

(1993) 02 KL CK 0010
In the High Court Of Kerala
Case No : W.A. No. 178 of 1993

A.K. Mohammed

APPELLANT

Vs

Project Officer and Others

RESPONDENT

Date of Decision : 18-02-1993

Acts Referred:

Constitution of India, 1950 — Article 226
Land Acquisition Act, 1894 — Section 10, 11, 18, 23, 23(1)

Citation : (1993) 1 KLJ 812

Hon'ble Judges : M. Jagannadha Rao, C.J;K. Sreedharan, J

Bench : Division Bench

Advocate : S. Venkitasubramanya Ayyar and V. Giri, for the Appellant; P.S. Krishna Pillai (Addl. CGSC), V. Bhaskara Menon, Govt. Pleader and K.N. Narayana Pillai, for the Respondent

Final Decision : Dismissed

Judgement

Sreedharan, J.—Writ petitioner in O. P. 9589/1992 is the appellant. He is aggrieved by the judgment of the learned Single Judge dated 25-1-1993, by which Original Petition has been dismissed. The issue urged before us relates to the interpretation of Section 49 of the Land Acquisition Act. 1894, hereinafter referred to as "the Act". The short facts germane for the decision of this appeal are as follows. - Respondents 15 to 19 in the writ petition are the owners of property comprised in Survey No. 371/1 of Aluva Village. Building, bearing door No. 1/312 of Choornikkara Panchayat, is situated in that property. The land owners were conducting a Saw Mill in that property. The machineries therein were sold to the writ petitioner as per Exhibit R15 (b) dated 30-4-1971. On the same day, the writ petitioner took the shed, where the machineries were installed, for running the Saw Mill on lease. The duplicate copy of the lease deed dated 30-4-1971 is Exhibit P2. As per the terms of that lease deed, writ petitioner was to pay rent at the rate of Rs. 300/- per month for the building bearing door No. 1/312 of Choornikkara Panchayat. Lessee was directed not to put up any structure or to make any alteration in the existing building. Lessor

agreed to put up a smoke shed in the property for the use of the lessee in connection with the running of the Saw Mill. While writ petitioner was thus in enjoyment of the building under the lease, Government published a notification for acquiring a portion of the property comprised in Survey No. 371/1 of Aluva Village for widening the National Highway 47. The property notified took in a portion of the building in which the Saw Mill is functioning. Since a portion of the building alone fell within the notified area respondents 15 onwards, who are the owners, expressed their intention to have the entire building acquired. The Land Acquisition Officer agreed with the request made by the owners because only a part of the building fell within the notified area. Writ petitioner, who is the tenant, objected to the proceeding initiated by the Land Acquisition Officer for acquiring the entire building

2. Writ petitioner earlier moved this Court by filing O.P. 1250/1992 for the issuance of a writ of mandamus compelling the Land Acquisition Officer not to demolish or take possession of the building and machineries in the unacquired portion in Survey No. 371/1 of Aluva Village. By-judgment dated 19-2-1992, this Court dismissed that Original Petition holding that writ petitioner is only a tenant of the building and it is the owner of the building to express desire as to whether the whole of such building to be acquired or not. Since the owner has expressed a desire to acquisition of entire building, writ petitioner's prayer to direct the Land Acquisition Officer to acquire only a portion of the building was declined. Writ petitioner challenged the decision of the learned Single Judge in W. A. 609/1992. When the appeal was heard by a Division Bench, he sought permission to withdraw the Original Petition since the owners of the building were not made parties to the proceedings. Consequently the writ petition was dismissed as withdrawn, with leave to file fresh writ petition after impleading necessary parties. Thereupon the writ petitioner filed O. P. 9589/1992, from which this appeal has arisen.

3. On behalf of respondents 15 to 19, who are the owners of the property comprised in Survey No. 371/1 of Aluva Village, 15th respondent has filed a detailed counter affidavit. According to them, property measuring 53 Cents in Survey No. 371/1 of Aluva Village and the building bearing door No. 1/312 of Choornikkara Village situated therein belong to them. No building was ever put up by the writ petitioner in the said property. Exhibit P2 lease deed executed by the writ petitioner specifically prohibits him from constructing any structure in the property. The buildings standing in the property has got only one door number. If writ petitioner had at any point of time put up any new structure, that would have been assigned a new number by the Panchayat. So far, no new number has been assigned to any structure in the property. On account of the addition of any building, building tax was not enhanced by the Panchayat either. On the date of the lease deed. Exhibit P2, machineries fixed in that building were sold to the writ petitioner. Sale deed is Exhibit R15 (b). Machineries mentioned in that document alone are in the building even now. Writ petitioner had not installed any new machinery either. The building in the property consists of a

large shed built in "L" shape. That building is situated partly in the portion of land which is being acquired and partly in the portion adjoining it. If one portion of that building is demolished, the remaining portion will become virtually useless. Hence Acquisition Officer was requested to acquire the whole building. 10th respondent, the Land Acquisition Officer, took steps to acquire the entire building. Land Acquisition authorities took possession of the land and the entire building. Writ petitioner requested for some time to remove the machineries from the building. Taking advantage of the time granted by the authorities, writ petitioner has embarked on this litigation.

