
(1967) 06 BOM CK 0005

In the Bombay High Court

Case No : Special Civil Application No. 1971 of 1964

Narayan Govind Gavate

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-06-1967

Acts Referred:

Evidence Act, 1872 — Section 106

Land Acquisition Act, 1894 — Section 4

Citation : (1971) 73 BOMLR 872

Hon'ble Judges : Mody, J;Chandrachud, J

Bench : Division Bench

Judgement

Mody, J.—This is a Petition under Article 226 of the Constitution for an appropriate writ, order or direction, the respondents being the State of Maharashtra, two Special Land Acquisition Officers and the Commissioner of the Bombay Division. By this Petition the petitioner challenges the validity of certain Notifications issued and directions passed under the Land Acquisition Act. The lands, in respect of which the notifications and directions have been issued, divide themselves into four groups.

2. The first group consists of two pieces of land, being Gat No. 21, Hissa No. 3, admeasuring A. 1-12-12, and Gat No. 109, Hissa No. 2, admeasuring A. 0-38-8, all situated in the village Ilthan. The petitioner is the owner of the former and a tenant of the latter. A notification u/s 4 of the Land Acquisition Act, dated 11th October 1963, was published in the Gazette of that date. Certain lands are specified in the Schedule to that notification and include the lands in the first group. That notification states that it appeared to the Commissioner, Bombay Division, that the lands specified in that Schedule were needed for a public purpose, viz., for development and utilization of the said lands as an industrial and residential area. That notification further states:

AND WHEREAS the Commissioner, Bombay Division, is of the opinion that the said lands are waste or arable lands and that their acquisition is urgently

necessary; he is further pleased to direct under Sub-section (4) of Section 17 of the said Act, that the provisions of Section 5-A of the said Act shall not apply in respect of the said lands.

Thereafter in respect of the lands in the first group a notification u/s 6 was issued on the 19th of December 1963 and the petitioner was thereafter served with two notices u/s 9(3) and 9(4) of the Land Acquisition Act.

3. The second group of land consists of five pieces of lands of Gat No. 31, admeasuring- A. 18-10-0, also situated in the village Ilthan. The petitioner was the owner of these lands along with five other persons. A notification u/s 4 was issued in respect of these lands on the 13th of June 1964. The contents of this notification are in all material respects identical to -those in respect of the first group of lands. This: notification u/s 4 was, however, not followed up by a notification u/s 6.

4. The third group consists of lands bearing Gat No. 155 admeasuring A. 9-4-12 situated in the village Airavali. In respect of these lands a notification u/s 4 was issued on the 13th of June 1964 in terms materially similar as those in respect of the first group of lands. In respect of this land a notice dated 21st August 1964 was issued u/s 4(7) and thereafter a notification was issued u/s 6 on the 28th of September 1964. It was thereafter followed up by a notice dated 28th October 1964 under Sub-sections (3) and (4) of Section 9.

5. The fourth group consists of land bearing Gat No. 154 admeasuring A. 5-24-0, situated in the village Airavali. In respect of this land a notification u/s 4 was issued on 13th November 1963. The public purpose stated in that notification is the same as that stated in the notification in respect of the first group of lands. The notification does not contain the urgency clause, that is, a direction u/s 17(4). Thereafter a notice was issued u/s 4(7) on 27th November 1963 and in pursuance thereof the petitioner filed his objections on 9th January 1964. The petitioner, however, was thereafter not granted any hearing as required u/s 5-A, A notification was thereafter issued u/s 6 on the 13th July 1964 which also states that the Commissioner, Bombay Division, was of the opinion that the said lands were waste lands and arable and that their acquisition was urgently necessary.

6. The petitioner challenges the validity of each of the said notifications issued u/s 4 on the ground that the purpose of the acquisition is not a valid purpose within the meaning thereof u/s 4. Mr. Sorabji, the learned Counsel for the petitioner, however, stated that in view of certain Judgments of the Supreme Court, which are binding on this Court, it is not open to him to argue and that for that reason he did not argue before this Court that the said notifications are invalid for that reason. We must, therefore, hold that all the said four notifications u/s 4 are valid and that the said challenge thereto fails.

