
(2019) 02 J&K CK 0125

In the Jammu And Kashmir High Court

Case No : Other Writ Petition (OWP) No. 1191 Of 2018, IA No. 01, 03 Of 2018

Shahmala Begum & Ors

APPELLANT

Vs

State Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 26-02-2019

Acts Referred:

Land Acquisition Act, 1894 — Section 4(1), 4(1)(a), 5A, 5A(2), 6, 9

Citation : (2019) 02 J&K CK 0125

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Nissar Ahmad Bhat, N. H. ShahM. A. Chashoo, Shuja Ul Haq

Judgement

1. The petitioners claim that they are owners in possession of agriculture land measuring 05 Kanals and 19 Marlas comprising Survey No. 263 situated at Mozia Berigam, Tehsil Devsar, District Kulgam.

2. It is pleaded that some influential persons living in their vicinity have an evil eye on their land, and many a times have tried to grab it.

3. It is stated that these 4 /5 influential families who too have their agriculture land at Berigam adjacent to the land of the petitioners intend to have better approach to the main road, even though, they have a separate approach to their land. Initially they tried to convert the land of the petitioners into their pathway, but their effort was resisted by the petitioners. It is alleged that these persons with the help of sitting minister ultimately prevailed upon the official respondents and got the road sanctioned which would cross over the land of the petitioners. The process for acquisition of the land for construction of the road was set in motion by the respondent no. 4 by issuing Notice under section 4(1) of the Land Acquisition Act (for short "Act") on 28th August, 2017, which appeared in the Daily Srinagar Times on 30th August, 2017. By virtue of the said notification, the land measuring 16 Marlas falling under survey No. 263 belonging to the petitioners has also been notified for acquisition. The petitioners claim that they

objected to the acquisition and submitted detailed objections to the respondent no. 4, taking therein a specific plea that the land sought to be acquired is only at the instance of and for the benefit of few individuals and is not for any public purpose. The respondent no. 4 did not pay any heed to the objections of the petitioners, which constrained them to file OWP No. 1541/2017 seeking quashment of Notice dated 28th August, 2017 issued by respondent no. 4 in terms of Section 4(1) of the Act. The writ petition was disposed of by this Court vide its order dated 04th October, 2017, directing the respondent no. 4 to hear the objections submitted by the petitioners in terms of Section 5A of the Act and proceed in the matter in accordance with law. The petitioners were also given opportunity to participate in the hearing before the respondent no. 4.

4. It is contended that the respondent no. 4 did not consider the objections filed by the petitioners in proper perspective nor procedure prescribed under Section 5A of the Act was followed. The respondent no. 4 rejected the objections without indicating any reasons and without dealing with them on the merits. It is also submitted that decision on the objections raised by the petitioners was required to be taken by the Government and not by the respondent no. 4 who was only supposed to forward his report along with the objections etcetera to the Government for appropriate decision. It may be relevant to note that before respondent no. 4 could take any decision on their objections to the acquisition of the land, the petitioners once again approached this Court by way of OWP No. 1935/2017, in which this Court vide its order dated 24th November, 2017, directed the respondents to strictly follow Section 5A of the Act and proceed further and file compliance report within two weeks.

5. The petitioners allege that the respondents did not consider their objections in proper perspective and took a decision in terms of Section 5A of the Act and proceeded to issue declaration in terms of Section 6 of the Act that the land measuring 01 Kanal, 05 Marlas and 07 Sirsai, which includes the land of the petitioners as well, is required for the public purpose viz construction of the road from main road Berigam to Gundipora. This has been done by the respondent no. 1 vide his Notification No. 194-Rev (LAJ) of 2018 dated 25th April, 2018 which is impugned in this writ petition.

