



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

WRIT PETITION NO. 3609 OF 2020

1. Prakash s/o. Gangaram Dhage,
Age 50 years, Occu. Agri.,
2. Shrikant s/o. Balajirao Dhage,
Age 39 years, Occu. Agri.,
3. Vaibhav s/o. Balajirao Dhage,
Age 34 years, Occu. Agri/Advocate,
4. Shantabai w/o. Ashok Dhage,
Age 50 years, Occu. Agri.,
5. Lalatabai w/o. Devidas Dhage,
Age 50 years, Occu. Agri.,
6. Gangadhar s/o. Masnaji Dhage,
Age 60 years, Occu. Agri.,
7. Taterao s/o. Shankar Dhage,
Age 40 years, Occu. Agri.,
8. Ganpati s/o. Sambhaji Dhage,
Age 50 years, Occu. Agri.,
9. Laxman s/o. Dattram Dhage,
Age 49 years, Occu. Agri.,

All R/o. Vazirgaon,
Tal. Naigaon, Dist. Nanded

.. Petitioners

Versus

1. The State of Maharashtra
Through it's Secretary,
Dept. of Public Works, (Roads)
Mantralaya, Mumbai - 32
2. The District Collector,
Nanded District, Nanded
Taluka and District Nanded

3. The Chief Engineer,
Public Works Department,
Regional Office, Aurangabad,
Taluka and District Nanded
4. The Superintending Engineer,
Public Works Circle, Nanded,
Taluka and District Nanded
5. The Executive Engineer,
Public Works Division, Degloor,
Taluka Degloor, District Nanded .. Respondents

Mr. G. V. Mohekar, Advocate for Petitioners;
Mr. N. S. Tekale, A.G.P. for Respondents

**CORAM : S. G. MEHARE &
SHAILESH P. BRAHME, JJ.**

**RESERVED ON : 26-11-2024
PRONOUNCED ON : 12-12-2024**

JUDGMENT (PER: S. G. MEHARE, J.) :-

1. Rule. Rule made returnable forthwith. Heard finally, with the consent of the parties.

2. The petitioners, by way of second round of writ petition, prayed for a writ of mandamus to hold and declare that the alleged land acquisition proceedings initiated by the respondents under the Bombay Highways Act, 1956 (Hereinafter, referred to as "**B.H.Act, 1956**"), with respect to State Highway (S.H.) No.261 passing through the lands belonging to the petitioners are vitiated due to noncompliance of procedure of law and contrary to the law laid down by the Hon'ble Supreme Court, in the case of **Vidya Devi vs. State of Himachal Pradesh, 2020(1) RCR Civil 670.**

3. The writ of mandamus or any other writ has also been requested to hold and declare that the alleged land acquisition proceedings initiated by the respondents for the B.H.Act and the road has been lapsed in view of Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (in short, "**L.A.Act, 2013**") and in view of the law laid down by the Hon'ble Supreme Court, in the case of ***Pune Municipal Corporation and another vs. Harakchand Solanki, 2014 AIR (SCW) 787***, or in alternate to hold and declare that the petitioners are entitled to get the compensation in view of the L.A. Act, 2013, if the respondents so desire as no acquisition proceedings are initiated, no possession is taken and no award has been passed till today under the B.H.Act, 1956.

4. The facts in brief are that the petitioners are the owners of the land Gat Nos. 134, 135, 123, 468, 510, 511, 112, 131, 155, 424, 125, 415, 136, 132 situated in the village Vazirgaon, Taluka Naigaon, District Nanded. Respondents/authorities have started constructing two lining road (i.e. Part; Chancha to Mudkhed) S.H.No.261. While laying the said road, the agricultural lands of the petitioners are also going to be affected. However, the respondents/authorities are intending to start the construction without initiating the acquisition proceedings. The tender notice was issued for laying the road, in which, it is mentioned that the

above road is affecting the lands of the petitioners. The lands of the petitioners are irrigated and under cultivation.

5. The further case of the petitioners is that the respondents /authorities did not acquire the lands of the petitioners or adjacent farmers of the said footway (*Paulvat*) or did not pay the compensation towards acquisition at any point of time before the work was started. In 7/12 extract, the footway adjacent to their lands was mentioned. The road in existence was 8 to 10 ft. wide. However, without following due procedure of law, respondents/ authorities are widening it to 80 feet. The representations were made in 2018 and the information were also sought under the Right to Information Act. However, the respondents/authorities did not pay heed. The authorities are trying to take forcible possession of the lands in dispute without following due procedure of law.