4. On behalf of respondents 1 to 4, second respondent filed a detailed counter affidavit. It is specifically averred therein that the sheds in Survey No. 371/1 of Aluva Village are inter - connected and they form portions of a single larger structure and that the land and building are in the possession of the National Highway authorities from 27-3-1992. They further averred that the roofings of the sheds are inter - connected and the entire structure forms part of a single building. Petitioner has also admitted in Exhibit P12 that the whole building was taken possession of by the National Highway authorities. He had given an assurance that he would remove the machineries within 30 days" time on the ground that the time is required due to Ramzan.

5. On behalf of respondents 10 to 12, 10th respondent filed another counter affidavit. The contentions raised therein are to the following effect. - Notification u/s 4(1) of the Act was published in the Kerala Gazette dated 19-1-1991 and in two daily newspapers on 20-1-1991 and 21-1-1991. It was also published in the locality. An extent of 0-05-70 Hectares of land belonging to the 15th respondent and others was included in the notification. Notification under Sec. 4(1) and Sec. 6 were published, giving all relevant details of land. Writ petitioner is only a lessee of the land. On 27-3-1992, the land and building thereon were taken possession of and were handed over to the National Highway authorities. As per Section 49 of the Act, it is the owner of the land to express his desire whether the entire building has to be acquired or not. In the instant case, the owners of the building expressed their desire to acquire the entire building. 15th respondent has given advance possession of the land and building on his behalf and on behalf of the other co-owners. The authorities have no option but to acquire the entire building. The statement of the writ petitioner that the sheds in the plot are separate ones is incorrect. The sheds are all built under one roof. The whole building has only one Panchayat number. Technical experts of the Public works Department valued the building as a single unit. It was also valued by the National Highway authorities as well. The entire building has been taken possession of and handed over to the National Highway authorities. Writ petitioner was evicted from the land and the building in question on 27-3-1992 with police protection. These respondents and respondents 1 to 4 have not concocted records as alleged in the writ petition. The acquisition work was a time bound programme, sponsored by the Central Government under the financial aid of the Asian Development Bank. Speedy implementation of the work relating to

the widening of the National Highway was to be carried out.

6. Respondents 15 to 19 are the ultimate owners of the property comprised in survey No. 371/1 of Aluva Village. A building is situated in that property, It has been leased out to the writ petitioner. He is running a Saw Mill in that property. Machineries are fixed in the building. A portion of the survey field is required for widening the National Highway. A portion of the building standing in the property falls within the area notified for acquisition. Owners of the property wanted the remaining part of the building also acquired by the State. Land Acquisition Officer agreed to that course. Writ petitioner, who is a lessee of the building, wants that portion of the building situated outside the notified area to be kept in fact. The counter affidavits filed by the authorities of the National Highway and the Land Acquisition Officers show that the entire building is one and when the owner wants the whole to be acquired, it is not possible to acquire only a part.

7. At the instance of the writ petitioner, a commission was issued, to report about the nature of the building. Advocate Commissioner, with the help of Engineers and photographers, filed a detailed report. A reading of that report shows that entire building in the property is one structure and the various portions of it cannot be considered as separate buildings,

8. Writ petitioner has got rights in the property belonging to respondents 15 to 19 under Exhibit P2 lease deed. By virtue of that right can he raise a contention that the portion of the building which falls outside the area notified u/s 4(1) of the Act be kept intact when the owners want that portion of the building also acquired ? For this, reference has to be made to Section 49 of the Act. For a proper understanding of that provision, we read the same:-

49. Acquisition of part of house or building.- (1) The provisions of this Act shall not be put in force for the purpose of acquiring a part only of any house, manufactory or other building, if the owner desires that the whole of such house, manufactory or building shall be so acquired;

Provided that the owner may, at any time before the Collector has made his award u/s 11. by notice in writing, withdraw or modify his expressed desire that the whole of such house, manufactory or building shall be so acquired :

Provided also that, if any question shall arise as to whether any land proposed to be taken under this Act does or does not form part of a house, manufactory or building within the meaning of this section, the Collector shall refer the determination of such question to the Court and shall not take possession of such land until after the question has been determined,

In deciding on such a reference the Court shall have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house, manufactory or building.

