
(2015) 12 AHC CK 0034
In the Allahabad High Court
Case No : Writ-C No. 22908 of 2001

Kusum Lata and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 11-12-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Land Acquisition Act, 1894 — Section 11, 17, 17(1), 17(2), 17(4)
Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 — Section 24, 26, 27, 28, 29

Citation : (2016) 1 ADJ 535

Hon'ble Judges : Krishna Murari and Amar Singh Chauhan, JJ.

Bench : Division Bench

Advocate : Umesh Narain Sharma, Amit Saxena, Chandan Sharma, Govind Krishna and J.P. Rai, for the Appellant; N. Misra, Rajendra Kumar Mishra and Shivam Yadav, for the Respondent

Final Decision : Disposed Off

Judgement

Krishna Murari, J.—Disputes relates to plot No. 411 area 3-0-0 (3100 sq. yard) situate at village Chhalera Banger, Tehsil Dadri, district Gautam Budh Nagar.

2. Petitioners by invoking extra-ordinary jurisdiction conferred by Article 226 of the Constitution have approached this Court challenging the notification dated 24.11.2000 issued under Section 4(1) of the Land Acquisition Act, 1894 (for short the "Act") as well as declaration made under Section 6 dated 27.3.2001 in respect of the said land. Petitioners claim that they are owners and in possession of the land sought to be acquired and having purchased the same long back from its erstwhile owner along with the constructions standing thereon and their names are duly recorded in the Khatoni.

3. A notification under Section 4(1) of the Act for acquisition of the plot in dispute was issued on 28.6.1997. However, no notification under Section 6 of the Act was issued and thus after expiry of period of one year, the notification under

Section 4 lapsed. The respondents without completing the process for acquisition by issuing notification under Section 6 of the Act when started to demolish the construction, the petitioners approached this Court by filing writ petition No. 8514 of 1988. A Division Bench of this Court vide order dated 06.03.1998 disposed of the writ petition with the direction that the said construction be not demolished except in accordance with law. The allegation of the petitioners is that despite due notice and knowledge of the order dated 06.03.1998, the respondent No. 2 wrongly and illegally demolished the construction on 09.06.1998. The petitioners filed a contempt petition being Civil Misc. Contempt Petition No. 1778 of 1998 wherein vide order dated 18.06.1998 notices were issued to the respondents to show cause why they may not be punished for disobeying the order of this Court. Subsequently, on an application made by the petitioners, further order was passed on 19.6.1998 restraining the respondents from raising construction over the disputed plot till the next date of hearing. On 22.07.1998 following order was passed:

"The learned counsel for the petitioners is present and submits that service has been caused on all the respondents. Appearance has been made for respondent No. 1 and 5 only. On the request of the learned counsel, Sri U.S. Awasthi, Sri Govind Krishna may give a copy of the contempt petition with its annexures to Sri Awasthi within a week. Show cause if any must come on record within two weeks from such service and the matter be listed on 20.8.1998.

The interim direction against any construction of the instance of the respondent shall continue."

4. It is alleged that the respondent No. 2 despite knowledge of the order passed in contempt petition did not stop the construction work and the petitioners were forced to file another contempt petition on 06.07.1998 being Civil Misc. Contempt Petition No. 1809 of 1998. On 07.07.1998 the contempt petition was directed to be tagged with earlier Contempt Petition No. 1778 of 1998 and to be listed on 22.07.1998 and in the meantime, the applicant was directed to take immediate steps for noticing the respondents so that they come up with the counter affidavit/show cause by the next date.

5. The petitioners thereafter, filed another writ petition being Civil Misc. Writ Petition No. 25973 of 1998 seeking an appropriate direction commanding the respondents to restore back possession of the disputed plot No. 411 and to give compensation for illegal demolition of construction. Notice was issued on the said writ petition requiring the respondents to file counter affidavit. Petitioners also filed writ petition No. 11754 of 2000 challenging the notification dated 18.6.1997 issued under Section 4(1) of the Act, which was directed to be tagged along with writ petition No. 25973 of 1998. During the pendency of the aforesaid litigation before this Court, fresh notification under Section 4 & 6 of the Act, which are impugned in this petition, were issued.

6. We have heard Shri Amit Saxena, learned counsel for the petitioners, learned

Standing Counsel for State respondent No. 1 and Sri Shivam Yadav for respondent No. 2.

7. Learned counsel for the petitioners contended that there was no occasion to invoke the urgency clause and to apply the provisions of Section 17 of the Act and the only purpose of invoking Section 17 was to deprive the valuable rights of the petitioners under section 5-A of the Act of making objection thereby the respondents escaped the obligation to consider the objections against the proposal for acquisition. It is further submitted that plea of urgency is belied from the fact that even though earlier proceedings for acquisition of the same land was initiated by issuing a notification under Section 4(1) of the Act on 28.6.1997 but the respondents allowed the said proceedings to lapse as they failed to issue declaration under Section 6 of the Act and the subsequent notification having been issued after about three years, there cannot be any justification for invoking the urgency clause.

