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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1122 OF 2017

WITH

CIVIL APPLICATION NO. 84 OF 2018

WITH

CIVIL APPLICATION (ST.) NO. 19017 OF 2018

WITH

CIVIL APPLICATION (ST.) NO. 19019 OF 2018

Bhiva Namdeo Borade & Ors.

... Petitioners

Versus

The State of Maharashtra & Ors.

... Respondents

Mr. Anil Ahuja, for Petitioners and Applicants.

Mr. A.B. Vagyani, GP with Mr. R.A. Salunkhe, AGP for Respondent No.1.

Mr. Murlidhar Laxman Patil, for Respondent No.4.

**CORAM: A.S. OKA AND
 RIYAZ I. CHAGLA, JJ.**
DATE: 6TH JULY, 2018.

ORAL JUDGMENT (Per A.S. Oka, J.)

1. In this petition under Article 226 of the Constitution of India, the challenge is to the acquisition proceedings under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short “the said Act of 2013”). The public purpose for acquisition is construction of Sewerage Treatment Plant (for short “STP”) for the Nashik Municipal Corporation. Initially, there was a challenge in this Petition to the notification dated 15th May 2015 issued under

section 11 (1) of the said Act of 2013 as well as a declaration dated 12th July 2016 issued in exercise of the power under section 19 of the said Act of 2013. By amendment, a challenge is permitted to be incorporated to the award dated 30th March 2017. There is also a challenge to the report dated 16th September 2015 purporting to be a report under sub-section (5) of section 16 of the said Act of 2013. There is prayer added by way of amendment seeking protection to the possession of the petitioners.

2. Certain factual aspects are material for the purpose of appreciating the legal submissions made across the bar. As indicated in the subsequent part of the judgment, the main contention is that the notification contemplated by section 19 (1) was not issued within the time provided under the provisions of the said Act of 2013. There are certain dates and events which have not been disputed. As stated earlier, the notification under section 11(1) was issued on 15th May 2015. It was published in the local newspapers on 20th May 2015. It was published in the Government Gazette of 21st to 27th May 2015. It was also published on the notice board of the office of the Tahasildar at Nashik on 4th June 2015. There is no dispute between the parties as regards the aforesaid dates and events. The contention of the State is that the said notification was published on 30th July 2015

on the notice board of the office of the Village Talathi at Pimpalgaon (Khamb). This factual case made out by the State has been disputed by the petitioners by pointing out that the publication was in fact on 20th May 2015. On 5th August 2015, notices were purportedly issued under section 16(5) in the said notices of the said Act of 2013 calling upon the petitioners to remain present for hearing. Later on 4th December 2015, a corrigendum was issued which provides that section 16(5) shall be read as section 15(2). There is no dispute that on 12th July 2016, a declaration under section 19 (I) was issued. There is no controversy as regards the publication of the said notification. The award was made on 30th March 2017 by the Deputy Collector (Land Acquisition) No.2 at Nashik.

3. The main challenge in the Writ Petition to the acquisition proceedings is on the ground that the declaration under sub-section 1 of Section 19 of the said Act of 2013 has been issued after expiry of stipulated period of 12 months from the date of the Notification under Section 11 (1) of the said Act of 2013. The contention in the Petition is that a false case is made out that the Notification dated 15th May, 2015 has been published on 30th July, 2015 in the office of village Talathi at Pimpalgaon (Khamb). The submission of the Petitioners is that the said Notification was

published on 20th May, 2015 in the office of the Talathi of village Pimpalgaon (Khamb). The Petitioners have relied upon several documents in support of their case. The contention of the Government as well as the Nashik Municipal Corporation is that there is a contemporaneous record available to show that the Notification was published on 30th July, 2015 in the office of the village Talathi and there is no record available to show that at any time prior to 30th July, 2015 there was any such publication. There are various other submissions made by the Petitioners for challenging the acquisition proceedings.

4. Additional submission made by the learned Government Pleader and the learned counsel appearing for the Nashik Municipal Corporation is based on the proviso to Section 125 of the Maharashtra Regional and Town Planning Act, 1966 (for short "MRTP Act") by contending that as the acquired land is reserved for STP in the sanctioned developed plan of the year 2017, the procedure contemplated by Sections 4 to 15 of the said Act of 2013 was not applicable and therefore, the acquisition proceedings could have commenced on the basis of a declaration under Section 19 (1) of the said Act of 2013.