(2) If, in the case of any claim u/s 23, sub-section (1), thirdly, by a person interested, on account of the severing of the land to be acquired from his other

land the appropriate Government is of opinion that the claim is unreasonable or excessive, it may, at any time before the Collector has made his award, order the acquisition of the whole of the land of which the land first sought to be acquired forms a part.

(3) In the case last hereinbefore provided for, no fresh declaration or other proceedings under Sections 6 to 10, both inclusive, shall be necessary; but the Collector shall without delay furnish a copy of the order of the appropriate Government to the person interested, and shall thereafter proceed to make his award u/s 11.

As per clause (1) of the above provision, if the owner of a house, manufactory or other building desires that the whole of the house, manufactory or building should be acquired, the Land Acquisition Officer cannot proceed to acquire a part of the same under the Act. This means that where a part of the house is proposed to be acquired and a notification is issued in that behalf, the owner has got the option to allow the acquisition of that part of the house or not, If he agrees to allow the acquisition of the part of the house, the Land Acquisition Officer can proceed with its acquisition. If on the other hand the owner desires to have the whole of the building acquired and he indicates this desire to the Land Acquisition Officer, the steps under the Act can be proceeded with only if the Land Acquisition Officer agrees to have the entire building acquired. The owner, who already expressed his desire to have the whole of the building acquired can withdraw from the same by giving notice in writing to that effect to the Collector at any time before the award is passed. If the Land Acquisition Officer is not agreeable to acquire the entire house or building, then he has to drop the proceedings. The Collector may take a stand that the portion of the building standing within the notified area is not a part of a bigger one. Then question as to whether the land proposed to be taken does or does not form part of a house, manufactory or building, should be referred to civil court for its determination.

9. Section 49 (1) of the Act is thus seen to have the following effect.- Provisions of the Act cannot be pressed into service for the purpose of acquiring only a part of a building if the owner desires to have the whole of it acquired. In such a situation, the Collector may decide to acquire the whole of the building as desired by the owner. Consequently, further proceedings can be continued as if the whole of the house is being acquired. The Collector may not, in certain cases, be agreeable to the acquisition of the whole building as it may not be worthwhile to acquire whole of it. In such a situation, nothing further can be done under the Act. What remains is to withdraw from the proceedings. Situation may arise where the collector may not accept the claim of the owner that what is being acquired is a part of the house. He may have the view that notified portion is independent of the remaining portion situated outside the notified area. In such a situation, a question will arise as to whether the land proposed to be taken does or does not form part of a house, building or manufactory, When such a question arises, the Collector is under an obligation to refer the matter to the

Court. Till the Court renders its decision, the Collector should not take possession of the land.

10. Sub-section (2) deals with a case where the claim made by an owner of the house u/s 23 (1) thirdly of the Act is excessive or unreasonable. Section 23 (1) thirdly states that in determining amount of compensation to be awarded for the land acquired under the Act, the Court shall take into consideration the damage, if any, sustained by reason of severing such land from other land belonging to the person interested in the property. Where land is acquired and it results in the acquisition of a part of the land only then any person interested in it can make a claim for additional compensation on account of the severance. The owner of the land has thus got two options. He may require the Land Acquisition Officer to have the whole of the house acquired or he may claim additional compensation on account of the severance of the part acquired from the remaining. When the Government is of the opinion that the claim for additional compensation on account of severance of the property is unreasonable or excessive, it may order acquisition of the whole of the land of which the land first sought to be acquired forms a part. If Government take such a view, then as per clause (3) of Section 49, no fresh declaration or other proceedings under Sections 6 to 10 of the Act shall be necessary. In other words, Section 49 (3) dispenses with the necessity of issuing a further fresh declaration or adopting other proceedings under Sections 6 to 10 in respect of cases falling within the purview of Section 49 (2) of the Act.

