
(2008) 12 AHC CK 0451
In the Allahabad High Court

Radhey Shyam Sh. and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 15-12-2008

Acts Referred:

Land Acquisition Act, 1894 — Section 4, 6

Citation : (2009) 2 AWC 1801

Hon'ble Judges : Sudhir Agarwal, J;S. Rafat Alam, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : Sri Radhy Shyam (Dead) through L.Rs. and Others Vs. State of U.P. and Others, (2011) 4 JT 524 : (2011) 3 RCR(Civil) 96 : (2011) 4 SCALE 677 : (2011) 5 SCC 553 : (2011) 8 SCR 359

S. Rafat Alam and Sudhir Agarwal, JJ.—Heard Sri N.P. Singh, for the petitioners, learned standing counsel for respondent Nos. 1,2, and 3 and Sri Pradeep Kumar, who has put in appearance on behalf of respondent No. 4.

2. The notifications dated 12.3.2008 and 19.11.2008 issued under Sections 4 and 6 of the Land Acquisition Act, 1894 (hereinafter referred to as the "Act") respectively are under challenge in this petition.

3. The State Government has acquired certain land detailed in the aforesaid notifications, copies whereof have been placed on record as Annexures 1 and 2 to the writ petition, for planned industrial development in District Gautambudh Nagar through Greater Noida Industrial Development Authority, which included plots No. 101, 394 and 399 of the petitioners.

4. The notification dated 12.3.2008 published u/s 4 of the Act further states that the Governor being of the opinion that the provisions of Sub-section (1) of Section 17 of the Act are applicable to the land in question as it is urgently required for the planned industrial development in District Gautambudh Nagar

through Greater New Okhla Industrial Development Authority (hereinafter referred to as "G.N.O.I.D.A.") and it is as well necessary to eliminate the delay likely to be caused by an enquiry u/s 5A of the Act and therefore, the Governor is pleased to direct under Sub-section (4) of Section 17 of the Act that the provisions of Section 5A of the Act shall not apply. Therefore, the provisions which permits a tenure holder whose land is sought to be acquired to file an objection so as to pursue the authorities not to acquire his land was dispensed with. The urgency u/s 17 (1) was reiterated in the notification dated 19.11.2008 published u/s 6 of the Act stating that the Governor, being satisfied that the case is one of urgency, is pleased under Sub-section (1) of Section 17 of the Act to direct that the Collector, Gautambudh Nagar, though no award u/s 11 of the Act has been made, may on the expiration of 15 days from the date of publication of the notice mentioned in Sub-section (1) of Section 19 take possession of the land mentioned in the Schedule of the said public purpose. It is not disputed that the petitioners' plots No. 101, 394 and 399 are mentioned in both the aforesaid notification and therefore, have been acquired by the respondents. The learned Counsel for the petitioner vehemently contended that exercise of power u/s 17 (4) of the Act and dispensation of Section 5A is wholly illegal inasmuch as neither there was any material before the State Government to form its opinion that the urgency exists and it is such which deserves dispensation of Section 5A nor, in fact, there was any urgency whatsoever. He, therefore, submitted that non-affording of opportunity to file objection to the petitioners is wholly illegal inasmuch the power u/s 17 (4) cannot be exercised in a mechanical manner unless there exists appropriate material justifying dispensation of Section 5A of the Act. He submitted that the right of property is a fundamental right and the land of the tenure holders cannot be forcibly taken by the State without giving them even a minimum opportunity of hearing, which is contemplated u/s 5A of the Act by taking recourse to Section 17 (4) of the Act unless relevant material is available with the State Government and it has applied its mind thereto. It is further contended that plot No. 394 is an abadi land since residential accommodation has been constructed by the petitioner long back, i.e., for last more than 40 years and they are living with their family therein. In accordance with Government policy, since abadi land is not to be acquired, therefore, the petitioners' land in Plot No. 394 cannot be acquired contrary to the said Government policy. In support of the aforesaid submissions, he placed reliance on the Apex Court's decision in *Om Prakash and Another Vs. State of U.P. and Others*, and *Union of India (UOI) and Others Vs. Mukesh Hans etc.*,

5. Having considered the submissions and after going through the pleadings in the writ petition and the record placed before us, we don't find any substance in any of the submission. On enquiry made by this Court from the learned Counsel for the petitioners as to where he has pleaded that there did not exist any material before the State Government to form its opinion that there exists some urgency and also the need for dispensation of Section 5A by invoking Section 17 (4) of the Act, he could not point out any averment in the writ petition to this

effect, though the entire submission has been made orally. The question as to whether there exists any material before the State Government or not and whether the State Government has applied its mind considering the said material to form opinion about urgency for invoking Section 17 (1) and the need of dispensing enquiry u/s 5A by exercising power u/s 17 (4) of the Act, there has to be a pleading since it is a question of a fact. In the absence of any pleading, it would not be possible for the respondents to give any reply and in the absence of such pleading, the Court also would not be justified in making a fishing and roving inquiry and directing the respondents to place relevant record since investigation in a question of fact, which is not pleaded, is not permissible.

