

(1983) 08 PAT CK 0024

In the Patna High Court

Case No : Civil Writ Jurn. Case No. 1123 of 1982

Mangtoo Ram

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 11-08-1983

Acts Referred:

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

Citation : AIR 1984 Patna 45 : (1983) PLJR 733

Hon'ble Judges : S. Sarwar Ali, C.J;Prabha Shanker Mishra, J

Bench : Division Bench

Advocate : Ras Bihari Singh, Ram Suresh, Roy, Binod Bihari Singh and Prabhakar Tekriwal, for the Appellant; S. Hoda, Standing Counsel No. 3, Mihir Kumar Jha and Aftab Alam, for the Respondent

Final Decision : Dismissed

Judgement

Prabha Shanker Mishra, J.—The petitioner has moved this Court under Article 226 of the Constitution of India for quashing the notification u/s 4 and Section 17(4) of the Land Acquisition Act, 1894 thereafter referred to as "the Act") dated, 1-8-1981 issued for the acquisition of lands measuring 0.92 acres and plot (Khesra) Nos. 25, 31, 32 and 33 in revenue thana No, 196 in the district of Saharsa for the purpose of constructing a Microwave Station.

2. The petitioner has not alleged that the acquisition of the said land has not been made for a public purpose. According to him Saharsa which is now a commissionary town has substantially expanded and embraced village Batraha in its urban agglomeration. The land falls within the boundaries of the Saharsa Municipality. The petitioner got this land in his share in a partition of the joint family properties and intended to construct a separate residential house and a clinic upon it. He is a doctor and a member of the Bihar Health Services and is presently posted in Nalanda Medical College Hospital, Patna. Since he has been residing in Patna he had no information about the notification for acquisition of the land and learnt for the first time from his elder brother, a Member of the

Legislative Assembly from Saharsa Constituency, only on 19-3-1982. The brother received a notice u/s 9 of the Act at Saharsa when he had gone during Holi festival. He filed a petition by way of objection to the acquisition stating therein that a family partition had taken place in the year 1982 and the land in question had been allotted to his brother, the petitioner. He, therefore, was not interested in the land. He, however, obtained certified copy of the order-sheet of Saharsa Land Acquisition Case No. 18 of 1980-31 and the notifications under Sections 4 and 17(4) and the declaration u/s 6 of the Act; copies whereof are annexed as Annexures 1 and 2 respectively. The petitioner thereafter obtained necessary informations and finding that the acquisition of his land was actuated by malice and invalid for the reason that Section 17(4) of the Act could not be applied to a land situated in the municipal area, he moved this Court.

3. The petitioner alleged mala fide, in fact, against Shri Ramesh Jha, Minister for Agriculture of the State of Bihar, who, according to him, on account of political rivalry with his brother Shri Shankar Prasad Tekriwal, saw to it that the original plan was modified surreptitiously and hurriedly and instead of the lands in village Bangaon the petitioner's land was acquired in village Batraha. He had impleaded Shri Ramesh Jha as the 5th respondent, but at the time of admission of this case deleted his name. He thus gave up his allegations of mala fide against Shri Jha.

4. Mr. Rash Bihari Singh, learned counsel for the petitioner, contended before us that the actual scheme of acquisition was of the land in village Ban-gaon and not in village Batraha. He placed reliance upon the order dated 31-10-1980 passed, in Land Acquisition Case No. 18 of 1980-81 for showing that the original proposal was to acquire lands for the purpose of Microwave Station in village Bangaon, which, according to him, is about 3 Kms. away from the town of Saharsa. Learned counsel for the respondents 1 to 3 produced the original order-sheet of Land Acquisition Case No. 18 of 1980-81 of the court of the Land Acquisition Officer, Saharsa, Quite a few words showing that the land sought to be acquired was in village Batraha. P. S. Bangaon and not in village Bangaon, P. S. Bangaon, were found omitted, in certified copy, from which the petitioner prepared true copy and annexed to the writ application. Finding it difficult to dispute the fact that the original proposal itself was to acquire land in village Batraha, learned counsel for the petitioner gave up this contention.