11. As per Section 49 (1), the option is given to the owner of the house, manufactory or other building to express his desire to acquire the whole of the house, manufactory or building. Has any person other than the owner got this right? The word "owner" is not defined in the Act. Section 3(b) defines "person interested" as to include all persons claiming an interest in compensation to be made on account of the acquisition of land under the Act. It also takes within its purview a person who is interested in an easement affecting the acquired land. Various provisions of the Act refer to "person interested". Reference to "owner" is seen made only in Sections 48 (2), and 49 (1) of the Act. As per Section 48 (2) whenever the Government withdraws from any acquisition, the Collector should determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings thereunder, and should pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under the Act. This shows that the Government is to determine the amount of compensation for the damage sustained by the owner of the property. That amount of damages is to be paid to the "persons interested". Therefore, it can safely be held that legislature was aware of the difference between "owner" and "person interested". An owner will certainly be a person interested. But, all persons interested cannot be considered as owner. The right u/s 49 (1) of the Act is available only to the owner. It cannot apply to person interested. Clause (1) of Section 49 with its provisos refer to the owner and owner only. In clause (2) of Section 49, we come across "person interested". If the claim u/s 23 (1) thirdly put forward by a

person interested is excessive or unreasonable, then the Government can direct the entire land to be acquired. A combined effect of clauses (1) and (2) of Section 49 shows that when a part of a house is to be acquired, the owner can require the Collector to have the entire house acquired. This right is not available to a "person interested". Person interested can only put forward a claim u/s 23(1) thirdly. If it is to be held that all persons interested in the land sought to be acquired have got the right u/s 49 (1) of the Act, it will amount to re-writing the provision.

12. Under the second proviso to Section 49 (1), if any question arises as to whether any land proposed to be taken under the Act does or does not form part of a house, the Collector shall refer the same to the court for its decision. This means, the question as to whether the building forms part of a larger one or not, should be as between the owner on the one hand and the Collector on the other. Inter se dispute between the owner and his tenant as to whether the building sought to be acquired is part of a larger one or not, is not one coming within the purview of the provisos to Section 49(1). If such a question arises as in this case between the writ petitioner and respondents 15 to 19, it is not to be referred by the Collector to any court u/s 49(1) of the Act.

13. Learned counsel representing the appellant relied on certain decisions in support of his contention that the writ petitioner-tenant has got right u/s 49 of the Act to prevent the acquisition of that part of the building which is outside the notified area even against the desire expressed by the owners to acquire the same. We shall refer to those decisions. The first one relied on by the learned counsel was *Krishna Das Roy v. Land Acquisition Collector, Pabna* (Vol. XIII Indian Cases 470) In that case, Petitioner therein claiming himself to be the owner of a salt godown, who wanted that to be acquired, objected to the steps taken by the Collector for acquiring the frontal land without making a reference to court u/s 49 of the Act. Petitioner therein was only an under-tenant. A division bench of Calcutta High Court took the view that the word "owner" takes within its ambit Proprietor, sub-proprietor, mortgagee, tenant or sub-tenant for the purpose of Section 49. In this view, learned Judges set aside the order of the Collector and directed him to proceed in accordance with law u/s 49 of the Act to refer the matter to the court for deciding the question as to whether the land does or does not form part of petitioner's salt godown. With respect, we are unable to agree with the statement that the word "owner" in Section 49 (1) of the Act takes within its purview tenant or sub-tenant.

14. In *Bhagwan Das Nagindas v. Special Land Acquisition Officer* (AIR 1915 Bom 15), the facts were as follows:- A part only of a certain piece of land was notified under the Act to be acquired. The owners expressed a desire that the whole land should be taken and not a part. The Collector assented to the acquisition of the whole, but did not consider it necessary for Government to declare its intention for acquiring the whole. An award was made in respect of the whole and the matter was referred to court. The owners contended that the entire proceedings

were illegal as there was no notification to acquire the whole land. A Bench of the Bombay High Court set aside the entire award. In that case, the owners of the said land at first took advantage of the provisions of Section 49 of the Act and expressed their desire that the whole land should be taken and not a part. When the Collector proceeded to pass an award in respect of the entire area, the owner objected to it and the matter was referred to court. There it was contended that the whole proceedings were ultra-vires because there had never been any declaration u/s 6 of the Act relating to the whole area. Justice Heaton, with whom Justice Shah concurred, stated:-

My opinion is that Section 49 confirms the view that in a case of this kind acquisition or rather the taking up of land without a declaration relating to the land taken is absolutely illegal. I feel no doubt, therefore, that the acquisition was contrary to law and that the whole of the proceedings beginning with the Collector's award are bad, and must be set aside.

With respect, we find it difficult to agree with this statement of law. This is more so in view of the decision of the Supreme Court in *State of Bihar and Another Vs. Kundan Singh and Another*, . In that case. Their Lordships observed:-

It would be noticed that if an objection is made by the owner under S. 49(1), the Collector may decide to accept the objection and accede to the desire of the owner to acquire the whole of the house. In that case, further proceedings will be taken on the basis that the whole of the house is being acquired. In some cases, the Collector may decide to withdraw acquisition proceedings altogether, because it may be thought not worthwhile to acquire the whole of the house; in that case again nothing further remains to be done and the notification issued has merely to be withdrawn or cancelled. But cases may arise where the Collector may not accept the claim of the owner that what is being acquired is a part of the house; in that case, the matter in dispute has to be judicially determined, and that, is provided for by the second proviso to S. 49(1).

