

(1971) 09 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : Writ Petition No. 6 of 1970

Sant Ram and others

APPELLANT

Vs

State of Jammu and Kashmir and others

RESPONDENT

Date of Decision : 09-09-1971

Acts Referred:

Constitution of India, 1950 — Article 32(2A)
Land Acquisition Act, 1894 — Section 18

Citation : AIR 1972 J&K 98

Hon'ble Judges : Syed Murtaza Fazl Ali, C.J.; Raja Jaswant Singh, J.; Mian Jalal-Ud-Din, J

Bench : Full Bench

Advocate : D.D. Thakur, for the Appellant; Amar Chand, for the Respondent

Final Decision : Allowed

Judgement

Mian Jalal-Ud-Din, J.—The petitioners have filed this writ petition under Article 32 (2-A) of the Constitution of India read with Section 103

of the Constitution of Jammu and Kashmir for the issuance of a Writ directing the Collector, respondent No. 2 to award compensation of the land

belonging to the petitioners acquired by him by apportioning the amount of compensation according to circular dated 12-8-1965 published in the

Government Gazette No. 20 of 1965 between the petitioners and respondents Nos. 3 to 6, or any other writ or direction as the court may deem

appropriate in the circumstances of the case.

2. The petitioners have averred that Kh. Nos. 202/78, 369/203/78 and 202 Min/79 measuring 28 kanals and 11 marlas situate in village Jakheni

Tehsil Udhampur belonged to the petitioners and the respondent Nos. 3 to 6 are tenants and pay cash rent @ Rs. 18/- per annum. The above

mentioned land was acquired under the Jammu and Kashmir Land Acquisition Act, for the construction of grid station at Udhampur, and that a

draft award was prepared by the Collector respondent No. 2. It was submitted to the Secretary to Government Revenue Department on 16-8-

1969 for approval of the Revenue Minister who accorded his approval vide his No. Rev. (LA) 304/69. The award was announced on 15-10-

1969. The total amount of compensation awarded was Rs. 69,406.25. Respondent No. 2 prepared apportionment statement of compensation

which was to be treated as a part of the award announced on 15-10-1969 (vide Annexure 'A'). Respondent No. 2, however, omitted to

apportion the amount of compensation between the petitioners (the landlords) and the respondents Nos. 3 to 6 (the tenants). The award as such is

an incomplete document and could not be sustained. Reference u/s 18 of the Land Acquisition Act in so far as it relates to the disputes regarding

the apportionment could not be possible in the absence of a decision regarding apportionment. After the passing of the award when the petitioners

approached the Collector respondent No. 2 with a request for the disbursement of the amount of compensation to them, the Collector offered to

the petitioners only 18/73 shares of the total amount of compensation and 55/73 shares were offered to the tenants. The basis of the

aforementioned apportionment even though unwritten was, according to respondent No. 2 the Circular No. 3 dated 26th August 1969 issued on

8th September 1969 (vide Annexure 'C'). Before the issuance of the circular Annexure 'C' the relevant provision regarding apportionment was

contained in the circular in the form of instructions dated 12-8-1965 published in the Government Gazette No. 20 of 1965. Para. No. 3 of the

aforementioned circular reads as under :-

Apportionment in the case of holdings under protected tenants :-

(i) In case of holdings under protected tenants the apportionment between the landlord and tenant shall respectively :-

(a) Where the tenants pay one half of the produce or its equivalent in cash as rent be 90% and 10%;

(b) Where the tenant pays 2/3rd of the produce or its equivalent in cash as rent be 85% and 15%;

(c) Where the tenant pays 1/4th of the produce or its equivalent in cash as rent

be 80% and 20 %; and

(d) Where the tenant pays only revenue at Parta Deh rates be 75% and 25%.

(ii) In all other cases where the rates of rent may be different the aforementioned percentage as laid down in sub-parts (I) will guide the calculation of apportionment, etc. etc.....

.....

