
(1960) 03 BOM CK 0008

In the Bombay High Court

Case No : Special Civil Application No. 1546 of 1959

Navnitlal Ranchhodlal

APPELLANT

Vs

State of Bombay and Another

RESPONDENT

Date of Decision : 08-03-1960

Acts Referred:

Land Acquisition (Amendment) Act, 1923 — Section 17(4)
Land Acquisition Act, 1894 — Section 4, 5

Citation : AIR 1961 Bom 89 : (1960) 62 BOMLR 622 : (1960) ILR (Bom) 651

Hon'ble Judges : V.S. Desai, J; S.T. Desai, J

Bench : Division Bench

Advocate : I.M. Nanavati and Hemendra K. Shah, for the Appellant; M.A. Rane, Asst. Govt. Pleader, for the Respondent

Judgement

V.S. Desai, J.—This is a Special Civil Application challenging a notification issued by the Commissioner, Ahmedabad Division; u/s 4 of the Land Acquisition Act, 1894, notifying for acquisition final Plots 160 and 163 of the Town Planning Scheme Ahmedabad No. 3 (Ellis Bridge) from the area of the village Shekhpur-Kanpur comprised in the Ahmedabad City. The petitioner owned both these final plots, but he disposes of final plot No. 160 by donating it to a Public Trust on the 5th May 1959. Both these final plots of land, according to the petitioner, are situate within the limits of the Ahmedabad Municipal Corporation and are valuable pieces of land in the Town Planning Scheme. They have an excellent situation commanding the meeting of four different roads and are on the bank of river Sabarmati. The public purpose for which they have been notified for acquisition is the construction of the office building of the Executive Engineer of the Ahmedabad Irrigation Division.

2. By clause 3 of the said notification the Commissioner has directed under Sub-section (4) of section 17 of the Land Acquisition Act that as the acquisition of the lands notified is urgently necessary, the provisions of Section 5-A of the said Act shall not apply in respect of the said lands.

3. The petitioner's challenge is directed against this clause of the notification. Several grounds are set up in the petition challenging this clause, but the only ground which is pressed before us is that the lands in the present case are not such as would come within the provisions of Section 17(4) of the Land Acquisition Act, and it is not, therefore, competent for the Commissioner to apply the provisions of Section 17(4) and direct that the proceedings u/s 5-A of the Act shall be dropped in the present acquisition. It is contended by the petitioner that the notification in so far as it directs that the provisions of Section 5-A shall not apply to the present acquisition proceedings deprives the petitioner of his valuable right to object to the acquisition of the land, of being heard in the enquiry u/s 5-A and of satisfying the Acquiring Authority that for a variety of reasons which he can adduce before the said authority, the proposed acquisition should be dropped. The petitioner's argument in support of the contention which he has raised in the present application shortly stated is as follows: Section 17(4) of the Land Acquisition Act applies only in the case of a land to which the provisions of Section 17(1) or Section 17(2) are applicable. We are not concerned with Section 17(2) which deals with cases where possession of land is immediately required by a Railway Administration under circumstances as mentioned in the said Sub-section and for purposes as specified therein. Section 17(1), according to the petitioner applies to waste or arable lands Only in urgent cases of acquisition. In other words, the petitioner has argued that in order that Section 17(1) may apply, two conditions must be satisfied. Firstly, there must be urgency of acquisition and secondly the land proposed to be acquired must be either waste or arable land. It is only when these two conditions are satisfied that the acquiring authority is competent to direct u/s 17(4) that the provisions of Section 5-A may be dropped in the case of the proposed acquisition of the land. The petitioner says that his land is neither waste nor arable. He has urged that the land is situated within the limits of the Municipal Corporation of Ahmedabad, has an excellent situation commanding the meeting of four public roads and is on the bank of the river Sabarmati .It abuts on a main 80 feet Road leading to Wadaj Gandhi Ashram and is situated just opposite the Income Tax Office and All India Radio House. According to the petitioner, it is an excellent and valuable building site and the land adjoining it has been only recently sold at a price of Rs. 24.75 nP. per square yard. The petitioner has further stated that he is desirous of building a bungalow on the site and has for that purpose already submitted plans for construction for sanction and approval to the appropriate authorities. The petitioner has contended that the land proposed to be acquired would by no stretch of imagination be said to be waste or arable and, therefore, one of the conditions necessary for enabling the acquiring authority to drop the enquiry u/s 5-A of the Act is not satisfied in the present case. As to the other condition, namely that there must be urgency of acquisition, the petitioner has urged in the petition that there is no such urgency because the Executive Engineer, Irrigation Division, Ahmedabad, for the construction of whose building the land is proposed to be acquired, has already got his office in another building near Lal Darwaja, Ahmedabad. It is, however, fairly conceded by Mr. Nanavati,