6. Admittedly, earlier to this writ petition, the petitioners approached this Court by way of writ petition No.13632 of 2018. Respondent/State had filed affidavit-in-reply in the said proceedings and had raised preliminary objection about tenability of the petition. The co-ordinate Bench of this Court, after considering the material, by order dated 22.12.2018, did not entertain the petition on merits, because the petition had raised the disputed the questions of facts. The Court also held that the petitioners can invoke jurisdiction of the Civil Court to adjudicate

the disputed questions of facts. After the said order, the petitioners had filed a Special Civil Suit No.1 of 2019 in the Civil Court Senior Division, Biloli, for perpetual injunction restraining the defendants/present respondents from causing interference and obstruction to their peaceful possession. The said suit was on the identical facts. In the said suit, the temporary injunction application was rejected. The petitioners were unsuccessful before the first Appellate Court, even after remanding the matter to the District Court to decide the Miscellaneous Civil Appeal No.17 of 2019 against the order of temporary injunction, the first appellate court rejected the appeal.

7. It appears that after passing the judgment and order of the District Judge-1, Biloli, in Miscellaneous Civil Appeal No.17 of 2019, dated 13.02.2020, the petitioners approached this Court. The petition is silent, whether the suit for mandatory injunction filed by the petitioners is decided on merit. However, it appears that in the identical remedy which was sought earlier in the writ petition is again sought.

8. The contesting respondents have filed their affidavit-in-reply. They have raised the preliminary objection on maintainability and suppression of material facts. They have submitted that the petitioners are not entitled to seek any relief in the present petition much less any equitable relief as the petitioners have

willfully suppressed material facts. The factum of acquisition way back in 1972 is not at all disclosed by the petitioners. In view of the law laid down by the Hon'ble Supreme Court, in the case of ***State of Maharashtra vs Digambar, 1995 AIR (SC) 1991***, the objection as regards acquisition or inadequate compensation cannot be opened at belated stage. The said view still holds the field. It has been pleaded that the activities of construction of the road are within the sphere of 60 feet (18 meters) only and as such the case of the petitioners is based on incorrect facts. No rights of the petitioners have been infringed, which susceptible of being challenged under public law regime and as such the writ petition falling beyond public law regime is dismissed as not tenable as the petitioners raised factual disputes of the matter.

9. The lands in dispute were in possession of the Public Works Department long back from 1972. The said road is a State Highway as per 2001-21 Road Development Plan. Previously the status of the road was in a major district road as per 1981-2001 Development Plan. The said road was marked as a double dotted line on Toposheet No. 56 E/8 published by Survey of India Department. In a nut-shell, the case of the respondents is that the road in question was already in existence and it was constructed in 1972. The erstwhile owners had donated their lands for construction of the road. Since then, it is in the possession of the contesting respondents. However, unfortunately, the documents of

donation are misplaced in the office. The road was constructed in the drought year of 1972 under the Employment Guarantee Scheme. The erstwhile owners of the lands did not raise objection. The petitioners have admitted that there was no land acquisition proceedings initiated under the B.H. Act or the then L.A. Act. However, after about 47 years, the petitioners are knocking the door for compensation. The contesting respondent did not encroach upon the lands of the petitioners nor their lands were going to be affected. The road was already in existence and in possession of the contesting respondents since drought year 1972 uninterruptedly. Hence, the writ petition deserves to be dismissed.

10. The learned counsel for the petitioners has vehemently argued that the construction of the road without acquiring the lands or paying the compensation violates constitutional right of the petitioners. No authority, even the Government can forcibly dispossess the land owners without following due procedure of law. Unless the compensation is paid, no property as such could be used for the public purpose.

11. On delay and laches, he relied on the case of **Vidya Devi** (*supra*). In that case, the Hon'ble Supreme Court laid the law that the State cannot be permitted to perfect its title over the land by invoking the doctrine of adverse possession to grab the property of its citizens. Taking the land without initiating acquisition

proceeding or any procedure known to law, the State should pay the compensation and legal costs. There is no period of limitation prescribed for the courts to exercise their constitutional jurisdiction to do substantial justice.