6. Learned Counsel for the petitioners also did not ask for any opportunity to file any supplementary-affidavit making necessary pleading and therefore, this Court is justified to infer that the petitioners, as a matter of fact, are not inclined to aver on affidavit that the State Government has exercised its power u/s 17 (1) and (4) of the Act without any application of mind and without any material on record and in the absence of such pleading, the petitioners cannot be permitted to raise an objection to the acquisition proceedings emanating from such factual aspect.

7. In order to challenge acquisition notification on a ground, which involves investigation into factual aspect, it is incumbent upon the petitioners to make necessary pleadings in the absence whereof the respondents would not have any opportunity to reply the same and this Court also in the absence of pleadings would not be justified in making an investigation of fact, which is not pleaded. In *First Land Acquisition Collector and Others Vs. Nirodhi Prakash Gangoli and Another*, of the judgment, the Apex Court held as under:

4. The question of urgency of an acquisition u/s 17 (1) and (4) of the Act is a matter of subjective satisfaction of the Government and ordinarily it is not open to the Court to make a scrutiny of the propriety of that satisfaction on an objective appraisal of facts. In this view of the matter when the Government takes a decision, taking all relevant considerations into account and is satisfied that there exists emergency for invoking powers u/s 17 (1) and (4) of the Act, and issues notification accordingly, the same should not be interfered with by the Court unless the Court comes to the conclusion that the appropriate authority had not applied its mind to the relevant factors or that the decision has been taken by the appropriate authority mala fide. Whether in a given situation there existed urgency or not is left to the discretion and decision of the concerned authorities. If an order invoking power u/s 17 (4) is assailed, the Courts may enquire whether the appropriate authority had all the relevant materials before it or whether the order has been passed by non-application of mind.... Opinion of the State Government can be challenged in a Court of law if it could be shown that the State Government never applied its mind to the matter or that action of the State Government is mala fide.

8. The Court further held "Even a mere allegation that power was exercised mala

fide would not be enough and in support of such allegation specific materials should be placed before the Court. The burden of establishing mala fides is very heavy on the person who alleges it."

9. Here the petitioners neither have pleaded that there exist no material before the State Government to come to the conclusion that the enquiry u/s 5A should be dispensed with by invoking Section 17 (4) of the Act nor the learned Counsel for the petitioners could place before us any such averment in the writ petition. Though, in Para 11 of the writ petition, an averment has been made that the respondents No. 1 and 2 without the application of mind dispensed with the enquiry on the ground of urgency invoking the power conferred by Section 17 (1) or (2) of the Act, but in the affidavit, the said paragraph has been sworn on the basis of perusal of record. Similarly, in Para 16 of the writ petition, the only averment contained therein is as under:

16. That the said notification u/s 4 of the Act issued by the respondent Nos. 1 and 2 is without application of mind and there was no urgency in the acquisition of land, for the planned industrial development, as the land, as per the master plan-2021 the land of the village Makaura is reserved for "residential" of which the respondent No. 2 invoked Section 17 (1) and Sub-section (4) of the Act by dispensing with an enquiry u/s 5A of the Act. The said action on the part of the respondents are unwarranted and is in gross violation of Articles 14, 19, 21 and 300A of the Constitution. The such illegal act on the part of the respondents show mala fide and their oblique motive to deprive the owners from their houses in order to fulfil their political obligations/promise to the private builders by taking the shelter of Section 17 of the Act by dispensing with the enquiry u/s 5A of the Act as well as overlooked purpose as stipulated in the Master Plan 2021 which in any way do not require any urgent attention.

10. However, in the affidavit, this para has not been sworn at all and in any case with respect to dispensation of enquiry u/s 5A by invoking Section 17 (4) of the Act nothing has been said except that the exercise of power is violative of Articles 14, 19, 21 and 300A of the Constitution.

11. We, therefore, do not find any occasion even to call upon the respondents to file a counter-affidavit placing on record, the material if any for exercising power u/s 17 (1) and (4) of the Act in the absence of any relevant pleading or material and the question of requiring the respondents to produce the original record in this regard also does not arise.