It is further averred that the draft award having been prepared and submitted by the Collector respondent No. 2 on 16-8-1969 the apportionment

had to be done according to the provisions contained in the above mentioned circular which was in force at the time of the draft award and was

superseded only by the circular of 1969. The apportionment as made in respect of the amount of compensation between the petitioners and the

respondents 3 to 6 according to the circular No. 69 of 1969 is illegal and without Jurisdiction. The circular of 1969 apart from being inapplicable

to the case of the petitioners, is ultra vires of the provisions of the Land Acquisition Act and amounts to an offensive piece of delegated legislation

inter alia on the following grounds:-

(a) That Section 53 of the Land Acquisition Act conferring power on the Govt. to frame rules makes it obligatory on the Govt. to make rules

consistent with the principal Act and for the purpose of guidance of the officers in all matters connected with its enforcement, and the same are to

be published in the Government Gazette. The aforesaid circular was never published in the Govt. Gazette, therefore omission on the part of the

Government to have the circular published in the Government Gazette rendered it wholly ineffective and unenforceable. The apportionment of

compensation between the landlords and the tenants in respect of the land acquired by the Collector, quantum of compensation for the landlord

and the tenants affected the substantive rights of the parties which could be done by the Legislature itself and not by an Executive fiat. The scope of

Section 53 therefore was not wide enough so as to include the power of creating substantive rights. The Section confers unfettered powers on the

Government without laying rational and guiding principle for the executive Government to exercise the powers. The power, it is averred, is hit by

Art. 14 of the Indian Constitution. The circular is in the form of instructions and as such cannot have a legislative effect so as to avoid the passing of

the necessary legislation. The apportionment in the manner proposed by the Collector orally amounts to violation of fundamental rights of the petitioners in regard to the immovable property inasmuch as the share of compensation offered to them can hardly be said to be adequate compensation for the ownership rights which would stand extinguished on the completion of the acquisition proceedings. The petition is supported by an affidavit. Along with the petition the petitioners have filed Annexure 'A' copy of the final award, Annexure 'B' apportionment statement for the land in dispute and Annexure 'C' the impugned circular.

3. The respondents filed their objections through Raizada Amar Chand Addl. Advocate General. The respondents have questioned the maintainability of the petition on the ground that the petitioners did not pursue the remedy available u/s 18 of the Jammu and Kashmir Land

Acquisition Act. It is, however, admitted that the land was acquired and award made after obtaining approval of the Revenue Minister. It is

conceded that the respondent No. 2 apportioned the compensation between different persons interested in accordance with the impugned circular.

The petitioners did not raise any objection at the time of filing their objections with regard to apportionment of compensation between the landlords

and tenants. The impugned circular has superseded and has replaced the earlier instructions contained in circular of 1965 relating to apportionment

of compensation. It is, however, admitted that the impugned circular was not published in the Government Gazette. About the impugned circular it

is stated that it contains only executive instructions issued by the respondent No. 1 for guidance of collectors and therefore it is not necessary under

law to publish the same in the Government Gazette. The above circular is legally valid and binding upon respondent No. 2 in spite of the fact that it

was not published in the Government Gazette. Respondent No. 1 was fully competent to issue impugned circular. It is denied that Section 53 of

the Land Acquisition Act is hit by Art. 14 of the Constitution of India, it is denied that the circular in any way offends the provisions of the

Constitution. Later on additional objections were filed by the State to the effect that the impugned circular was published in the Government

Gazette on 24th December 1970 (that is after the writ petition was admitted). By the above publication in the Government Gazette the impugned

circular has acquired the force of rule made u/s 53 of the Land Acquisition Act. A supplementary affidavit from S. Sohan Singh Secretary to

Government Revenue Department was also filed along with the additional objections.

4. The case originally came up for hearing before my learned Brother Jaswant Singh, J. The points raised were that the Government was not

competent to issue executive instructions relating to apportionment of compensation payable for the land acquired under the provisions of Jammu

and Kashmir Land Acquisition Act amongst the persons interested in such land; that the impugned circular was invalid and it not only affected the

rights of the parties but also the discretion of the Collector under S. 11 of the Act. The instructions contained in the impugned circular could not be

characterised as rules u/s 53 of the Land Acquisition Act as it had not been made after the previous publication.

5. Considering all these matters that were raised before him, my learned Brother was of the opinion that these points were of great importance and

required authoritative pronouncement and therefore he referred the case to the Hon'ble Chief Justice who was pleased to refer this case to the Full

Bench for determination of these points, and for disposal of the petition.