8. A counter affidavit has been filed on behalf of State respondent No. 1 on 11.05.2015 wherein in paragraph 4, it has been stated that possession of the land in dispute in the present petition was duly acquired and transferred in favour of the acquiring body i.e. New Okhla Industrial Development Authority (in short "NOIDA") and award in respect of the present land was published on 24.11.2000. It is stated that none of the petitioners in the present petition have received compensation for their land so acquired till date.

9. Respondent No. 2 has also filed a counter affidavit pleading that Khasra No. 411 was having a total area of 21-17-0 out of which an area of 16-5-12 was acquired vide notification dated 14.03.1980 and declaration was made on 21.03.1980 and thereafter, physical possession of the said area was taken on 12.05.1980.

10. It is not denied in the counter affidavit that earlier notification dated 28.6.1997 issued under Section 4(1) of the Act, in respect of the area in dispute in the present writ petition, lapsed for want of declaration under Section 6 of the Act. Thus it is an admitted position of the fact to the parties that for the area of plot No. 411, which is in dispute in the present petition, earlier notification dated 28.6.1997 was issued under section 4(1) of the Act read with Section 17 invoking urgency clause, which was allowed to lapse and after about 3 years, the impugned notifications were issued again invoking the urgency clause. Purpose of acquisition in both the notifications was planed industrial development in district Gautam Budh Nagar through NOIDA.

11. The question whether in a matter like the present one the State Government could invoke urgency provision contained in Section 17 of the Act is no longer res integra and is settled by various judicial pronouncements of the Hon"ble Apex Court. Reference may be made to the pronouncement in Dev Sharan and Others Vs. State of U.P. and Others, , Sri Radhy Shyam (Dead) through L.Rs. and Others Vs. State of U.P. and Others, and Devender Kumar Tyagi and Others Vs.

State of U.P. and Others, .

12. In *Radhey Shyam (Supra)*, the Hon"ble Apex Court reviewed various judicial pronouncements and culled out following principles:

"(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 expropriatory 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 v. State of U.P., Civil Appeal No. 2334 of 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 , 5-A 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 under Section 5A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.

(vi) The satisfaction of the Government on the issue of urgency is subjective but

is a condition precedent to the exercise of power under Section 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 mala fides or that the concerned authorities did not apply mind to the relevant factors and the records.

(vii) The exercise of power by the Government under Section 17(1) does not necessarily result in exclusion of Section 5-A 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 5-A 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 the exercise of power under Section 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 under Section 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 5-A(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."

13. In the aforesaid case before the Hon"ble Apex Court, the appellants' land was acquired for planned development in district Gautam Budh Nagar. Taking cognizance of the justification offered by the State respondent for invoking the urgency provisions, the Hon"ble Apex Court in paragraph 79, 80, 81 & 82 held as under:

"79. In our view, the above noted factors do not furnish legally acceptable justification for the exercise of power by the State Government under Section 17(1) because the acquisition is primarily meant to cater private interest in the name of industrial development of the district. It is neither the pleaded case of the respondents nor any evidence has been produced before the Court to show that the State Government and/or agencies/instrumentalities of the State are intending to establish industrial units on the acquired land either by itself or through its agencies/instrumentalities. The respondents have justified the invoking of urgency provisions by making assertions, which are usually made in such cases by the executive authorities i.e. the inflow of funds in the State in the

form of investment by private entrepreneurs and availability of larger employment opportunities to the people of the area. However, we do not find any plausible reason to accept this tailor-made justification for approving the impugned action which has resulted in depriving the appellants" of their constitutional right to property.

80. Even if planned industrial development of the district is treated as public purpose within the meaning of Section 4 , there was no urgency which could justify the exercise of power by the State Government under Section 17(1) and 17(4) . The objective of industrial development of an area cannot be achieved by pressing some buttons on computer screen. It needs lot of deliberations and planning keeping in view various scientific and technical parameters and environmental concerns. The private entrepreneurs, who are desirous of making investment in the State, take their own time in setting up the industrial units. Usually, the State Government and its agencies/instrumentalities would give them two to three years" to put up their factories, establishments etc. Therefore, time required for ensuring compliance of the provisions contained in Section 5-A cannot, by any stretch of imagination, be portrayed as delay which will frustrate the purpose of acquisition.

81. In this context, it is apposite to note that the time limit for filing objection under Section 5-A(1) is only 30 days from the date of publication of the notification under Section 4(1) . Of course, in terms of sub-section (2), the Collector is required to give opportunity of hearing to the objector and submit report to the Government after making such further inquiry, as he thinks necessary. This procedure is likely to consume some time, but as has been well said,

"Principles of natural justice are to some minds burdensome but this price-a small price indeed-has to be paid if we desire a society governed by the rule of law."

82. In this case, the Development Authority sent proposal some time in 2006. The authorities up to the level of the Commissioner completed the exercise of survey and preparation of documents by the end of December, 2006 but it took one year and almost three months to the State Government to issue notification under Section 4 read with Section 17(1) and 17(4) . If this much time was consumed between the receipt of proposal for the acquisition of land and issue of notification, it is not possible to accept the argument that four to five weeks within which the objections could be filed under sub-section (1) of Section 5-A and the time spent by the Collector in making inquiry under sub-section (2) of Section 5-A would have defeated the object of acquisition."

14. Again in the case of Raghbir Singh Sehrawat Vs. State of Haryana and Others, , Hon"ble Apex Court after referring various judgments in the case of Munshi Singh and Others Vs. Union of India (UOI), , State of Punjab and Another Vs. Gurdial Singh and Others, , Shyam Nandan Prasad and Others Vs.

State of Bihar and Others, , Union of India (UOI) and Others Vs. Mukesh Hans etc., , Hindustan Petroleum Corporation Ltd. Vs. Darius Shapur Chenai and Others, and Anand Singh and Another Vs. State of Uttar Pradesh and Others, observed as under:

"39. In this context, it is necessary to remember that the rules of natural justice have been ingrained in the scheme of Section 5A with a view to ensure that before any person is deprived of his land by way of compulsory acquisition, he must get an opportunity to oppose the decision of the State Government and/or its agencies/instrumentalities to acquire the particular parcel of land. At the hearing, the objector can make an effort to convince the Land Acquisition Collector to make recommendation against the acquisition of his land. He can also point out that the land proposed to be acquired is not suitable for the purpose specified in the notification issued under Section 4(1) . Not only this, he can produce evidence to show that another piece of land is available and the same can be utilised for execution of the particular project or scheme.

40. Though it is neither possible nor desirable to make a list of the grounds on which the landowner can persuade the Collector to make recommendations against the proposed acquisition of land, but what is important is that the Collector should give a fair opportunity of hearing to the objector and objectively consider his plea against the acquisition of land. Only thereafter, he should make recommendations supported by brief reasons as to why the particular piece of land should or should not be acquired and whether or not the plea put forward by the objector merits acceptance. In other words, the recommendations made by the Collector must reflect objective application of mind to the objections filed by the landowners and other interested persons.

41. Before concluding, we deem it necessary to observe that in recent past, various State Governments and their functionaries have adopted very casual approach in dealing with matters relating to the acquisition of land in general and the rural areas in particular and in a large number of cases, the notifications issued under Sections 4(1) and 6 with or without the aid of Section 17 and the consequential actions have been nullified by the courts on the ground of violation of the mandatory procedure and the rules of natural justice. The disposal of cases filed by the landowners and Ors. take some time and the resultant delay has great adverse impact on implementation of the projects of public importance. Of course, the delay in deciding such cases may not be of much significance when the State and its agencies want to confer benefit upon private parties by acquiring land in the name of public purpose."

15. If factual matrix of this case is tested in the light of the principle laid down by the Hon"ble Apex Court in respect of invoking urgency clause, it becomes crystal clear that the State Government had no valid reason to invoke urgency provision contained in the Act. The first notification for acquisition of major area of plot No. 411 invoking urgency clause was issued as long as 1980. There is no justification in the counter affidavit of both the respondents for excluding a small area from

acquisition. Another notification under Section 4(1) of the Act again invoking the urgency clause for the remaining area of plot No. 411, which is subject matter of dispute in the present writ petition, was issued after about 17 years on 28.6.1997 again invoking the urgency clause under Section 17 of the Act. Admittedly, the notification lapsed for want of a declaration under Section 6 of the Act. After about 3 years of the second notification Dt. 28.6.1997, the impugned notification dated 24.11.2000 was issued under Section 4(1) of the Act again invoking the urgency clause. In case there was a real urgency there is absolutely no reason or justification available on record to justify the action of the respondents in permitting the notification issued in 1997 to lapse. Aforesaid facts leave no room for doubt that there was no urgency at all to acquire the land for alleged planned development.

16. Further there is nothing on record not even an averment before us to demonstrate that at the time of formation of opinion by the government for dispensing with the enquiry under Section 5-A of the Act there was due application of mind on the material which were before the State government. The counter affidavit of the Additional District Magistrate (Land Acquisition), Gautam Budh Nagar filed on behalf of the State respondent is not only sketchy but lacks material which may have been relied upon to formulate the opinion to dispense the enquiry under Section 5-A .