12. The facts of the ***Vidya Devi*** (supra) were that the Respondent/State took over the land of the Appellant in 1967-68 for the construction of a major District Road being the Nadaun - Sujanpur Road, without taking recourse to acquisition proceedings, or following due process of law. The construction of the road was completed by 1975. The Appellant, being an illiterate widow, coming from a rural background, was wholly unaware of her rights and entitlement in law, and did not file any proceedings for compensation of the land compulsorily taken over by the State. The Respondent/State had admitted that the Department had used land in the ownership of the Appellant for the construction of the Nadaun - Sujanpur road, a major district road in 1967-68. The State had been in continuous possession of the property since 1967-68, i.e. for the last 42 years. The objection was raised that the title of the Respondent/State was perfected by "adverse possession". It was submitted that the statutory remedy available to the Appellant was to file a Civil Suit. In these premises, the above judgment was delivered. However, the facts of this case are different.

13. The contesting respondents had a case that the road in question was already constructed and developed during the drought year 1972 under the Employment Guarantee Scheme. The erstwhile owners had donated the lands. The erstwhile owners during their life time never raised objection. The papers on record reveal that the road in question was in existence since 1972.

14. The petitioners also relied on the case of ***Sukh Dutt Ratra and another vs The State of Himachal Pradesh and others, (2022) 7 SCC 508***. The facts of that case were that the Respondent/State utilized the subject land and adjoining lands for the construction of the 'Narag Fagla Road' in 1972-73, but allegedly no land acquisition proceedings were initiated, nor compensation were given to the appellants or owners of the adjoining land. Pursuant to a judgment of the Himachal Pradesh High Court, the land acquisition proceedings was initiated and compensation was determined for the neighbouring land owners whose lands were similarly used for construction of the same road. The writ petition of the appellants before the High Court was disposed of by holding that the matter involved disputed questions of law and fact for determination on the starting point of limitation, which could not be adjudicated in writ proceedings. The writ petition was disposed of, with liberty to file a civil suit in accordance with law. In that case also, the defense of the respondent/State was that the *Narag Fagla* road was in fact

constructed at the request of the appellants, and other landowners were volunteered their land for the purpose of road as they were desiring to have the benefit of connectivity and hence, the road was constructed with their verbal consent in the year 1972-73. Till 2011, no objection was raised. The land acquired for same road were not adjacent to the land of the appellant. The Hon'ble Supreme Court has observed that while the right to property is no longer a fundamental right [Constitution (Forty Forth Amendment) Act, 1978], it is pertinent to note that at the time of dispossession of the subject land, this right was still included in Part III of the Constitution. The right against deprivation of property unless in accordance with procedure established by law, continues to be a constitutional right under Article 300-A. It is the cardinal principle of the rule of law, that nobody can be deprived of liberty or property without due process, or authorization of law. Considering the defence of the Respondent/ State it was held that the contentions raised by the State, do not inspire confidence and deserve to be rejected. The State has merely averred to the appellants' alleged verbal consent or the lack of objection, but has not placed any material on record to substantiate this plea. Further, the State was unable to produce any evidence indicating that the land of the appellants had been taken over or acquired in the manner known to law, or that they had ever paid any compensation. The plea of having no land adjacent to the acquired

land was also discarded for the reason that the subject land was acquired for the same reason i.e. construction of the same road. The ratio laid down in **Vidaya Devi** (supra) was also referred. It has been finally held that the forcible dispossession of a person of their private property without following due process of law, was violative of both their human right, and constitutional right under Article 300-A, the appeal was allowed and the approach taken by the Hon'ble Supreme Court in **Vidaya Devi** (supra) is squarely applicable to the nearly identical facts before us in the present case.

15. The Hon'ble Supreme Court in **Digambar (supra)** on its facts held that where a High Court in exercise of its power vested under Article 226 of the Constitution issues a direction, order or writ for granting relief to a person including a citizen without considering his disentitlement for such relief due to his blame-worthy conduct of undue delay or laches in claiming the same, such a direction, order or writ becomes unsustainable as that not made judiciously and reasonably in exercise of its sound judicial discretion, but as that made arbitrarily. It has been further observed that thus, when the writ petitioner (respondent here) was guilty of laches or undue delay in approaching the High Court, the principle of laches or undue delay adverted to above, disentitled the writ petitioner (respondent here) for discretionary relief under Article 226 of the Constitution from the High Court, particularly,

when virtually no attempt had been made by the writ petitioner to explain his blame-worthy conduct of undue delay or laches. The High Court, therefore, was wholly wrong in granting relief in relation to inquiring into the allegation and granting compensation for his land alleged to have been used for scarcity relief road works in the year 1971-72.

