



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

WRIT PETITION NO. 10012 OF 2022

1. Anil Kerba Kadam,
Age : 35 years, Occu. : Agriculture,
R/o Jalkot, Tq. Tuljapur,
Dist. Osmanabad.
2. Prakash Kerba Kadam,
Age : 55 years, Occu. : Agriculture,
R/o Jalkot, Tq. Tuljapur,
Dist. Osmanabad. .. Petitioner

Versus

1. Raosaheb Kerba Kadam,
Age. 56 years, Occu. : Agriculture,
R/o Jalkot, Tq. Tuljapur,
Dist. Osmanabad.
2. The State of Maharashtra,
(Through the Collector, Osmanabad)
3. Special Land Acquisition Officer
(Krushna Khore Vikas Mahamandal)
Sinchan Bhawan, Samta Colony,
Osmanabad, Tq. & Dist. Osmanabad.
4. The Executive Engineer, Osmanabad
(Medium Project Division, Osmanabad) .. Respondents

Shri P. S. Chavan, Advocate for the Petitioner.
Mrs. M. S. Mhase, Advocate for the Respondent No. 1.
Shri S. M. Ganachari, A.G.P. for the Respondent No. 2.
Shri G. B. Rajale, Advocate for the Respondent No. 4.
The Respondent Nos. 3 and 4 are served.

CORAM : SHAILESH P. BRAHME, J.

CLOSED FOR JUDGMENT ON : 21.12.2023
JUDGMENT PRONOUNCED ON : 12.01.2024.

JUDGMENT :-

. Rule. Rule is made returnable forthwith with the consent of parties. Heard the litigating sides finally at the admission stage.

2. The petitioners are challenging the rejection of their application Exhibit 37 preferred under Order I Rule 10 of the Code of Civil Procedure (for short 'C.P.C.') by the learned 04th Jt. Civil Judge Senior Division, Osmanabad in L. A. R. No. 20 of 2018. The respondent No. 1 claims to be the exclusive legal representative of the deceased Kerba and stepping in his shoes as a claimant in L.A.R. No. 20 of 2018. The petitioners are real brothers of the respondent No. 1 and by the impugned order they are refused to be impleaded in the proceedings along with the respondent No. 1.

3. Land gut No. 90 and 92 situated at village Hangera (Nal), Tq. Tuljapur, Dist. Osmanabad were acquired by the respondent Nos. 3 and 4 for minor irrigation tank. Notification U/Sec. 04 of the Land Acquisition Act, 1984 (hereinafter referred as to the "Act) was issued on 06.11.1996. An award was passed on 14.12.2004. The petitioners' father Kerba submitted application before the Collector for enhancement of the compensation. It was referred to the Reference Court and registered as L.A.R. No. 20 of 2018. On 17.01.2008, Kerba died. He is survived by the present

petitioners, respondent No. 1 and other four siblings.

4. The petitioners submitted application Exhibit 37 under Order I Rule 10 of the C. P. C. to implead them in the reference. It was objected by the respondent No. 1 by filing say. By order dated 07.07.2022 application Exhibit 37 was rejected. Being aggrieved present petition is filed.

5. The learned counsel for the petitioner submits that the lands which were acquired belong to joint Hindu family. After the death of Kerba, the petitioners should have been brought on record along with other siblings. However, the respondent No. 1 got recorded his name vide mutation entry No. 1091 excluding the petitioners and other siblings. The petitioners are entitled to the compensation being legal heirs of deceased Kerba. The learned Judge committed error of jurisdiction in rejecting their application.

6. The learned counsel submits that the learned Judge committed perversity in relying upon the decree, Exhibit 52 passed in R.C.S. No. 72 of 2000, the consent deed and the power of attorney executed by the deceased Kerba. Though there is a decree passed in R.C.S. No. 72 of 2000 in favour of the respondent No. 1 it was collusive and obtained by the respondent No. 1 by entering into compromise with deceased Kerba. He would further submit that the respondent No. 1 does not get any exclusive right to claim the compensation or enhancement of the compensation because the decree Exhibit 52 was not brought to

the notice of the Special Land Acquisition Officer before passing award on 14.12.2004.

