
(2011) 05 UK CK 0083

In the Uttarakhand High Court

Case No : Writ Petition No. 275 (M/S) of 2010

Prem Singh Pawar and Others

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 03-05-2011

Acts Referred:

Constitution of India, 1950 — Article 166

Land Acquisition Act, 1894 — Section 11, 17, 17(1), 17(2), 17(4)

Citation : (2011) 1 UD 473

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—45 Bhumidhars have preferred the instant writ petition for the quashing of the notification dated 18th January, 2010, issued u/s 4(1) of the Land Acquisition Act. The petitioners are Bhumidhars of the land situate at Mauja Sherpur, Pargana Pachhwadon, District Dehradun. A Notification No. 133/1/2010-04(3)/25/09 dated 18th January, 2010 was issued by the State Government u/s 4(1) of the Land Acquisition Act (hereinafter referred to as the "Act") for the acquisition of 17.9343 hectares for the construction of 400/220 KV Sub Station. In the said notification, it was contended that the land was urgently required for a public purpose, namely, for the construction of a Sub Station and that in view of the pressing urgency, it was necessary to eliminate the delay likely to be caused by an enquiry u/s 5A of the Act and therefore, by exercising the powers under Sub-section (4) of Section 17 of the Act, the provision of Section 5A of the Act was dispensed with.

2. According to the petitioner, approximately 85 families of the farmers would be affected by the said acquisition. It was also alleged that the construction and the commissioning of the Sub Station would take between 2 to 21/2 years. It was also stated that pursuant to the notification dated 18th January, 2010, the State Government published the information in the daily newspaper "Dainik Jagran" on

19th February, 2010, i.e., after a month from the date of the issuance of the notification u/s 4(1) of the Act in the gazette.

3. The contention of the petitioner is, that there was no urgency or unforeseen emergency to dispense with the enquiry as provided u/s 5A of the Act, whereas u/s 5A of the Act, an objection by the affected person was required to be given within 21 days. On the other hand, the construction would take about 21/2 years and therefore, it was submitted that there was a total non-application of mind in dispensing with the provision of Section 5A of the Act. It was also urged that the mere fact that the publication was made in a newspaper after one month from the date of the issuance of the notification in the Official Gazette indicates that there was no urgency on the part of the respondents in implementing the project. On these grounds, the petitioners prayed that the notification dated 18th January, 2010 issued u/s 4(1) of the Act be quashed.

4. The acquiring body, namely, the State Government has filed a counter affidavit contending that after the State of Uttarakhand was created in the year 2000, the Government realized that it has no power grid of its own and even though, energy was being generated, but in the absence of a grid, the State Government was forced to transmit the power to a neighbouring State and then arrange power supply to the State of Uttarakhand through their power grid lines, and in this way, there was not only wastage of line losses in the intra-State transmission or purchase of power but also led to loss of time. The State Government contented that the erection of a Sub Station/grid would be the first such grid in the State of Uttarakhand and would reduce the line losses and therefore, the project was one of public importance and urgency. To buttress the contention of the State that the project was of public importance and that the matter was one of urgency which justified the invocation of Section 17 of the Land Acquisition Act, the State Government has annexed various documents showing correspondence between the District Magistrate, Dehradun and the Secretary, Energy, a Department of the Uttarakhand Government.

5. A supplementary counter affidavit was also filed by the State annexing the note files, which are required to be maintained by the Energy Department under the Rules of Business framed under Sub-clause (3) of Article 166 of the Constitution. The stand of the State Government in the counter affidavit and supplementary counter affidavit is clear and explicit, namely, that the reason for the erection of a power grid was to cut the line losses and therefore, was of public importance. Further, the State Government had applied its mind and that there was a subjective satisfaction that the matter was one of urgency and consequently, the State Government was justified in invoking the provision of Section 17(4) of the Act and rightly dispensed the provision of Section 5A of the Act. To support their contention, the State Government has placed reliance upon the letter of the District Magistrate dated 18th March, 2009 to the Secretary, Energy, indicating therein that the agency, namely, the Power Grid Corporation had deposited the amount towards the contemplated compensation to be paid to

the farmers. The District Magistrate, in this letter also, indicated that the acquisition was for a public purpose, namely, for the erection of a power grid which would be the first in the State of Uttarakhand. The District Magistrate, in the said letter, requested that the proceedings under Sections 4(1), 6(1) and 17(4) of the Act should be invoked. In another report, the District Magistrate informed the State Government that the land under acquisition would involve the acquisition of 2 Kachcha houses and 930 trees. By another letter dated 29th May, 2005, the District Magistrate informed the State Government that there was no need to rehabilitate the farmers as they were not being completely evicted and that a consent had been taken from the Forest Department with regard to the existing trees. The documents annexed to the counter affidavit and supplementary counter affidavit reveals that certain queries were made by the State Government vide letters dated 20th May, 2009 and 17 August, 2009, which were duly replied by the District Magistrate vide letters dated 29th May, 2009 and 7th September, 2009. The note files also indicates that certain queries were raised by the State Government with regard to the cutting of the trees.

