

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.

WRIT PETITION NO.5121 OF 1998

Beig Iftekharullah s/o Beig Saidullah,
Age : 35 years, Occu : Service,
R/o. Chondi (Shahapur)
Taluka – Aundha Nagnath, District Parbhani
(At present residing at House No.479,
Nawabpura, Aurangabad)

.. Petitioner

Versus

1. The State of Maharashtra
2. The Collector, Parbhani
3. The Special Land Acquisition
Officer, Parbhani
4. The Sub-Divisional Soil Conservation
Officer (LD NC)
Non-CADA, Parbhani-1.
5. District Superintendent of Agriculture,
Hingoli, District Hingoli.

.. Respondents

...

Shri Ajinkya Kale, Advocate, holding for
Shri S.B. Talekar, Advocate for petitioner

Shri S.J. Salgare, Assistant Government Pleader
for respondents / State

...

CORAM : SUNIL P. DESHMUKH &
P. R. BORA, JJ.

Date : February 06, 2018

ORAL JUDGMENT (PER SUNIL P. DESHMUKH, J.) :

1. Petitioner is before this court seeking writ of
mandamus to respondents viz. the State of Maharashtra,

Collector, Special Land Acquisition Officer, Sub-Divisional Soil Conservation Officer, District Superintendent of Agriculture, Hingoli to initiate land acquisition proceedings and to award compensation at market rate and to direct respondents no.2 to 4 to pay interim compensation for his land in respect of his land contending it to be remaining under submergence due to construction of Kolhapur Type Weir.

2. Petition proceeds on the footing that, petitioner is owner of the land admeasuring about 10 acre, 36 guntha in block no.1 at Chondi (Shahapur), Tq. Aundha Nagnath, District Hingoli. Petitioner fairly refers to that a natural stream has been flowing through his aforesaid land. Village Chondi had been experiencing scarcity of drinking water. Respondent no.2, due to shortage of drinking water, had decided to construct Kolhapur Type Weir (KTW). Accordingly, respondents had constructed KTW in/on the stream close to boundary of his land. Due to construction quite some portion of his land abutting stream had become submerged. Petitioner contends that, stones lying in his agriculture land were used for construction of KTW.

3. However, according to petitioner, the same was not proper and was illegal since no land acquisition proceedings had been initiated for said purpose and the construction had been

made without consent of petitioner. His several representations to the authorities concerned went unresponded. Around August-1995, a communication had been issued by respondent no.5 stating that, there is no provision for payment of compensation for land by agriculture department. No compensation in respect of the same had been paid.

4. He had been making representations to pay compensation of Rs.one lakh for using land for construction of KTW, however, all his efforts went unheard.

5. Petitioner further contends that, the streamlet is hardly 15 feet wide, however, KTW is about 110 feet wide. Petitioner further alleges that, due to construction of KTW, about two acre land of petitioner has been put out of use and petitioner is unable to take crops in said area of the land. Petitioner contends that, apart from land under submergence, several other damages are sustained due to flow of water.

6. Respondent no.2 has filed reply stating that, KTW had been necessitated as the villagers had been facing scarcity of water. The KTW has been constructed on the stream and submergence zone of said KTW is only bed of the stream and to prevent water entering adjoining land, embankments have been

constructed and there is no possibility of seepage of water in petitioner's land. It has further been pointed out that, a *panchanama* had been drawn after allegations of damages had been made by the petitioner. It was found that, the petitioner's land has not sustained any damage due to storage of water. The affidavit-in-reply annexes copies of *panchanamas* and statements recorded showing that, the petitioner's land has not suffered any damage.

7. Petitioner filed rejoinder since an averment had occurred in affidavit-in-reply filed on behalf of respondent no.2 that the petitioner had intimated in writing that he would not prosecute the writ petition and had decided to withdraw the same.

8. In the rejoinder, it has been sought to be explained that, the claim under affidavit-in-reply is not proper and incomplete information had been supplied and the writing had been obtained from him under some misunderstanding like pitching work would be done to the walls of the KTW. The *panchanama* had been declined to be accepted under the rejoinder stating that, the same had been drawn in his absence. The rejoinder further reiterates the contentions in the writ petition.

9. Respondent no.3 has filed a separate affidavit-in-reply stating that, there is a report of Agriculture Assistant of Chondi that the construction has not damaged agriculture land. He has referred to the *panchanama* and the report dated 21.09.2017. It is denied that, the work of KTW is illegal.