6. The petitioners have assailed the notification impugned, inter alia on the ground that no notification in terms of Section 6 of the Act could have been issued by the respondent no. 1 without first disposing of the objections of the petitioners in terms of Section 5A of the Act. Referring to the Provisions of Section 5A of the Act, it is contended that the respondent no. 4 who disposed of the objections of the petitioners vide his order No. DCK/LA-552/2017/737 dated 02.10.2017, is not competent authority under the Act to do so and it was for the Government to take a decision on the basis of the record of enquiry, if any, conducted by the respondent no. 4. The order impugned has, further, been assailed on the ground that the rejection of the objections of the petitioners by the respondent no. 4 is not supported by any reasons and the objection taken to

the land acquisition by the petitioners has not been adequately dealt with. The objections of the petitioners have been disposed of by the respondent no. 4 only on the ground that amongst the land owners whose land has come under acquisition, there is division of opinion. Some have favoured the acquisition and some are opposed to it. But the real objection of the petitioners that acquisition is not for the public purpose, but is aimed at conferring benefit upon some influential persons in the locality has not been addressed nor the issue as to whether there is other access to the houses of the beneficiaries of the construction of road has been dealt with.

7. Respondent no. 3, amongst official respondents, has filed objections in the matter.

8. The stand taken by the respondents in the objections is, that the issue as to whether any acquisition proceedings taken by the Government are aimed at achieving public purpose or not, is not justiciable. The respondents have placed reliance upon the judgement of this Court in the case *Mushtaq Ahmad Wani versus State of J&K and Ors*, 2009 (2) JKJ 440 [HC], in which a Single Bench of this Court in Para 8 and 9 has held thus:

"... (8). It is for the Government/State to take a decision. Any person interested or aggrieved cannot challenge the decision of the Government on the ground that acquisition is not for public purpose except on the ground of malafide. In the instant case, no doubt, the petitioner has half-heartedly stated that action is outcome of malafide consideration but against whom malafide is attributed is neither a party nor his name is indicated. Thus, petitioner has no right to question the acquisition proceedings and dispute the decision of the Government viz-a-viz public purpose.

(9). My this view is fortified by the Apex Court judgment delivered in case title *Daulat Singh Surana & Ors V. First Land Acquisition Collector & Ors*, reported as 2006 AIR SCW 5879. It is apt to reproduce para Nos. 60,66,73 of the said judgment herein:

"60. The Constitution Bench of this Court in *Somawanti* (supra) observed that whether in a particular case the purpose for which land was needed was a public purpose or not was for the Government to be satisfied about and the declaration of the Government would be final subject to one exception, namely that there was a colourable exercise of the power the declarations would be open to challenge at the instance of the aggrieved party.

66. In *Laxman Rao Bapirao Jadhav v. State of Maharashtra* reported in (1997) 3 SCC 493, this Court observed that "it is for the State Government to decide whether the land is needed or is likely to be needed for a public purpose and whether it is suitable or adaptable for the purpose for which the acquisition was sought to be made. The mere fact that the authorized officer was empowered to inspect and find out whether the land would be adaptable for the public purpose, it is needed or is likely to be needed, does not take away the power of the

Government to take a decision ultimately."

73. Public purpose cannot and should not be precisely defined and its scope and ambit be limited as far as acquisition of land for the public purpose is concerned. Public purpose is not static. It also changes with the passage of time, need and requirement of the community, Broadly speaking, public purpose means the general interest of the community as opposed to the interest of an individual".

9. It is further pleaded in the objections that though the petitioners have challenged the declaration made by the Government under Section 6 of the Act, but they have not called in question subsequent Notification issued under Section 9 of the Act, which renders the petition not maintainable.

10. Other allegations levelled by the petitioners in their petition that the road has been sanctioned for the benefit of few influential individuals has been refuted. It is claimed that the road, if constructed, would take care of 50 families and their school going children and is therefore, in the larger public interest.

11. The respondents 6 and 7 who came to be impleaded later on in this petition pursuant to the Division Bench direction dated 11.10.2018 passed in MCC No. 17/2018 have also filed their objections. The objections filed by the respondents 6 and 7 are also on the similar lines and the allegations that the road in question has been sanctioned to sub-serve their personal interest, have been denied.

12. Having heard learned counsel for the parties and perused the record, it is seen that the decision in this writ petition would primarily turn on the interpretation of Section 5A of the Act and therefore, it is necessary to first set out the aforesaid provision:

"...5-A. Hearing of objection, (1). Any person interested in any land which has been notified under Section 4, sub-section (1), as being needed or likely to be needed for a public purpose may within fifteen days after such land is notified in the manner prescribed in clause (a) of sub-section (1) of Section 4 as being needed or likely to be needed for a public purpose, object to the acquisition of the land or of any land in the locality, as the case may be.