17. In Anand Singh and Another Vs. State of Uttar Pradesh and Others, while considering the questions whether State Government was justified in invoking Section 17(4) for acquisition of land for residential colony to be constructed by a Development Authority the Hon"ble Apex Court has observed as under:

"43. The exceptional and extraordinary power of doing away with an enquiry under Section 5-A in a case where possession of the land is required urgently or in an unforeseen emergency is provided in Section 17 of the Act. Such power is not a routine power and save circumstances warranting immediate possession it should not be lightly invoked. The guideline is inbuilt in Section 17 itself for exercise of the exceptional power in dispensing with enquiry under Section 5-A . Exceptional the power, the more circumspect the Government must be in its exercise. The Government obviously, therefore, has to apply its mind before it dispenses with enquiry under Section 5-A on the aspect whether the urgency is of such a nature that justifies elimination of summary enquiry under Section 5-A ."

"44. A repetition of the statutory phrase in the notification that the State Government is satisfied that the land specified in the notification is urgently needed and the provision contained in Section 5-A shall not apply, though may initially raise a presumption in favour of the Government that prerequisite conditions for exercise of such power have been satisfied, but such presumption may be displaced by the circumstances themselves having no reasonable nexus with the purpose for which the power has been exercised. 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 the enquiry under Section 5-A has been formed by the Government after due application of mind on the material placed before it".

"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 5-A may not be held and objections of landowners/persons interested may not be considered. In many cases, on general assumption likely delay in completion of enquiry under Section 5-A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realizing 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 5-A 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 5-A . We have already noticed a few decisions of this Court viz. Narayan Govind Gavate and Pista Devi. In Om Prakash this Court held that the 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 pre-notification 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 5-A ."

18. Even in the counter affidavit and the supplementary counter affidavit filed on behalf of the respondent No. 2, there is no reference to any material, which may have been forwarded to the State Government upon which reliance was placed to formulate the opinion to dispense with the enquiry under Section 5-A of the Act.

19. In view of the facts of the case and the legal position settled by judicial

pronouncements, we have no hesitation in coming to a conclusion that there has been no application of mind by the State Government to form an opinion that there was extreme urgency in the matter to invoke the provisions of Section 17(4) of the Act and to eliminate the enquiry provided by Section 5-A of the Act, as the State Government has completely failed to justify the dispensation of enquiry prescribed by Section 5-A by invoking Section 17(4) of the Act.

20. In view of admitted factual position between the parties that the land in dispute lies within Sector 16-A, which is fully developed, and was allotted to two different private companies namely, M/s. Mindwell Software Pvt. Ltd., and M/s. I.T. Infrastructure Pvt. Ltd., who have raised huge construction and the allegations made in the supplementary affidavit filed by the petitioners on 13.08.2015 stating that the two private companies have constructed building on the said plot, the question, which arises for our consideration, is what relief the petitioners would be entitled to particularly in the absence of any notice to two allottees.

21. From the records, we find that the impleadment application filed by the petitioners for impleading M/s. Mindwell Software Pvt. Ltd., and M/s. I.T. Infrastructure Pvt. Ltd., was allowed vide order dated 20.11.2009 and the impleadment was to be incorporated within a week. However, petitioners" did not carry out the impleadment and took no steps to serve the impleaded allottees.

22. Even though we have come to the conclusion that the impugned notifications are bad in law as there was no justifiable reason for the State Government to invoke the urgency clause, still we do not find it appropriate to quash the same for the simple reason that there has been massive development done by two allottees, which fact is admitted to the petitioners as well.

23. Learned counsel for the petitioners made a statement that in view of provisions of Section 24 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short the "Act, 2013"), which came into effect from 01-01-2014, the petitioners can be compensated by awarding compensation in accordance with the provisions of the said Act.

24. Section 24 of the Act, 2013 reads as under:

"24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases. - (1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), -

(a) where no award under Section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said

Act has not been repealed.

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

25. In view of the admitted fact by the State in its counter affidavit that compensation in pursuance of the award made has not been received by the petitioners, the petitioners become entitled to payment of compensation in accordance with the provisions of Act, 2013. This would also balance the equities between the parties as the petitioners will be entitled to receive compensation under the Act, 2013 which is at a much higher rate and the development made by the allottees on the land in dispute shall remain unaffected.

26. In view of above facts and discussions, we dispose of the writ petition by making a direction that the State respondent shall declare an award in respect of the land in dispute in accordance with the provisions contained in Section 26 to 30 of the Act, 2013 within a period of three months from the date of production of a certified copy of this judgment.

27. However, there shall be no order as to costs.