7. As regards the land in the said second group, it is stated in the affidavit in reply to this Petition that there was a building standing on that land at the date of the notification u/s 4 and that the said land could not therefore be said to be

waste or arable land. Mr. Setalvad, the learned Counsel for the respondents, stated that under the circumstances the urgency provision contained in Section 17(4) cannot apply and that due to that reason all proceedings subsequent to the said notification u/s 4 dated 13th June 1964 as required by the Act will have to be complied with and gone through. The result is that the direction contained in the said notification u/s 4 u/s 17(4) will have to be set aside.

8. As regards the land comprised in the fourth group Mr. Setalvad stated that the direction u/s 17(4) was issued only on the 13th July 1964, but a notice u/s 4(7) had been issued and the petitioner filed objections long prior thereto and that therefore a hearing ought to have been given to the petitioner as required by Section 5-A. Mr. Setalvad conceded that under the circumstances the notification u/s 6 dated 13th July 1964, including the direction contained therein u/s 1.7(4), will have to be set aside. He states that the respondents will issue a fresh notice required to be issued consequent upon the notification u/s 4 dated 13th November 1963 and thereafter the procedure under the Land Acquisition Act may be gone through.

9. What, therefore, survives is the consideration as regards the other challenge in respect of the lands comprised in groups Nos. 1 and 3. The other challenge is to the validity of the application of the urgency clause in the two notifications dated 11th October 1963 and 13th June 1964 respectively by incorporating therein directions u/s 17(4). Mr. Sorabji contended that the existence of urgency is a condition precedent to the exercise of the power under Sub-section (4) of Section 17 read with Sub-section (7) of Section 17. In support of that proposition he relied upon certain authorities, but it is not necessary to refer to the same as Mr. Setalvad conceded that the proposition urged by Mr. Sorabji is correct.

10. Mr. Sorabji then contended that the existence of urgency is a justiciable issue and that in any event the State must place before the Court materials to justify the order u/s 17(4). Mr. Setalvad, however, pointed out that the material words of Sub-section (4) of Section 17 are:

In the case of any land to which, in the opinion of the appropriate Government or, as the case may be, of the Commissioner, the provision of Sub-section (1) or Sub-section (2) are applicable, the appropriate Government or, as the case may be, the Commissioner may direct that the provisions of Section 5A shall not apply,...

He contended that the formation of the opinion as mentioned herein is subjective to the authority, i.e., the Government or the Commissioner as the case may be and that it is not justiciable. He further contended that even if it be held that it is justiciable, there is a recital in each of the two relevant notifications u/s 4 in the words "The Commissioner, Bombay Division, is of the opinion that the said lands are waste or arable lands and that their acquisition is urgently necessary" and that because of that recital a presumption arises that all conditions precedent to the exercise of power u/s 17(4) were duly complied with and satisfied. He

contended that in view of that recital it would be open to the petitioner to show by admissible evidence that that recital is false or incorrect, but that in this case the petitioner has not placed any material whatever before the Court to show that in fact any evidence existed. In support of his contention that the formation of opinion u/s 1.7(4) is subjective, Mr. Setalvad relied upon certain authorities. Mr. Sorabji had, however, at the initial stage relied upon the Judgment in *Sadrudin v. J.H. Patwardhan* (1964) 67 Bom. L.R. 101 and sought to argue that the formation of such opinion is not subjective and that the respondents must establish that conditions precedent to the exercise of that power had in fact been fulfilled. Mr. Sorabji, however, after Mr. Setalvad's argument, conceded that, in view of the Supreme Court Judgment in *Raja Anand Brahma Shah Vs. State of Uttar Pradesh and Others*, , the formation of such opinion is subjective. It is, therefore, unnecessary for us to refer to the authorities cited on either side on the question whether the formation of that opinion is subjective or not. Mr. Sorabji, however, contended that even though the formation of such opinion is subjective, the respondents must show at least *prima facie* that conditions precedent are satisfied. He further contended that on the facts of this case materials on which an opinion could be formed that there was urgency were within the knowledge of only the respondents and that the petitioner was and is totally unaware of the same and that therefore when the petitioner has in the Petition specifically challenged the existence of urgency, it is for the respondents to show that there was material on which the Government could form such an opinion, although, of course, the question whether the material was sufficient to form that opinion or not would not be open for being judicially reviewed by a Court of law.