5. Learned counsel for the petitioner, however, maintained that the respondents acted illegally in taking recourse to Section 17(4) of the Act as the land sought to be acquired fell in the urban agglomeration and, the municipal area. He placed reliance upon a judgment of this Court in the case of Kunja Malaha v. Land Acquisition Officer, Patna, 1965 BUR 272 and submitted that a land in a town cannot be described either arable land or waste land. He also contended that a notification u/s 17(4) cannot be combined with the notification u/s 4 of the Act as the act of deriding that opportunity to file objections to the acquisition u/s 5(A) of the Act should be given or not has to be done after deciding to acquire the land for a public purpose and, accordingly, publishing the required notification u/

s 4 of the Act.

6. In K. Malaha's case (supra) 360.09 acres of land were notified for acquisition u/s 4 of the Act for establishment of Cattle-cum-Milk Colony at Patna. The said notification also stated that in exercise of the powers conferred by Section 17(4) of the Act, the State Government had decided that, in view of the urgency of the project, provisions of Section 5-A of the Act shall not apply. It was stated before this Court by the petitioners of the said case that their lands falling in survey plots Nos. 735, 646, 648, 624, 634 and 732 were included in the acquisition and subjected, to the provisions u/s 17(4) of the Act, although those plots were within the Patna Municipal Corporation and were not waste and arable lands. They said that they grew crops on these lands but they were actually adjacent to a Patna Municipal Corporation pitched road, having electric street lights on the north, running from east to west via Gulzarbagh Railway Station, which is popularly known as Sudarsan Path, and which is again connected with the Ashok Raj Path at Pachhim Darwaza on the east and also at City Chawk on further east. Sudarsan Path is said to have been connected with the by-pass on the south. According to them their lands were thus connected with three important and main public roads of Patna and they were valuable budding sites and they desired to build houses thereon. Upon these facts it was contended on their behalf that the notification u/s 17(4) making provision of Section 5-A of the Act was ultra vires and illegal. Relying upon a Bench decision of the Bombay High Court in the case of Navnitlal Ranchhodlal Vs. State of Bombay and Another, , this Court held that an arable land is a land which is fit for tillage and the expression is usually used to mean lands, which are ploughed for raising ordinary annual crops such as rice, jowar etc. and a land which is a building site within the municipal limits and situated in the developed part of the City cannot be regarded as an arable land. Such a land can also not be regarded as waste land because the expression "waste land" would apply to lands which are desolated, deserted, uninhabited and uncultivated as a result of natural barrenness or rendered unfit for cultivation by reasons of natural ravages etc. The expression "waste land" as contrasted with "arable land" would mean land which is unfit for cultivation by being marshy, stony, full of pits, ditches etc. and so far as the lands in the urban areas are concerned, the expression "waste lands" may possibly be used with reference to pieces of land which are desolate, abandoned and not fit ordinarily for any use as building sites etc. A building site which is quite suitable to be built upon cannot be regarded as a waste land simply because it is not put to any present use. It is its unfitness as for use and not the mere fact that it is not put to any present use that must determine whether the land is waste or not. The Bench deciding K. Malaha's case 1965 BLJR 272 followed an earlier Bench decision of this Court in the case of Lachmi Mahto v. The Collector of Patna (MJC 33/61 disposed of on 30-8-64).

