
(2011) 12 RAJ CK 0073

In the Rajasthan High Court

Case No : Civil Writ Petition No"s. 8963 and 8929 of 2011

Ishwar Singh and Another

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 19-12-2011

Acts Referred:

Constitution of India, 1950 — Article 14

Land Acquisition Act, 1894 — Section 17, 17(1), 17(1)(4), 17(4), 3

Citation : (2012) 3 RLW 2472

Hon'ble Judges : Ajay Rastogi, J

Bench : Single Bench

Advocate : Jitendra Sharma, for the Appellant; L.L. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Rastogi, J.—Since both the petitions involve identical questions, hence are being decided by present order. To appreciate the controversy raised herein, relevant facts, in brief, are narrated. As alleged, agricultural lands measuring total 19.45 hectares of different 61 khasra numbers of village Ikran, Tehsil & district Bharatpur was acquired for utilization & construction of sewerage treatment plant (STP) and after completion of acquisition proceedings thereof, mutation of the land came to be opened & recorded in the name of Department of Public Health & Engineering Government of Rajasthan Bharatpur (STP) vide mutation entry No. 1323 (Ann.1). But the land was not utilised for public purpose for which State Government intended to acquire the land.

2. But, for construction of sewerage treatment plant in village Nagal Gopal, Tehsil Bharatpur, State Government issued preliminary notification dt. 22/10/2010 (Ann.3) U/s 4(1) of Land Acquisition Act, 1894 ("LA Act") needed for a public purpose (sewerage treatment plant (STP) and as follow up action, invoking urgency clause issued a declaration U/s 6 read with S.17(1)(4) vide notification dt. 28/06/2011 (Ann.8) while dispensing with inquiry provided U/s 5A of LA Act read with corrigendum dt. 16/08/2011 (Ann.R/1/13).

3. In CWP-3273/1996 (PIL), Division Bench of this Court is monitoring unauthorized constructions in the Fort & Moat area of Sujan Ganga Canal in Bharatpur. Initially, directions were issued on 11/05/2010 (Ann.R1/3) to frame plan/scheme for proper sewerage system in Bharatpur, alongwith other directions ad infra:

Looking to the earlier orders passed by this Court from time to time, the issues which are required to be addressed by the State are formulated in the following manner as the problems focused in this public interest litigation pertain to basic amenities to the public:

(i) To remove unauthorized construction & encroachments completely from the Fort area, nearby Sujan Ganga Canal and Bharatpur City;

(ii) To clean and remove sludge, garbage, filth, rubbish from Sujan Ganga Canal;

(iii) To frame plan/scheme, for proper sewerage system in Bharatpur;

(iv) To ensure disposal of hospital waste in a hygienic manner in accordance with the provisions of Bio-medical wastes & Acknowledgment Rules, 1998;

(v) To ensure pollution free environment in Bharatpur.

(vi) To streamline traffic situation in Bharatpur.

(vii) To conduct enquiry and fix accountability of the officials/ officers as huge amount of more than Rs. 3 Crores had gone in waste on account of fault design and construction of canal.

(viii) To ensure proper maintenance of monuments Bharatpur Fort as well as canal.

To do the needful, two month's time prayed by learned Additional Advocate General in presence of the officers of the State Government, Municipal Council as also the District Administration.

To implement directions of this Court (DB) (supra), including for construction of sewerage treatment plan, efforts were made by State Government and after obtaining NOC from all respective departments including UIT, Pollution control Board, Forest Department, Town & Planning Department, a preliminary notification came to be issued U/s 4(1) expressing intention & proposed acquisition of the land, which came to be published in the official gazette on. 29/10/2010 and in daily new paper "Rajasthan Patrika" on 31/10/2010 & in "Dainik Bhaskar" on 01/11/2010, which was also affixed in the locality on 03/11/2010 and in reference to notification U/s 4(1) of LA Act, objections were submitted by petitioners on 27/05/2011.