11. When the formation of an opinion or the satisfaction of an authority is subjective, but is a condition precedent to the exercise of a power, the challenge to the formation of such opinion or to such satisfaction is limited, in law, to three points only. It can be challenged, firstly, on the ground of *mala fides* secondly, on the ground that the authority which formed that opinion or which arrived at such satisfaction did not apply its mind to the material on which it formed the opinion or arrived at the satisfaction; and, thirdly, that the material on which it formed its" opinion or reached the satisfaction was so insufficient that no man could reasonably reach that conclusion. So far as the third point, is concerned, no Court of law can, as in an appeal, consider that on the material placed before the authority the authority was justified in reaching its conclusion. The Court can interfere only in such cases where there was no material at all or the material was so insufficient that no man could have reasonably reached that conclusion. It is not necessary to refer to the authorities" which lay down these propositions because they have by now been well established in numerous judgments and they are not in dispute before us at the Bar. In this case, however, there is no challenge on any of these three grounds. The dispute in this case therefore narrows down to the point as to the burden of proof. In other words, the dispute is whether it is the petitioner who has to bring the material before the Court to

support his contention that no urgency existed or whether, once the petitioner denied that any urgency existed, it was incumbent upon the respondents to satisfy the Court that there was material upon which the respondents could reach the opinion as mentioned in Section 17(4).

12. In support of his contention that it is for the petitioner to place such material before the Court, Mr. Setalvad relied upon several authorities. He first invited our attention to the Judgment of Chief Justice Sir Patrick Spens in *King Emperor v. Sibnath Banerjee* [1944] F.C.R. 1, and particularly the following passage therein appearing at page 42 of the Report, viz.:-

.. It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid making of that order. In the normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate. If however in any case a detenu can produce admissible evidence to that effect, in my judgment the mere existence of the recital in the order cannot prevent the Court considering such evidence and, if it thinks fit, coming to a conclusion that the recital is inaccurate.

There was an appeal filed against that Judgment before the Privy Council and in delivering the Judgment of the Judicial Committee reported in *King Emperor v. Sibnath Banerji* (1945) L.R. 72 IndAp 241 : 48 Bom. L.R. 1 Lord Thankerton at page 261 of the Report reproduced the decision contained in the above passage with approval. These observations of Spens C.J. were again cited with approval by the Supreme Court in *The Swadeshi Cotton Mills Co. Limited Vs. The State of U.P. and Others*, . Relying upon these authorities Mr. Setalvad contended that the presence of the recital about the opinion in the two notifications must be accepted by the Court as establishing that the necessary condition precedent was fulfilled and that because of the presence of that recital the burden is on the petitioner to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is inaccurate. He contended that the burden is on the petitioner, but the petitioner has not, barring a bare statement in the petition that no urgency existed, produced any evidence or material to support the petitioner's allegation about the absence of urgency.

13. Mr. Sorabji, however, contended that these observations are made in cases where facts on which the opinion was to be formed or satisfaction to be arrived at by the authority were not within the exclusive knowledge of that authority. He contended that the petitioners in those cases making the challenge were in a position to positively aver and lead evidence and place material before the Court as to the facts on which the petitioners could contend that no opinion could validly be formed and no satisfaction could validly be arrived at. Mr. Sorabji

contended that the principle as laid down in these observations in the class of cases where the relevant material is not within the exclusive knowledge of the authority cannot be and should not be extended to the class of cases where such material is within the exclusive knowledge of the authority alone and the petitioner who makes such challenge is not and cannot be aware of such material. He contended that the effect of a direction u/s 17(4) is to deprive a citizen of a very valuable right available to him u/s 5A of the Land Acquisition Act and that he cannot be deprived of such a valuable right by a mere bald or bare declaration of the statement in the order or in the affidavit as to the opinion or satisfaction because a citizen would, in the absence of any knowledge, be rendered completely helpless and the authority would be enabled to take shelter behind such a bald statement even in cases where no facts exist to justify his opinion or satisfaction, he contended that it would be totally illogical and unfair to place the burden on a person who does not know and is, in the nature of things, incapable of knowing the relevant facts. He further contended that this principle has been statutorily embodied in Section 106 of the Evidence Act which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. He conceded that once the authority brings the material on record, the challenge would, of course, be restricted to the three points already set out by us earlier.

