

(2016) 05 AHC CK 0322

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 12138 of 1982

Balbir Singh

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 05-05-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Land Acquisition Act, 1894 — Section 11A, 17, 4(1), 5A, 6, 9

Citation : (2016) 6 AllWC 5624 : (2016) 119 ALR 626 : (2016) 3 UPLBEC 1873

Hon'ble Judges : Sudhir Agarwal and Shamsher Bahadur Singh, JJ.

Bench : Division Bench

Advocate : N.S. Chaudhary, R.K. Porwal, Anshul Chaudhari and Dharam Pal Singh, Advocates, for the Petitioner; S.C, for the Respondent

Final Decision : Partly Allowed

Judgement

Sudhir Agarwal and Shamsher Bahadur Singh, JJ.—; Heard Sri Dharam Pal Singh, Senior Advocate assisted by Sri Anshul Chaudhari, learned counsel for petitioners, learned Standing Counsel for respondents and perused the record.

2. Petitioners have filed this writ petition under Article 226 of Constitution of India assailing notifications dated 31st July 1982 published in U.P. Gazette dated 2nd October 1982 issued under Section 4(1) of Land Acquisition Act, 1894 (hereinafter referred to as "Act, 1894") proposing to acquire certain land at Etawah for the purpose of construction of a building of Government Polytechnic Institute, Etawah. He has also challenged notification dated 6th August 1982 published in U.P. Gazette dated 2nd October 1982 issued under Section 6 read with Section 17 of Act, 1894.

3. The ground of challenge is that dispensation of enquiry under Section 5A is illegal and arbitrary. There was no urgency and since possession of land belong to petitioners has not been taken by respondents, hence acquisition notifications are illegal.

4. The dispute relates to Khata No. 36, plot no. 264 (area 3.09 acres), 280 (area 4.57 acres) belong to petitioners; Khata No. 272 plot no. 227 (area 1.09 acres) belong to petitioner no. 4 and Khata No. 92 plot no. 262 (area 0.10 acres) belong to petitioner no.1 and one Yogendra Singh. It is said that construction of Government Polytechnic Institute is a complex project. Government has not earmarked any fund for construction of building and yet it has invoked urgency clause for dispensing enquiry under Section 5A, which shows total non-application of mind. Further, State proposed acquisition of a total area of about 24.63 acres of land for which a plan lay out for construction of building and other development is necessary and nothing has been done in this regard still invoking urgency clause, enquiry under Section 5A has been dispensed with.

5. A supplementary affidavit has also been filed sworn by petitioner 1 on 30th September 1997, stating therein that during pendency of writ petition, Act, 1894 has been amended and Section 11A has been inserted in the year 1984. The disputed land belong to petitioners and is still in their possession in view of interim order passed on 8.11.1982. A copy of letter dated 16th May 1996 sent by Special Land Acquisition Officer (in short "SLAO") addressed to Principal, Government Polytechnic, Etawah has also been placed on record, wherein it has been said that for want of amount of compensation it is not possible to make award of land, acquired for the purpose of said Polytechnic, and he required to furnish a cheque/draft for Rs. 3 lacs towards estimated compensation. He also informed that for the purpose of Government Polytechnic, Vidhuna, District Etawah, a sum of Rs. 3,75,740/was made available to SLAO on 19th September 1995 but Government now, vide letter dated 29th March 1996, has informed of its idea of dropping construction of Government Polytechnic at Vidhuna, therefore, if otherwise funds are not available, the said amount furnished in respect of Government Polytechnic, Vidhuna may be permitted to be utilised for the purpose of payment of compensation in respect to land, acquired for Government Polytechnic, Etawah. Another letter dated 24th April 1997 sent by Principal, Government Polytechnic, Etawah to Director, Technical Education, U.P. Kanpur has also been placed on record, wherein it was informed that seven writ petitions challenging acquisition at Etawah have been filed in High Court and in respect thereto, for want of funds for payment of compensation, award has not been made till date. It therefore, requested Director to either furnish funds separately or permit utilisation of funds already remitted to SLAO in connection with Government Polytechnic, Vidhuna. Referring to aforesaid two letters, it has been suggested that acquisition commenced in 1982 and amount of compensation was not available for making award to SLAO, till 1996/97 which clearly shows that neither there was any urgency, nor there was any planning, nor requisite funds were allocated for more than a decade and hence there was no urgency whatsoever and dispensation of enquiry under Section 5A is patently illegal, arbitrary and bad.