6. We have heard the learned counsel for the parties at great length.

7. Appearing for the petitioners Mr. Thakur has submitted that the award was announced by the Collector on 15-10-1969, but the Collector

omitted to apportion the amount of compensation between the landlords and the tenants i.e. the petitioners and respondents 3 to 6. The award

could not therefore be said to have been made in pursuance of Section 11 of the Land Acquisition Act as it was an incomplete document. An

obligation was cast under the Section on the Collector to apportion the amount of compensation amongst the interested persons. Nor was this

notified to the interested persons with the result that no reference regarding the dispute of apportionment could be made u/s 18 of the Land

Acquisition Act to the Civil Court. It was only after the passing of the award that the Collector when approached by the petitioners for the

disbursement of the amount of compensation offered to the petitioners only 18/73 share out of the total amount of compensation and he reserved

55/73 shares for the tenants. The Collector informed the petitioners that his

basis of the apportionment was the circular of 26th, August 1969 (Annexure 'C'). It is contended that this Government circular has not force of law. Even if it be assumed that this circular was issued by the Government in exercise of the powers vested in it u/s 53 of the Land Acquisition Act nevertheless this could not acquire the statutory force inasmuch as it was not published in the Government Gazette and also it fettered the judicial discretion of the Collector. Attention is invited to an earlier circular of the Government dated 12-8-1965 which was published in the Government Gazette. It is submitted that it was most appropriate on the Part of the Collector to have disbursed the amount of compensation in accordance with the instructions laid down in this earlier circular which had acquired the force of rules u/s 53 of the Jammu and Kashmir Land Acquisition Act. The manner in which the impugned circular has been issued and the way in which the Collector has proceeded in the matter has adversely affected the proprietary rights of the petitioners. It is a case where the fundamental rights of the petitioners have been violated. Mr. Thakur has further submitted that the court may declare the impugned circular of 1969 (Annexure 'C') as ultra vires and therefore liable to be quashed and the Collector also directed to pass a fresh award in the case in which the question relating to apportionment of compensation amongst the parties could be decided in pursuance of Section 11 of the Land Acquisition Act and the rules made thereunder.

8. As against this Mr. Amar Chand counsel for the respondents has questioned the maintainability of the petition on the ground that the petitioners remedy in the matter was not by way of writ but by way of asking the Collector to make a reference to the Civil Court u/s 18 of the Jammu and Kashmir Land Acquisition Act. As the petitioners have failed to avail of this remedy in time, therefore the present petition cannot lie. It is further submitted that the petitioners did not object to the apportionment of compensation at the time of filing of the objections when the question of apportionment of compensation between the persons interested was determined in accordance with the instructions laid down in the impugned circular. The position is not, however, denied that the impugned circular was not published in the Government Gazette and therefore it has not acquired the force of a rule, but notwithstanding this the circular is valid and

binding on the Collector as in this document executive instructions have been laid down by the Government for the guidance of Collectors. Even this circular was later on published and now it would be deemed to be a rule on the subject in pursuance of the provision of Section 53 of the Land Acquisition Act. The circular does not, it is urged, offend any of the provisions of the Constitution.

9. I have given my thoughtful consideration to the points raised at the bar. It is true that the Collector while making the award has failed to decide the question of apportionment of compensation between the landlords and the tenants. u/s 11 of the Land Acquisition Act it is the statutory responsibility of the Collector to proceed to enquire into the respective merits of the claims of the interested persons regarding compensation.

While making the award under this Section the Collector has to indicate therein:-

- (1) The true area of the land acquired,
- (2) the compensation which in his opinion would be allowed for the land and
- (3) the apportionment of the said compensation among all the persons known or believed to be interested in the land of whose claims he has information whether or not they have respectively appeared before him.

The last requirement contained in para 3, it seems, has not been fulfilled by the Collector. The draft award was prepared and sent to the Revenue

Minister for his sanction on 16-8-1969. After the sanction was accorded it was announced on 15-10-1969. The impugned circular No. 3 though

bearing the date of 26th August, 1969 was in fact issued on 8-9-1969. From this it is clear that when the draft award was prepared and sent to the

Revenue Department on 16-8-1969 at that time the impugned circular had not seen the light of the day. If the Collector had followed the

provisions of Section 11 in time while making the award and had made apportionment of compensation he would have necessarily followed the

instructions as laid down in the earlier circular of 1965, but because of his omission to do so he had later on to take resort to and seek guidance

from the impugned circular of 1969. The statement of compensation appended with the case file shows that no apportionment was made by the

Collector between the landlords and the tenants when he finally announced the award (vide Annexures 'A' & 'B'). Section 18 of the Land

Acquisition Act gave the petitioner a right to ask the Collector to refer the dispute regarding apportionment of compensation to the Civil Court.