The above observation of Their Lordships make it clear that the Land Acquisition Officer can proceed with the acquisition if he agreed with the desire of the owner that the whole of the building ought to be acquired as if the whole of such building has been proposed to be acquired. If the owner was not desirous of the acquisition of the part outside the notified land, the Collector is not to acquire that land. In such a situation, the Government can order acquisition of the entire land when it considers the claim put forward u/s 23 (1) thirdly is excessive or unreasonable. Then also no notification is contemplated as is clear from clauses (2) and (3) of Section 49.

15. Next case that was referred to us was *Province of Bengal Vs. Mahes Missir and Others*, . In that case, the areas marked in blue and pink formed a compact plot. The land to be acquired was the blue coloured portion and the pink coloured area was exempted. Tenants of some huts situated in the pink coloured area wanted that area also to be acquired because they had certain rights of

casement over the blue coloured portion. Consequently they wanted the exempted pink coloured area also to be acquired. Their claim was negated by the division bench in the view that :-

To hold that the opposite parties (tenants) are owners of the blue land and owners of houses on the pink land within S. 49 would lead to absurdity.

In the course of the discussion. Their Lordships took the view:-

The expression "owner" which occurs in S. 49 is nowhere defined in the Act, and though the expression "person interested" must obviously include "owner", the connotations of the two terms are by no means coincident.

Thus it was taken that the expression "person interested" has an application much wider than the word "owner" in the ordinary accepted meaning of that word. We are in respectful agreement with this observation and hold that the word "owner" in Section 49 cannot bring within its ambit all persons interested in the land.

16. The next decision that was referred to us was Harsook Das Bal Kishan Das Vs. The First Land Acquisition Collector and Others, . In that case, out of a total area of approximately 23 bighas of land, State acquired a small portion. Owners claimed a fabulous sum as damages for severance of the land u/s 23 (1) of the Act. Since that claim was found unreasonable, Government accorded sanction for acquiring the whole area. Award was passed in respect of the whole area. The owners contended that Section 49 (2) has no application where acquisition is of vacant land and that it can apply only when acquisition relates to land and buildings. This contention was negated, holding that Section 49(2) of the Act will be attracted by reason of definition of "Land". According to Their Lordships, object of Section 49(1) of the Act is to give to the owner the option whether he would like a part of his property to be acquired. If the owner does not allow a part to be taken, Government is helpless. It was also stated therein that Section 49 (2) of the Act has nothing to do with Section 49 (1). Section 49 (2) of the Act gives the option to the Government only where the claim u/s 23 (1) thirdly is seen excessive. Government, in such a case of acquisition of the remaining portion u/s 49 (2), saves the public exchequer. Regarding the contention that there should have been a fresh declaration, Their Lordships observed:-

This contention is unacceptable. Sub-sections (2) and (3) of Section 49 of the Act indicate that the acquisition for public purpose need not be stated. Section 49 (3) of the Act specifically provides that no fresh declaration under Sections 6 to 10 of the Act shall be necessary. Section 49 (2) of the Act implies public purpose inasmuch as the compensation for acquisition is payable out of the public fund. Sections 4 and 5 of the Act are excluded because of proposal by owner in case of further acquisition u/s 49(1) of the Act and proposal by Government for further acquisition in a case u/s 49(2) of the Act. All that is necessary is that in one case the owner of the land and in the other the Government must act under Sections 49 (1) and 49(2) of the Act respectively before the award is made. The public

purpose is to prevent people from making exaggerated claims. Section 49 (2) of the Act is subsidiary to public purpose. The acquisition is for public purpose. The subsequent acquisition is in aid of that purpose.

From the decisions referred to above, we come to the conclusion that the right u/s 49 (1) of the Act is available only to the owner. Writ petitioner has no right u/s 49 (1) of the Act to prevent the owner from exercising the right under that Section. His right, if any, can only be in a reference u/s 18 of the Act. From the counter affidavits filed on behalf of respondents 1 to 4, 10 to 12 and the report submitted by the Commissioner, it has necessarily to be found that the portion of the building which is situated within the area notified for acquisition is part of a bigger structure. The owners of the building expressed their desire to have the entire building acquired. Land Acquisition Officer accepted the desire and proceeded with the acquisition. We do not find any illegality in the procedure adopted by the Land Acquisition Officer for this Court to interfere under Article 226 of the Constitution.

The writ appeal fails. It is accordingly dismissed. However, we make no order as to costs.