(2). Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard either in person or by pleader or by a person authorised by him and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, submit the case for the decision of the Government, together with the record of the proceedings held by him and a report containing his recommendations on the objections. The decision of the Government on the objections shall be final.

(3). For the purpose of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act".

13. From the reading of section 5A, it is evident that the interested persons whose land has been notified for acquisition under Section 4(1) of the Act are well within its rights to object to the acquisition and every objection filed before the Collector, is to be enquired into. The Collector is also obliged to give objectors an opportunity of hearing either in person or by pleader or any person authorised by him. The Collector after hearing of the objections and after making such further enquiry as he thinks necessary, shall submit the case for the decision of the Government. The record of the proceedings held by him and report containing his recommendations on the objections is also required to be forwarded to the Government to take a final decision in the matter. The decision of the Government on the objections is final. By very nature of provision. It is clear that its compliance is mandatory.

14. The Collector himself is not a competent authority to take final decision on the objections of the objector. Although, he is required to prepare a report which shall also contain his recommendation on the objections. It is, then, for the Government to apply its own mind to the material contained in the report and take a decision either by accepting or rejecting the recommendations. As is held in the case of *AvtarKrishan& Ors versus State of J&K and Ors*, 2011 (3) JKJ 98 {HC}, when the law provides a particular thing to be done in the particular manner, the same is to be done in the manner provided or not done at all. It is thus clear and emphatic that the Collector is not the competent authority to take a final decision on the objections of the petitioners. Para 12 of the Judgement rendered in the case of *Avtarkrishan (supra)* is worth taking note of and the same is reproduced hereunder:

"...Plain reading of the provision would suggest that compliance is mandatory i.e. when the Collector has received the objections in writing from the objectors, they have to be given an opportunity of being heard, either in person or by a pleader or by a person authorized, and it is only after hearing of such objections and making further enquiries, as may be required, the Collector has to submit the case for the decision to the Government together with the record of the proceedings held by him and he is required to formulate a report containing his recommendations on the objections and then whatever shall be the decision of the Government on such objections shall be final. What is required to be done, Collector in any case has to hear the objectors and while hearing shall also, if need arises, make further enquiries as he may think necessary and then has to submit the case to the Government. The Collector himself is not competent to take any decision on the objections of the objectors. All that he is required to do is to prepare the report which shall contain his recommendations on the objections. It is then for the Government to accept or reject such recommendations and the decision of the Government on the objections so filed by the objectors is final. When the law provides a particular mode to be adopted, same has to be adopted. There is no question of deviation as same may defeat the purpose".

15. In the light of the judgment rendered in the case of Avtar Krishan when the case in hand is examined, it is seen that the petitioners have taken specific objection to the acquisition of the land on the ground that the same is not for any public purpose, but is for extending the benefit to few individuals and therefore, falls foul of the provisions of the Land Acquisition Act. As is evident from the order of the respondent no. 4 dated 02.10.2017, the objections were enquired into and even statements of the objectors and few others were recorded. The report of Tehsildar, Devsar was also sent for by the respondent no. 4. The communication dated 02.10.2017, however, does not reflect any recommendations made by the respondent no. 4 to the Government. How the Government has dealt with the report, if any, submitted by the respondent no. 4 is, thus, required to be examined.

16. Perusal of the Notification No. 194-Rev(LAJ) of 2018 dated 25th April, 2018, which is impugned in this petition reveals that some report had been furnished by the District Collector (DC), Kulgam endorsed by Divisional Commissioner, Kashmir and Financial Commissioner, Revenue to the Government which was examined and the objections filed by the owners are stated to have been disposed of in accordance with the rules. The relevant extract of the order impugned which deals with the issue needs to be reproduced:

"...Whereas, the District Collector (DC) Kulgam vide No. DCK/LA-552/2017/764-68 dated 12.12.2017 has reported that the notification issued under section 4(1) of the J&K State Land Acquisition Act by him was served upon the interested persons for filing objections, if any, to the proposed acquisition, and Mohd Ismail Dar and others had filed objections within the prescribed period and after examination which were disposed of in accordance with the rules.

