
(2001) 01 J&K CK 0034
In the Jammu And Kashmir High Court
Case No : O.W.P. No. 126 Of 2000

Mohd.Rashid Khan

APPELLANT

Vs

State J&K and Others

RESPONDENT

Date of Decision : 01-01-2001

Acts Referred:

Constitution of India, 1950 — Article 21

Citation : (2001) JKLR 526 : (2001) KashLJ 256

Hon'ble Judges : T.S.Doabia, J

Bench : Single Bench

Advocate : Seema Shehkar, H.A.Siddiqui, A.Kapoor, Advocates appearing for the Parties

Judgement

1. The undisputed facts in this petition are that the Public Works Department represented by respondents 3 and 4 wanted to build a road. On a

piece of land on which road was to be constructed'; there existed a house. This belonged to the petitioner. This alignment is said to be on Sakhi

Maidan Kalai road. Kilometre is said to be at RDO25. Acquisition proceedings were not taken. Compensation was determined at the rate of Rs.

15/ per square feet. The petitioner submits that he has received a sum of Rs. 18,000/. This is said to be part payment of compensation. The

petitioner's grievance is that for similar type of construction and for the similarly located land compensation has been paid @ Rs. 36 per square

feet. The petitioner wants this much compensation to be paid to him.

2. The case of the petitioner is that a reassessment was made. For this, reliance is being placed on annexure ""C"". As compensation has not been

paid on the basis of this reassessment and as the instances quoted by the petitioner have not been taken note, he has approached this court.

3. Respondents have filed objections. They submit that the petitioner voluntarily offered his land which was to come under the road. It is further

submitted that he had accepted the compensation. It is, accordingly, submitted that he is not entitled to any relief.

4. One fact which is not disputed is that the land was not formally acquired under the J and K Land Acquisition Act.

A dispute has since arisen. This is with regard to the following effect:

i) Whether the possession of the property which has been utilised for construction of road was voluntarily given by the petitioner or not ?

ii) whether the case as projected by the State has to be accepted ?

iii) that in case there is a dispute then who should settle the same.

5. A suggestion was made to the learned counsel for the State that let the Collector examine the matter. The learned counsel for the State has

expressed inability to accede to this suggestion. This is because the petitioner after having accepted the amount of compensation without raising any

objection, is not within his rights to claim enhanced compensation.

As indicated above, this aspect of the matter is being challenged.

6. There can be no dispute that right to property is a fundamental right. Articles 19(1) (f) and 31 are still applicable to the State of Jammu and

Kashmir. These fundamental rights cannot be waived.

7. In *Basheshar Nath vs. Commissioner of Income Tax* AIR 1959 SC 149, the majority view was that the fundamental right under Article 14

could not be waived. *Bhagwati and Subba Rao JJ* extended the proposition to cover all fundamental rights in general including that under Article

14. In that decision *SR Das, CJ and Kapur J* pointed out that on the language of Article 14 it was a command issued by the Constitution to the

State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare state

such as India, is expected to do and no person can by any act or conduct relieve the State of the solemn obligation imposed on it by the

constitution. Whatever breach of other fundamental rights a person or a citizen may or may not waive, he cannot certainly give up or waive a

breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State. *Bhagwati J.* observed that the

preamble to our constitution Article 13 and the language in which the fundamental rights has been enacted lead to the only conclusion that whatever be the position in America, no distinction can be drawn in India, as has been attempted in the United States of America, between fundamental rights enacted for the benefit of individuals and those enacted in public interest or on grounds of public policy. He observed further :

Ours is a nascent democracy and situated as we are socially economically, educationally and politically, it is the sacred duty of the Supreme Court to safeguard the fundamental rights which has been for the first time, enacted in Part III of our Constitution. The limitations on those rights have been enacted in the Constitution itself e.g. in Articles 19, 33 and 34. But unless and until we find the limitations on such fundamental rights enacted in the very provisions of the Constitution there is no justification whatever for importing any notions from the United States of America on the authority of cases decided by the Supreme Court there, in order to whittle down the plenitude of the fundamental right enshrined in Part III of our constitution".

8. In *Behram Khurshid vs. State of Bombay*, AIR 1955 SC 123 also the view was expressed that the fundamental rights could not be waived. It was held in that case that it was not open to an accused person in a criminal prosecution to waive his constitutional right and get convicted. In this connection, Mahajan CJ observed that the fundamental rights granted by our Constitution were not meant merely for benefit of individuals but were put there as a matter of public policy and that the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. He observed "A citizen cannot get discrimination by telling the State you can discriminate or get convicted by waiving the protection given under Articles 20 and 21".

9. Thus, in case the property of a citizen is to be deprived, this can be done in accordance with law, that has apparently not happened in this case.

The plea that the petitioner has waived his right is of no avail. Fundamental rights cannot be waived.

10. As the land has not been formally acquired, the petitioner cannot resort to proceedings U/s 18 of the J and K Land Acquisition Act. In view of the stand taken by the State, the dispute cannot be referred to any other agency

also. In this situation, with a view to provide remedy to the petitioner, the State is directed to issue a formal notification acquiring land of the petitioner. This notification would be issued within a period of three months from the date a copy of this order is made available by the petitioner to the respondents. Whatever compensation is payable in terms of Section 11 i.e. the award would be made by the authority competent to deal with it. Copy whereof would be made available to the petitioner. Thereafter, the petitioner would have a right to get a reference made to the District Judge concerned. It is only in this manner a right can be provided to the petitioner to claim just and reasonable compensation. As and when the compensation is determined, the petitioner would be well within his rights to contend that he is entitled to the benefits which are available under the Land Acquisition Act, including solatium and interest as provided under the Act. In the event of nonissuance of notification within the period indicated above, the petitioner would be entitled to compensation at the same rate at which it has been allowed to other similarly situated persons whose instances have been quoted in the writ petition.a

11. Disposed of accordingly.