16. The next question raised by the respondents is that writ petition is hit by doctrine of *res judicata*. The earlier writ petition was not entertained by this Court as there was a dispute about possession of the land. In that view of the matter, the petitioners can invoke jurisdiction of the Civil Court to adjudicate the disputed question of facts.

17. The learned counsel for the petitioners has relied on ***Government of NCT of Delhi and another vs. BSK Realtors LLP and another, (2024) 7 SCC 370***. In a bunch of cases before the Hon'ble Supreme Court, in one Group "A" the prayers were made to recall the judgments and orders in view of the change in law. In another Group "B", Group B-1, the Civil Appeal dismissed in the first round; SLP pending in the second round and Group B-2, Civil Appeal allowed in the first round; SLP pending in the second round. In the third Group "C" (SLP in the first round), the cases were dismissed *in limine* in the first round. Again the SLPs were pending in second round. In the third group "C", the land

acquisition proceedings would lapse following the test laid down in the case of **Indore Development Authority (Lapse-5 J) v. Manoharlal, 2020 (8) SCC 129**. In next Group, in second round of litigation, the cases/SLP were that the land acquisition proceedings would not lapse following test laid down **Manohar Lal** (supra) as the twin conditions under Section 24(2) of 2013 Act were not met. In another Group, during pendency of SLP in the first round, the petitioners approached the Hon'ble Supreme Court owing to the change in law and in last group, the allegations were levelled related to the subsequent sale transaction by the land owners. Considering the submissions of the respective learned counsels, the Hon'ble Supreme Court framed the following issues for consideration:-

- (a) Whether the dismissal of a civil appeal preferred by one appellant in the first round operates as *res judicata* against the other appellant in the second round before us?"

The other issues are not re-produced as not relevant to the questions raised. In the said case, the Hon'ble Supreme Court reproduced the law laid down in **Munni Bibi v. Triloki Nath, AIR 1931 PC 114,**

"... (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between defendants must have been finally decided."

18. Referring to the case **Mathura Prasad Bajoo Jaiswal vs Dossibai N. B. Jeejeebhoy, (1970) 1 SCC 613**, the Hon'ble Supreme Court in paragraphs No.10 and 11 observed thus;

"10. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

11. In determining the application of the rule of res judicata the court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the Code of Civil Procedure means the right litigated between the parties, i.e., the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision

will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land.”
(emphasis supplied)

19. The order of this Court in earlier writ petition No.13632 of 2018 is apparently not decided the question between the parties finally. The writ petition was not entertained for the reason that it involved the questions of facts and possession. The contesting respondents admitted that they are in possession of the land in dispute since 1971-72 as erstwhile owners of the said land had handed over the possession to them. Therefore, this Court is of the view that this writ petition would not be dismissed under the doctrine of *res judicata*.

20. It is a fact that the lands in dispute have been used for constructing the road though way back 1971-72, it was the property of the forefathers of the petitioners, their forefathers never objected. To resist the claim of the petitioners, the contesting respondents, in earlier writ petition, had pleaded that the erstwhile owners of the lands in dispute have already donated the lands voluntarily to the Government for construction of the road in 1972. However, they admitted that the acquisition proceedings was not initiated either under the B.H.Act or the then L.A.Act. Though the learned A.G.P. has vehemently argued that the erstwhile owners of the lands in question had donated the lands to

the Government, they did not produce any document as such. Therefore, it does not inspire the confidence that the erstwhile owners of the land had donated their lands for the construction of the road under the Employment Guarantee Scheme, 1971. The plea raised by the respondents in reply-in-affidavit are indirectly based upon plea of "adverse possession". Such a plea has been discarded by the Hon'ble Supreme Court, in the case of **Vidya Devi** (supra). Considering the admissions of the respondent/State that the land in question is in their possession and absence of record showing documents of donation by the erstwhile owners, the relief of the petitioners for initiating the scheme for acquisition deserves to be allowed. Hence, the following order:-

ORDER

- (i) The writ petition is allowed partly.
- (ii) Respondents No.3 and 4 should submit the proposal of the petitioners to respondent No.2, for initiating the land acquisition proceedings and determine the compensation as per the law.
- (iii) Rule made partly absolute.

[SHAILESH P. BRAHME]
JUDGE

[S. G. MEHARE]
JUDGE