5. Another submission made by them is that the first two Petitioners have accepted the compensation under the award

dated 30th March, 2017 without any protest and they have parted with possession of their respective acquired lands. On this aspect, the submission of the learned counsel appearing for the Petitioners is that in fact on the representation made by the Land Acquisition Officer that the Petitioners will be free to prosecute their own remedies that they have accepted the compensation. However, he accepted that there is no written document to show that the first two Petitioners accepted the compensation under protest and without prejudice to their rights and contentions in the Petition.

6. The learned counsel appearing for the Petitioners stated that the Petitioners have no objection, if the State Government is directed to initiate fresh acquisition proceeding in respect of the subject lands under the said Act of 2013, while keeping the issue of the area of the acquired lands' open.

7. The first question to be considered is whether the Petition can be entertained as far as the first two Petitioners are concerned. Shri Deepak Yashwant Malwal, the Deputy Engineer, Sewerage Department of Nashik Municipal Corporation has filed an Affidavit dated 11th January, 2018 to which various documents have been annexed. There are receipts placed on record signed by the first two Petitioners. On page 484, there is a possession

receipt bearing thumb impression of the first Petitioner in respect of an area of 6000 Sq. mtrs. out of Gat No. 2/4. There are vouchers / receipts on pages 486 and 487 dated 14th November, 2017, which bear thumb impression of the first Petitioner acknowledging the receipt of sum of Rs.38,27,362/- towards compensation on account of Trees thus which was deposited in his bank account through RTGS. The receipt records that one Mahadu Bahiru Borade, who was the owner of area of 3000 Sq. mtrs out of land bearing Gat No. 2/4 has agreed that compensation in respect of mango trees on his land should paid to the first Petitioner. There is a receipt (page 482) showing that the first Petitioner received a sum of Rs.71,22,110/- payable to him as per the impugned award in respect of area 3000 sq. meters out of Gat No. 4/2 and the said Bhiwa received the same amount in respect of his area of 3000 sq. metres. Page 483 is the possession receipt executed by both of them. These receipts are not disputed by the first Petitioner which show the unconditional receipt of compensation by him.

8. As regards the second Petitioner, page 676 shows that his son Rajendra Shivram Borade whose name is already on record

of the Petition in his capacity of the legal representative of the second Petitioner accepted compensation of Rs.35,08,249/- in respect of area of 1500 Sq. mtrs. out of Gat No. 2/5 which is payable in terms of the impugned award. The possession receipt signed by him is on page 669. It is not in dispute that the first two Petitioners have received additional amount by way of compensation for trees from Nashik Municipal Corporation.

9. In none of the aforesaid receipts bearing the thumb impressions of the first Petitioner and the signatures of the legal representatives of the second Petitioner, it is mentioned that the compensation has been received under protest and without prejudice. In fact, the first and second Petitioners have accepted the compensation without any protest on 14th November, 2017. We may note her that they accepted compensation during the pendency of this Petition. If the said Petitioners wanted to accept the compensation under protest without prejudice to their rights in this Petition, they could have always approached this Court for seeking necessary clarification. After having accepted the entire compensation payable to them under the award of 30th March, 2017, now the first two Petitioners are not entitled to prosecute this Petition under Article 226 of the Constitution of India, as they have accepted to the impugned award. Therefore, this Petition will

have to be entertained as far as the other Petitioners are concerned.

10. Now we turn to the controversy, whether the declaration under sub-section 1 of Section 19 was made within the period of 12 months as provided in sub-section 7 of Section 19 of the said Act of 2013. Sub-section 7 of Section 19 reads thus:-

7) Where no declaration is made under sub-section (1) within twelve months from the date of preliminary notification, then such notification shall be deemed to have been rescinded: Provided that in computing the period referred to in this sub - section, any period or periods during which the proceedings for the acquisition of the land were held up on account of any stay or injunction by the order of any Court shall be excluded: Provided further that the appropriate Government shall have the power to extend the period of twelve months, if in its opinion circumstances exist justifying the same: Provided also that any such decision to extend the period shall be recorded in writing and the same shall be notified and be uploaded on the website of the authority concerned.