learned Counsel appearing for the petitioner, that the existence and extent of urgency at the stage of issuing a direction u/s 17(4) would be a matter for the subjective determination of the acquiring authority and will, therefore, not raise a justiciable issue. He has, accordingly conceded that it will not be possible for him to agitate in the present Special Civil Application that the condition as to urgency of acquisition also has not been satisfied in the present case.

4. In the affidavit in reply which has been filed by the second respondent, the Commissioner, Ahmedabad Division, the allegations of the petitioner with regard to the situation, suitability and value of the land have not been specifically traversed. It is, however, stated that at the time of the submission of the proposals u/s 4 under urgency clause in form "E", the land was inspected and it was found that it was waste, arable and containing no structure on it. It is stated that although the petitioner was granted permission to build a compound wall by the Municipal authorities, he has not constructed the wall and the land has continued to remain waste and arable. It is further stated that the Government decided to notify the lands u/s 4 on 19th November 1959 although the notification appeared in the Bombay Government Gazette on 3rd December 1959 and the petitioner's application for permission to construct a building was after the date on which the Government had decided to notify the lands for acquisition. From the affidavit in reply filed by the Commissioner, it does appear that the only ground on which the Commissioner has regarded the land as waste and arable is that it was not put to any present use and has no structure standing on it. 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. The land which is a building site within the Municipal limits and situated in the developed part of the City cannot in our opinion be regarded as an arable land. The expression "waste land" in our opinion would apply to lands which are desolate, deserted, uninhabited and uncultivated as a result of natural barrenness or rendered unfit for cultivation by reason 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 lands in the urban area 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 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. We are, therefore, inclined to agree with the petitioner that the land in the present case cannot come within the expression "waste or arable" land. If the determination of this question only was sufficient to dispose of the matter, we would have had no difficulty in holding that the challenge of the petitioner against the Notification must be upheld. In view of certain legal submissions, however, which have been advanced before us by Mr. Rane, the learned Assistant Government Pleader, we have to consider the

matter further.

5. It has been urged by Mr. Rane in the first place that in order to direct u/s 17(4) that the provisions of Section 5-A shall not apply to the proposed acquisition of any land, it is not necessary that the land must be waste or arable. According to Mr. Rane, such a direction can be given u/s 17(4) in all cases where in the opinion of the acquiring authority, there is an urgency of acquisition. In support of this argument, Mr. Rane has invited our attention to some of the relevant provisions, of the Land Acquisition Act. In the case of acquisition of land under the Act, there is a notification in the first place u/s 4 notifying that certain lands are required for a public purpose. After this notification is issued there is an enquiry u/s 5- in which persons interested in the lands proposed to be acquired are given an opportunity to object to the proposed acquisition. After a report of the inquiry is submitted to the Government by the Collector, the Government decides whether to proceed with the acquisition or to drop it and when it decides to proceed further with the requisition, it issues a final notification u/s 6 notifying that the lands specified in the notification are required for a public purpose. After this notification, the next stage in the acquisition proceeding relates to the making of an award determining the true area of the land, the compensation to be allowed for the lands and the apportionment of the compensation between all persons known or believed to be interested in the lands. The provisions relating to the making of the award are contained in Sees, 9 to 11- of the Act. Section 9 provides for notice to be given to the persons interested. Section 10 empowers the Land Acquisition Officer to enforce the making of statements as to name and interest and Section 11 provides for the inquiry to be held and the matters to be determined and included in the award and the making of the award. u/s 12 the award made u/s 11 becomes final on the same being filed in the Collector's office. After an award has been made under these provisions and the compensation has been determined, we come to the further provisions which relate to the taking possession of the land acquired. Section 16 provides that when the award has been made u/s 11, the Collector can take possession of the land and on such possession being taken, the land vests absolutely in the Government free from all encumbrances. Normally, therefore, possession of the land under acquisition can only be taken after an award has been made determining the compensation to be paid in respect thereof. Section 17 provides for cases by way of exception to this normal procedure and make provision for cases where possession can be taken even before the award is made and the effect of taking such possession. Section 17(1) provides that,

"in cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may on the expiration of fifteen days from the publication of the notice mentioned in Section 9, Sub-section (1), take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the Government free from all encumbrances."