14. In support of his contention he pointed out that in the case of *King Emperor v. Shibnath Banerjee* the order impugned was an order of detention under rule 26 of the Defence of India Rules and the material on which the subjective satisfaction of the Government was to be arrived at would concern the activities of the person against whom the detention order was made. In such cases of detention orders the activities would be known to that person himself and he would be in a position to place material before the Court to show that he had not acted in any prejudicial manner which would justify the satisfaction of the Government. In such cases the activities complained of of the person against whom such an order is made would not be within the exclusive knowledge of the Government alone. He pointed out that the position in the case of *Swadeshi Cotton Mills v. 8. I. Tribunal* referred to by Mr. Setalvad was similar. The case arose under the U.P. Industrial Disputes Act, 1947. u/s 3 of that Act the State Government, if it formed a certain opinion, could issue an order, inter alia, setting up Conciliation Boards and Industrial Tribunals. The State Government issued two orders of the nature contemplated by Section 3 and the appellants and certain other industrial concerns challenged the validity of the orders. Mr. Sorabji pointed out that the existence of the situation as to which the State Government was to form its opinion would be known to the employers who impugned the orders and would not be within the exclusive knowledge of the State Government. He pointed out that in these cases relied upon by Mr. Setalvad the material facts would not be within the exclusive knowledge of the authority but would also be known to the person making the challenge to the orders and that he would be in a position to bring material before the Court.

15. Mr. Sorabji then relied upon certain observations in the Judgment of Hidayatullah J. in the case of Barium Chemicals Ltd. v. Company Law Board AIR [1907] S.C. 295. In that case what was impugned was an order appointing Inspectors under the provisions contained in Section 237(b) of the Companies Act, 1956, which provides that the Central Government may appoint one or more competent persons as Inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct, if, in the opinion of the Central Government, there existed circumstances suggesting one of the several things laid down in that section. In exercise of the power under that section an order was made which specifically stated that in the opinion of the Company Law Board (which was the authority which was to arrive at that opinion) there were circumstances suggesting that the business -of the Company concerned in that case was being conducted with intent to defraud its creditors. Moreover, on behalf of the authority in that case an affidavit had been filed in which the authority itself brought material on the record on which it had arrived at its said opinion. It is, therefore, clear that the order impugned in that case was itself a speaking order and that further material had been brought on the record by the authority itself and no question of burden of proof did or could arise. That case was heard by a Bench of five Judges composed of Sarkar C.J., Hidayatullah, Mudholkar, Bachawat and Shelat JJ. and the case was decided by the majority constituted of Hidayatullah, Bachawat, and Shelat JJ., Sarkar C.J. and Mudholkar J. dissenting-. Although there are differing Judgments, the difference between the majority of that ,, Bench and the minority was only as to the conclusion to be drawn on the material brought on the record as to the existence or otherwise of the grounds justifying the formation of that opinion. The grounds had in fact been disclosed both in the order itself and in the affidavit. All of the learned Judges in that case, however, agreed that the formation of the opinion was subjective. As the material was to be found in the order itself and in the affidavit filed on behalf of the authority, no question of burden of proof arose and, as a matter of fact, no Judgment except that of Hidayatullah J. appears to deal with the question of burden of proof. Hidayatullah J., however, at page 309 of the Report observed, inter alia, :-

. ..An action, not based on circumstances suggesting an inference of the enumerated kind will not be valid. In other words, the enumeration of the inferences which may be drawn from the circumstances, postulates the absence of a general discretion to go on a fishing expedition to find evidence. No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out. . ..Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and

give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness.

In our opinion, these observations clearly mean that when the existence of the circumstances on which an opinion is to be formed or has been arrived at, the question of the existence of circumstances has to be proved, at least *prima facie* and that it would not be sufficient for the authority which arrived at that opinion to assert the circumstances existed but give no clue whatever as to what such circumstances were. These observations clearly indicate that in such cases the burden is on the authority to at least prove the existence of the circumstances on which its opinion was based and that such authority cannot sit back and give no clue as to what they were. These observations clearly cast the burden of leading *prima facie* evidence on the authority as pointed out by Mr. Sorabji. These observations are undoubtedly *obiter*. Moreover, these observations as to burden of proof are in general terms applicable to all classes of cases and they are not confined to the class of cases where such circumstances are not within the knowledge of the person challenging the validity of an order and to which restricted class of cases Mr. Sorabji seeks them to confine. Although these observations are by way of *obiter dicta*, the same being of the Supreme Court they are entitled to great weight and they do support the contention of Mr. Sorabji.

