

(2015) 04 SHI CK 0088
In the High Court Of Himachal Pradesh
Case No : CWP No. 11334 of 2011

Parkash Chand

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 17-04-2015

Acts Referred:

Constitution of India, 1950 — Article 300 A, 300-A
Land Acquisition Act, 1894 — Section 6

Citation : AIR 2015 HP 42

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : Hamender Chandel, for the Appellant; Virender Kumar Verma, Rupinder Singh, Additional Advocate Generals and Parul Negi, Dy. Advocate General, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J.—By medium of this writ petition, the petitioner has prayed the following substantive reliefs:

(i) That the respondents may be directed to immediately construct/repair the road from Bhathmana Bus Stand to Dharvidhar road.

(ii) That the respondents may be directed to take all the necessary steps to make the road usable for at least the small vehicles like Ambulance and utility vehicles.

2. The grievance set out in the petition is that respondents have failed to construct and maintain the road from Bhathmana Bus Stand to Dharvidhar, as a result whereof, the petitioner as well as the other residents of Gram Panchayat are facing great difficulty in approaching the main road "Bhathmana to Shimla". The demand for construction of link road was raised by the residents, but the government did not take any steps for the construction of the road. Vide resolution dated 8.12.2009, the Gram Panchayat resolved that a grant of Rs. 5,00,000/- may be provided for construction of the road. The Gram Panchayat

started construction of the road by contributing money as also providing labour and resultantly the road became jeepable in the year 2009 which provides connectivity to about 300 residents of the Gram Panchayat.

3. It is alleged that since the link road was constructed by the residents, it required further leveling by the expert agency of the government and at few places retaining wall and breast walls were also required to be constructed. The residents of the area repeatedly represented to the government and finally the government sanctioned an amount of Rs. 3,60,000/- for the construction of the road, but the said amount is not being used for the construction of the road.

4. The official respondents in their reply have raised preliminary objection regarding the maintainability of the petition and it is submitted that the villagers had started the construction of Ambulance road out of their personal funds. The respondent No. 2 had sanctioned a sum of Rs. 1,00,000/- for the construction of the road on 15.1.2010. The respondent No. 3 further released funds to the Gram Panchayat on 24.11.2010 to construct the said road after completing all codal formalities mandatory for its execution. However, a complaint was received in the office of respondent No. 3 Sub Divisional Magistrate, Shimla, where one of the land owners whose land falls adjacent to the public path had requested to stop construction of the road till the construction of the breast wall for protection of his house. Two kilometers of road was constructed by the local residents themselves but then the same was damaged and washed away due to heavy rains in many places. It was further reported that road from RD 0/000 to 0/075 is quite narrow and there were houses towards the hilly side, which required additional funds for their protection.

5. This court vide various interim orders had directed the official respondents to look into the feasibility of construction of the road, pursuant to which various amounts were also sanctioned by the official respondents. However, the State expressed its inability to acquire the private lands including the land belonging to respondent No. 3 on account of its policy decision not to acquire any private land for the construction of rural link road as it would lead to multiplicity of litigation in other similarly situated cases throughout the State. Later, when the petitioner offered to bear the entire cost of the acquisition as also the construction, the official respondents were not averse to such proposal as would be clear from the detailed order passed by this court on 18.12.2014, which reads thus:-

"In compliance to the directions passed by this Court on 12.12.2014, Engineer-in-Chief, HPPWD, Shimla is present. On 15.9.2014, this Court passed the following order:

"It is represented by the learned counsel for the petitioner that the petitioner and the co-villagers are ready to bear the cost of acquisition of the land belonging to respondents No. 5 and 9, in case the State is willing to acquire the same in accordance with law, let the State obtain instructions in this regard."

When the matter was listed subsequently, it was pointed out by learned

Additional Advocate General that the respondent-State is unable to acquire the land belonging to respondents No. 5 to 9 being its policy decision not to acquire any private land for the construction of rural link road as it shall lead to multiplicity of litigation in other similar situated cases throughout the State. It has been brought to the notice of Engineer-in-Chief, HPPWD, Shimla that the entire cost towards acquisition and construction of five mtrs. wide road on land comprised in Khasra No. 773, including override charges thereof advertisement etc. shall also be borne by the petitioner and the co-villagers. He has also been apprised of the fact that the acquisition of this land on behalf of the State would not in any manner mean that it is for the HPPWD to construct the road over this khasra number or beyond this point.