Section 17(2) provides for the taking of possession of certain lands as specified in the Sub-section immediately after the notice u/s 9(1) is issued when the land is required under the circumstances mentioned in the section and for the purposes as stated therein by any Railway Administration. Sub-section (3) of Section 17 does not concern us for the purposes of the present application. Then comes section 17(4) which states:

"In the case of any land to which, in the opinion of the appropriate Government, the provisions of Sub-section (1) or Sub-section (2) are applicable, the appropriate Government may direct that the provisions of Section 5-A shall not apply, and, if it does so direct, a declaration may be made u/s 6 in respect of the land at any time after the publication of the notification u/s 4, Sub-section (1)". It may be noted that Sub-section (4) of Section 17 was added to the Land Acquisition Act in the year 1923 by Act 38 of 1923. It may also be noted that by the same amending Act 38 of 1923 Section 5-A has also been added. Mr. Rane's argument is that Section 17(1) which is by way of an exception to Section 16 provides for a case of urgency. Ordinarily, taking of possession of the land acquired has to be deferred till after the making of the award. In cases of urgency, however, possession is permitted to be taken before the making of the award, although the taking of possession is restricted only to waste or arable lands. Mr. Rane, therefore argues that there are two things which are contemplated u/s 17(1) -- urgency of acquisition and the taking of possession of certain lands when the urgency exists. When Section 17(4) refers to cases of lands to which the provisions of Sub-section (1) of section 17 are applicable, it refers to cases of urgency. It may be, says Mr. Rane, that when it comes to taking possession of the lands, the Government can take possession only of waste or arable lands. But, although the taking of possession is so confined to waste or arable lands, dropping of the enquiry u/s 5-A will be available in all cases where urgency exists. He has tried to support this interpretation of Section 17(4) by inviting our attention to the standard form of the notification u/s 4 containing a direction u/s 17(4) which is adopted by the Government. The notification issued in the present case is in this standard form which is Form E. Clause (3) in this notification in the Standard Form E refers only to the land being urgently required and does not further state that the lands proposed to be acquired are waste or arable. He has also invited our attention to the Standard Form F which is used for the final notification u/s 6 in cases where the enquiry u/s 5-A is dropped and the notification u/s 4 is issued in Standard Form E. This notification u/s 6 refers to the notification u/s 4 and thereafter makes a declaration u/s 8 that the land is needed for a public purpose for the purposes of a company. It then proceeds on to name the person who is appointed to perform the functions of a Collector in all further proceedings and then after having stated that the acquisition of the land or lands was urgently required directs that u/s 17(1) the Collector shall on the expiration of fifteen days from the publication of the notice mentioned in Section 9, Sub-section (1) take possession of the waste or arable lands specified in the notification. According to Mr. Rane, the

effect of the provisions of Section 17(1) and (4) is that whereas the direction dropping the enquiry u/s 5-A can be given in all cases of urgent acquisition, the taking of possession is only restricted to waste or arable lands. Mr. Rane has, therefore, argued that it may be that at the stage of taking possession of the land the petitioner may be entitled to contend that the possession should not be taken on the ground that the lands are neither waste nor arable; but at the present stage when we are only concerned with the direction relating to the dropping of the proceedings u/s 5-A, the petitioner cannot complain because the Commissioner having been satisfied that the case is one of urgent acquisition is entitled to direct that the enquiry u/s 5-A should be dropped.

6. We have carefully considered the argument advanced by Mr. Rane, but we do not think that it is sustainable on the language of Section 17(4). The Sub-section (4) of Section 17 refers to the case of any land to which the provisions of Sub-section (1) are applicable. The land to which the provisions of Sub-section (1) are applicable is a waste or arable land in cases of urgent acquisition. In order to interpret Sub-section (4) in the way in which Mr. Rane wants us to interpret it, we think that the language of Sub-section (4) will have to be different. Since the Sub-section (4) of Section 17 in terms refers to land to which the provisions of Sub-section (1) are applicable and since the land to which Sub-section (1) applies is only waste or arable land which is urgently required, we do not think that that argument urged by Mr. Rand can be accepted as correct.