This of course the petitioners could have done within the prescribed time of six weeks as laid down in Section 18. That time had already expired. It

is to be seen now as to what course of action is open to the petitioners and to the Collector in the context of the matter. This also brings us to the

consideration of the question as to what is the nature and legal effect of the impugned circular and how, it affects the powers of the Collector.

10. In my opinion it must be laid down that the impugned circular has got no statutory force and the same is not binding on the Collector. u/s 53 of

the Land Acquisition Act the Government has got power to make rules consistent with the Act for the guidance of the officers in all matters

connected with its enforcement and it has got power to make, alter or add to the rules, but all such rules require to be published in the Government

Gazette in order to acquire the force of law. In the instant case it is conceded that at the time when the award was made or even the apportionment

of compensation was made the impugned circular had not acquired the force of law inasmuch as it had not been published in the Gazette.

Therefore when the circular has no statutory force, the question is: are the powers and the judicial discretion of the Collector fettered by the

executive instructions? In my opinion they are not. The circular has got no legal or binding force on the Collector especially in a case where right to

property is involved. It is true that the impugned circular was later on published on 24th of December 1970 but that will not improve the position as

the circular had not acquired the force of rule at the time when the award was made and when money was offered to the petitioners. The argument

of Mr. Amar Chand that although the impugned circular was not published in the Government Gazette yet it was valid and binding on Collectors

and could be pressed into service by them because it contained executive instructions for the guidance of Collectors which the State Government

was competent to lay down does not appeal to me. I am not able to subscribe to this view because the fundamental rights of a citizen cannot be

abridged by an executive fiat. In this context it is useful to reproduce the observations made by Shah, J. (as His Lordship then was) in AIR 1967

SC 1170 on page 1178.

We (in India) have adopted under the Constitution not the continental system but the British system under which the rule of law prevails. Every Act

done by the Government or its officers must if it is to operate to the prejudice of any person be supported by some legislative authority.

The above observations were made after examining the provisions of Art. 162 of the Constitution of India which provides that subject to the

provisions of the Constitution the executive power of the State shall extend to the matters with respect to which the legislature of the State has

power to make laws. His Lordship observed that the observations of Mukerjee, C. J. in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State*

of Punjab, , which were relied upon by the Counsel for the State in that case had restricted application. The observations made to the effect that

powers of the State Executive did extend to matters upon which the State Legislature was competent to legislate and were not confined to matters

over which legislation had been passed already were not to be construed as laying down a broad proposition of law. Those observations had to be

read in the light of the facts of that case. 'The executive action in that case *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*,

which was upheld was, it was true, not supported by any legislation but it did not operate to the prejudice of any person'. Their Lordships in AIR

1967 SC 1170 were clearly of the view that viewed in the light of those facts the observations made in *Rai Sahib Ram Jawaya Kapur and Others*

Vs. The State of Punjab, did not support the contention that the State or its officers might in exercise of executive authority infringe the rights of a

citizen merely because the legislature of the State has the power to legislate in regard to the subject on which the executive order is issued. In the

instant case the impugned circular does operate to the prejudice of the petitioners and therefore the executive action or direction given in the

unpublished circular cannot be upheld.

11. As regards the course of action to be followed by the petitioners or the Collector in the case. Section 30 of the Land Acquisition Act is clear.

That section is wide enough to cover the case of the petitioners. Section 30 provides that when the amount of compensation has been settled u/s

11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the person to whom the same or any part thereof is

payable the Collector may refer such dispute for the decision of the Court.

11-A. In this connection it is useful to reproduce the following passage from Dr. G.H. Grant Vs. State of Bihar, :-

There are two provisions, Ss. 18 (1) and 30 of the Act which invest the Collector with powers to refer to the Court a dispute as to apportionment

of compensation or as to the persons to whom it is payable. The Collector is enjoined u/s 18 (1) to refer a dispute relating to apportionment, or

title to receive compensation, on the application within the time prescribed by Sub-section (2) of that section of a person interested who has not

accepted the award. The Collector is authorised u/s 30 to refer to the Court after compensation is settled u/s 11 any dispute relating to

apportionment of the same or any part thereof or relating to the persons to whom the same or any part thereof is payable. A person who is shown

in that Part of the award which relates to apportionment of compensation and who is present either personally or through a representative, or on

whom a notice is served under sub-section (2) of S. 12, if he does not accept the award, must apply to the Collector within the time prescribed

under sub-section (2) of S. 18 to refer the matter to the Court. But a person who has not appeared in the acquisition proceeding before the