4. However, since this Court (DB) was monitoring the matter and calling for the report to be submitted, a letter (Ann.R/1/12) was sent by RUIDP on 16/05/2011 to the District Collector, Bharatpur, that technical bid for STP has already been tendered but the land has not been acquired - in absence whereof, financial bid

cannot be opened and construction of STP would take time and by that time, there can be rains of the season; and taking note of over-all conspectus of the facts on record including dire urgency & the matter being of public importance, notification dt. 28/06/2011 U/s S.6 read with 17(1)(4) was issued alongwith corrigendum dt. 16/08/2011 dispensing with inquiry contemplated U/s 5A of LA Act.

5. Thereafter, again writ petition (PIL) came up before the DB but a detailed order came to be passed on 14/11/2011 and State Government assured regarding sewerage treatment plant that it has taken active steps and was called upon to explain on record as to how much time would be taken in compliance of Scheme of STP- extract of order dt. 14/11/2011 runs ad infra :

With respect to the cleaning & removal of sludge, gabage, filth, rubbish from Sujan Ganga Canal, it is submitted by Counsel appearing on behalf of petitioner that effective steps have not been taken so far and money sanctioned is not being properly utilized.

In the circumstances, let the respondents make an effort to remove sludge, garbage, filth, rubbish from Sujan Ganga Canal, which has already been ordered by this Court, and place compliance report before thus Court. Respondents are also directed to place on record as to how much money has been spent so far in this regard and what was the result achieved. Names of the persons involved in cleaning operation and respondents for spending money be also indicated by the respondents.

With respect to sewerage system, it is submitted by Mr. NA Naqvi, AAG appearing on behalf of State that scheme has been prepared and it is underway. Let the progress report of the scheme be placed on record and explain how much time is likely to be taken in completion of the scheme.

With respect to disposal of hospital wastes, certain steps have been taken. However, for the purpose of segregation of hospital waste in a hygienic manner in accordance with the provisions of Biomedical Wasters & Acknowledge Rules, 1998,

In the circumstances, respondents are directed to show what steps have been taken for segregation of hospital waste as per the Rule and submit compliance report that segregation of waster has been started within a period of one month from today. Let an order be also made by respondents to establish the plant at Bharatpur. Establishment of plant at Alwar cannot serve the purpose to District Bharatpur.

The respondents are also directed to submit the traffic plan prepared in 2001 and to what extent it has been implemented. Let specific affidavit be filed in this regard.

With respect to pollution free environment, we direct the pollution control board to conduct air and waster test at the various places and to submit report within a

period of one month and also submit proposal what steps are required to be taken for providing pollution free environment. Present status report with respect to steps to be taken to preserve environment be also indicated.

With respect to the fixation of accountability of officers/ officials as huge amount of more than 3 Crores had gone in waste on account of faulty design and construction of canal, it is submitted that First information report has been filed. Let the respondents place on record the stage of investigation and also place on record the case diary on the next date.

It is also submitted that the fort and Moat of Bharatpur canal have been severely damaged at several places. Archaeological Department is not doing its job. We direct the Archaeological Department to make survey and submit its plan for recuperation of the Fort and Moat and amount required for the purpose of its proper restoration.

We also request the District Judge, District Bharatpur to make inspection with respect to the aforesaid various aspects enumerated in the order and submit the report within a period of six weeks from today. It is open to the parties to provide material to the District Judge.

Copy of petition & the order passed on 11.05.2010 and copy of this order be forwarded to the District Judge. List after six weeks.

Thus, the Division Bench has taken note of the sludge, garbage, filth & rubbish from Sujan Ganga Canal, apart from segregation & disposal of the hospital wastes, which had to be cleaned within shortest period while at the same time, sewerage treatment plant had to be constructed.

6. From the orders of Division Bench (supra), it can be noticed that apart from air pollution, water of Sujan Ganga canal was highly contaminated to be necessarily cleaned and that being prime source of water supply, residents of Bharatpur City are discharging almost of totality of untreated sewage carrying industrial and domestic waste which falls into the Sujan Ganga canal.