7. The learned counsel would further submits that the petitioners being heirs are entitled to stake their claim under Order XXII of the C. P. C. He seeks reliance on the judgment of this Court in the matter of **Shivaji and others Vs. Special Land Acquisition Officer and another** reported in *2003(1) All M.R. 633*. He further submits that the petitioners are not given opportunity to challenge the documents of consent deed power of attorney and decree passed in R.C.S. No. 72 of 2000, which are not admissible to the petitioners. He therefore urged that the petitioners are necessary parties and the learned Judge should not have foreclosed their right in this manner.

8. The respondent No. 1 filed his say to application Exhibit 37 as well as affidavit in reply in the present matter. His stand is that in view of the compromise decree passed in R.C.S. No. 72 of 2000 the land gut No. 90 and 92 are declared to be owned by the respondent No. 1. It is further agreed by deceased Kerba to disburse compensation to the respondent No. 1. In paragraph No. 4 of the affidavit in reply of the respondent No. 1 it is stated that the lands were ancestral properties and there was partition in the year 1996. All members of the family were allotted share and acquired lands were allotted to the respondent No. 1.

9. The learned counsel appearing for the respondent No. 1 has contested the submissions of the petitioners. It is submitted that

in the year 1996 there was oral partition and the lands under acquisition and others properties were partitioned by metes and bounds amongst the members of the family. The lands which are acquired were allotted to deceased Kerba. He had exclusive right to alienate the property. The decree passed in R.C.S. No. 72 of 2000 has not been challenged by the petitioners.

10. Learned counsel Ms. Mhase would further submit that the Reference Court has no jurisdiction to decide the entitlement amongst the parties. The reference is pending since 2004, however, the present application is submitted belatedly on 30.03.2022 with an oblique motive. It is further submitted that the petitioners have alternate remedy to file separate suit claiming their right and entitlement for the compensation and intervention in the present reference is not warranted. Lastly, it is submitted that the respondent No. 1 is the exclusive owner after the death of Kera to receive the compensation and prosecute the reference.

11. The learned Assistant Government Pleader appearing for the respondent No. 2 and the learned counsel for the respondent No. 4 supported the respondent No. 1.

12. I have considered rival submissions of the learned counsel for the litigating sides.

13. The parties are *ad-idem* that land gut Nos. 90 and 92 were acquired by the respondent No. 2. An award was passed on

14.12.2004. At the instance of father of the petitioners and the respondent No. 1, the matter was referred to the Reference Court. Kerba died on 17.01.2008. He is survived by the present petitioners, respondent No.1 and other four siblings. After the death of Kerba, the respondent No. 1 is exclusively prosecuting the L.A.R. No. 20 of 2018. Deceased Kerba had filed R.C.S. No. 72 of 2000 against the respondent No. 1 for declaration and injunction. The petitioners were not party to the suit. A compromise decree was passed between deceased Kerba and the respondent No. 1 on 10.06.2004.

14. The compromise decree Exhibit 52 is placed on record. There are various landed properties which were subject matter of the suit. It is averred in the plaint of R.C.S. No. 72 of 2000 that there was partition and allotment of lands amongst sons and deceased Kerba. The lands gut No. 90 and 92 were shown to have been allotted to the deceased Kerba. The compromise deed was placed on record at Exhibit 49 of R.C.S. No. 72 of 2000. The respondent No. 1 claims exclusive title over the lands in question in view of the terms of compromise.

15. The decree in terms of compromise was passed on 10.06.2004. At that time the matter was pending before the Special Land Officer and award was yet to be passed. It was passed on 14.12.2004. If the lands under acquisition were declared to be owned by the respondent No. 1 and he was to receive compensation, deceased Kerba or the respondent No. 1 ought to have brought compromise decree to the notice of the

Special Land Acquisition Officer. In view of compromise decree deceased Kerba was not entitled to claim enhancement of the compensation. In that view of the matter, the reference made to the civil Court by the deceased Kerba was defective.

16. The compromise decree reveals that R.C.S. No. 72 of 2000 was filed by Kerba against the respondent No. 1. The petitioners were not party. The suit was compromised. The compromise decree has not been disclosed to the competent authority. This type of conduct of the respondent No. 1 does not inspire confidence. Similarly, the learned Judge relied upon the consent deed and other documents. It is unsafe to rely upon these documents. The petitioners are entitled to have opportunity to deal with the documents. Their claim cannot be discarded relying upon the documents.

17. At this juncture of the proceedings it is relevant notice that the application of the petitioners Exhibit 37 is under Order I Rule 10 of the C. P. C. To decide whether the petitioners are the necessary parties or not, a *prima facie* case for their entitlement has to be seen. The petitioners are the heirs along with the respondent No. 1 of the deceased Kerba. I am of the considered view that they have arguable points to claim entitlement. Just because application Exhibit 37 is made at belated stage cannot be a ground to deprive them from their substantial proprietary rights.

18. The learned Judge has relied upon the compromise decree,

consent deed and power of attorney in rejected the application Exhibit 37. Simultaneously the entitlement of the petitioners has also been rejected. I have already recorded that the conduct of the respondent No. 1 is suspicious. Under these circumstances the recourse could have been taken to Section 30 of the Act after impleading the petitioners as parties to the reference proceedings. The entitlement and the rights of the parties could have been adjudicated U/Sec. 30 of the Act giving opportunity to the parties. It's an error committed by the Reference Court by foreclosing the rights of the petitioners by the impugned order.

19. The learned counsel for the petitioners has sought reliance on the judgment rendered in the case of **Shivaji and others Vs. Special Land Acquisition Officer and another** (supra). In that matter the original claimant died when the matter was before the Special Land Acquisition Officer. An application to bring on record his heirs was filed before referring the matter to the Court. Without deciding that application, the matter was referred to the Reference Court. Before the reference Court the heirs again agitated their right under order XXII of the C. P. C. In that context the ratio is laid down in para Nos. 10 and 11 of the judgment. In the present matter deceased Kerba was alive and at his instance the reference was made to the Court. The facts of the matter in hand are different. The ratio laid down in the judgment cannot be made applicable.

20. I find that in the present matter the reference made by the deceased Kerba was voidable one. There is irregularity in

making the reference. The said irregularity is rectifiable. If the heirs of deceased Kerba have made application to bring them on record along with the respondent No. 1, such application should have been allowed to rectify the defect. In that view of the matter also application Exhibit 37 deserves to be allowed.

21. For the reasons stated above, I pass following order.

ORDER

- i) The writ petition is allowed.
- ii) The order dated 07.07.2022 passed by the learned 04th Jt. Civil Judge Senior Division, Osmanabad in L.A.R. 20 of 2018 is quashed and set aside. The application below Exhibit 37 is allowed.
- iii) The parties are at liberty to agitate their claim by resorting to Section 30 of the Act.
- iv) The rule is made absolute in above terms. There shall be no order as to costs.

[SHAILESH P. BRAHME, J.]

22. After pronouncement of the judgment and order today, Ms. Ashwini Mate, learned counsel holding for Mrs. M. S. Mhase, learned counsel for the respondent No. 1 prays for staying the

effect and operation of the judgment and order. The learned counsel for the petitioner would oppose the request/prayer as L.A.R. No. 20 of 2018 is posted for pronouncement of the judgment.

23. As the L. A. R. No. 20 of 2018 has reached an advance stage, staying the operation of the present judgment and order would create complication. Considering overall circumstances of the matter the prayer for stay is rejected.

[SHAILESH P. BRAHME, J.]

bsb/Jan. 24