Collector, if he is not served with notice of the filing, may raise a dispute relating to apportionment or to the persons to whom it is payable, and

apply to the Court for a reference u/s 30 for the determination of his right to compensation which may have existed before the award, or which

may have devolved upon him since the award. Under S. 18 an application made to the Collector has to be made within the period prescribed by

clause (b) of sub-section (2) of S. 18. But no such period is prescribed u/s 30. Again where as u/s 18 the Collector is bound to make a reference

on a petition filed by a person interested, the Collector is, u/s 30, not enjoined to make a reference, he may relegate the person raising the dispute

to agitate the same in a suit and pay the compensation in the manner declared by his award. The powers which are exercised by the Collector u/s

18 (1) and under S. 30 are distinct and may be invoked in contingencies which do not overlap.

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The Collector is not authorised finally to decide the conflicting right of the

persons interested in the amount of compensation. His primary concern is with the acquisition of the land. It is true that while determining the amount of compensation which may be offered, he has to apportion the amount of compensation between the persons known or believed to be interested in the land, or whom, or of whose claims, he has information, whether they have appeared before him or not. But the apportionment by him does not determine finally the rights of the persons interested in the amount of compensation; as award is only conclusive between the Collector and the persons interested and not among the persons interested. The Collector has no power to adjudicate finally upon the title to compensation that dispute has to be decided either in a reference u/s 18 or u/s 30 or in a separate suit. Consequently the payments of compensation u/s 31 to the persons declared by the award to be entitled thereto discharges the State of its liability to pay compensation (subject to any modification by the Court), leaving it open to the claimant to compensation to agitate his right, though devolved on him after the award in a reference u/s 30 or by a separate suit.

Again in AIR 1926 321 (Lahore) where the Collector had not adjudicated upon the claims of different claimants in respect of apportionment before the award was made but he adjudicated the dispute after the award was made it was held that Collector's adjudication was without Jurisdiction, and it was further held that the application presented before the Collector for adjudication of the respective claims which were made before the award was filed, should have been referred to the Civil Court u/s 30 of the Land Acquisition Act.

12. Again in AIR 1941 268 (Lahore) , a Division Bench of the Lahore High Court opined:-

The three main points of distinction between Sections 18 and 30 are that Section 30 leaves the Collector with a power of discretion in the matter which he does not possess u/s 18; that the subject-matter of reference u/s 30 is limited to cases in which Government is not directly interested; and that Section 18 alone contains a definite provision for limitation. No specific time is provided within which a reference u/s 30 should be made when the question is purely one of title, it is open to the Collector to forward the reference whether the period has expired or not.

When a statute confers an unqualified discretion upon some authority, this is usually interpreted as meaning that the authority may act either entirely

on his own motion or upon being moved by some interested party, and his powers are regarded as limited if this is required by some necessary

implication. No such implication arises in Section 30. Section 30 simply means that the Collector must refer a question of title if required to do so

by an application received within the prescribed time, but if an application is received after that time, he then has the option of referring the matter

to District Judge or refusing to do so; and if the Collector while forwarding the reference himself mentions that the application is received after the

prescribed time, it is to be presumed that he is intentionally making a reference under S. 30.

The propositions enunciated above would make it clear that the Collector has got power u/s 30 of the Land Acquisition Act to refer the dispute of

apportionment to the Civil Court and his power to do so is unfettered by any statutory inhibition.

13. The result is that the petition is allowed and the order of the Collector apportioning the amount of compensation between the petitioners and

the tenants is hereby quashed. It will be open to the petitioners to move the Collector u/s 30 of the Land Acquisition Act for referring the matter

relating to the apportionment of compensation to the Civil Court. Having regard to the fact that the Collector, as found by us, was guided by a

legally erroneous consideration in passing the order of apportionment (i.e. by relying on the circular of 1969 which has been held by us to be

illegal) and also having regard to the fact that the Collector did not pass an order of apportionment as required by Section 11 of the Act at the time

when he gave the award, this is a fit case in which the Collector would seriously consider the desirability of making a reference to a Civil Court

after he makes a fresh apportionment order, if and when he is moved in the matter by the petitioner u/s 30 of the Act. Pending final decision by the

Collector under S. 30 of the Act, he is restrained from disbursing the amount of compensation to any of the parties.

S.M.F. Ali, C.J.

14. I agree.

Jaswant Singh, J.

15. I agree.

Petition allowed.