7. This Court while monitoring the matter, called upon State functionaries to make efforts to remove sludge, garbage, filth & rubbish from Sujan Ganga Canal and the authorities were directed to take up the work of utilization & construction of STP on war footing plan in the back ground of directions of the Court (supra) which was a time bound programme for setting up STP, urgency clause was invoked by respondents while issuing declaration u/Sec. 6 read with Sec. 17(1) & (4) of LA Act vide notifications dt. 28.06.2011 and 16.08.2011.

8. Counsel for petitioner submits that the land was earlier acquired by State Government for construction of STP in village Ikran (Bharatpur) and despite mutation of the acquired land being opened & recorded in the name of PHED, it was not utilized for STP and fresh acquisition proceedings were initiated which according to Counsel, were without application of mind and arbitrary exercise of power of the State Government in initiating acquisition proceedings in regard to

the subject land which is in violation of Art. 14 of the Constitution.

9. Counsel further submits that valuable right of petitioners to submit objections U/s 5A of LA has been dispensed with by invoking urgency clause by scuttling enquiry and very invocation of S.17(4) of LA Act was not warranted and there was no urgency or complete necessity nor was it a matter of urgency U/s 17(4) which could justify the proceedings and are liable to be quashed.

10. Respondents have filed reply to the writ petition and inter-alia averred therein that acquisition proceedings in regard to the subject land in village Ikran was not initiated since the land was charagah (pasture) being vested in the State Government, it was set apart for PHED; and at the stage of setting up STP, it was found that the land was scattered and total land of pasture was not adjoining to each others in between the land of khasra numbers, there were some lands in khatedari of other persons, as well; besides in centre of the subject land, there was a school in Khasra No. 1142 & 1135 being within radius of 500 meter, and taking note thereof, the land was not found technically feasible & workable for establishment of STP in village Ikran; and after physical verification, acquisition proceedings were initiated in regard to the subject land. It has further been averred in the reply that Division bench of this Court has been monitoring the matter since 1996 and heavily pressed upon State Govt., regarding encroachment near Sujan Ganga Canal & Fort and was called upon to remove sludge garbage & problem of sewerage system by construction of STP within time bound schedule vide order dt. 11/05/2010 (supra) and taking note thereof, the State Government was also keen interested in taking active steps since it was for public purpose and public at large; and after obtaining NOC from all State functionaries, notification U/s 4(1) of LA Act came to be issued and published in Rajasthan Gazette apart from its publication in daily news papers.

11. However, later on it was considered appropriate that for purposes of utilization & construction of STP, active steps have to be taken and the bids have been received and there is very short time available in which sewerage treatment plant has to be constructed, which is the prime public purpose and time being the essence urgency clause was invoked by appropriate Govt. & notification dt. 28/06/2011 U/s 17(4) of LA Act was issued followed by corrigendum on 16/08/2011 (Ann.R/1/13) dispensing with inquiry U/s 5A of the Act. Counsel for respondents submits that decision making process adopted by appropriate Government is in conformity with provisions of the LA Act and does not call for interference.

12. This Court has considered rival contentions advanced at the bar and with their assistance, examined the material on record. Scheme of the LA Act is clear providing for issuance of preliminary notification U/s 4(1) empowering "appropriate Government" to issue such notification for acquiring land needed or likely to be needed for any public purpose. Since the property belongs to a private individual, unless there is a "public purpose" as defined in Cl.(f) of S.3 of LA Act, no acquisition of land can be made, it is also true that in exercise of

power of eminent domain that a sovereign may acquire property which does not belong to it but it is trite that in exercise of power of eminent domain, the law must provide an opportunity of hearing against proposed acquisition.

13. Under the Scheme of Act, after issuance of preliminary notification U/s 4 & before final declaration U/s 6 of LA Act, the Government is under obligation to hear and afford opportunity of hearing to the persons interested in the property provided U/s 5A against proposed acquisition before depriving him of his ownership right.

14. But there may be acquisition of "urgency of unforeseen emergency" while avoiding delay for acquisition of such property in larger public interest. Taking note thereof, the legislature thought it proper to deal with such cases of exceptional nature and in its wisdom enacted S. 17 in the LA Act.

