judgment of the Apex Court in the case of **Abhay Ram**. The learned counsel for the Respondents relied upon Paragraphs 10 and 11 which read thus:

- “10. The question then arises is: whether the quashing of the declaration by the Division Bench in respect of the other matters would enure the benefit to the appellants also? Though, prima facie, the argument of the learned Counsel is attractive, on deeper consideration, it is difficult to give acceptance to the contention of Mr. Sachhar. When the Division Bench expressly limited the controversy to the quashing of the declaration qua the writ petitioners before the Bench, necessary consequences would be that the declaration published under Section 6 should stand upheld.
11. It is seen that before the Division Bench judgment was rendered, the petition of the appellants stood dismissed and the appellants had filed the special leave petition in this Court. If it were a case entirely relating to Section 6 declaration as has been quashed by the High Court, necessarily that would enure the benefit to others also, though they did not file any petition, except to those whose lands were taken possession of and were vested in the State

under Section [16](#) and [17\(2\)](#) of the Act free from all encumbrances. But it is seen that the Division Bench confined the controversy to the quashing of the declaration under Section [6](#) in respect of the persons qua the writ petitioners before the Division Bench. Therefore, the benefit of the quashing of the declaration under Section [6](#) by the Division Bench does not enure to the appellants”.

(underline supplied)

For the reasons which we are recording hereafter, even the said decision is of no help to the First Respondent.

10. We have already made a reference to the decision of the Apex Court in the case of *Kulsum*. What is held by the Apex Court is that there is no compliance with the mandatory requirements of Sub-section (1) of Section 4 of the said Act as regards the publication of the Notification and therefore, the entire acquisition proceedings are required to be declared as null and void. There is no observation in the Judgment that the declaration of nullity of the proceedings is confined only to one property. An attempt is made in the second affidavit filed by the First Respondent-Union of India to contend that the decision of the Apex Court is per incuriam as the First Respondent was not represented before the Apex Court. A Review Petition seeking Review of the said Judgment was dismissed. What is material is that a Curative Petition (C) No.270 of 2014 filed by the First Respondent has been dismissed by the Apex Court by order dated 3rd February 2015. As

pointed out earlier, the Apex Court specifically held that the acquisition proceedings based on the same notification under Sub-section (1) of Section 4 of the said Act which is the subject matter of challenge in this Petition was null and void on the ground of non compliance of the mandatory requirement of publication. Hence, even the acquisition in respect of the said acquired land subject matter of this Petition stands vitiated.

11. Nevertheless, we are dealing with the contentions raised by the First Respondent. Perusal of the Writ Petition and in particular Clause (h) of Paragraph 4 thereof shows that a specific contention has been raised by the Petitioners that neither the Petitioners nor their predecessors were served with any notice and were not offered any opportunity of raising objections to the Notification under Sub-section (1) of Section 4 of the said Act. It is specifically contended that there is a non-compliance with the mandatory requirement of Section 5A of the said Act. Affidavit of Shri Manoj Shankarrao Gohad, the Special Land Acquisition Officer (4) is completely silent as far as this factual and legal challenge in this Petition is concerned. The second challenge in the Petition is that the requisition of the said acquired land from the year 1947 is rendered illegal as continuation of the requisition for inordinately long time vitiates the requisition. A contention is raised that before initiating the acquisition proceedings, the Petitioners were

not placed in possession of the said land. Another contention raised in the Petition is that the said acquired land could have been acquired only in accordance with the provisions of the Requisitioning and Acquisition of Immovable Property Act, 1952 by taking recourse to Sections 6 and 7 thereof. The contention is that this is the only legislation which permits property under requisition to be compulsorily acquired for a public purpose. In the first affidavit filed on behalf of the First Respondent of Shri Sourav Ray, the factual averments in Clause (h) of Paragraph 4 of the Petition have been dealt with in Paragraph 8 of the said affidavit. There is merely a denial of the said averments. It is merely contended that the name of the actual owner is not Raja Bahadur Bhagwandas Haridas but it is Raja Bahadur Bhagwandas. The Petitioners have specifically pleaded that they are the legal representatives of one Rajabahadur Bhagwandas Haridas. Even in the second affidavit filed on behalf of the First Respondent by Smt. Rachel Koshy, the said contention is not specifically dealt with. We must note here that this affidavit has been filed after the decision in the case of **Kulsum** and, therefore, a stand has been taken therein that the decision in the case of **Kulsum** is per incuriam.