10. Respondent no.5 Superintendent of Agriculture has filed additional affidavit dated 16.01.2018 stating that, *panchanama* had been drawn on 14.11.2017 in presence of petitioner along with sketch map and that, statement of petitioner had also been recorded. It has been stated by the petitioner, due to storage of water, adjoining land to the stream has become wet. Additional affidavit-in-reply further refers to that, land acquisition was not required for the purpose of cement nullah band and that there is no provision for acquisition for said purpose. It further refers to that, cement nullah band is constructed on the stream and submergence zone of the same is restricted to bed to protect the water from entering the lands adjoining to the storage tank and there is no possibility of storage water entering into the lands of petitioner. *Panchanama* annexed along with the additional reply referred to above is about position as on the date of *panchanama*.

11. Learned Counsel for petitioner contends that, factual position about construction of KTW has not been disputed and naturally the storage of water due to such construction has damaged the adjoining land belonging to petitioner. He submits that, in the circumstances, liability is incurred for payment of compensation for such damage to the land and that precisely is the demand under the writ petition seeking directions to respondents to acquire petitioner's land, since portion of land is getting sub-merged.

12. He submits that, except averments in the writ petition, petitioner has not been able to produce any other material to show actual damage being sustained due to construction of KTW. He further submits that, as a matter of fact the situation is otherwise due to construction of KTW, the petitioner has got benefited since an area, which had been suffering water scarcity, the water level in the adjoining land had been upped. He submits that, KTW is constructed for improvement in water supply from natural sources and natural flows for which, no land acquisition is required and construction is limited to stream width and bed thereunder and therefore there is no scheme or proposal for acquisition of lands for construction of KTW save in exceptional circumstances. He submits that, in absence of record and denial by the authorities

of the claims by the petitioner, the petition has been rendered untenable for it raises serious dispute about the factual position.

13. It has been pointed out that, save and except the petitioner, other land holders through whose land streamlet passes have not appeared contending damage to their land as claimed by the petitioner.

14. Learned Counsel for petitioner submits that, a decision at the fag end of hearing in writ petition after 20 years on merits would not be detained since there is no absolute embargo on giving finding on facts as would emerge from the observations of Supreme Court in the decision in the case of *ABL International Ltd and another Vs. Export Credit Guarantee Corporation of India Ltd and others* reported in (2004) 3 *Supreme Court Cases* 553, reading, thus :

"16. A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of *Gunwant Kaur v. Municipal Committee, Bhatinda* where dealing with such a situation of disputed questions of fact in a writ petition this Court held :

"14. The High Court observed that, they will not determine disputed question of fact in a writ petition. But what facts were in dispute

and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector."

. Learned Assistant Government Pleader submits that, the citation relied on, on behalf of the petitioner may not carry forward the case for petitioner and the observations, have been rendered in entirely different factual background and context, would hardly be applicable to the present scenario. He, therefore, urged the court to dismiss the writ petition.

15. While arguments also advanced on behalf of the parties, petitioner purports to assert that, due to construction of KTW, there has been submergence of some part of his land and thus seeks *mandamus* to the respondents for acquisition of his such land, whereas the learned AGP has contended that, there is nothing on record to indicate that, any part of the land of petitioner had ever been damaged or is covered under submergence.

16. The position emerges that, KTW has been constructed on a natural streamlet flowing through block no.1. It is not disputed by the petitioner that it is a natural flow and the natural streamlet. Although petitioner claims that, width of KTW is far more than width of streamlet, yet there is no credible material appearing on record substantiating such a claim in the writ petition.

17. Respondents have categorically asserted that, construction is limited to the width of the streamlet and the bed of the stream and that, there have been embankments. There have been various *panchanamas* including a very recent one.

18. Time and again there have been assertions and affidavits based on the record and spot inspections that, not only

land acquisition is not required, but also the construction of KTW is limited to the bed of the streamlet and there have been embankments preventing damage to adjoining lands. There is no record placed before this Court about any damage being sustained in process of construction of KTW by the petitioner. In such a scenario of record and material before this Court, it does not appear that, it would be appropriate for this Court to give any directions as sought under the writ petition by the petitioner. There appears to be a serious dispute about the factual position. The damage being sustained by the petitioner being a question of fact and may require a detailed inquiry. It would be not proper to be decided in a writ petition, with reference to the record as has been produced before this Court. In the circumstances, we are not inclined to accede to the request made by petitioner by passing any order as prayed for. However this would not preclude from taking recourse to a remedy as may be available in law to be decided in accordance with law.

19. Writ petition stands dismissed. Rule discharged.

[P.R. BORA]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE