IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8419 OF 2008
WITH
INTERIM APPLICATION NO. 680 OF 2023

Mr. Shantinath Dada Chougule)
(deceased) through his legal heir)
Ashok Shantinath Chougule)
Age: 65 years, Occ. Agriculturist)
Residing at Ashta, Tal. Walwa,)
Dist. Sangli) **… Petitioner**

Versus

1. The State of Maharashtra)
2. Divisional Commissioner)
(Rehabilitation), Pune Division, Pune)
3. Rehabilitation Officer, Sangli)
4. Banubai D.Kumbhar (since)
deceased through her legal heirs))
4a.Babaso Pandurang Karaale)
4b.Arun Pandurang Karaale)
Both residing at Ashta, Tal. Walwa,)
District : Sangli) **… Respondents**

And

1. Babaso Pandurang Karaale)
2. Arun Pandurang Karaale) **… Applicants**

Mr. Bhushan Walimbe with Mr. Mayank Tripathi for Petitioner.
Ms. P. J. Gavhane, AGP for State.
Mr. Mahindra Deshmukh for Respondent Nos.4a & 4b and Applicant in IA 680/2023.

CORAM: G. S. KULKARNI &
SOMASEKHAR SUNDARESAN, JJ.
RESERVED ON: 30 AUGUST, 2024
PRONOUNCED ON : 25 OCTOBER, 2024.

Judgment (Per G. S. Kulkarni, J.):

1. This petition under Article 226 of the Constitution of India was filed on 19 December, 2008. It was admitted by this Court by an order dated 22 April, 2013. The primary challenge is to an order dated 3 December, 2008 passed by the Divisional Commissioner (Rehabilitation), Pune Division, Pune rejecting the petitioner's application under Section 48(1) of the Land Acquisition Act, 1848 (for short **"the 1848 Act"**) refusing to withdraw the petitioner's land for acquisition as also to the legality of the acquisition of the petitioner's land.

2. At the outset, the prayers as made in the petition are required to be noted which read thus:-

> "a This Hon'ble Court may be pleased to call for record and proceedings of acquisition of Gut No. 903/2 and Gut No. 131/1B+2B43C situated as Mauje Mardwadi and also record and proceedings of Rehab/KV—3/Complaint Appln SR/01 /2004.
>
> b After examining legality, propriety and validity of the decision to acquire Gut No. 903/2 and Gut No. 131/1B+2B+3C situated as Mauje Mardwadi, this Hon'ble Court may be pleased to quash and set aside the said decision and declare that said land of the Petitioner is liable to be acquired and further this hon'ble Court may be pleased to set aside and quash the impugned order dated 3.12.2008 passed by the Respondent No. 2 in Rehab/KV—3/ Complaint Appln SR/01/2004,
>
> c. In the alternative, this Hon'ble Court may be pleased to direct the respondents to acquire the alternative land being Gut No. 124/1B+2B+3C admeasuring 88 R instead of Gut No.903/2 and Gut No. 131/1B+2B+3C situated as Mauje Mardwadi;

> d. This Hon'ble Court may be pleased to stay effect, implementation and operation of the Judgement and order dated 3.12.2008 passed by the Respondent No.2 in Rehab/KV—3/ComplaintAppinSR/01/2004,
>
> e Ex-parte ad-interim/interim relief in terms of prayer clause (d) be granted."

3. The relevant facts are:

On 13 May 1977, the State Government published a notification under Section 11(1) of the Resettlement Act setting out 13 May 1977 to be the notified date. For the area of Village Ashta, a slab of 8 acres came to be fixed for acquisition of the different lands. In other words, the ceiling of 8 acres was fixed, thus, land holding beyond such ceiling limit was to be acquired for the public purpose of rehabilitation of the project affected persons, who were displaced persons from the 'Warna Dam project.'

4. On 13 October 1983, the State Government issued a notification under Section 4 of the Land Acquisition Act, 1894 (for short, "**LA Act**") read with the provisions of the Resettlement Act. On 21 August 1986, a corrigendum was issued to the notification under Section 4 and thereafter on 08 October 1986, notification under Section 6 of the LA Act was issued. Land of the petitioner and subject matter of acquisition is described to be Gat No.903/2 and Gat No. 131/1B+2B+ 1C/2 admeasuring 19 R situated at Mauje Mardawadi. On 29 December

1988, an award acquiring the land was published qua the petitioner's land.

5. It is the case of the petitioner that the petitioner's father Shantinath Chougule was Karta of the petitioner's joint family which comprised of the petitioner (Ashok) and his brother Bahubali. On the notified date i.e. 13 May 1977, the holding of the joint family of the petitioner was 8 acres and 5 gunthas only, which is stated to be clear from the revenue extracts being the account, of petitioner's holding. Accordingly, only 5 gunthas land was in excess of the ceiling limit. It is however, submitted that the State considered the petitioner's holding to be more than 8 acres and 5 gunthas for the reason that one Vasant Dharma Wadkar had mortgaged his land with the petitioner's father Shantinath Chaugule, being land Revisional Survey No. 1077/2 admeasuring 3 acres and 16 gunthas. It is contended that although such land was mortgaged, Shantinath was never put in possession of the said land and therefore, Revisional Survey No. 1077/2 belonging to Vasant Wadkar (for short, "**Wadkar**") had never become part of the holding of Shantinath, as the revenue record also described Wadkar as the mortgagor in respect of the said land. The petitioner has also described as to how Wadkar had purchased the said land.

6. It is, therefore, the petitioner's contention that on the notified

date, Survey No.1077/2 admeasuring 3 acres and 16 gunthas could not have been added to the petitioner's account for the purpose of consideration of the slab for acquisition and on the notified date (13 May 1977), the petitioner's entire holding was thus exempted from the acquisition. The averment to this effect made by the petitioner is "*however unfortunately, under some wrong pretext, Survey No. 1077/2 was included while calculating the total holding of Shantinath*". The petitioner has also contended that in fact in the year 1981, a regular Civil Suit No. 90 of 1981 was filed by Jaywant Bharama Wadkar and Kumar Bharma Wadkar against Shantinath praying for redemption of the mortgage and re-conveyance of the said mortgaged land bearing revisional survey no. 1077/2. It is stated that such suit came to be decreed. Shantinath accordingly, re-conveyed Revisional Survey No. 1077/2 to the said plaintiffs (mortgagor). It is contended that "*however wrongly, the revenue authorities included Revisional Survey No. 1077/2 area in the total holding of Shantinath and have arrived at a wrong conclusion that total holding of Shantinath is 11 acres and 22 gunthas*" (reference in paragraph 5 of the petition). It is stated that due to such mistake, as per section 16 of the LA Act, an area of 81 R was held to be in excess in the total holding of Shantinath, hence the respondents decided to acquire 62 R area out of Gut No. 903/2 and Gut No. 131/1B+2B+1C/2 admeasuring 19 R situated at Mauje Mardawadi

from the holding of Shantinath. In this context, relevant averments are made in paragraph 5 of the petition.

7. It is next contended that 62 R of land out of the petitioner's land purportedly acquired, Gat No. 903/2 was allotted to one Smt. Banubai Dnyanu Kumbhar in regard to which mutation entry (ME) no. 58249 recording her name in the revenue records was made in 7/12 extract, qua the said land.

8. In the aforesaid circumstances, the petitioner being aggrieved by the acquisition of the petitioner's land, *inter alia* contending that it was illegal, filed an application before the Divisional Commissioner, Pune Division under Section 48(1) of the LA Act praying that the acquisition of Gut No.903/2 be withdrawn/deleted on the ground that the petitioner's land was not liable to be acquired considering the slab under the Act. Such application came to be filed in January 2004 as seen from Exhibit-B and was numbered as Resettlement Application No. 1 of 2004. It is significant that in such application, the petitioner in paragraph 11 made a categorical averment that although the respondent contended that possession of the land was taken over and handed over to the project affected person, however, it was merely on paper, as the physical possession of the land was with the petitioner. No panchanama recording the taking over of the possession of the petitioner's land

formed part of the record. It is for such reason, the application of the petitioner was stated to be valid under the provisions of Section 48(1) of the LA Act. This apart, in paragraph 12 of the said application, the petitioner also contended that the petitioner was ready to hand over alternate land i.e. total slab of 88 ares from Gut No. 1224/1B-2B-3C and such land was totally admeasuring 1 hector and 22 ares. He also admitted that in the revenue record, the name of the petitioner qua the land which stood acquired was deleted and the name of the project affected person namely Banubai Dyanu Kumbhar was recorded and on such basis she was trying to dispossess the petitioner from the land.

9. The petitioner's application under Section 48(1) of the LA Act came to be rejected by the Divisional Commissioner, Pune Division, by the impugned order dated 03 December 2008. In such order, the Divisional Commissioner recorded that the petitioner's father never objected to the acquisition of the land as also he never objected to the slab as fixed, in respect of which report of the DRO was called for which was placed on the record of the said proceedings. It was observed that in fact, the entire land acquisition proceedings had taken place, when the petitioner's father was surviving and who never objected to the said acquisition. It is observed that in fact in the year 1997 the project affected persons were allotted the petitioner's land. Thereafter in

January 2004, the petitioner made an application offering alternate land to be acquired in lieu of the land which was already acquired under the award dated 29 December 1988. It is *inter alia* on such reasons, the Commissioner rejected the application of the petitioner under Section 48(1) refusing to withdraw the land from acquisition. The impugned order passed by the Commissioner needs to be noted, which reads as under:-

> "(Official Translation of a photocopy of an ORDER, being a marked portion, typewritten in Marathi)
>
> Considering the aforesaid facts in this matter, I, Divisional Commissioner, Pune Division, Pune pass order as under :-
>
> **ORDER**
>
> 1) Acquisition process has been completed and possession has been vested in the Government. The Land has been allotted to the
> Project Affected Person in the year 1997 itself. As per the provisions of Section 48(1) of the Land Acquisition Act, 1894, the
> Commissioner has no powers to withdraw any land from the acquisition process.
>
> 2) In this matter, as per the entries of the survey of crops made in the 7/12 extract and the panchanama dated 31.03.2004 drawn up by the Circle Officer, District Rehabilitation Office, Sangli, the Applicant has his house and a tin-sheet shed situated in the area admeasuring 0.02 hectares. Hence, the possession of the said land shall be given to the Project Affected person by confirming the boundary marks thereof and by withdrawing the said area from acquisition process. Further, the District Rehabilitation Officer, Sangli shall take steps to acquire from the Applicant, a continuous area admeasuring 0 hectare, 2 Are situated adjacent to the area suitable for acquisition, in lieu of the said area withdrawn from the acquisition process.
>
> Signature/-XXX
> (Dr. Nitin Karir)

Commissioner, Pune Division, Pune.

The Seal of the Commissioner,
Pune Division, Pune.

To,
1) Late Shantinath Dada Chougule, since deceased, through heir Shri Ashok Shantinath Chougule, R/at Ashta, Tal. Walwa, District Sangli.

Copy for Information and for taking steps :-
1) District Rehabilitation Officer, Sangli.
2) Special Land Acquisition Officer No.11, Sangli.

(Signature Illegible)
For Commissioner,
Pune Division, Pune.

True Copy,
(Signature Illegible)
Advocate."

10. It is on the aforesaid premise, the present petition is filed praying for the reliefs as noted by us hereinabove.

11. At the time when this petition was filed, the jurisdiction to entertain and hear such petition was vested with the learned Single Judge. On 6 January 2009, the learned Single Judge passed the following order on this petition *inter alia* directing the parties to maintain status quo while adjourning the proceedings:-

" The petitioner is directed to implead the affected person viz. Smt.Banubai Dnyanu Kumbhar as party-respondent in the petition and serve copy of petition on newly added respondent. Amendment to be carried out within one week from today.

Stand over for two weeks.

In the meantime, parties to maintain status-quo."

Thereafter, the proceedings were transferred to be heard by the Division Bench. A co-ordinate Bench of this Court while admitting the petition on 22 April, 2013 passed the following order:

> " Time is sought on behalf of the State Government to comply with the order dated 28th March 2013. Though the petition is pending from the year 2008, till today, there is no reply filed.
>
> 2. Rule. The learned AGP waives service for the Respondent Nos.1 to 7.
>
> 3. Rule on interim relief is made returnable on 12th July 2013. By way of ad-interim relief, we direct that the status quo, as of today, shall be maintained in respect of the possession of the land in dispute."

12. The proceedings since had remained pending, however, as the added respondents having filed an interim application, the proceedings were moved before us. Accordingly, the proceedings were listed before us on 29 August 2024 when we had extensively heard learned Counsel for the parties, however, considering the fact that the petition was admitted for final hearing and a short issue was involved, we thought it appropriate to adjourn the proceedings to 30 August 2024 so that the parties can be heard finally and the petition can be closed for judgment to be delivered. The order dated 29 August 2024 reads thus:

> "1. As this petition is admitted for final hearing and as the issue involved is a short issue, we list the petition tomorrow on the Supplementary Board.

> 2. Parties are put to notice that the petition would be taken up and finally disposed of.
>
> 3. We have spent considerable time on this petition. Today we have also examined the documents. What we require is further arguments of learned counsel for the petitioner and the State Government, if any.
>
> 4. Let learned counsel for the parties keep ready appropriate list of dates."

13. There are two reply affidavits filed on behalf of the State Government. The first reply affidavit dated 13 February 2009 of Mr. Jotiba Tukaram Patil, District Resettlement Officer, Sangli, which *inter alia* contends that on the cut-off date i.e. on 13 May 1977, the petitioner's holding as per village form No.8/A, Khata No.3430 was 11 acre 22 gunthas i.e. 4 H 62 R. The affidavit avers that the petitioner's contention that the petitioner's joint family holding was 8 acre 5 gunthas, is not correct. It is further stated that the petitioner has admitted that an area admeasuring 2 acre 16 gunthas from Survey no. 1077/2 was mortgaged with petitioner's father, as also to the fact that there was a Regular Civil Suit filed by the original owners which was decreed and the land was restored to the original owner Mr. Wadkar. Even considering such restoration of Survey no.1077/2 in favour of Mr. Wadkar, is stated to have taken place, after the cut-off date, i.e., 13 May 1977. It is next stated that the petitioner has not produced any evidence to show the entry in the revenue records deleting the name of the

petitioner's father was cancelled under the provisions of Bombay Tenancy and Agricultural Lands Act. It is averred that the evidence produced by the petitioner showed that land under Survey No.1077/2 was restored to the original tenant Mr. Wadkar after re-conveyance deed dated 13 April 1982, and as per the decree in Regular Civil Suit No.80 of 1981. It is stated that this position was evidently seen from the mutation entry No.49298.

14. The affidavit further states that the petitioner is not correct in contending that under a wrong pretense, Survey No.1077/2 was included while calculating his total holding. It is stated that Survey No.1077/2 was mortgaged with the petitioner, and its redemption and re-conveyance had taken place after the cut-off date of 13 May 1977. It is stated that the land's re-conveyance deed was effected on 13 April 1982 and its effect was taken into the village record by mutation entry no.49298 which was mutated on 2 July 1982 and certified on 26 August 1982. It is contended that such position made it clear that the petitioner was holding land from Survey No.1077/2 on cut-off date as such calculation of slab and its further acquisition is statutory as per existing laws.

15. It is contended that re-conveyance deed and redemption of mortgage had taken place after the cut-off date and hence, the

petitioner's contention of incorrect inclusion of petitioner's land in his holding qua the requirement of slab, is misconceived.

16. It is next stated that during the hearing before the Additional Commissioner, Pune Division, on 8 January 2004, the petitioner had proposed to substitute the land for acquired land, and on enquiry through the District Resettlement Officer, Sangli, it was revealed that the petitioner was not ready to give substitute land and therefore, taking into consideration the petitioner's proposal does not arise. It is stated that the acquired land was already distributed to the project affected persons who were cultivating the same. It is next contended that since the acquisition proceedings under the LA Act were completed and the possession has been taken over, the land cannot be withdrawn from the acquisition under the provisions of Section 48(1) of the LA Act, so also the land has been granted to the project affected persons, the petitioner's proposal of alternative land cannot be accepted in the absence of the project affected persons' willingness.

17. On 20 March 2013, a Division Bench of this Court passed a detailed interim order on the present petition *inter alia* observing that by the impugned order, the Additional Commissioner has declined to entertain the application made by the petitioner under Section 48(1) of the LA Act on the ground that the possession of the acquired land has

already been taken over and the same has been allotted to a third party. It was observed that though in the reply affidavit filed by the District Resettlement Officer, it was stated that the possession has been handed over, there was no document in support of such contention. It was observed that the State will have to produce necessary documents to show that the possession of the acquired land has been already taken over under Section 16 of the LA Act. The respondent No.3 was accordingly directed to file additional affidavit within a period of three weeks and along with the additional affidavit, copies of the necessary documents were directed to be annexed to substantiate the contention that the possession of the acquired land is taken over under Section 16 of the Act. The said order reads thus:

> ". By the impugned order, the Additional Commissioner has declined to entertain the Application made by the Petitioner under Section 48(1) of the Land Acquisition Act, 1894 on the ground that the possession of the acquired land has been already taken over and the same has been allotted to a third party. Though in the reply filed by the District Re-settlement officer, it is reiterated that the possession has been handed over, there is no document annexed to the reply in support of the said contention. The State will have to produce necessary documents to show that the possession of the acquired land has been already taken over under Section 16 of the said Act. We, therefore, direct the Respondent No.3 to file an additional affidavit within a period of three weeks from today. Along with the additional affidavit, copies of the necessary documents shall be annexed to substantiate the contention that the possession of the acquired land has been taken over under Section 16 of the said Act."
>
> (emphasis supplied)

18. It is on such backdrop when the proceedings were listed before

the Division Bench on 22 April 2013, the Division Bench while issuing rule on the petition, passed the following order:

> " Time is sought on behalf of the State Government to comply with the order dated 28th March 2013. Though the petition is pending from the year 2008, till today, there is no reply filed.
>
> 2. Rule. The learned AGP waives service for the Respondent Nos.1 to 7.
>
> 3. Rule on interim relief is made returnable on 12th July 2013. By way of ad-interim relief, we direct that the status quo, as of today, shall be maintained in respect of the possession of the land in dispute."

19. In pursuance of the interim order dated 20 March 2013 (supra), an additional affidavit of Mr. Hanmant Ramchandra Mhetre, Naib Tahasildar, Office of Collector, Sangli, was filed on behalf of respondent nos.1 to 3. The affidavit states that on 13 May 1977, land admeasuring 0.81 R belonging to the petitioner and situated at Village Astha, Taluka Walva, District Sangli was acquired for rehabilitation of Project Affected Persons of Warna project. That out of the said land, the land admeasuring 0.62 R from Survey no.903/2 was allotted to Smt. Banubai Dnyu Kumbhar on 1 January 1990. It records that the said transfer was recorded in the revenue records by mutation entry no.58248. It is further stated that the balance land of 0.19 R from Survey No.903/2 (old) and Gat No.131/1B+2B+3C situated at Mauje Mardwadi, Taluka Walva, District Sangli, so far has not been allotted to any project affected

persons, possession of such balance land is with the District Rehabilitation Officer, Sangli.

20. On 17 December 2012, on behalf of the added respondent no.4(a), Shri. Babaso Pandurang Karaale who claims to be the legal heir of the deceased respondent no.4-Smt. Banubai (the project affected allottee of the land) has filed an affidavit to contend that the suit land was allotted to respondent no.4 Banubai as she was project affected person, who expired on 19 April 2006 at Ashta. It is stated that before her death, Banubai had executed a Will in favour of respondent No.4(a) and 4(b) as they had taken care of Smt. Banubai during her old age. It is stated that Banubai died issueless and there was no legal heir of her except respondent nos.4(a) and 4(b) hence out of love and affection, the land allotted to Smt. Banubai as project affected person was bequeathed to respondent nos.4(a) and 4(b). It is stated that these respondents applied to the revenue authority to enter their names in the revenue record of the land, in pursuance of the Will executed by Banubai in their favour and accordingly, their names were entered in the revenue record. It is stated that the land in question has although been shown in their names, the physical possession of the land has never been taken over by the State Government from the petitioner to be given to respondent Nos.4(a) and 4(b), also due to interim orders passed by the

Commissioner and the interim orders passed on the present writ petition by this Court on 6 April 2009. There is something more in this affidavit when it is stated that respondent nos.4(a) and 4(b) were in dire need of finance hence they had obtained loan. It is stated that as there was burden on them to repay the loan, respondent Nos.4(a) and 4(b) with an intention to raise funds were desirous of selling the said land as allotted to Smt. Banubai as project affected person, to a willing buyer. It is stated that as the petitioner came to know that respondent Nos.4(a) and 4(b) were desirous of selling the land, the petitioner gave a proposal to respondent Nos.4(a) & 4(b) to purchase the said land (petitioner's own land allotted to Banubai) for valuable consideration. It is stated that although the land was not in the possession of respondent nos.4(a) and 4(b) and as also litigation was pending on this land, it was decided by them to sell this land to the petitioner. It is contended that permission of the Collector was necessary before executing a sale deed and as already the parties had executed an agreement for sale on 30 August 2012 in favour of son of the petitioner by accepting earnest money of Rs.3,25,000/-. It is stated that as the possession of the land was already with the petitioner, respondent Nos.4(a) and 4(b) confirmed the sale of the land to the petitioner after the agreement for sale was entered with the petitioner. A copy of the agreement for sale is placed on record in the application filed on behalf of respondent Nos.4(a) and 4(b) being

Civil Application (st) No.34871 of 2012. It is stated that as the dispute between the petitioner and respondent nos.4(a) and 4(b) is settled between the parties in the aforesaid terms, the parties are ready to file minutes of the order/consent terms and as it is not possible for respondent Nos.4(a) and 4(b) to travel to Mumbai, they have authorized Advocate Shri. Mahindra Deshmukh to make a statement on their behalf and to sign all applications, documents including minutes of the order or consent terms before the High Court and for such reasons, presence of these respondents be dispensed with. There is a similar affidavit dated 17 December 2012 filed by respondent No.4(b) of Mr. Arun Pandurang Karaale.

21. It is on the above backdrop, the proceedings are before us and argued by learned Counsel for the parties.

<u>Submissions on behalf of the Petitioner</u> :-

22. Mr. Walimbe, learned Counsel for the petitioner has made the following submissions:

(i) The petitioner's application being filed under Section 48(1) of the LA Act, the State Government / Commissioner had power to drop the acquisition of the petitioner's land, as the possession of the land was not taken over by the State. It is submitted that till the time, the possession

of the acquired land was not taken over, the petitioner had a right to maintain an application under Section 48 of the LA Act. In the present case, indisputedly the possession of the acquired land is with the petitioner till date.

(ii) On the date of acquisition, the land of the Petitioner was not in excess of the slab as notified.

(iii) As per the Government Resolution dated 28 October 1987, the State can acquire the land if it was more than 20R and that too the State must acquire land continuously at one place, however, in the petitioner's case, the State was trying to acquire the land at two different places. It is submitted that the petitioner has a house, gobergas, dung pit, cattle shed on the present land, therefore, he cannot be displaced to make way for project affected person (Smt. Banubai) who does not require land.

(iv) A mortgaged land cannot be considered to be part of one's holding, which is squarely applicable to facts of the petitioner's case.

(v) It is a settled principle of law that till possession of the acquired land is taken, State Government would have jurisdiction to consider application for deletion of land from acquisition.

(vi) It is submitted that when the initiation of acquisition itself was

vitiated, land of the petitioner therein was not liable for acquisition under the Maharashtra Project Affected Persons Rehabilitation Act, 1999.

(vii) That Respondent No. 4(a) and 4(b) have accepted Rs. 3,25,000/- and have filed their respective affidavits before this Court confirming that they have entered into such agreement for sale qua the acquired land, which is an additional factor to indicate that the land now needs to be deleted from acquisition.

(viii) In the Government Resolution dated 28 June 1988, the State Government has directed the authorities to verify the holding before acquiring the land. Hence any acquisition without satisfying the basic requirements under the Government Resolution would be bad and illegal.

Submissions on behalf of the State :-

23. Learned Assistant Government Pleader for the State has made extensive submissions based on the reply affidavits as filed. She would submit that the acquisition had taken place during the lifetime of the petitioner's father who had not challenged the acquisition and the award was passed. She is, however, not in a position to dispute that although the land was acquired, the possession of the land has remained with the

petitioner. She is also not in a position to point out whether the petitioner's father has been paid compensation and more particularly, when specific averments have been made in the petition that the petitioner's father was poor agriculturist having income only from agriculture and had no other source of income. On the maintainability of the petitioner's application under Section 48(1) of the LA Act and the reasons as set out therein, it is her submission that the orders passed by the Additional Divisional Commissioner require no interference. However, while so submitting, she is not in a position to dispute the jurisdictional aspect namely of the petitioner having remained in physical possession of the land being the necessary requirement to maintain an application under Section 48(1) being complied. The learned AGP also is not in a position to dispute the subsequent developments of respondent nos.4(a) and 4(b) having agreed to sell the land as acquired in favour of the petitioner.

Submissions on behalf of respondent nos.4(a) and 4(b) :-

24. Learned Counsel for respondent Nos.4(a) and 4(b) has fairly stated that there was an attempt on behalf of his clients to sell the land under an agreement of sale dated 30 August 2012 to the petitioner. However, it is his submission that the land was being sold merely on the ground that the revenue entries were made in their favour on the basis

of a Will of Banubai who was project affected person, however, without physical possession being received by her. He has not disputed that the possession of the land as pointed out in the affidavit of respondent Nos.4(a) and 4(b) has remained with the petitioner. He submits that the petition be dismissed and the possession of the land be taken over from the petitioner and be handed over to respondent Nos.4(a) and 4(b).

Analysis and conclusion :-

25. We have heard learned Counsel for the parties. With their assistance, we have perused the record.

26. The question which falls for our consideration is as to whether in the facts and circumstances of the case, the impugned order dated 3 December 2008 passed by the Divisional Commissioner, Pune Division, rejecting the petitioner's application under Section 48(1) of the LA Act, is legal and valid and whether the petitioner is correct in its contention that the petitioner's land could not have been subjected to acquisition considering the issue in regard to applicability of the slab as arisen on the wrong assumption on redemption of mortgage and hence, the land acquisition qua the petitioner's land itself was vitiated.

27. First and foremost, we examine whether the jurisdictional requirement under sub-section (1) of Section 48 of the LA Act stood

satisfied for the petitioner to maintain his application, namely, the possession of the land not being taken over although an award was passed on 29 December 1988. Also the legality of the impugned order would be required to be tested on the grounds which the petitioner has raised and more particularly the specific contention in respect of inappropriate slab being applied to acquire the petitioner's land on the ground that the revenue record had indicated that the petitioner is holding the land admeasuring 3 acre 16 gunthas, by including in the petitioner's holding the mortgage land, which was not land of the ownership of the petitioner, but the ownership of one Mr. Wadkar and which was required to be returned to him under the decree of the Civil Court.

28. Insofar as the first contention as urged on behalf of the petitioner assailing the impugned order passed by the Divisional Commissioner when it observes that the application of the petitioner under Section 48(1) of the LA Act, did satisfy the jurisdictional requirement as possession of the land taken over by the State, appears to have been considered by the Commissioner without application of mind. To appreciate this ground of challenge, it would be necessary to note the provisions of Section 48(1) of the LA Act, which read thus:

> "**48. Completion of acquisition not compulsory, but compensation to be awarded when not completed**:

> (1) Except in the case provided for in section 36, the government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.
> ……..”
>
> (emphasis supplied)

29. On a plain reading of Section 48(1) of the LA Act, the jurisdictional requirement to maintain an application under Section 48(1) is to the effect that the possession of the land needs to remain with the owner of the land, irrespective of the fact that an award being published. In the present case, it appears to be as clear as the sunlight, that although the award was published on 29 December 1988, the possession of the land in question has remained with the petitioner. This is evident from the reply affidavit as filed on behalf of the State Government in pursuance of the order dated 20 March 2013 passed by this Court, as noted hereinabove. By this specific order passed by the Court, the State Government was directed to place on record the documents showing that the possession of the land was taken over by the State. In response to the same, as noted hereinabove, the reply affidavit filed on behalf of the State Government, Shri. Hanmant Ramchandra Mhetre, does not disclose anything in compliance of such order of the Court that the physical possession of the land was taken over. This apart respondent Nos.4(a) and 4(b) in their reply affidavits have categorically stated that the possession of the land is with the

petitioner which has not been disputed by the State Government. Thus, merely on the basis of unilateral revenue entry, the Divisional Commissioner has proceeded to pass the impugned order overlooking that the possession of the land had remained with the petitioner and for such reasons, the petitioner's application under Section 48(1) was maintainable. Thus, on an untenable premise and contrary to sub-section (1) of Section 48 he proceeded to reject the petitioner's application, when the jurisdictional requirement of the physical possession being not taken over, was the reality on record.

30. The second aspect and which, in our opinion, is quite crucial is to the petitioner's case of patent non-application of mind on the part of the Divisional Commissioner, to reject the case of the petitioner on the ground of appropriate slab being not applied. In the present case, the petitioner had clearly taken a contention that an area admeasuring 3 acre 16 gunthas from the total holding of the petitioner was not the land of the ownership of the petitioner, but it was the ownership of Mr. Wadkar who had mortgaged his land to the petitioner's father and in respect of which the petitioner's father was never put in possession. It has also come on record that Mr. Wadkar had filed a suit for redemption of the mortgaged property and succeeded in the said suit (Regular Civil Suit No.90 of 1981). As a consequence of the decree of the Civil Court, the

mortgage, which was of the year 1966, stood redeemed the consequence being looked from any angle the land could never have formed part of the ownership of the petitioner's father qua the application of the slab. It is significant that the notified date for the slab to operate was almost 11 years thereafter i.e. on 13 May 1977. Thus, the legal consequence of mortgage was completely overlooked as the petitioner's land could not have been considered to be in the ownership of the petitioner's father in determination of the relevant slab. It is not the case that the mortgage was created after the notified date of 13 May 1977. In fact on this count, we find that there is total non-application of mind of the Divisional Commissioner in regard to the legal consequence the mortgage would create. Such mortgage certainly did not create ownership of the mortgaged land in favour of the petitioner's father unless in a manner known to law there was a foreclosure of the mortgage so that the ownership of the land would shift to the petitioner. Nothing to this effect had happened for the Commissioner to assure that the land held by the petitioner's father was in excess of the slab as notified and therefore could be subjected to acquisition. Such legal aspect has been completely overlooked by the Divisional Commissioner in passing the impugned order on the petitioner's application under Section 48(1). This apart, in the reply affidavit of Mr. Jotiba Tukaram Patil, District Resettlement Officer, Sangli, a stand contrary to the legal position on

mortgage of land is sought to be taken to justify the contention that the mortgaged land would be included in the total holding of the petitioner's father. The relevant contents of paragraphs 4, 5 and 6 of the reply affidavit read thus:

> "4. With reference to Para No. 3 of the Petition, I say that on cut-off date i.e. on 13.5.1977, the Petitioner's holding as per village form No. 8/A, Khata No. 3430 was 11 acre 22 gunthas i.e 4 H 62 R. The petitioners contention that their joint family holding was 8 acre 5 gunthas only is incorrect. The petitioner himself admitted that an area admeasuring 2 acre 16 Gunthe from Survey No. 1077/2 was mortgaged land with them. This mortgaged land was decreed in Regular Civil Suit No. 90 of 1981 and restored to the original owner i.e Shri Wadekar. The restoration of Survey No. 1077/2 was taken place after cut-off dated ie 13.5.1977. All these things clearly indicates that, the Petitioner's were holding Survey N. 1077/2 alongwith their other lands. This can be clearly evident from the extract of Mutation Entry No. 49298 which was produced by the Petitioner himself in this writ. As such contention of the Petitioner in Para No.3 is not acceptable.
>
> 5. With reference to Para no. 4 of the Petition, I say that the petitioner has not produced any evidence to show that the entry of the name of the Petitioner's father came to be cancelled due to the provisions of B.T and A.L Act. Whatever evidence produced by the Petitioners shows that, mortgaged Survey No. 1077/2 was restored to original owner Shri Wadkar after re-conveyance deed dated 13/4/1982 and as per decree in regular Civil Suit No. 80/81. this position. evidently seen from the mutation entry No. 49298. As such contention of the Petitioner in para 4 is not acceptable.
>
> 6. With reference to Para No.5 of the Petition, I say that the Petitioner under some wrong pretence the Survey No. 1077/2 was included while calculating the total holding is incorrect. The survey No. 1077/2 was mortgaged with Petitioner and its redemption and re-conveyance was taken place after the cut-off dated i.e 13.5.1977. Re-conveyance deed was affected on 13.4.1982 and its effect was taken to the village record by mutation entry No. 49298 which was muted on 2.7.1982 and certified on 26.8.1982. This situation makes clear that Petitioners were holding land from Survey No. 1077/2 on cut-off date. As such calculation of slab and its further acquisition is statutory as per existing laws."

31. Thus, the cumulative position apparent from the record is that the physical possession of the land from the petitioner or his father was never taken over, although the Award was published on 29 December 1988. Moreover, the petitioner's possession had remained protected by the interim orders dated 06 January 2009 (supra) passed by this Court and is continued till date. There was never an attempt on the part of the State to get the interim orders vacated and also an attempt to take over the possession. Further the basic requirement in law of a panchanama to take over the possession of the acquired land finds no trace on the record of the proceeding so as to consider that the possession of the land under a formal panchanama was taken over. The petitioner, therefore, has continued to remain in possession of the land since the year 1988 till date which is a period of 36 years and that too openly and hostile to the State Government as also respondent Nos.4(a) and 4(b), who also do not dispute on the petitioner's possession.

32. Being confronted with such a clear position on record, learned AGP would intend to rely on the decision of the Supreme Court in **Indore Development Authority Vs. Manoharlal & Ors.**[1] to contend that the land stood vested with the State and therefore, the orders passed by the Divisional Commissioner ought not to be set aside.

1 (2020)8 SCC 120

33. We have given anxious consideration to such contention as urged on behalf of the State. Insofar as the possession of the land is concerned, in Indore Development Authority (supra), the Court has held that drawing of panchnama for taking over possession is the accepted legal mode of taking possession in land acquisition cases, and thereupon land vests in the State and any re-entry or retaining the possession thereafter is unlawful and does not inure for any benefits to be availed under section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short, "**2013 Act**").

34. In the present case though the award was rendered on 29 December 1988, it clearly appears that the physical possession of the land was not taken over within the meaning of Section 16 of the LA Act, for the absolute vesting of the land from the Government free from all encumbrances. This is clear from the following: (i) categorical assertion as made by the petitioner that physical possession of the land is with the petitioner; (ii) in such context an order dated 20 March 2013 passed by the co-ordinate Bench of this Court directing respondent No.3 to file an additional affidavit within a period of three weeks and also directing that alongwith the additional affidavit, copies of the necessary documents be annexed to substantiate the contention that the possession of the

acquired land has been taken over under Section 16 of the Act.

35. A reply affidavit was filed on behalf of the State Government in compliance of the aforesaid order which shows that only symbolic possession has been taken and not the physical possession, as no panchanama or any other document as would be acceptable in law to show that the physical possession of the land being taken over, is placed on record.

36. The clear statement as made in the affidavits filed on behalf of respondent Nos.4(a) and 4(b) who claimed to succeed the interest of the original allottee (Project Affected Person) have also contended that the physical possession of the land is already with the petitioner. The statement as made in their respective affidavits read thus:

> "6. I say that since the permission of the collector is necessary before executing sale deed, we have already executed notarised agreement for sale on 30.08.2012 by accepting earnest amount of Rs. 3,25,000/- in favour of son of the Petitioner. Since the possession is already with the petitioner, we have merely confirmed the same after the said agreement for sale. I say that the aforesaid notarised agreement for sale is annexed at Exhibit - B to the Civil Application (St) No. 34871 of 2012 for bring legal heirs. I accept the same to be true and binding on us."

37. It is thus clear that the physical possession of the land has remained with the petitioner. In such context as the land acquisition in question falls under the provisions of the Land Acquisition Act,1894 (for short '**the 1894 Act**'), the position in law is required to be noted.

38. Section 16 of the LA Act provides for power to take possession which reads thus:

> **16. Power to take possession.**—When the Collector has made an award under Section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances.

39. In ***Indore Development Authority Vs. Manoharlal & Ors.*** (supra), one of the issues which had fallen for consideration of the Supreme Court was an issue of possession under the LA Act. Such issue has been dealt under the title **"In re: Issue no.4: mode of taking possession under the Act of 1894."** The Supreme Court considering the provisions of Section 16 of the LA Act observed that the act of vesting of the land in the State is with the possession of the land being taken over. It is held that a person cannot come in possession of the land after the possession is taken over and would remain as trespasser and would not have right to possess the land which vests in the State free from all encumbrances as per the provisions of Section 16 of the LA Act. The Supreme Court considered the question whether there is any difference between taking possession under the LA Act and the expression "physical possession" used in Section 24(2) of the 2013 Act. Insofar as taking possession under the LA Act is concerned, it was observed that "As a matter of fact, what was contemplated under the Act of 1894, by taking the possession meant only physical possession of the land." The

Supreme Court further observed that when the Government proceeds to take possession of the land acquired by it under the LA Act, it must take actual possession of the land since all interests in the land are sought to be acquired by it. There was no question of taking "symbolical" possession in the sense understood by judicial decisions under the Code of Civil Procedure, nor would possession merely on paper be enough. The following observations as made by the Supreme Court are required to be noted which read thus:-

> "258. Thus, it is apparent that vesting is with possession and the statute has provided under Sections 16 and 17 of the Act of 1894 that once possession is taken, absolute vesting occurred. It is an indefeasible right and vesting is with possession thereafter. The vesting specified under section 16, takes place after various steps, such as, notification under section 4, declaration under section 6, notice under section 9, award under section 11 and then possession. The statutory provision of vesting of property absolutely free from all encumbrances has to be accorded full effect. Not only the possession vests in the State but all other encumbrances are also removed forthwith. The title of the landholder ceases and the state becomes the absolute owner and in possession of the property. Thereafter there is no control of the land-owner over the property. He cannot have any animus to take the property and to control it. Even if he has retained the possession or otherwise trespassed upon it after possession has been taken by the State, he is a trespasser and such possession of trespasser enures for his benefit and on behalf of the owner.
>
> … … …
>
> 261. Now, the court would examine the mode of taking possession under the Act of 1894 as laid down by this Court. In Balwant Narayan Bhagde (supra) it was observed that the act of Tehsildar in going on the spot and inspecting the land was sufficient to constitute taking of possession. Thereafter, it would not be open to the Government or the Commission to withdraw from the acquisition under Section 48(1) of the Act. It was held thus:

“28. We agree with the conclusion reached by our brother Untwalia, J., as also with the reasoning on which the conclusion is based. But we are writing a separate judgment as we feel that the discussion in the judgment of our learned Brother Untwalia, J., in regard to delivery of "symbolical" and "actual" possession under Rules 35, 36, 95 and 96 of Order 21of the Code of Civil Procedure, is not necessary for the disposal of the present appeals and we do not wish to subscribe to what has been said by our learned Brother Untwalia, J., in that connection, nor do we wish to express our assent with the discussion of the various authorities made by him in his judgment. We think it is enough to state that when the Government proceeds to take possession of the land acquired by it under the Land Acquisition Act, LA, it must take actual possession of the land since all interests in the land are sought to be acquired by it. There can be no question of taking "symbolical" possession in the sense understood by judicial decisions under the Code of Civil Procedure. Nor would possession merely on paper be enough. What the Act contemplates as a necessary condition of vesting of the land in the Government is the taking of actual possession of the land. How such possession may be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard and fast rule laying down what act would be sufficient to constitute taking of possession of land. We should not, therefore, be taken as laying down an absolute and inviolable rule that merely going on the spot and making a declaration by beat of drum or otherwise would be sufficient to constitute taking of possession of land in every case. But here, in our opinion, since the land was lying fallow and there was no crop on it at the material time, the act of the Tehsildar in going on the spot and inspecting the land for the purpose of determining what part was waste and arable and should, therefore, be taken possession of and determining its extent, was sufficient to constitute taking of possession. It appears that the appellant was not present when this was done by the Tehsildar, but the presence of the owner or the occupant of the land is not necessary to effectuate the taking of possession. It is also not strictly necessary as a matter of legal requirement that notice should be given to the owner or the occupant of the land that possession would be taken at a particular time, though it may be desirable where possible, to give such notice before possession is taken by the authorities, as that would eliminate the possibility of any fraudulent or collusive transaction of taking of mere paper

possession, without the occupant or the owner ever coming to know of it."

262. In Tamil Nadu Housing Board v. A. Viswam (supra) it was held that drawing of Panchnama in the presence of witnesses would constitute a mode of taking possession. This court observed:

> "9. It is settled law by series of judgments of this Court that one of the accepted modes of taking possession of the acquired land is recording of a memorandum or Panchnama by the LAO in the presence of witnesses signed by him/them and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. It is common knowledge that in some cases the owner/interested person may not cooperate in taking possession of the land."
>
> (emphasis supplied)

263. In Banda Development Authority (supra) this Court held that preparing a Panchnama is sufficient to take possession. This Court has laid down thus:

> "37. The principles which can be culled out from the above noted judgments are:
>
> (i) No hard-and-fast rule can be laid down as to what act would constitute taking of possession of the acquired land.
>
> (ii) If the acquired land is vacant, the act of the State authority concerned to go to the spot and prepare a panchnama will ordinarily be treated as sufficient to constitute taking of possession.
>
> (iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the authority concerned will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the authority concerned will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.
>
> (iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken

> by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document.
>
> (v) If beneficiary of the acquisition is an agency/instrumentality of the State and 80% of the total compensation is deposited in terms of Section 17(3-A) and substantial portion of the acquired land has been utilised in furtherance of the particular public purpose, then the court may reasonably presume that possession of the acquired land has been taken."

… … …

265. In Balmokand Khatri Educational and Industrial Trust, Amritsar v. State of Punjab & Ors168, this Court ruled that under compulsory acquisition it is difficult to take physical possession of land. The normal mode of taking possession is by way of drafting the Panchnama in the presence of Panchas. This Court observed thus:

> "4. It is seen that the entire gamut of the acquisition proceedings stood completed by 17-4-1976 by which date possession of the land had been taken. No doubt, Shri Parekh has contended that the appellant still retained their possession. It is now well-settled legal position that it is difficult to take physical possession of the land under compulsory acquisition. The normal mode of taking possession is drafting the panchnama in the presence of panchas and taking possession and giving delivery to the beneficiaries is the accepted mode of taking possession of the land. Subsequent thereto, the retention of possession would tantamount only to illegal or unlawful possession.
>
> 5. Under these circumstances, merely because the appellant retained possession of the acquired land, the acquisition cannot be said to be bad in law. It is then contended by Shri Parekh that the appellant-Institution is running an educational institution and intends to establish a public school and that since other land was available, the Government would have acquired some other land leaving the acquired land for the appellant. In the counter-affidavit filed in the High Court, it was stated that apart from the acquired land, the appellant also owned 482 canals 19 marlas of land. Thereby, it is seen that the appellant is not disabled to proceed with the continuation of the

> educational institution which it seeks to establish. It is then contended that an opportunity may be given to the appellant to make a representation to the State Government. We find that it is not necessary for us to give any such liberty since acquisition process has already been completed."

266. In P.K. Kalburqi v. State of Karnataka and Ors., 169, with respect of mode of possession, this Court laid down as under:

> "6. Moreover, the Hon'ble Minister who passed the order of denotification of the lands in question sought to make a distinction between symbolic possession and actual possession and proceed to pass the order on the basis of his understanding of the law that symbolic possession did not amount to actual possession, and that the power to withdraw from the acquisition could be exercised at any time before "actual possession" was taken. This view appears to be contrary to the majority decision of this Court in Balwant Narayan Bhagde v. M.D. Bhagwat, wherein this Court observed that how such possession would be taken would depend on the nature of the land. Such possession would have to be taken as the nature of the land admits of. There can be no hard-and-fast rule laying down what act would be sufficient to constitute taking of possession of land. In the instant case the lands of which possession was sought to be taken were unoccupied, in the sense that there was no crop or structure standing thereon. In such a case only symbolic possession could be taken, and as was pointed out by this Court in the aforesaid decision, such possession would amount to vesting the land in the Government. Moreover, four acres and odd belonging to the appellant was a part of the larger area of 118 acres notified for acquisition. We are, therefore, satisfied that the High Court has not committed any error in holding that possession of the land was taken on 6-11-1985. Even the order of the Minister on which considerable reliance has been placed by the appellant indicates that possession of the lands was taken, though symbolic."

269. In Ram Singh v. Jammu Development Authority 171, this Court stated that the mode of taking possession is by drawing a Panchnama. Concerning the mode of taking possession in any other land, law to a similar effect has been laid down in NAL

Layout Residents Association v. Bangalore Development Authority172. Certain decisions were cited with respect to other statutes regarding coalfields etc. and how the possession is taken and vesting is to what extent. Those have to be seen in the context of the particular Act. Possession comprises of various rights, thus it has to be couched in a particular statute for which we have a plethora of decisions of this Court. Hence, we need not fall back on the decisions in other cases. The decision in Burrakur Coal Co. Ltd. (supra) held that a person can be said to be in possession of minerals contained in a well-defined mining area even though his actual physical possession is confined to a small portion. Possession in part extends to the whole of the area. The decision does not help the cause of the petitioner. Once possession has been taken by drawing a Panchnama, the State is deemed to be in possession of the entire area and not for a part. There is absolute vesting in Government with possession and control free from all encumbrances as specifically provided in Section 16 of the Act of 1894.

272. The decision in Velaxan Kumar (supra) cannot be said to be laying down the law correctly. The Court considered the photographs also to hold that the possession was not taken. Photographs cannot evidence as to whether possession was taken or not. Drawing of a Panchnama is an accepted mode of taking possession. Even after re-entry, a photograph can be taken; equally, it taken be taken after committing trespass. Such documents cannot prevail over the established mode of proving whether possession is taken, of lands. Photographs can be of little use, much less can they be a proof of possession. A person may re-enter for a short period or only to have photograph. That would not impinge adversely on the proceedings of taking possession by drawing Panchnama, which has been a rarely recognised and settled mode of taking possession.

279. … … .. … ..Thus, we have no hesitation to overrule the decisions in Velaxan Kumar (supra) and Narmada Bachao Andolan (supra), with regard to mode of taking possession. We hold that drawing of Panchnama of taking possession is the mode of taking possession in land acquisition cases, thereupon land vests in the State and any re-entry or retaining the possession thereafter is unlawful and does not inure for conferring benefits under section 24(2) of the Act of 2013."

40. Applying the aforesaid principles of law to the facts of the present case, it is clear that there is no drawing of panchanama to take possession, which is a required mode of taking possession in land acquisition cases. What appears to have been done is without taking physical possession, symbolical possession is taken, which is not accepted by the Supreme Court as also held in the decision in **Balwant Narayan Bhagde v. M.D. Bhagwat**[2], and in terms what was observed by the Supreme Court that only "paper possession" which was not enough. The consequence of physical possession not being taken would be that there would be no lapse of proceedings and the petitioner would become entitled to higher compensation as observed in paragraph 174 of the decision in **Indore Development Authority Vs. Manoharlal & Ors**. (supra) which reads thus:

> "174. A reading of section 24(2) shows that in case possession has been taken even if the compensation has not been paid, the proceedings shall not lapse. In case payment has not been made nor deposited with respect to the majority of the holdings in the accounts of the beneficiaries, then all the beneficiaries specified in the notification under Section 4 of the Act of 1894 shall get the enhanced compensation under the provisions of the Act of 2013. Section 24(2) not only deals with failure to take physical possession but also failure to make payment of compensation. If both things have not been done, there is lapse of the acquisition proceeding. But where payment has been made though possession has been taken or payment has been made to some of the persons but not to all, and it has also not been deposited as envisaged in the proviso, in that event all beneficiaries (under the same award) shall get higher compensation. This is because once possession is been taken, there can be no lapse of the proceedings, and higher

2 (1976) 1 SCC 700

compensation is intended on failure to deposit the compensation. Once an award has been passed and possession has been taken, there is absolute vesting of the land, as such higher compensation follows under the proviso, which is beneficial to holders. In a case where both the negative conditions have not been fulfilled, as mentioned in section 24(2), there is a lapse. Thus, the proviso, in our opinion is a wholesome provision and is, in fact, a part of section 24(2); it fits in the context of section 24(2) as deposit is related with the payment of compensation and lapse is provided due to non-payment along with not taking possession for five years or more whereas for non-deposit higher compensation is provided. Thus, when one of the conditions has been satisfied in case payment has been made, or possession has not been taken, there is no lapse of the proceedings as both the negative conditions must co-exist.

175. When we consider the provisions of section 24(1)(b) where an award has been passed under section 11 of the Act of 1894, then such proceedings shall continue under the provisions of the said Act as if it has not been repealed. The only exception carved out is the period of 5 years or more and that too by providing a non-obstante clause in Section 24(2) to anything contained in section 24(1). The non-obstante clause qualifies the proviso also to Section 24(2). It has to be read as part of Section 24(2) as it is an exception to Section 24(1)(b). In our opinion, Section 24(1)(b) is a self-contained provision, and is also a part of the non-obstante clause to the other provisions of the Act as provided in sub-section (1). Parliament worked out an exception, by providing a non-obstante clause in section 24(2), to Section 24(1). Compensation is to be paid under Section 24(1)(b) under the Act of 1894 and not under the Act of 2013. As such Section 24 (2) is an exception to section 24(1)(b) and the proviso is also an exception which fits in with non-obstante clause of Section 24 (2) only. Any other interpretation will be derogatory to the provisions contained in Section 24(1)(b) which provides that the pending proceedings shall continue under the Act of 1894 as if it had not been repealed, that would include the part relating to compensation too. Even if there is no lapse of proceedings under section 24(1)(a), only higher compensation follows under Section 24(1)(a). Section 24(2) deals with the award having been made five years or before the commencement of the new Act. The legislative history also indicates/it was intended that five years' period should be adequate to make payment of compensation and to take possession. In that spirit, the proviso has been carved out

> as part of section 24(2). Thus when Parliament has placed it at a particular place, by a process of reasoning, there can be no lifting and relocation of the provision. To bodily lift it would be an impermissible exercise. Unless it produces absurd results and does not fit in the scheme of the Act and the provisions to which it is attached such an interpretation, doing violence to the express provision, is not a legitimate interpretative exercise. There is no need to add it as the proviso to Section 24(1)(b) as it has not been done by the legislature, and it makes sense where it has been placed. It need not be lifted."

41. In view of the above discussion, the following conclusions are required to be drawn:

(I) The impugned order dated 3 December 2008 passed by the Divisional Commissioner (Rehabilitation) under Section 48(1) of the LA Act is passed without application of mind, when it failed to give due regard to the slabs being required to be fixed, and considering the mortgaged land not belonging to the petitioner to be a part of the petitioner's holdings.

(II) There is a patent error in the Divisional Commissioner coming to a conclusion that the possession of the land was taken over by the Land Accquisition Officer, to hold that the petitioner's application under Section 48(1) was not maintainable, when the physical possession of the land was not taken over and it has continued to remain with the petitioner and as clear from the record. Also the status quo order passed earlier by the Commissioner and subsequently by this Court, has

remained to operate without the same being attempted to be vacated by the State Government. The petitioner accordingly has continued to remain in possession for a period of 36 years after passing of the award.

(III) The project affected person Smt. Banubai was allotted the land without physical possession of the same being taken and therefore, the land could not be handed over to Smt. Banubai and her legatees.

(IV) Peculiarly the legatees [respondent nos.4(a) and 4(b)] under unfounded presumption in law and the revenue entries not creating any title in them presumed that they have become the owners of the land, have attempted to sell the very land of the petitioner, to the petitioner under the agreement dated 30 August 2012 and have received valuable consideration from the petitioner. Such agreement, by no stretch of imagination, can be recognized in law. They had no legal rights to sell the land when their title itself was not perfect, and they could never give the possession of the land to the petitioner.

42. As noted hereinabove, in the present case, there is no panchanama under which possession of petitioner's land was taken over by the State, so as to have a situation that the petitioner illegally entered upon the

land and has retained possession amounting to any unlawful act. In fact, in the present case, throughout the possession of the land has remained with the petitioner and for a long period of 36 years. The conduct of the State also indicates that the whole purpose for which the acquisition of the land was made, stood frustrated.

43. The petitioner's land purportedly acquired was a small parcel of the land which was to enure to the benefit of the project affected person Smt. Banubai, who has since expired. In fact the legal heirs of such project affected person has accepted money and have sold the land to the petitioner which they have admitted and they have entered into the consent terms as stated in the affidavit. The relevant extracts from the affidavit filed on behalf of respondent Nos.4(a) are required to be noted which read thus:

> "2. I say that the suit land was allotted to the Respondent No. 4 Banubai, as she was project affected person. I say that said Banubai has died on 19.4.2006 at Ashta. I say that before her death, the Respondent No. 4 had executed a will in our favour out of love and affection, as we were taking care of her during her old age. I further say that the Respondent No. 4 has died on 19.04.2006, issueless. She has no other legal heirs, except us. I say that after death of said Banubai, we have applied to revenue authorities for entering our names to the Revenue Record of the said land. Pursuant to the same and on the basis of Will deed, executed in our favour, our names have been entered to the revenue record of the suit land.
>
> 3. I say that though the suit land has been shown in our names, the actual, physical possession of the land has never been taken by State Govt. and given to us due to interim orders from

> the Commissioner and thereafter interim order passed by this Hon'ble Court on 6/1/2009 in the aforesaid writ Petition.
>
> 4. I say that, we were in dire financial needs for household expenses therefore we have taken loan from Bapuso Shinde Patsanstha and Ashta Lokmanya Nagari Patsanstha, on the suit land. I further say that due to rising cost of living, burden of repayment of loan an various household expenses coupled with the fact that marriage Respondent No. 4A has been fixed and he has solemnise marriage on 7.12.2012, the Respondents No. 4A and 4B are ne of money. Therefore with an intention to raise the necessary fur to repay the bank loan as well as to meet necessary household expenses, the Respondent No. 4A to 4B were desirous of selling of the said land to the willing buyer.
>
> … … …
>
> 7. I say that since the dispute is settled between the parties in the aforesaid terms, we area also ready to file the minutes of order. However since the matter is not on board today and it would be cumbersome to travel all the way to Mumbai again on the notified date, the Respondent Nos. 4A and 4B have authorised their advocate Shri. Mahindra Deshumkh make the statement on our behalf to sign all applications documents including minutes of order. or consent terms before this Hon'ble High Court."

44. In so far as the respondent's contention on delay in filing the present petition is concerned, in our opinion, the same is misconceived inasmuch as the petitioner being in possession of the land, had locus to maintain an application under Section 48(1) of the LA Act, which has been decided by the impugned order and subject matter of challenge in the present petition. It was certainly a continuous cause of action. Even otherwise considering the provisions of Section 48(1), once possession of the land as acquired, is with the petitioner, the petitioner was entitled to maintain Section 48(1) application praying for withdrawal of the land

from acquisition. The order on the Section 48(1) application was passed on 3 December 2008 and the present petition was filed on 9 December 2008. Thus, the contention as urged on behalf of the respondent-State that the petition is barred by delay considering the date of the Award to be of 29 December 1988, is not well founded nay untenable. As to what would be relevant for the Court to consider, is the date of the impugned order and legality of such order passed under Section 48(1) of the LA Act.

45. We have observed that the basic objections as raised by the petitioner which were required to be considered within the parameters of Section 48(1), have not been considered by the Divisional Commissioner in passing the impugned order and thus, the impugned order would necessarily deserve interference in the light of the discussion.

46. In the aforesaid circumstances, in our opinion, the petitioner has suffered real injustice inasmuch as an incorrect slab was being applied on the ground that the petitioner was the owner of the mortgaged land when he was actually not. The land mortgaged to the petitioner's father could never been considered to the land of petitioner's ownership and thus inherently what was legal and proper was to acquire only the land excess of the notified holding i.e. above 8 acres and 6 gunthas. Thus, in the peculiar facts and circumstances of the case and taking overall view

of the matter, it is eminently in the interest of justice, that the petition needs to succeed. It is accordingly, allowed in terms of the following order:-

ORDER

i. The impugned order dated 03 December 2008 passed by respondent no.2/Divisional Commissioner (Rehabilitation), on the petitioner's application under Section 48(1) of the LA Act, 1894 is quashed and set aside.

ii. It is declared that the decision to acquire the petitioner's land Gut No. 903/2 and Gut No. 131/1B+2B+3C situated as Mauje Mardwadi, is illegal and arbitrary, as prayed by the petitioner in prayer clause (b). Consequently, the land acquisition award in respect of the petitioner's land is also rendered illegal.

iii. In the event respondent nos.4(a) and 4(b) have any rights of allotment of alternate land as project affected persons, they are free to espouse such rights as the law may permit. All contentions in that regard are expressly kept open.

iv. The petition stands allowed in the aforesaid terms. No costs.

v. Interim Application No. 680 of 2023 would not survive. It is accordingly disposed of.

(SOMASEKHAR SUNDARESAN, J.) (G. S. KULKARNI , J.)