15. Sub-S.(1) of S.17 deals with cases of "urgency" while Sub-S.(2) thereof covers cases of "sudden change in channel of any navigable river or other "unforeseen emergency". But even in cases of "urgency" or "unforeseen emergency", enquiry contemplated by S.5A cannot ipso facto be dispensed with as is evident from Sub-S.(4) of S.17 of LA Act. In fact, Sub-S.(4) of S.17 is an enabling provision and declares that if in the opinion of "appropriate Govt.", provisions of Sub-Ss.(1) or (2) are applicable, it may specify that provisions of S. 5A of LA Act would not apply. Thus it is clear that the legislature has contemplated that where there is "urgency"/ "unforeseen emergency" & in such contingencies, private properties may be acquired; but in such cases, owner of property should not be deprived of his right to property & possession thereof without following the procedure of law provided U/s 5A of the Act unless the urgency/emergency is of such a nature that the Government is convinced that holding of enquiry or hearing of objections may be detrimental to public interest.

16. In *Jai Narain and Others Vs. Union of India and Others*, while dealing with invocation of urgency clause U/s 17(4) of I.A. Act where the land was acquired for public purposes namely for setting up of pumping station/sewerage treatment plant; and taking note of the Scheme of LA Act, the Apex Court finally held that setting up of sewerage treatment plant/pumping stations is of utmost and great public importance for health & supply of pure water; and there was utmost urgency of land being acquired; as such urgency clause was rightly invoked. Apex Court observed:

10. Various orders and directions issued by this Court from time to time in Mehta's case clearly show that the land in dispute - for Keshavpur STP - is being acquired under the directions of this Court. Even the impugned notifications under Sec. 4 read with 17 and Section 6 of the Act have been issued under the directions of this Court. This Court repeatedly indicated in the orders-directions that there was urgency in taking over the possession of the land, under acquisition, for the construction of STP at Keshopur. The authorities were directed to take up the work of land acquisition and construction of STP's on war-

footing. "Likely" in the background of this Court's orders passed from time to time for a time bound programme for setting up the STPs means, for purposes of this case, "certainly" and "urgently".

17. In recent judgment of Sri Radhy Shyam (Dead) through L.Rs. and Others Vs. State of U.P. and Others, , Apex Court laid down guidelines for invoking urgency clause ad infra:

From the analysis of the relevant statutory provisions and interpretation thereof by this Court in different cases, the following principles can be culled out:

(i) Eminent domain is a right inherent in every sovereign to take and appropriate property belonging to citizens for public use. To put it differently, the sovereign is entitled to reassert its dominion over any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good.

(Dwarkadas Shrinivas of Bombay Vs. The Sholapur Spinning and Weaving Co. Ltd. and Others, , Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, and Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc., .

(ii) The legislations which provide for compulsory acquisition of private property by the State fall in the category of expropriator legislation and such legislation must be construed strictly - D.L.F. Qutab Enclave Complex Educational Charitable Trust Vs. State of Haryana and Others, ; State of Maharashtra and Another Vs. B.E. Billimoria and Others, and Dev Sharan vs. State of U.P. (Civil Appeal No. 2334/2011 decided on 7.3.2011).

(iii) Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, it must be remembered that compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the society or people suffering from other handicaps, then the Court is not only entitled but is duty bound to scrutinize the action/decision of the State with greater vigilance, care and circumspection keeping in view the fact that the land owner is likely to become landless and deprived of the only source of his livelihood and/or shelter.

(iv) The property of a citizen cannot be acquired by the State and/or its agencies/instrumentalities without complying with the mandate of Sections 4, 5A and 6 of the Act. A public purpose, however, laudable it may be does not entitle the State to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, the State can invoke the urgency provisions and dispense with the requirement of hearing the land owner or other interested persons.

(v) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5A. These provisions can be invoked only when the purpose of acquisition cannot

brook the delay of even few weeks or months. Therefore, before excluding the application of Section 5A, the concerned authority must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry u/s 5A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.