12. At this stage, we may also refer the Apex Court decision in Om Prakash (supra) relied on by the petitioners wherefrom it is clear that specific averments were made in Paras 25 and 26 of the writ petition therein and relevant facts were also pleaded in the writ petition showing that earlier by notifications issued in the year 1976 certain land of village Chhalera Banger was acquired for N.O.I.D.A. invoking Section 17(1) and (4) of the Act. Thereafter, in the year 1987 the acquisition of large track of the land was made by issuing notification u/s 4 on

30.10.1987, and on 14.12.1989 u/s 6, but this time Section 17(4) was not invoked and enquiry u/s 5A was conducted. Thereafter, immediately on 14.12.1989, when Section 6 notification was issued in respect to the aforesaid land, simultaneously, another communication was made by N.O.I.D.A. to Special Land Acquisition Officer requiring 494.26 acres further land in the same village, i.e., village Chhalera Banger and this time the notification u/s 4 was issued on 5.1.1991 invoking Section 17 (4) of the Act and Section 6 notification was issued on 7.6.1992. In the aforesaid background, the petitioners contended that there was no urgency at all and there was no material for dispensing with the enquiry u/s 5A which was not properly replied by the respondents in the counter-affidavit or supplementary counter-affidavit etc., and in these peculiar facts and circumstances, the Apex Court found that dispensation of enquiry u/s 5A was not justified. Further, the Apex Court for this reason alone, however, refused to interfere in the matter considering various other aspect including the fact that the Section 4 notification was issued in 1991 and Section 6 notification was issued after a year, but no such objection was raised by the petitioners before issuance of notification u/s 6 as is evident from the following:

For such a contention, of course, grievance could have been made u/s 5A inquiry if it was held. But that could have been urged years back before Section 6 notification saw the light of the day in 1992.

13. The aforesaid reason supports the well settled principle that in the matter of land acquisition delay in challenging the acquisition proceedings is fatal.

14. In *Kshama Sahakari Avas Samiti Ltd. Vs. State of U.P., Collector, Land Acquisition Officer and Agra Development Authority*, , the Division Bench also in Para 22 of the judgment observed as under:

No doubt the correctness of such a notification can be examined while testing the validity of the declaration issued u/s 6 of the Act. But it is sometimes too late in the day to challenge the same as once a declaration u/s 6 of the Act is issued after invoking urgency provisions, the Collector is entitled and do takes over the possession of the acquired land on the expiry of fifteen days of the notice u/s 9 of the Act. Thus, vesting the land in State free from all encumbrances as even taking of symbolic possession is sufficient to vest the land in the State. Once vesting gets completed, it becomes next to impossible to divest the land to the original owners/tenure holders. Moreover, the Apex Court has repeatedly held that the delay in challenging the notification for acquisition is fatal and if the land acquisition proceedings stood finalized, interference by the Court is not called for. Therefore, the notification issued u/s 17 (4) of the Act is open to challenge independently even before the issuance of the declaration u/s 6 of the Act where prima facie, there is no material before the authorities to record subjective satisfaction about urgency.

15. Similar is the view taken recently by a Division Bench of this Court in *Jasraj Singh v. State of U.P. and Ors.* 2008 (8) ADJ 329 and *Jagriti Sahkari Avas Samiti*

Ltd., Ghaziabad and Anr. v. State of U.P. and Ors. 2008 (9) ADJ 43.

16. So far as the learned Counsel for the petitioner's contention that there is policy of not acquiring land where abadi exists, we find that he could not place any such Government order before this Court. He placed, however, reliance on Para 27 of the judgment in Om Prakash (supra), and said that there the learned Counsel for the N.O.I.D.A. as well as the State of U.P., admitted that there is a policy adopted by the State of U.P., not to acquire the land on which there is abadi and contended that in view of the said admission of fact as noticed in the aforesaid judgment, this Court must presume that this policy is still continuing and exists. The submission is thoroughly misconceived inasmuch in Om Prakash (supra), the acquisition proceedings were initiated in the year 1991, which were up for challenge before the Apex Court. There also, while referring such policy in the year 1991, the Apex Court has further noticed that the said policy is applicable to genuine abadi land on which abadi situate within the village site but not where there are some stray constructions on agricultural lands beyond the village sites they would not be covered by such State policy. Moreover, the Apex Court has not decided this issue as is evident from Para 28 of the judgment observing that it is a disputed question of fact as to whether abadi is such so as to fall within the policy decision of the State Government or not. In Para 31 of the judgment, the Court has also observed that it is also not clear as to whether such policy had continued thereafter at the stage of notification u/s 6, as is evident from the following:

and whether such policy had continued thereafter at the stage of Section 6 notification of 7th January, 1992 and whether such policy is still current and operative at the time when the appellants' representations come up for consideration of appropriate authorities of the State Government.

17. In the present case, after almost 17 years, i.e., in the year 2008, in the absence of any material on record that any such policy exists, no interference is called for this reason alone. Moreover, in the writ petition, the petitioned themselves have admitted that the so called construction in Khasra No. 394 is not a part of the abadi of the village, but it is adjoining the village abadi.

18. Learned Counsel for the petitioners further contended that the constructions made on a land, if so exists, cannot be acquired, but the submission is thoroughly misconceived. We find that under the Act any land can be acquired and there is no such restriction that a land over which a construction exists cannot be acquired. In taking this view, we also find support from the Apex Court decision in Anand Buttons Ltd. Vs. State of Haryana and Others,

19. In view of the aforesaid discussion and considering the facts and circumstances of the case, we do not find any merit in this writ petition and it is, accordingly, dismissed.