Learned Advocate General, on instructions from the Engineer-in-Chief, HPPWD, has stated that they are not averse to the proposal that in case the entire cost of acquisition and construction of the road is borne by the petitioner, then it will have no objection in issuing necessary notification under the Right to Fair Compensation and Transparency in Land Acquisition, Re-habilitation and Re-settlement Act, 2013 (for short "Act"). Accordingly, let the Land Acquisition Collector, HPPWD, Winter Field, Shimla make a tentative assessment of the value of the land for construction of five mtrs. wide road over Khasra No. 773 including the structure(s), if any, over the same in accordance with the Act, within a period of eight weeks.

In the meanwhile, learned counsel for the petitioner shall also seek instructions in this regard from the petitioner because before passing any final order regarding acquisition, the petitioner will have to file an undertaking before this Court undertaking therein that it will be the petitioner who shall bear all the costs of acquisition and construction of the road and no amount whatsoever shall be paid from the State Exchequer for the construction of the road and the mere fact that the State will issue the necessary notification under the Act would not in any manner be construed to mean that the road would be constructed by the State Government. It further be undertaken that the land having width of only five mtrs would be acquired. The presence of Engineer-in-Chief, HPPWD, Shimla, is dispensed with.

List on 27.2.2015.

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6. However, the respondent No. 5 has now raised a preliminary objection regarding the very maintainability of the petition by arguing that direction to acquire the land of the respondent and other private land owners by the State at the expense and cost of the petitioner or the other beneficiaries of the road is in violation of letter and spirit of Article 300-A of Constitution of India and therefore, the petition ought to be dismissed on this ground alone. The learned counsel for the petitioner on the other hand would argue that petition of the present nature is still maintainable.

I have heard the learned counsel for the parties and have also gone through the records of the case.

7. The learned counsel for the petitioner has vehemently argued that taking into the peculiar facts and circumstances of the case where the construction of the road is for the general public, the same cannot be obstructed by a single individual and if that be so a writ in the nature of mandamus can always be issued directing the respondents to acquire the land since the petitioner and the other beneficiaries, who were always ready and willing and are still ready and willing to bear the cost not only of the acquisition but also of the construction of the road. He in support of his contention has placed reliance upon a three Judges Bench judgement of Hon"ble Supreme Court in Union of India (UOI) and Another Vs. S.B. Vohra and Others, AIR 2004 SC 1402 : (2004) 1 CTC 217 : (2004) 1 JT 38 : (2004) 1 SCALE 131 : (2004) 2 SCC 150 : (2004) SCC(L&S) 363 : (2004) 2 SCR 36 : (2004) 2 SLJ 188 : (2004) AIRSCW 321 : (2004) 1 Supreme 471 more particularly the following observations:-

"28. The broad principles of judicial review as has been stated in the speech of Lord Diplock in Council of Civil Services Unions v. Minister for the Civil Service [(1985) A.C. 374], i.e., illegality, irrationality and procedural impropriety, have greatly been overtaken by other developments as for example, generally not only in relation to proportionality and human rights but also in the direction of principles of legal certainty, notably legitimate expectations.

30. Judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic feature of the Constitution. The Court in exercise of its power of judicial review would jealously guard the human rights, fundamental rights and the citizens' rights of life and liberty as also many non-statutory powers of governmental bodies as regards their control over property and assets of various kinds which could be expended on building hospitals, roads and the like, or overseas aid, or compensating victims of crime (See for example, R. v. Secretary of State for the Home Department ex parte Fire Brigades Union [1995] 2 WLR 1.

31. The Court, however, exercises its power of restraint in relation to interference of policy. In his recent book "Constitutional Reform in the UK" at page 105, Dawn Oliver commented thus:

"However, this concept of democracy as rights-based with limited governmental power, and in particular of the role of the courts in a democracy, carries high risk for the judges - and for the public. Courts may interfere in advisedly in public administration. The case of Bromley London Borough Council v. Greater London Council ([1983] 1 AC 768, HL) is a classic example. The House of Lords quashed the GLC cheap fares policy as being based on a misreading of the statutory provisions but were accused of themselves misunderstanding transport policy in so doing. The courts are not experts in policy and public administration - hence Jowell's point that the courts should not step beyond their institutional capacity

(Jowell, 2000). Acceptance of this approach is reflected in the judgments of Laws LJ in *International transport Roth GmbH v. Secretary of State for the Home Department* ([2002] EWCA Civil 158, [2002] 3 WLR 344) and of Lord Nimmo Smith in *Adams v. Lord Advocate* (Court of Sessions, Times, 8 August 2002) in which a distinction was drawn between areas where the subject matter lies within the expertise of the courts (for instance, criminal justice, including sentencing and detention of individuals) and those which were more appropriate for decision by democratically elected and accountable bodies. If the courts step outside the area of their institutional competence, government may react by getting Parliament to legislate to oust the jurisdiction of the courts altogether. Such a step would undermine the rule of law. Government and public opinion may come to question the legitimacy of the judges exercising judicial review against Ministers and thus undermine the authority of the courts and the rule of law."