7. At a first glance law laid down by this Court in Lachmi Mahto and K. Malaha (supra) seems to support the petitioner. But this Court in K. Malaha noticed an observation in the Bombay case and, although expressing that the same was

obiter, expressed no disagreement, rather applied the test laid down therein. The Bombay Court stated;

"Whether the land is waste or arable is an objective fact. u/s 17(4) Government is required to form an opinion with regard to this objective fact as a preliminary step to the exercise of its power to issue a direction dropping the inquiry tender Section 5-A. The Government must form the necessary opinion with regard to this objective fact on consideration of reasons which are relevant to its determination. If the Government forms such opinion, the correctness of the opinion cannot be challenged and the sufficiency of the reasons on which the opinion is formed in pursuance of the opinion cannot be assailed. If, however, the Government has formed no opinion at all or the opinion formed is based on reasons which are not relevant to the determination of the objective fact regarding which the opinion is formed, in either of those two cases the direction issued can be successfully challenged as not being in accordance with law".

In the case before the Bombay Court the notification that was impugned did not mention that the land was waste and arable. In the proceedings before the Court, however, an affidavit was sworn in by the Commissioner, Ahmedabad Division, stating that the land of the petitioner was waste and arable as it was open and contained no structures. The affidavit, however, did not state that the Government had formed the opinion that the provisions of Section 17(4) were applicable to the land notified in that case, nor did it state the facts from which the court could conclude that such an opinion was formed by the Government. In that view of the matter, a direction was issued to the opponents to cancel or withdraw the notification. In K. Malaha's case 1965 BLJR 272 there was a certificate in the notification that the lands were waste and arable but noticing that there was nothing to show in that notification as to on what consideration the State Government formed the opinion that the lands were waste or arable, and the fact that in the counter affidavit filed on behalf of the Improvement Trust also there was no specific statement that the relevant facts were considered by the State Government before giving the above certificate, this Court accepted the assertion of the petitioner that their lands were building sites, and were not waste or arable and held that the notification u/s 17(4) of the Act was invalid.

8. The expression "arable land" came for consideration in the case of Smt. Lakshmi Devi and Others Vs. The State of Bihar and Others, . A Bench of this Court held that the expression "arable land" in Section 17(1) includes land brought under cultivation or tillage, and not confined only to land fit to be ploughed but not already ploughed or cultivated. A similar view was expressed by the Allahabad High Court in the case of Baldeo Singh and Others Vs. State of Uttar Pradesh and Others, and the Andhra Pradesh High Court in AIR 1967 Andh Pra 280. Smt. Lakshmi Devi and Others Vs. The State of Bihar and Others, related to a notification acquiring lands in villages in Patna for development of residential neighbourhoods to provide for housing facilities for various income groups along with various local services and modern amenities to facilitate

planned growth of the City of Patna. This court rejected the contention that a land in the close vicinity of the City, the road side and other building sites, though arable will not be treated as arable land or waste land. It said :

"No holding number has yet been ascribed to this by the Municipality. Mere proximity to other sites will not alter the character of the land. The land may have the potentiality of being developed into building site. That will affect the market value for purposes of compensation but not alter the nature of the land as it was on the day of the notification so as to exclude the application of Section 17(4) of the Act".

9. There were as many as five cases disposed of together by this Court. In cases in which lands for construction of houses were sanctioned by the Patna Improvement Trust and either a building had been constructed or was going to be constructed, this Court held that the exclusion of the operation of Section 5-A was not proper. In the cases, however, in which the land was still under cultivation, no map for construction of a house had been sanctioned and no holding number had been ascribed, this Court declined to interfere.

10. In the case of Ishwarlal Girdharlal Joshi etc. Vs. State of Gujarat and Another, , the Supreme Court considered the question as to what may be the meaning of the expression "arable land". The view taken in the case of Smt. Lakshmi Devi and Others Vs. The State of Bihar and Others, , was approved and it was pointed out that the fact that the land is actually cultivated land demonstrates its nature as arable land and that by arable land is meant not only the land capable of cultivation but also actually cultivated. A contrary view taken by the Bombay High Court in the case of Sadruddin Suleman Jhaveri Vs. J.H. Patwardhan and Others, was overruled.