6. A counter affidavit has been filed, which has been sworn by Shiv Kishore, Amin, SLAO, Kanpur. It is stated therein that Collector, Etawah sent a proposal to

Government with respect to acquisition of land for establishing a Government Polytechnic at Etawah. The matter was examined by State and thereafter acquisition notifications dated 31st July 1982 and 6th August 1982 under Sections 4 and 6 of Act, 1894, respectively, were issued. Both were published in U.P. Gazette on the same day i.e. 2nd October 1982. Notice under Section 9 was issued to all tenure holders. There was no construction existing on the land, sought to be acquired, when committee inspected the site. There was an urgency for immediate acquisition of land for the purpose of construction of building of Government Polytechnic Institute in conformity with standards fixed by All India Council of Technical Education. Since there was urgency, hence inquiry under Section 5A of Act, 1894 was dispensed with. The entire expenses were to be borne by Government. An amount of Rs. 5 lacs, for the time being, was sanctioned by Government for payment of compensation. In para 10 of counter affidavit, while replying para 13 and 14 of writ petition, it is stated that Principal, Government Polytechnic Institute sent proposal for acquisition of land but no final map was prepared. The planning etc. for construction of building will not take much time and as soon as possession of acquired land is taken planning of lay out will be done. The land has been chosen by a Committee of Experts and District Officers, which has examined all relevant aspects. Acquired land is near bye pass at Mainpuri-Etawah road and the selection of site cannot be challenged. With regard to possession it is said that possession of 15 plots measuring 10.60 acres was taken but land belong to petitioners could not be possessed in view of interim order dated 25.11.1982 passed in this writ petition. It may thus be noted that a vague averment about sanction of Rs. 5 lacs has been mentioned in counter affidavit without giving any date etc., which shows that money was not at all available to Revenue Authorities towards compensation payable to land owners.

7. In rejoinder affidavit, petitioners have reiterated what they have stated in writ petition, hence we are not repeating facts stated therein.

8. A Misc. Application along with affidavit filed by petitioners has placed on record certain letters dated 16th May 1996 and 30th July 1996, sent by Government to Collector, Etawah. The aforesaid letters show that there was a proposal from Government for fresh acquisition proceedings, since neither possession of disputed land has been taken nor award has been made. It is stated that in view of Section 11A of Act, 1894, acquisition proceedings have lapsed.

9. Sri Dharam Pal Singh, Senior Advocate assisted by Sri Anshul Chaudhari has confined his arguments, challenging aforesaid acquisition proceedings on the ground that dispensation of enquiry under Section 5A of Act, 1894, by invoking urgency clause under Section 17, is apparently arbitrary, based on no material, hence illegal and, therefore, declaration under Section 6 without any enquiry is bad in law. He has placed reliance on decision of Apex Court in *Darshan Lal Nagpal (Dead) By Lrs. v. Government of NCT of Delhi and others* (2012) 2 SCC

327. (Paras 23, 24, 26, 27, 32 to 35)

10. Learned Standing Counsel though attempted to oppose writ petition on the ground that dispensation of enquiry under Section 5A of Act, 1894 was necessary for valid reasons but neither could place any relevant fact/material since none has been pleaded in counter affidavit nor could place any material or original record for Court's perusal, to justify the same.

11. Before discussing the question, "whether dispensation of enquiry under Section 5A of Act, 1894, in the present case, is justified or not, in the light of statutory provisions and judicial precedent rendered in several decades", it would be appropriate to refer certain admitted facts borne out from pleadings of parties.

12. Government Polytechnic Institute appears to be running already at Etawah. Principal thereof, proposed construction of building for which acquisition of land was proposed. Collector examined the matter and proposed acquisition of about 24 acres of land and sent its recommendations to State Government. Accepting recommendations, State Government issued notification dated 31st July 1982 under Section 4 (1) of Act, 1894, proposing to dispense with enquiry under Section 5A by invoking urgency clause under Section 17 of Act, 1894 and within a short time, declaration under Section 6 was also made by notification dated 6th August 1982 and both the aforesaid notifications were published in U.P. Gazette on the same day i.e. 2nd October 1982. No plan/ lay out map of proposed building was ready till the date of declaration under Section 6 of Act, 1894. And even thereafter no budgetary allocation was made for raising construction of building on the proposed acquired land. Even requisite amount of estimated compensation was not made available to Collector, Etawah for payment to land owners. Though acquisition notifications were issued in 1982 but till 1996 amount of compensation was not made available to Collector/ SLAO, Etawah for payment to land owners.