11. Hence, it follows that if the declaration under sub-section 1 of section 19 is not made within the prescribed period of 12 months from the date of the preliminary Notification under sub-section 1 of Section 11, such Notification shall be deemed to have been rescinded. It is not the case of the Respondents that there was any prohibitory order of any Court which prevented the State Government from issuing a declaration under sub-section 1 of Section 19 or that the State Government for the reasons recorded

in writing which were notified extended the prescribed period of 12 months.

12. For deciding whether sub-section 7 of Section 19 is applicable, we have to see what was the last date of the publication of the notification dated 15th May 2015 under sub-section 1 of Section 11. There is an Affidavit filed by Shri Vitthal Govind Sonawane, the In-charge Deputy Collector, Land Acquisition II, which is affirmed in February, 2017. In paragraph 7 of the said Affidavit, the manner in which the Notification under sub-section 1 of Section 11 was published has been set out. Paragraph 7 reads thus:-

7. It is submitted that, in acquisition proceeding of the suit land, on 15th May, 2015, a Notification under Section 11 of the New Act has been issued by these Respondents. It is submitted that, aforesaid Notification has been published in Daily Bahujanratna Loknayak and Daily Deshdoot dated 20th May, 2015. It has been further published on 4th June, 2015 at Notice Board of Tahsil office, Nashik and also published on 21st May, 2015 to 27th May, 2015 in Maharashtra Gazette.

*Annexed hereto and marked as **Exhibit "4"** is photo copy of the Notification dated 15th May, 2015.*

13. To the same Affidavit of Shri Vitthal Govind Sonawane, a copy of individual notice issued under sub section 1 of Section 11

of the said Act of 2013 has been annexed. Apart from the gazette publication made in the Government gazette of 21st to 27th May 2015 and the publication in two local newspapers on 20th May, 2015, it is stated that the said Notification under Section 11 (1) of 15th May, 2015 was published in the offices of (i) the Deputy Collector, Land Acquisition Officer-II, Nashik (ii) the Tahasildar at Nashik and (iii) the Talathi at Pimpalgaon (Khamb) on 20th May, 2015. It is stated that it was published on the Government website on 20th May, 2015. Thus going by the said notice dated 28th May, 2015 under Section 11 of the said Act of 2013, the Notification was published in the office of the Talathi of Pimpalgaon (Khamb) on 20th May, 2015. At highest, going by the said document, the last date of the publication can be taken as 20th May, 2015. We may note here that the said is Affidavit is affirmed on 2nd February, 2017 and the award was made, as stated earlier, on 30th March, 2017. Even in the Affidavit, it is not stated that the notification was published in the office of the Talathi of Pimpalgaon (Khamb) on 30th July, 2015. The said award was produced on record along with an Affidavit dated 11th January, 2018 filed by Nashik Municipal Corporation. In the said award, for the first time, it was stated that the Notification under Section 11(1) was published in the office of Talathi at Pimpalgaon Khamb

on 30th July, 2015.

14. Therefore, the position which emerges is that in the notice dated 28th May, 2015 issued under Section 11 of the said Act, 2013, the date of publication of the Notification in the office of the Talathi is stated to be 20th May, 2015 and in the award it is stated to be 30th July, 2015. If publication is made on both the dates, the second publication will have to be kept out of consideration for the purposes of computation of period of 12 months provided in sub-section 7 of Section 19. The law is fairly settled on this aspect. Repeated publication made by the same mode is of no avail to decide the question whether the subsequent Notification is published within the stipulated time. The provision like sub-section 7 of Section 19 cannot be defeated by showing repeated publication by the same mode.

15. Photocopies of the inward register maintained by the office of the Talathi of village Pimpalgaon (Khamb) which are obtained under the Right to Information Act, 2005 by the Petitioners are placed on record. Entry No. 29 of 20th May, 2015 is of a letter received by the Talathi from Tahasildar, Nashik regarding the publication of notice of the subject acquisition. The endorsement in column No.7 of the said inward register records that the notice

was published. The last column gives the date of publication as 20th May, 2018. Even a copy of the letter dated 15th May, 2015 is placed on record on page 580. It is a letter addressed by the Deputy Collector, Land Acquisition to the Tahasildar and the Talathi of Pimpalgaon (Khamb) calling upon them to publish the Notification under Section 11 (1) in their respective offices. Thus, there is a contemporaneous record available apart from the notice under Section 11 issued by the Deputy Collector, (Land Acquisition-II) himself to show that the Notification under Section 11 (1) was published in the office of the Talathi on 20th May, 2015. Reliance was placed by the Respondents on the same inward register and especially entry No.48. The column No.3 which requires recording of the date of receipt of a letter is kept blank. Column No.2 indicates that a letter dated 15th May, 2015 was received from Deputy Collector, (Land Acquisition Officer – II). Column No.5 shows that it is concerning publication of the Notification under Section 11 in the office on 30th July, 2015. Column No.7 records an entry that the letter was concerning publication of a Notification under Section 11. In the last column, there is no entry that it was published on 30th July, 2015. We must note that the copy of the inward register issued to the Petitioners contains photo copies of various pages. Entry No.48 is the last

entry on the concerned page of the inward register which is in the first half of the page and the rest of the page is kept blank. From the next page, the entries start from Serial No.1 which is an entry of a letter received on 7th August, 2015.

16. Smt. Vasanti Mali, Deputy Collector, (Land Acquisition II) filed an Affidavit dated 22nd February, 2018 raising the contention that the publication of notice in the office of the Talathi was on 30th July, 2015. The matter does not rest here. By filing an Affidavit dated 14th March, 2018, the same Deputy Collector, relied upon the entry No.48 in the inward register. Paragraph 3 of the Affidavit refers to entry at serial number 29, which we have referred earlier. For the first time, it is contended that the details mentioned in the notice dated 28th May, 2015 under Section 11 (1) are erroneous. Shri Shailendra Krishnarao Shinde, the Talathi of village Pimpalgaon Khamb filed an Affidavit affirmed on 19th May, 2018 in which he has come out with the case that he was not able to publish the Notification on 20th May, 2015 as mentioned in Serial No. 29 of the inward register as he was busy in Kumbhmela work. He has stated that he had published the Notification on 30th July, 2015 in his office and has noted the same at serial number 48 of the inward register. He has stated that he has sent a report to that effect to the Deputy Collector, Land Acquisition – II.

However, a copy of the report is not placed on record. On 11th June, 2018, the same Deputy Collector (Smt. Vasanti Mali) filed an Affidavit. Very interestingly, in the said Affidavit filed, as late as on 11th June, 2018, the Deputy Collector, stated that on 5th April, 2018, the Talathi addressed a letter to the Land Acquisition Officer stating that though the Notification was received by his office on 20th May, 2015, it was not published on the same date due to the work of Kumbhmela. In paragraph 2, the Deputy Collector stated thus :

"2. I say that from the record in the office of the Land Acquisition Officer the Notice u/s. 11(1) of the Act dated 15th May, 2015 was again sent for publication on 30th July, 2015, as there was no record of publication of that notice in the office of Talathi, and the said notice was thereafter published on 30/07/2015 on the notice board of Talathi.

(underline supplied)

17. This paragraph clearly indicates that according to her, as there was no record of the publication of the notice in the office of Talathi, the said notice was again published on 30th July, 2015. The letter dated 5th April, 2018 addressed by the Talathi to the Deputy Collector is annexed to the said Affidavit which records that though he received the Notification Section 11 (1), he did not publish it on 20th May, 2015.

18. As pointed out earlier, in the first Affidavit which is filed on

record by Shri Vitthal Govind Sonawane, the Deputy Collector, it is not stated that the Notification was published on 30th July, 2017. Even in notice dated 28th May, 2015 under Section 11 of the said Act, 2013 issued by the Deputy Collector, it is stated that the publication in Talathi's Office was on 20th May, 2015. Three years after the said notice was issued, now a stand is sought to be belatedly taken by the Deputy Collector that what is mentioned in the said notice issued in May, 2015 is incorrect. As stated earlier, there is a contemporaneous record in the form of entry No. 29 in the inward register maintained by the Office of the Talathi to show that the notification was published on 20th May, 2015. What is sought to be stated by the Talathi by the letter dated 5th April 2018 it is clearly an after thought. Moreover, the copy of the said letter does not bear outward number of the office of the Talathi. Inward number of the officer of the Deputy Collector does not appear on the letter. Taking over all view of the matter, there is sufficient record available to show that on 20th May, 2015, the notification of 15th May, 2015 under Section 11(1) was published in the office of the Talathi. The subsequent publication allegedly made on 30th July, 2015 is doubtful. Thus, the period provided in sub-section 7 of Section 19 began running from 20th May, 2015. Hence, the declaration under Section 19(1) is beyond the period

of 12 months.