(vi) The satisfaction of Government on the issue of urgency is subjective but is a condition precedent to the exercise of power u/s 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to malafides or that the concerned authorities did not apply mind to the relevant factors and the records.

(vii) The exercise of power by the Government u/s 17(1) does not necessarily result in exclusion of Section 5A of the Act in terms of which any person interested in land 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 makes it clear that it merely enables the Government to direct that the provisions of Section 5A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of exercise of power u/s 17(1).

(viii) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government u/s 17(1) and/or 17(4). The Court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of audi alteram partem embodied in Section 5A (1) and (2) is not at all warranted in such matters.

(ix) If land is acquired for the benefit of private persons, the Court should view the invoking of Section 17(1) and/or 17(4) with suspicion and carefully scrutinize the relevant record before adjudicating upon the legality of such acquisition.

Division Bench of this Court in recent decision in Ganesh Ram vs. State of Rajasthan (2011(2) WLC Raj.I) took note of decisions of Apex Court on the issue and held ad infra:

29. Testing on the anvil of the aforesaid decision, it is apparent that there was application of mind and the decision could not be said to be malafide and mere delay on the part of Government subsequent to its decision to dispense with the inquiry would not invalidate the decision, itself.

30. In view of aforesaid discussion, we find no force in the submission of Shri Bhoot that action was not bonafide and just to do the lip service to the court's

order, the urgency provision had been invoked to the detriment of the holders of the land. As already mentioned above, at the sake of repetition, we are constrained to observe that the purpose of Transport Nagar considering the traffic hazard was in fact urgent purpose to relieve the traffic congestion in the city of Jodhpur. The material was available on record to invoke the urgency clause. Thus, it could not be said that the decision was not taken bonafide. When real urgency existed, in our opinion, invocation was in accordance with the spirit of Section 17(4). We cannot sit in appeal when the material was available to invoke the provisions in the form of order of this Court and letter of the Collector.

Thus in view of what has been held by Apex Court and this Court (supra), it clearly emerges that the case of urgency of acquisition is a matter of subjective satisfaction of "appropriate Govt." based on objective assessment of material on record but where there is a challenge on the ground of non-application of mind & malafides, burden lies on the person alleging malafides based on certain specific materials; and so long purpose of acquisition & utmost urgency continues to exist, exercise of powers U/s 17(4) of LA Act cannot be held to be malafide. Mere delay at the behest of appropriate Government dispensing with inquiry U/s 5A by invoking powers U/s 17(4) would not invalidate the decision itself.

18. In the instant case, the Division Bench of this Court is monitoring the matter and orders /directions came to be passed (supra) directing State Government to take active steps for removal of unauthorized encroachments & constructions nearby Fort area and Sujana Ganga canal; besides to make effectives for removal of sludge, garbage, filth, rubbish from Sujana Ganga Canal and for construction of sewerage Treatment Plant. At the same time, as taken note of while quoting directions (supra) with respect to sewerage treatment system, the scheme has to be formulated & placed with compliance report as to how much time is likely to be taken in completing the scheme.

19. This being of utmost public importance and being grave urgency in the matter, to complete construction of STP in the City of Bharatpur, the project is certainly of great public importance and this Court can take judicial notice of the fact that it was of utmost urgency of the land required to be acquired and has no hesitation in holding that submission made regarding inquiry U/s 5A being illegally dispensed with, is without substance and holds that urgency clause of S. 17(4) of LA Act has rightly been invoked and does not require interference by this Court. Submission made by Counsel for petitioners that earlier the land was acquired for construction of STP in village Ikran, is of no substance for the reason that reply filed by State Government in its counter to the petition clearly discloses that the land was never acquired for construction of STP but a part of charagah land was set apart and transferred to the Public Health Engineering Department and when it was not found to be technically feasible, instant acquisition proceedings were initiated in which this Court does not find any error in the decision making process adopted by respondents pursuant to notification impugned which may require interference.

Consequently, writ petitions fail and are hereby dismissed. No costs.