13. During the course of arguments, both learned counsels appearing for respectively parties including learned Standing Counsel stated at the Bar that presently Government Polytechnic Institute at Etawah has already been constructed and functioning thereto, though, admittedly, disputed land is still in possession of petitioners, and neither possession thereof has been taken by respondents nor any award in respect thereto has been made till date, nor compensation has been paid to petitioners.

14. In the above factual background, we proceed to consider, "whether dispensation of enquiry under Section 5A of Act, 1894 by invoking urgency clause under Section 17 of Act, 1894 is justified".

15. Section 5A was inserted in Act, 1894 as long back as in 1923, by Act No. 38 of 1923. There are minor amendments made subsequently but substance of provision has remained the same.

16. Normal procedure of acquisition is that a proposal of acquisition is published

in notification under Section 4 of Act, 1894. Land owners whose land is proposed to be acquired, are given an opportunity to make their objections. Collector is under an obligation to consider objections and also offer an opportunity of hearing to objectors and thereafter submit a report to Government containing his recommendations on the objections, for decision of Government. After considering the report and other material, Government make declaration that land is proposed to be acquired for public purpose and this is done by publication of notification under Section 6. Therefore, there is possibility of some difference in details of land stated in the notification issued under Section 4 and finally declared land, as acquired for public purpose, detailed in notification under Section 6.

17. Collector is then authorised to take order for acquisition and under Section 8 is supposed to mark, measure and plan the acquired land. A notice thereafter is issued under Section 9 to Land Owners by Collector notifying his intention of taking possession of land and that the claim for compensation be submitted to him. Under Section 11, Collector makes enquiry for determining amount of compensation payable to land owners, whose land has been acquired, and make award. After payment of compensation, Collector takes possession of land.

18. There is an exception to normal procedure of taking possession which is contained in Section 17 of Act 1894. It says that in case of urgency, even though no award has been made, Government can direct Collector to take possession of any land, needed for public purpose, and on such possession being taken by Collector, land shall vest absolutely with the Government free from all encumbrances. Section 17(4) provides, where such urgency for the purpose of possession is to be acted upon, Government, shall declare that provision of Section 5-A shall not apply.

19. The circumstances, when Government would be justified to dispense with enquiry under Section 5A while invoking urgency clause under Section 17, for the purpose of taking possession, has been considered in a catena of decisions in last several decades and it would be useful to refer some relevant authorities in this regard.

20. Right to file objection against proposal of acquisition of land published under Section 4 is a substantial right, consistent with principle of natural justice, since forcibly acquisition of land, without consent of land owners, is a serious matter.

21. In *Nandeshwar Prasad v. U.P. Government* AIR 1964 SC 1217. Court said "the right to file objection under Section 5A is a substantial right when a person's property is being threatened with acquisition and we cannot accept that right can be taken away as if by a side wind".

22. In *Munshi Singh and others v. Union of India* (1973) 2 SCC 337. which is a decision of three judges bench, Court stressed upon and emphasised upon an inbuilt legislative recognition of principle of natural justice in Section 5A and said "Subsection (2) of Section 5A makes it obligatory on the Collector to give an

objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. ?..... The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5A".

23. In *State of Punjab v. Gurnail Singh and others* 1980 (1) SCC 471. it was held that it is fundamental that compulsory taking of a man's property is a serious matter and smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and preemptive of arbitrariness. Denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing, land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of Act, 1894. A slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes travesty of emergency power.

24. In *Shyam Nandan Prasad and others v. State of Bihar and others* (1993) 4 SCC 255. reiterating that section 5A is mandatory, Court said "the proceeding before the Collector is a blend of public and individual enquiry".

25. In *Union of India and others v. Mukesh Hans* (2004) 8 SCC 14. Court held that Section 17(4) is an exception to normal mode of acquisition. Mere existence of urgency or unforeseen emergency by itself is not sufficient to direct for dispensation of Section 5A. Court reiterated that there must be real existing emergency for which an opinion must be formed by the Government, objectively. Court said "It requires an opinion to be formed by concerned Government that along with existence of such urgency or unforeseen emergency there is also a need for dispensing with Section 5A enquiry, which indicates that the legislature intended that the appropriate Government to apply its mind before dispensing with Section 5A enquiry. It also indicates the mere existence of an urgency under Section 17 (1) or unforeseen emergency under Section 17 (2) would not by itself be sufficient for dispensing with Section 5A enquiry. If that was not the intention of the legislature then the latter part of subsection (4) of Section 17 would not have been necessary and the legislature in Section 17 (1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically Section 5A enquiry will be dispensed with, but then that is not language of the Section which, in our opinion, requires the appropriate Government to further consider the need for dispensing with Section 5A enquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while dispensing with Section 5A inquiry does not mean that in every case when there is an urgency contemplated under Section 17(1) and unforeseen emergency contemplated under Section 17(2) exists that by itself

would not contain the need for dispensing with Section 5A enquiry. ?.... There is need for application of mind by appropriate Government that such an urgency for dispensing of Section 5A enquiry is inherent ?..... ."

26. In *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai & Ors* (2005) 7 SCC 627. it was held that the provisions of Section 5A of Act, 1894 must be read consistent with Article 300A of the Constitution and it is akin to fundamental right of procedure before depriving a persons of his land, and must be strictly complied with.

27. In *Essco Fabs Pvt. Ltd. & Anr v. State of Haryana & Anr* (2009) 2 SCC 377. it was held that enquiry should not be dispensed with lightly.

28. In *Anand Singh and another v. State of U.P. and others* (2010) 11 SCC 242. Court considered as to when State would be justified in invoking power under Section 17(4) for acquisition of land and dispensing with enquiry under Section 5A so as to take possession immediately. It is said that power under Section 17 is not to be exercised in a routine manner. It would be justified only when circumstances warrant immediate possession. It should not be lightly invoked. It is an exceptional power enabling land acquiring body to dispense with enquiry under Section 5A. Government must apply its mind before dispensing with enquiry under Section 5A whether urgency is of such a nature that justifies elimination of summary enquiry under Section 5A. The mere mention of words in acquisition notification that Government is satisfied about urgency and dispensing with enquiry under Section 5A may raise a presumption in favour of Government with per-requisite conditions for exercise of such power are satisfied but when challenged, Government has to produce relevant material before Court to show existence of such circumstances, which justify dispensation of inquiry and avail an exceptional power under Section 17. Court further said "upon challenge being made to the use of power under Section 17 the Government must produce appropriate material before the Court that the opinion for dispensing with enquiry under Section 5A has been formed by the Government after due application of mind on the material placed before it".

29. With regard to judicial review of exercise of power, Court in *Anand Singh and another* (Supra) further said in paras 45, 46, 47 and 48 as under :

"45. It is true that power conferred upon the Government under Section 17 is administrative and its opinion is entitled to due weight, but in a case where the opinion is formed regarding the urgency based on considerations not germane to the purpose, the judicial review of such administrative decision may become necessary."

"46. As to in what circumstances the power of emergency can be invoked are specified in Section 17 (2) but circumstances necessitating invocation of urgency under Section 17(1) are not stated in the provision itself. Generally speaking, the development of an area (for residential purposes) or a planned development of city, takes many years if not decades and, therefore, there is no reason why

summary enquiry as contemplated under Section 5A may not be held and objections of land owners/persons interested may not be considered. In many cases on general assumption, likely delay in completion of enquiry under Section 5A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realising that an important and valuable right of the person interested in the land is being taken away and with some effort enquiry could always be completed expeditiously."

47. The special provision has been made in Section 17 to eliminate enquiry under Section 5A in deserving and cases of real urgency. The Government has to apply its mind on the aspect that urgency is of such nature that necessitates dispensation of enquiry under Section 5A. We have already noticed few decisions of this Court. There is conflict of view in the two decisions of this Court viz.; Narayan Govind Gavate and Pista Devi. In Om Prakash this Court held that decision in Pista Devi must be confined to the fact situation in those days when it was rendered and the two Judge Bench could not have laid down a proposition contrary to the decision in Narayan Govind Gavate. We agree."

"48. As regards the issue whether prenotification and post-notification delay would render the invocation of urgency power void, again the case law is not consistent. The view of this Court has differed on this aspect due to different fact-situation prevailing in those cases. In our opinion such delay will have material bearing on the question of invocation of urgency power, particularly in a situation where no material has been placed by the appropriate Government before the court justifying that urgency was of such nature that necessitated elimination of enquiry under Section 5A."

30. In Radhe Shyam (Dead) through Lrs. and others v. State of U.P. and others 2011(5) SCC 553. it was reiterated that property of a citizen cannot be acquired by State without complying with the mandate of Sections 4, 5A and 6 of Act, 1894. A public purpose however, loudable would not entitle Government to invoke urgency provisions, since the same have the effect of depriving owner of his right to property and that too without being heard. Only in a case of real urgency, Government would be justified in invoking urgency provisions. Section 17 must have been invoked only when purpose of acquisition cannot brook the delay of even few weeks or months. The authority must be fully satisfied that time of few weeks or months likely to be taken in conducting enquiry under Section 5A shall, in all probability, frustrate the public purpose for which land is proposed to be acquired. Satisfaction of Government on issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and can be challenged on the ground that authority did not apply its mind to relevant factors, and on record, there is no material justifying existence of alleged urgency. It also held that exercise of power under Section 17(1) necessarily does not result in exclusion of Section 5A, inasmuch as, the person concerned can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-Section (4) of Section 17 shows that it

merely enables Government to direct that Section 5A would not apply to the cases covered under Sections (1) or (2) of Section 17. Therefore, mere fact that certain purposes may be treated as public purpose for purpose of acquisition but that by itself would not mean that there exists urgency to dispense with inquiry unless the circumstances actually and really are in existence to show that delay in taking possession would be adverse to public interest. It also held that Court can take judicial notice of the fact that for planning, execution and implementation of scheme relating to development of residential, commercial and industrial or institutional areas, Government takes few years, therefore, in such cases private property should not be acquired by invoking urgency clause as denial of Rule of audi alteram partem embodied in Section 5A is not at all warranted in such cases.

31. In *Darshan Lal Nagpal (Dead) By Lrs. v. Govt. of NCT of Delhi and others* (2012) 2 SCC 327. after having retrospection of some of authorities on the subject, Court in para 28 of the judgment stated as under :

"What needs to be emphasised is that although in exercise of the power of eminent domain, the State can acquire the private property for public purpose, it must be remembered that compulsory acquisition of the property belonging to a private individual is a serious matter and has grave repercussions on his Constitutional right of not being deprived of his property without the sanction of law - Article 300A and the legal rights. Therefore, the State must exercise this power with great care and circumspection. At times, compulsory acquisition of land is likely to make the owner landless. The degree of care required to be taken by the State is greater when the power of compulsory acquisition of private land is exercised by invoking the provisions like the one contained in Section 17 of the Act because that results in depriving the owner of his property without being afforded an opportunity of hearing."

32. In *Union of India and others v. Shiv Raj and others* 2014 (6) SCC 564. Court in para 15 said that Section 5A confers a valuable right on the owner of land and it is not an empty formality. It is a substantive right, which can be taken away only for good and valid reasons and within the limitations prescribed under Section 17(4) of Act, 1894.

33. Now considering the aforesaid exposition of law and circumstances in which Section 17 can be invoked, if we apply the same to the facts of present case, it is admitted position that neither there was any plan sanctioned for establishment of Government Polytechnic Institute, nor scheme was prepared, nor funds were made available for almost a decades, and still in a mechanical manner, respondents invoked provisions of Section 17(1) and dispensed with enquiry under Section 5A.

34. Despite opportunity, respondents have also not placed any material before this Court either along with counter affidavit or by producing original record to show that there actually existed any material justifying to draw inference of

existence of urgency. Therefore, we have no manner of doubt that dispensation of enquiry under Section 5A in the present case is clearly illegal and a colourable exercise of power. Hence, impugned notifications in so far as the same dispense with enquiry under Section 5A of Act, 1894, cannot be sustained.

35. The impugned notifications, in so far as the provisions of Section 17 have been invoked and enquiry under Section 5A has been dispensed with, are hereby quashed. If respondents still require land in dispute, they may proceed from stage of making enquiry under Section 5A of Act, 1894 after giving public notice to landowners, inviting objections and thereafter take appropriate action as permissible in law.

36. The writ petition is partly allowed in the manner above. The petitioners are entitled to cost, which we quantify to Rs. 5000/-.