8. The learned Senior counsel for respondent No. 5 on the other hand has vehemently argued that his client cannot be deprived of his property only because some moneyed persons are willing to offer the price of his land while the State of its own is admittedly not interested in acquiring the land.

9. I have weighed the rival contentions of the parties and of the considered view that this court is not vested with the jurisdiction to issue direction to the State to acquire third party's land only because the petitioner and other beneficiaries are willing to pay the price of the same, particularly when admittedly, the State of its own is not willing to acquire the land.

10. No doubt, the right to hold property has ceased to a fundamental right under the Constitution of India but then it has been left to the legislature to deprive a person of his property but in accordance with law. This right cannot be exercised by an individual(s) because Article 300-A provides that a person cannot be deprived of his property by executive fiat and it can only be done in accordance with law. No law, no deprivation of property is the principle underlying under Article 300 A of Constitution of India, an executive order depriving of his property without being backed by law is not constitutionally valid. Under this Article right to property is not a human, but also a constitutional right and hence it cannot be taken away except in accordance with law.

11. Taking possession or acquisition should be in the connotation of acquisition or requisition of property for public purpose. The word "law" used in Article 300-A of Constitution of India must be an act of Parliament or of State Legislature, a rule or statutory order having force of law. The deprivation of property as observed earlier shall be only by authority of law, be it an Act of Parliament or State Legislature, but not by executive fiat or an order. Deprivation of property is by acquisition or requisition or taking possession of for public purpose. It is more than settled that in case the owner of the immovable property is interdicted to deal with his property as he likes it would be violative of Article 300-A of Constitution of India.

12. The deprivation of property by a statute within the meaning of Article 300-A generally speaking must take place for public purpose or public interest. The concept of eminent domain, which applies when a person is deprived of his property postulates that the purpose must be primarily public and not primarily of private interest and merely incidentally beneficial to the public. An act or law, which deprives of a person of his private property for private interest will be unlawful and unfair and undermines the rule of law and can be subjected to judicial review.

13. The concept "public purpose" has been given fairly expansive meaning, which has to be justified upon the purpose and object of the Land Acquisition Act as also the policy of the legislation, if any. The public purpose is therefore a condition precedent for deprivation of a person from his property under Article 300-A. Article 300-A would be violated if the provisions of the law authorizing deprivation of property have not been complied with in letter and spirit. The law has to be reasonable and must comply with other provisions of the Constitution.

14. It is now well established that if the cost of acquisition is borne either wholly or partly by the government, the acquisition can be said to be for a public purpose within the meaning of Land Acquisition Act, but if the cost is entire borne by an individual, group of individual(s), or a company etc., then the same cannot be treated to be an acquisition for a public purpose within the meaning of Land Acquisition Act. No doubt, even if a trifling sum or even token or nominal contribution is made by the government, the same is held to be sufficient compliance with the second proviso to section 6 of Land Acquisition Act. In ultimate analysis, an acquisition can only be held to be for public purpose, if only the government comes forward to sanction the payment of a nominal sum towards compensation.

15. Indisputably acquisition of land is an act falling within the purview of eminent domain of the State and it essentially relates to the concept of compulsory acquisition as opposed to voluntary sale. But then the decision to acquire the property has to be of the State and not individual(s).

16. The acquisition of property of respondent No. 5 by proxy acquisition where not only the provisions of the Land Acquisition Act would be invoked but even the cost of acquisition and publication will be paid by some other third agency would in fact mean depriving the respondent No. 5 of his property save and except by authority of law, which would be contrary to the letter and spirit of Article 300 A of Constitution of India.

17. Article 300 A imposes a duty and an obligation that no person can be deprived of his property save by the authority of law. In case such a course is permitted then the same would also be against the very object for which the Land Acquisition Act was enacted. All business, houses individuals etc. would then on their sheer financial strength be able to acquire prime properties. This obviously cannot be permitted as nobody can be permitted to buy others

property without his consent.

18. The government while exercising the power as eminent domain may of its own chose and come to the rescue of the petitioner, but then this court in teeth of Article 300 A is not competent to issue directions to the State to compulsory acquire the land of 5th respondent even despite the fact that petitioner and other beneficiaries are not only willing but are ready to bear not only the cost of acquisition but also the cost of construction of the road. This would mean proxy acquisition, which is prohibited by law.

19. In view of the aforesaid discussion, the preliminary objection raised by the respondents is accepted and the petition is dismissed as being not maintainable, so also all the pending application, if any.