11. I dilated a bit more to the question as to what is the meaning of the expression "arable land" with a view to emphasising that the primary concern, in exercise of discretion to exclude application of Section 5-A of the Act in exercise of the power u/s 17(4) of the Act, should always be to see as to what is the nature of the land irrespective of its location and the best test always is to confine to the express words and a construction and a real meaning given to the expressions used in the statute.

12. It is on the record of the case that the land in question is under cultivation. True it is in the vicinity of the town of Saharsa and perhaps has now been embraced by the Municipality, yet there is nothing on the record, to show that the land has changed its character and is no longer arable. The petitioner might have intended or suggested on his behalf to construct a house and a clinic upon the land. But he has done nothing to that end; the Municipality has not yet given any holding number to the Land; the petitioner has not proceeded to get any map sanctioned, by the Municipality in accordance with the provisions of the Bihar and Orissa Municipal Act. According to the admitted position flowing from the petition of the brother of the petitioner, there is Pumping Set installed in the

land for agriculture purposes. There is a mention in the impugned notification that the Governor is satisfied that the land is arable. On the basis of the facts on the record, I have no hesitation in concluding that the land sought to be acquired satisfies the meaning of arable land

13. Coming to the next contention of the learned counsel for the petitioner, it is to be noticed that there is one important difference between the two Sub-sections (1) and (4) in Section 17 of the Act. Unlike Clause (4), Clause (1) does not leave the determination of the objective fact, whether the land is waste or arable land to subjective determination of the Government. Nor does it make the exercise of power to issue a direction dependant on the opinion of the Government that the land is waste or arable land. Any action u/s 17(1) is to be taken only in respect of land needed for public purpose. It can be only done by means of a declaration u/s 6 that determination as to what land is needed for the public purpose can be done. A direction u/s 17(1) can be issued only subsequent to the issue of declaration u/s 6. A notification u/s 17(4) can, however, be issued even if a declaration u/s 17(1) has not already been issued because while a notification u/s 17(1) cannot be issued along with notification u/s 4, a notification u/s 17(4) can be so issued. Formation of opinion to exclude the operation of Section 5-A must precede the action u/s 17(1), to expedite the action u/s 17(1). Notifications under Sections 4 and 17(4) of the Act and a declaration u/s 6 of the Act may be simultaneously published. In the case of Babu Singh and Others Vs. Union of India (UOI) and Others, , it has been held that there is nothing in the provisions of the Land Acquisition Act which would come in the way of the Government in issuing a notification u/s 6 of the Act immediately after the notification u/s 4, if on applying emergency clause, enquiry u/s 5-A is dispensed with. In the case of Babu Singh (supra) the notifications u/s 4 and Section 17(4) were combined and the declaration u/s 6 was made on the same day of the notification u/s 4 of the Act. Since the notification u/s 17(4) has got to precede the declaration u/s 17(1) of the Act as also the declaration u/s 6 of the Act, it is not improper if the notification u/s 17(4) and the notification u/s 4 are combined.

14. In view of the fact that the action u/s 17(4) can precede action u/s 17(1) the condition precedent for action u/s 17(1) cannot be applied to Section 17(4) of the Act. There is no force, in my opinion, in the argument of the learned counsel for the petitioner that the decision to take recourse to the emergency provisions could not have been taken before issuing notice u/s 9 of the Act and before completing the time limit fixed for the said purpose.

15. There cannot be any doubt that the Microwave Station will serve a very important public purpose of linking remote corners of north-eastern extreme of the State of Bihar with the capital of the State and the capital of the country through the Tele-communication and like communication. Resort to the emergency provisions (if Section 17(4) and simultaneous declaration u/s 6 of the Act, for constructing a Microwave Station cannot be said to be unwarranted.

16. In the result, the application is dismissed. On the facts and in the circumstances of the case, there shall be no order as to costs.

S. Sakwar Ali, C.J.

17. I agree.