12. Even in this affidavit filed after the decision in the case of **Kulsum**, no attempt is made to bring on record the fact that the compliance was made with the mandatory requirements of Sub-section

(1) of Section 4 of the said Act. Sub-section (1) of Section 4 of the said Act requires publication of a Notification in the Official Gazette and apart from that, a publication is required to be made by several other modes which are prescribed in the Section itself. We are unable to entertain the submission that the decision of the Apex Court is per incuriam especially in the light of the fact that a curative Petition filed by the First Respondent Union of India for challenging the decision is dismissed by the Apex Court.

13. Now we turn to the issue of delay. Firstly, in the case of *Kulsum*, the Apex Court was not impressed by the ground of delay. Secondly, the finding of the Apex Court is that the entire acquisition on the basis of the notification under Sub-section (1) of Section 4 of the said Act is null and void. Thirdly, we must record here that it is not the case of any of the Respondents that the possession of the acquired land was taken over under Section 16 of the said Act. There can be vesting of the acquired land only after the possession is taken over in accordance with Section 16 of the said Act. This is not a case where urgency clause under Section 17 of the said Act was made applicable. In fact, the stand taken by the Special Land Acquisition Officer is that the possession of the land in question was handed over to the Defence Authorities on 6th January 1987. He claims that a panchanama of the delivery of possession has been drawn up. However, the said

panchanama is not produced on record. The acquired land was already in possession of the first Respondent on the basis of the order of requisition. It is not the case of any of the Respondents that the possession of the said acquired land was restored to the Petitioners and by taking recourse to Section 16 of the said Act, the possession was taken over by the State Government. It is not the case that before the so called taking over of the possession and delivery of the possession, any notice was issued to the Petitioners. Therefore, even as of today, there is no vesting of the acquired land in the Respondents in accordance with the provisions of the said Act. In the affidavit of Shri Sourav Ray, in Paragraph 3, it is contended that the possession of the said land was taken over by the Defence Estate Officer on 6th January 1987. It is not the case of the First Respondent that the possession was taken over from the Petitioners. On the contrary, it is not disputed that the said acquired land was never released from the requisition.

14. Apart from the fact that the finding recorded by the Apex Court in the case of *Kulsum* binds this Court and even the First Respondent, there is no vesting of the said acquired land in the Respondents under the provisions of the said Act. In Paragraph 13 of the Petition, it is specifically averred that the Petitioners were aware of filing of the Writ Petition by the said ***Kulsum*** and the Petitioners were awaiting the outcome of the said Petition. It is specifically pointed out

that after the dismissal of the Petition by this Court, a Special Leave Petition was filed by the said ***Kulsum*** which was admitted by the Apex Court. Therefore, considering the aforesaid factors, in our view, the delay in filing of the Petition does not come in the way of this Court entertaining the Petition.

15. As far as the Reference Application filed by one of the Petitioners being Land Acquisition Reference No.4 of 1997 is concerned, we have perused the record of the Reference. Apart from the fact that the Reference Application proceeds on the footing that the acquisition is illegal, we find that the Reference Application was never prosecuted by the Claimants therein. It was dismissed on 31st March 2000. It is not shown to us that any other Petitioners have prosecuted the remedy under Section 18 of the said Act.

16. Therefore, the Petition must succeed and the Rule deserves to be made absolute in terms of prayer clauses (b) and (d). Hence, we pass the following order:-

ORDER:

- (a) The Rule is made absolute in terms of prayer clauses (b) and (d).

- (b) We grant time of three months to the First Respondent Union of India to place the Petitioners in possession of the acquired land in question in terms of the prayer clause (d).
- (c) The record of the Land Acquisition Reference No.4 of 1997 be returned to the concerned Department.
- (d) The pending Notice of Motion does not survive and the same is accordingly disposed of.

(REVATI MOHITE DERE, J)

(A.S. OKA, J)

Certified to be true and correct copy of the original signed Judgment/Order.