6. The Power Grid Corporation, which is a Central Government enterprise, has been authorized to erect and construct the power grid. The said respondent also submitted that the acquisition is for a public purpose and that the electricity is a public purpose which is contemplated u/s 17(4) of the Act and that they have made the entire payment of Rs. 5.18 crores to the State Government towards the possible compensation payable to the farmers.

7. In the light of the aforesaid stand, the Court has heard Sri V.K. Kohli, the learned senior counsel assisted by Sri T.C. Pande, the learned Counsel for the petitioners, Sri R.C. Arya, the learned Brief Holder for the State and Sri U.K. Uniyal, the learned senior counsel assisted by Sri Rajendra Singh, the learned Counsel for the respondent No. 3, namely, the Power Grid Corporation of India.

8. The core issue to be decided in this petition is, whether the State Government was justified in invoking the provision of Section 17(4) of the Act and in dispensing with the provision of Section 5A of the Act. In order to appreciate the contention of the learned Counsel for the parties, it is essential that the procedure envisaged under the Land Acquisition Act is explained.

9. u/s 4(1) of the Act, the Government is required to publish a notification declaring its intention to acquire the land for a public purpose. The intention of the Government is required to be published so that it puts an embargo on future dealings by the owners of the said property. Section 5A of the Act contemplates a right of hearing to any person interested in the land and provides for filing objections, which are required to be considered by the competent authority after giving an opportunity of hearing to the interested person. Section 6 provides for a declaration to be made with regard to the requirement of the land for a public purpose. Such declaration is required to be made after the report of the Enquiry Officer u/s 5A of the Act is considered by the appropriate Government. Section 9 of the Act contemplates issuance of a notice to the interested person and Section

11 of the Act provides for an enquiry and an award to be made by the Collector.

10. The aforesaid procedure is the normal mode for acquisition of land under the Land Acquisition Act, but there can be a deviation in exceptional circumstances and the provision of Section 17 of the Act could be invoked. Section 17 of the Act, therefore, becomes relevant, which, for facility, is extracted hereunder:

17. Special powers in cases of urgency.-(1) 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 land needed for a public purpose]. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

(2) Wherever owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, [or the appropriate Government considers it necessary to acquire the immediate possession of any land for the purpose of maintaining any structure or system pertaining to irrigation, water supply, drainage, road communication or electricity,] the Collector may, immediately after the publication of the notice mentioned in Sub-section (1) and with the previous sanction of the appropriate Government, enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances:

Provided that the Collector shall not take possession of any building or part of a building under this Sub-section without giving to the occupier thereof at least forty-eight hours" notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his movable property from such building without unnecessary inconvenience.

(3) In every case under either of the preceding Sub-sections the Collector shall at the time of taking possession offer to the persons interested, compensation for the standing crops and trees (if any) on such land and for any other damage sustained by them caused by such sudden dispossession and not excepted in Section 24, and, in case such offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained.

[(3A) Before taking possession of any land under Sub-section (1) or Sub-section (2), the Collector shall, without prejudice to the provisions of Sub-section (3),-

(a) tender payment of eighty per centum of the compensation for such land as estimated by him to the persons interested entitled thereto, and

(b) pay it to them, unless prevented by some one or more of the contingencies mentioned in Section 31, Sub-section (2), and where the Collector is so

prevented, the provisions of Section 31, Sub-section (2), (except the second proviso thereto), shall apply as they apply to the payment of compensation under that section.

(3-B) The amount paid or deposited under Sub-section (3A), shall be taken into account for determining the amount of compensation required to be tendered u/s 31, and where the amount so paid or deposited exceeds the compensation awarded by the Collector u/s 11, the excess may, unless refunded within three months from the date of the Collector's award, be recovered as an arrear of land revenue.

(4) 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 5A 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 date of the publication of the notification u/s 4, Sub-section (1)].

11. A perusal of Sub-section (1) of Section 17 of the Act indicates that in a case of urgency, the appropriate Government may take possession of the land without making an award. Consequently, under Sub-section (1) of Section 17 of the Act, the appropriate Government is required to decide that there is an urgency in order to invoke Section 17(1) of the Act.