16. We are of the opinion that the principle concerning the burden of proof to be found in the said observations of Spens C.J. must be confined to the class of cases where, on the facts and circumstances of each case, the grounds on which an opinion can be formed or satisfaction can be arrived at are not within the exclusive knowledge of the authority concerned but are known or are reasonably capable of being known to a sufficient extent by the person challenging the validity of the order passed against him. It would be illogical and unreasonable to extend that principle to the class of cases in which the person challenging the order does not know and cannot reasonably come to know to a sufficient extent the circumstances relevant to the formation of its opinion or the arrival at its satisfaction. That principle cannot therefore be extended to that class of cases. That principle has been regarded as the burden of proof in Section 106 of the Evidence Act and finds great support from the above observations of Hidayatullah J.

17. In the case before us the petitioner has stated in the petition more than once that the urgency clause had been applied without any valid reason. The urgency clause in respect of each of the said two notifications concerning the lands in groups Nos. 1 and 2 is contained in the relative Section 4 notification itself. The public purpose stated in the notifications is "for development and utilization of the said lands as an industrial and residential area". To start with, this statement itself is vague, in the sense that it is not clear. Whether the development and utilization of the lands referred to in that statement was confined to the lands mentioned in the Schedule to the Notification or it applied to a wider area of

which such lands formed only a part. So far as the affidavit in reply is concerned, no facts whatever are stated. The affidavit only states that the authority, i.e., the Commissioner of the Bombay Division, was satisfied that the possession of the said lands was urgently required for the purpose of carrying out the said development. Even Mr. Setalvad conceded that the affidavit does not contain a statement of facts on which the authority was satisfied or on which it formed its opinion. It is therefore quite clear that the respondents have failed to bring on record any material whatever on which the respondents formed the opinion mentioned in the two notifications. The notifications themselves show that they concern many lands other than those falling in the said first and third groups. It is not possible to know what was the development for which the lands were being acquired, much less is it possible to know what were the circumstances which caused urgency in the taking of possession of such lands. We have held that the burden of proving such circumstances, at least prima facie, is on the respondents. As the respondents have brought no relevant material on the record, the respondents have failed to discharge that burden. We must, in conclusion, hold that the urgency provision u/s 17(4) was not validly resorted to.

18. We record that at the earlier stages Mr. Sorabji cited certain authorities as to what the law would be on urgency and how urgency is to be judged. Mr. Setalvad also replied to those authorities. In the view which we have taken it is not necessary to refer to the same and therefore we do not refer to the same,

19. In conclusion, we hold that the notifications dated 11th October 1963, 13th June 1964, 13th July 1964, and 13th November 1963 in respect of the said four groups respectively in so far as they are notifications u/s 4 are valid and operative. We, however, set aside the following:-

(a) the direction in the said notification dated 11th October 1963 relating to the lands in the first group issued u/s 17(4) of the Land Acquisition Act applying the urgency clause and all notifications, orders, directions and proceedings subsequent thereto,

(b) the direction in the said notification dated 13th June 1964 relating to the lands in the second group issued u/s 17(4) of the Land Acquisition Act applying the urgency clause and all notifications, orders, directions and proceedings subsequent thereto,

(c) the direction in the said notification dated 13th June 1964 relating to the lands in the third group issued u/s 17(4) of the Land Acquisition Act applying the urgency clause and all notifications, orders, directions and proceedings subsequent thereto, and

(d) the notification dated 13th July 1964 u/s 6 of the Land Acquisition Act, including the direction u/s 17(4) of the Land Acquisition Act applying the urgency clause and all notifications, orders, directions and proceedings subsequent thereto.

20. The respondents to restore to the petitioner possession of the lands, if any, of which the respondents have taken possession in pursuance of the notifications and orders set aside in this Petition. The parties state that they are agreed that the respondents may do so within one month from today. We make an order accordingly.

21. The respondents to pay the petitioner's costs of this Petition, fixed at Rs. 400/-.