Whereas, the report furnished by District Collector (DC) Kulgam, vide above referred letter duly endorsed by the Divisional Commissioner, Kashmir, vide No. Div/Com/LAS-Const/3263/4071 dated 10.03.201 and Financial Commissioner, Revenue vice No. FC-LS/LA-4631/2018 dated 03.04.2018 has been examined and it has been found that the land owners had filed objections and after examination which were disposed of in accordance with the rules".

17. This, by no stretch of imagination or reasoning can be said to be appropriate disposal of the objections filed under Section 5A of Act. There is, absolutely, no application of mind on the part of the Government. Rather, it appears that the respondent no. 1 has presumed that the objections have been dealt with and disposed of by the Collector and therefore, he was not required to apply his mind and take a decision. It is noted that the decision of the respondent no. 4 completely sans objectivity and is totally perfunctory in nature. It cannot be said to be compliance of the Section 5(A) of the Act. Needless to say that failure to consider the objections of the objectors in accordance with the mandate of Section 5(A) of the Act would vitiate further notifications issued under Section 6 and 9 of the Act. I am supported by the Judgement of the Hon'ble Supreme Court rendered in the case of Munshi Singh versus Union of India, AIR1973 SC

1150. , the relevant portion whereof is advantageous to be reproduced hereunder:

"Section 5A embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. We may refer to the observation of this Court in *Nandeshwar Prasad &Anr. v. The State of U.P. & Others*(1) that the right to file objections under section 5A is a substantial right when a person's property is being threatened with acquisition and that right cannot be taken away as if by a side wind. Sub-section (2) of section 5A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. The decision of the appropriate Government on the objections is then final. The declaration under section 6 has to be made after the appropriate Government is satisfied, on a consideration of the report, if any, made by the Collector under section 5A (2). The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of section 5A. (See: Section 17 (4) of the Acquisition Act)."

18. That in view of the aforesaid position of law, the compliance with the provisions of Section 5A of the Act is mandatory. The Hon'ble Supreme Court in the case *May George vs. Tehsildar*, (2010) 13 SCC 98, in paragraph 25 has summarized the law and test to be applied for declaring a particular provision mandatory. What was held by the Supreme Court in paragraph 25 of the judgment is as follows:

"25. The law on this issue can be summarized to the effect that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance with the provision could render the entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of the legislature and not upon the language for which the intent is clothed. The issued is to be examined having regard to the context, subject-matter and object of the statutory provisions in question. The Court may find out as to what would be the consequence which would flow from construing it in one way or the other and as to whether the statute provides for a contingency of the non-compliance is visited by small penalty or serious consequence would flow therefrom and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid."

19. Analysing the provision 5A of the Act in the light of Law laid down by the Hon'ble Supreme Court in case *May George* (supra) and *Munshi Singh* (Supra), it is clear that Section 5A of the Act has its own role to play. The entire proceedings under the Act are based on the principle of eminent domain under the exercise

whereof, the State can compulsorily acquire the land of the private persons, but this proposition cannot be, however, stretched to legitimise patently illegal and fraudulent exercise undertaken for depriving the land owners of their constitutional right to property with a view to favour the private persons.

20. Object of enquiry to be conducted under Section 5(A) of the Act is to provide an opportunity to the owners of the land to convince the competent authority that the land in question is not suitable for the purpose for which it is sought to be acquire or that the same is sought to be acquired for collateral purpose. It is, though, correct that the report of the enquiry officer prepared under Section 5A of the Act is not binding on the acquiring authority, still, it can open the mind of the acquiring authority as to what is the need or necessity to acquire the land.

21. Since declaration under Section 6 is to be made by the Government and, therefore, a fortiori, the decision on the objections of the land owners to acquisition is also required to be taken by the Government. It is because of this reason, the legislature has not conceded the power to take final decision on the objections of the land owners to the acquisition to the Collector.

22. In view of the discussions made hereinabove, I find merit in this petition and same is accordingly allowed. Notification No. 194-Rev(LAJ) of 2018 dated 25.04.2018 is quashed. The respondent no. 1, however, shall proceed to consider the record of the proceedings conducted by the respondent no. 4 under Section 5A of Act and the report containing recommendations, if any, on the objections of the petitioners submitted by him and take a decision in terms of Section 5A of the Act before issuing formal declaration in terms of Section 6 of the Act.

23. The writ petition is disposed of as above along with the connected IA(s).