12. Under Sub-section (2) of Section 17 of the Act, a different type of urgency is contemplated, namely, unforeseen emergency where under possession can be taken without waiting for the fifteen-day period as contemplated u/s 9(1) of the Act. Sub-section (4) of Section 17 of the Act provides that where the appropriate Government comes to the conclusion that there exists an urgency or unforeseen emergency as contemplated under Sub-section (1) and Sub-section (2) of Section 17 of the Act, it may direct that the provisions of Section 5A of the Act would not apply and if such direction is given, in that event, the enquiry contemplated u/s 5A of the Act could be dispensed with and a declaration could be made u/s 6 of the Act on the publication of a notification u/s 4(1) of the Act and possession can be taken by the appropriate Government.

13. In the light of the aforesaid provision, namely, Sub-section (1) and (2) of Section 17 of the Act, it is clear that the existence of an urgency or unforeseen emergency is a condition precedent for invoking Section 17(4) of the Act. The counter affidavit and the supplementary counter affidavit of the State make it apparently clear that there was an urgency for the acquisition of the land for a public purpose, namely, for the construction of a Sub Station/Power Grid in the State of Uttarakhand. The documents annexed to the counter affidavit and supplementary counter affidavit gives a clear picture that there was sufficient urgency on the part of the State Government to invoke the provision of Section 17 of the Act. The Court is satisfied that the Government had considered the urgency and had applied its mind to the facts at hand and gave its subjective

satisfaction on the question of urgency in invoking the provision of Section 17 for the acquisition of the land for a public purpose.

14. But, mere existence of urgency or unforeseen emergency is not sufficient to dispense with the provision of Section 5A of the Act, namely, the hearing of the objections contemplated under the said provision. Mere existence of an urgency is not sufficient to dispense with the provision of Section 5A of the Act under Sub-clause (4) of Section 17 of the Act. It requires an opinion to be formed by the State Government to the effect that along with the existence of urgency or unforeseen emergency there is also an eminent need to dispense with the provision of Section 5A of the Act and, for this purpose, the appropriate Government is required to apply its mind on the dispensation of Section 5A of the Act. This view of the Court is fortified by a decision of the Supreme Court in Union of India (UOI) and Others Vs. Mukesh Hans etc., , wherein the Supreme Court held:

32. A careful perusal of this provision which is an exception to the normal mode of acquisition contemplated under the Act shows that mere existence of urgency or unforeseen emergency though is a condition precedent for invoking Section 17(4), that by itself is not sufficient to direct the dispensation of the Section 5A inquiry. It requires an opinion to be formed by the government concerned that along with the existence of such urgency or unforeseen emergency there is also a need for dispensing with Section 5A inquiry which indicates that the Legislature intended that the appropriate government to apply its mind before dispensing with Section 5A inquiry. It also indicates the mere existence of an urgency u/s 17(1) or unforeseen emergency u/s 17(2) would not by itself be sufficient for dispensing with Section 5A inquiry. If that was not the intention of the Legislature then the latter part of Sub-section (4) of Section 17 would not have been necessary and the Legislature in Section 17 (1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically Section 5A inquiry will be dispensed with. But then that is not language of the Section which in our opinion requires the appropriate Government to further consider the need for dispensing with Section 5A inquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while dispensing with Section 5A inquiry does not mean that in and every case when there is an urgency contemplated u/s 17(1) and unforeseen emergency contemplated u/s 17(2) exists that by itself would not contain the need for dispensing with Section 5A inquiry. It is possible in a given case the urgency noticed by the appropriate Government u/s 17(1) or the unforeseen emergency u/s 17(2) itself may be of such degree that it could require the appropriate Government on that very basis to dispense with the inquiry u/s 5A but then there is a need for application of mind by the appropriate Government that such an urgency for dispensation of the Section 5A inquiry is inherent in the two types of urgencies contemplated under Sections 17(1) and (2) of the Act.

15. The said proposition was reiterated by the Supreme Court in Babu Ram and Another Vs. State of Haryana and Another, , wherein the Supreme Court held:

9. In the said decision in Mukesh Hans, this Court had pointed out that mere existence of an urgency or unforeseen emergency was not sufficient in itself to dispense with the provisions of Section 5A of the aforesaid Act. The said right could be dispensed with only after the appropriate Government forms an opinion that along with the existence of urgency u/s 17(1) or unforeseen emergency u/s 17(2), there was also a need to dispense with the provisions of Section 5A.