7. Mr. Rane has then raised another contention-He has argued that at the stage when the direction u/s 17(4) is required to be issued, the fact whether the provisions of Sub-section (1) are applicable to the land proposed to be acquired is a matter which is left entirely to the opinion of the Government. In other words, it is a matter left to the subjective determination of the Government. In dispute says Mr. Rane that in order to see whether Sub-section (1) of Section 17 is applicable or not, the Government may have to consider whether in the first place there is the existence of urgency and secondly whether the lands involved in the acquisition are waste or arable but both these matters are to be determined subjectively by the Government at that stage. Mr. Rane has, therefore, argued that whether the lands are or are not waste or arable would not be a justiciable issue in the present Civil Application. If the Government has formed its opinion, the opinion of the Government is as much incapable of being questioned with regard to the existence or extent of urgency as with regard to the lands proposed to be acquired being waste or arable. Mr. Rane has, therefore, argued that the petitioner is not entitled to complain that the direction contained in the notification is bad because he is not in a position to raise a justiciable issue with regard to what has been left to the subjective determination of the competent authority.

8. In reply to this argument of Mr. Rane, Mr. Nanavati has argued that what has been left to the subjective determination of the competent authority u/s 17(4) is only the matter relating to the existence or extent of urgency. The determination

of the question as to whether the lands involved are waste or arable is a matter which is capable of being objectively determined by certain well-known standards and cannot therefore be left to the subjective determination of the acquiring authority and has not in fact been so left under the provisions of that section. Mr. Nanavati has further argued that even if it be assumed that both the conditions viz. that the case must be one of urgent acquisition and secondly that the lands involved must be waste or arable are left to the subjective determination of the competent authority, he is entitled to urge in the present case that on the face of the record. the authority has not applied its mind and has not determined even subjectively that the lands in the present case are waste or amble. Mr. Nanavati has argued that before the Government issues a direction u/s 17(4) dropping the inquiry u/s 5-A it must form an opinion that the case of the proposed acquisition is one to which the provisions of Section 17(1) are applicable. The necessity of forming this opinion as a condition precedent to the exercise of its power to issue the said direction must be present in the mind of the Government, it must apply its mind to it and must come to the conclusion that the condition is satisfied. It is only then that the direction issued will be in accordance with law and will not be capable of being challenged on the ground that the opinion formed is not correct. If, however, it can be shown that the Government in issuing the direction has ignored this condition and has not formed the necessary opinion the direction issued can be challenged as not being in accordance with law. Mr. Nanavati argues that it is clear on the face of the clause (3) of the Notification that the Government has not formed the necessary opinion before issuing the direction in the present case.

9. Now on a proper interpretation of the provisions of Section 17(4) of the Act we have no doubt that the opinion which the Government has to form relates both to the urgency as well as to the nature and condition of the land. In our opinion both these matters are left to the opinion of the Government and therefore are matters which are required to be subjectively determined by the Government and the correctness of the opinion formed cannot raise a justiciable issue. We are also not inclined to agree with Mr. Nanavati that the question as to the nature and condition of the land i.e. whether the land is waste or arable cannot be left to the subjective determination of the Government since that question is capable of being objectively determined by certain well known standards or tests. We have however not thought it necessary to deal with this argument of Mr. Nanavati in any detail because we feel that the last part of his argument that the direction in the present case has been issued without forming the opinion which was necessary to be formed as a condition precedent appears to be well founded and must be accepted.

10. Clause (3) of the Notification is as follows :

"The Commissioner, Ahmedabad Division, is further pleased to direct under Sub-section (4) of Section 17 of the said Act that, as the acquisition of the said lands is urgently necessary, the provisions of Section 5-A of the said Act shall not apply

in respect of the said lands".

As can be seen from this clause, it gives no indication at all that the authority in issuing this direction has formed the opinion or satisfied itself that land proposed to be acquired is a land to which the provision of Section 17(1) are applicable. As we have already pointed out, Section 17(1) applies to a land which is urgently required and which is waste or arable. The clause (3) in the notification only refers to the urgency of the acquisition and does not refer to the nature of condition of the land i.e. whether the land is waste or arable. On the face of the notification, therefore, Mr. Nanavati is entitled to argue that the only condition which appears to be present in the mind of the Government and to which it has applied its mind and regarding which it has formed its opinion is the urgency of the acquisition. Mr. Nanavati has argued that if the other condition had been present in the mind of the Government and it had applied its mind to that condition, it could never have formed the opinion that the land of the petitioner was either waste or arable. In our opinion, there is considerable force in the argument of Mr. Nanavati that the Government in issuing the direction appears to have taken, the view that it can issue such direction in all cases of urgent acquisition and not in such cases of urgent acquisition only where the lands involved are either waste or arable.