19. The acquisition was for a very important public purpose of setting up STP. The construction of STP has been delayed for a considerably long time. In case of acquisition for such an important public purpose, the State Government has committed a default by not publishing the declaration under sub-section 1 of 19 under the said Act, 2013 within the stipulated period of 12 months. Not only that this default was committed, but belatedly in April and June, 2018, a stand was sought to be taken regarding the publication made on 30th July, 2015. We are really surprised to note about the manner in which the Deputy Collector by filing an Affidavit in April, 2018 has gone to the extent of stating that what is mentioned by her own predecessor in the Notice dated 28th May, 2015 is incorrect. Therefore, we have no option but to hold that there was a publication made on 20th May, 2015 of the Notification under Section 11(1) in the office of the Talathi of Pimpalgaon (Khamb). Even assuming that on 30th July, 2015, there was one more such publication, the same cannot taken into consideration for computing the period of 12 months provided in sub-section 7 of section 19. Even taking the last date of publication of the Notification under sub-section 1 of Section 11 as 27th May, 2015 (as the Gazette is for the period 21st to 27th May,

2015), the declaration issued on 12th July, 2016 under sub-section 1 of section 19 is beyond the period prescribed by sub-section 7 of section 19 and therefore, there is an automatic lapsing of the said Notification. The State Government could have saved all this by passing a speaking order of extending the time as provided in proviso to sub-section 7. But that was not done. Therefore, we have no option but to set aside acquisition proceedings and award to the extent of the lands held by all the Petitioners except the first two Petitioners.

20. An argument was canvassed that in view of Section 125 of the MRTP Act, the acquisition could have commenced from Section 19 as Sections 4 to 15 of the said Act of 2013 are not applicable when acquisition is under MRTP Act. However, perusal of the Notification / declaration under Section 11 and Section 19 do not show that the acquisition was not under MRTP Act. In an Affidavit dated 3rd February, 2018 filed by Shri Ganesh Digambar Maid, Deputy Engineer, Sewerage Department of the Nashik Municipal Corporation, he has stated that on 9th January, 2017 final development plan was sanctioned by the State Government in which the acquired lands have been shown reserved for STP. As the present acquisition was not under MRTP Act, the said submission merits no consideration.

21. Some grievance was made by the learned counsel appearing for the Petitioners as regards the area of the acquired land. Section 23 of the said Act of 2013 lays down that while making an award, the Collector will have to determine the true area of the acquired land. Therefore, the said objection is irrelevant.

22. As the position emerges today, now the acquired land is reserved in the sanctioned Development Plan for STP. Therefore, the State Government and the Municipal Corporation can take recourse to Section 126 of the MRTP Act and in particular clause (c) of sub-section (1) thereof for acquiring the subject lands. In view of proviso to Section 125 of the MRTP Act, the procedure specified in Sections 4 to 15 of the said Act 2013 will not be applicable to such acquisition. Therefore, the issue of the existence of public purpose does not remain open for challenge to the Petitioners.

23. We, therefore, pass the following order:-

i) Writ Petition stands rejected as far as the Petitioner Nos.1 and 2 are concerned;

ii) The impugned acquisition proceedings and award dated

30th March, 2017 are hereby quashed and set aside only in so far as the lands in respect of which the Petitioner Nos. 3 to 17 have been found to be persons interested. We make it clear that acquisition proceedings which culminated in the award dated 30th March, 2017 in relation to the lands of the Petitioner Nos. 1 and 2 and those who have not challenged the acquisition proceedings, will continue to be legal and valid;

iii) We make it clear as there is no dispute that the Petitioner Nos. 3 to 17 have not been paid any compensation and hence, it is not necessary to pass any order of refund;

iv) We also make it clear that in view of what is held in the judgment, it will be always open for Respondents to initiate fresh acquisition proceedings by taking recourse to Section 126 read with 125 of the MRTP Act;

v) We also make it clear that in view of the reservation in the sanctioned Development Plan, if the acquisition is initiated under the MRTP Act, the provisions of Sections 4 to 15 of the said Act of 2013 will have no application;

vi) The Petition is allowed on the above terms with no order

as to costs.

(RIYAZ I. CHAGLA J.)

(A.S. OKA, J)