16. Again, the Supreme Court in Union of India (UOI) and Others Vs. Krishan Lal Arneja and Others, , held:

16. Section 17 confers extraordinary powers on the authorities under which it can dispense with the normal procedure laid down u/s 5A of the Act in exceptional case of urgency. Such powers cannot be lightly resorted to except in case of real urgency enabling the Government to take immediate possession of the land proposed to be acquired for public purpose. A public purpose, however, laudable it may be, by itself is not sufficient to take aid of Section 17 to use this extraordinary power as use of such power deprives a land owner of his right in relation to immovable property to file objections for the proposed acquisition and it also dispenses with the inquiry u/s 5A of the Act. The Authority must have subjective satisfaction of the need for invoking urgency clause u/s 17 keeping in mind the nature of the public purpose, real urgency that the situation demands and the time factor i.e. whether taking possession of the property can wait for a minimum period within which the objections could be received from the land owners and the inquiry u/s 5A of the Act could be completed. In other words, if power u/s 17 is not exercised, the very purpose for which the land is being acquired urgently would be frustrated or defeated. Normally urgency to acquire a land for public purpose does not arise suddenly or overnight but sometimes such urgency may arise unexpectedly, exceptionally or extraordinarily depending on situations such as due to earthquake, flood or some specific time-bound project where the delay is likely to render the purpose nugatory or in fructuous. A citizen's property can be acquired in accordance with law but in the absence of real and genuine urgency, it may not be appropriate to deprive an aggrieved party of a fair and just opportunity of putting forth its objections for due consideration of the acquiring authority. While applying the urgency clause, the State should indeed act with due care and responsibility. Invoking urgency clause cannot be a substitute or support for the laxity, lethargy or lack of care on the part of the State Administration.

17. On the other hand, the provision of Section 5A of the Act is of importance and a valuable right is given to the interested persons whose land is proposed to be acquired. The interest person has a right to file objection. In Mahender Pal and Others Vs. State of Haryana and Others, , the Supreme Court held:

12. Right to file objection and hearing thereof to a notification issued by the

appropriate Government expressing its intention to acquire a property is a valuable right. Such a valuable right of hearing and particularly in a case of this nature could have been taken away only if conditions precedent for exercise of this emergency power stood satisfied. Sub-section (4) of Section 17 of the Act is an exception to Section 5A of the Act.

18. Similar view was also given by the Supreme Court in the case of Mukesh Hans (supra) wherein the Supreme Court held that a limited right was given to the interested person u/s 5A of the Act to object to the acquisition proceedings, which was not an empty formality but a substantive right. The Supreme Court further held that the said right could only be taken away for good and valid reasons. The Supreme Court further held that if the appropriate Government decides to take away this minimal right then its decision to do so must be based on materials on record to support the same bearing in mind the object of Section 5A of the Act.

19. In the light of the aforesaid, the Court is required to find out whether the State Government was justified in dispensing with the provision of Section 5A of the Act by invoking the provision of Section 17(4) of the Act. The formation of the opinion of the State Government and the application of mind can only be assessed by looking into the record which culminated in the issuance of the notification. Various documents and the note sheets have been annexed to the counter affidavit and the supplementary counter affidavit of the State. The Court finds that the entire sequence and chain of events was to show the urgency in acquisition of the land for a public purpose, namely, for the construction of a grid. To that extent, the State Government was justified in showing that it had applied its mind on the urgency u/s 17(1) of the Act, but the Court is constrained to observe that the documents so annexed by the State in their counter affidavit and supplementary counter affidavit does not indicate any formation of opinion to dispense with the provision of Section 5A of the Act. The State Government is completely silent on this issue. No reasons whatsoever has been given to justify dispensation of the provision of Section 5A of the Act. There has been a complete non-application of mind by the State Government in this regard. The Court is of the opinion that the correspondence between the District Magistrate and the State Government and the nothings in the files of the State Government indicates that there is no reference to the need for dispensation of the provision of Section 5A of the Act by invoking Section 17(4) of the Act. This Court is further of the opinion that the decision of the State Government to dispense with the provision of Section 5A of the Act suffers from the vice of non-application of mind and cannot be sustained.

20. For the reasons stated aforesaid, since there was no formation of opinion and there was complete lack of application of mind, the dispensation of Section 5A of the Act was wholly illegal and consequently, the notification dated 18th January, 2010 issued u/s 4(1) of the Act in so far as it relates to the dispensation of Section 5A of the Act is concerned, is quashed to that extent.

21. The writ petition is partly allowed. The Court hereby directs the authorities to give an opportunity to the petitioners and other affected persons to file objections u/s 5A of the Act to the proposed acquisition and the respondents would be at liberty to take consequential steps after disposal of their objections. The petitioners may file objections before the authority concerned on or before 31st May, 2011 and the authority would dispose of the objections of the petitioners and of the affected persons, who are not party before this Court, after giving them an opportunity of hearing and placing their respective cases.

22. In the circumstances of the case, parties will bear their own costs. Certified copy of this order shall be made available to the respective parties within two weeks.