11. Mr. Rane for the Government has argued that we should not reach the conclusion that the opinion as is required to be formed under the provisions of Section 17(4) has not been formed by the Government in the present case merely because of the language used in clause (3) of the notification. He has argued that if as a matter of fact the Government was aware of the conditions regarding which it had to form its opinion had applied its mind to those conditions and thereafter formed its opinion the mere omission to refer to one of the conditions in the notification issued will not be fatal to the notification. Mr. Rane says that the Commissioner, Ahmedabad Division, who has issued the notification has filed an affidavit in the present case and that affidavit shows that he had applied his mind with regard to the nature and condition of the land proposed to be acquired and had formed his opinion with regard to the same before issuing the notification. In view of the affidavit of the Commissioner, Mr. Rane has urged that we should hold that the opinion as was necessary was formed in the present case and the direction issued therefore is good and valid. Unfortunately for Mr. Rane the affidavit of the Commissioner on which he seeks to place reliance is thoroughly unsatisfactory and incapable of supporting the submission which he has made. As we have seen the clause (3) of the notification raises a serious doubt as to whether the Government had formed the necessary opinion which was a condition precedent to the validity of the direction issued by it in the said clause. Assuming that this doubt can be dispelled and the direction justified by the affidavit put in by the Commissioner, the affidavit must be such as would clearly show that although the language of the notification was defective the Government was as a matter of fact aware of the conditions which were necessary to be satisfied and had applied its mind to those conditions and

had formed its opinion relating to the said conditions before issuing the direction.. The Commissioner's affidavit in the present case falls very much short of this requirement. In paragraph 3 of the affidavit the Commissioner has stated :

"I may submit that at the time of submission of proposal u/s 4 under urgency clause in form "E", the Suit land was inspected and it was found that the land was waste, arable and containing no structure on the suit land. Though" the petitioner was granted permission by the, Municipal Authorities, Ahmedabad, for construction of compound wall, he has not "up to this date carried out work for that purpose. Thus the suit land is lying waste and arable".

Further on the affidavit states :

"The contention made by the "Petitioner that it does not appear to be a case for the Respondents that the petitioner's land is waste or arable land is baseless, as the land is open and contains no structures and the ulterior object of the petitioner appears to be to save the land from compulsory acquisition on the ground of his personal requirements which are always affected where lands are acquired for public purpose".

The affidavit does not state that the Government had formed the opinion that the provisions of section 17(1) were applicable to the land in the present case nor does it state facts from which we can conclude that such an opinion was formed by the Government. The affidavit has stated that before issuing the notification the land was inspected and was found to be waste and arable and having no structure on it. It seems to us difficult to understand how the land in the present case which possesses such excellent and advantageous features as a valuable building site as is alleged by the petitioner and which is situated in the Municipal area and included in the town planning scheme was found to be waste and arable. The further statements in the affidavit indicate that the only facts on which this conclusion was based were firstly that the petitioner had not utilised the permission which he had secured for building a compound wall and secondly the land was open and contained no structure on it. In our opinion, these facts can hardly have any relevance in forming the opinion that the land in the present case was either waste or arable or both waste and arable as stated in the affidavit of the Commissioner. 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 u/s 5-A. The Government must form the necessary opinion with regard to this objective fact on considerations 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 based cannot be questioned and the direction issued 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 these two cases the direction

issued can be successfully challenged as not being in accordance with law.

12. In the present case the clause (3) of the notification does not indicate that the necessary opinion was formed by the Government. Nor do we find anything in the affidavit of the Commissioner assuming we should look at it -- from which we can conclude that such opinion was formed by the Government on a consideration of reasons which could be regarded as relevant for the formation of the opinion. We must, therefore, hold that direction issued by the Government in clause (3) of the notification u/s 4 of the Land Acquisition Act in the present case is not in accordance with law and must be set aside. Since the notification issued in the present case by clause (3) thereof has deprived the petitioner of his valuable right to object to the acquisition in proceedings u/s 5-A by filing objections within thirty days of the issue of the notification, we must direct that the whole of the notification be set aside as prayed for by the petitioner.

13. We, accordingly, order that the opponents be directed to cancel or withdraw the notification No. LAQ. 1725, dated 19th November 1959, issued by the Commissioner, "Ahmedabad Division, u/s 4 of the Land Acquisition Act and published in the Bombay Government Gazette on December 3, 1959 and they be further directed not to give any effect to the said notification.

14. The Rule is made absolute. Petitioner to get his costs from the Respondents.

15. Application allowed.