

(2015) 05 OHC CK 0017

In the Orissa High Court

Case No : Writ Petition (C) Nos. 3059, 4829, 5093, 5094, 5095, 5096, 5097, 5098, 5099, 5101, 5103, 5104, 5411, 5410, 5409, 6035, 5100, 5102, 4830, 4388 and 4459 of 2015

Shakuntala Pradhan and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 27-05-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 32
Land Acquisition Act, 1894 — Section 4, 4(1), 5A, 6
Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 — Section 11, 11(1), 11(1)(b), 11(1)(c), 15(2)

Citation : (2015) 2 OLR 39

Hon'ble Judges : P. Mohanty, A.C.J; Biswajit Mohanty, J

Bench : Division Bench

Advocate : N. Hota, S.S. Routray, V. Kar and D.J. Sahoo, for the Appellant; Jyoti Prakash Patnaik, Addl. Government Advocate, Advocates for the Respondent

Judgement

Biswajit Mohanty, J.—The above noted 21 writ applications have been filed mainly challenging the preliminary notifications published under Section 11(1) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement, Act, 2013, for short, the "Act" by the opposite party No. 1. The petitioners have also prayed for direction to the opposite party No. 1 to follow the "Act" strictly read with "1958 Act". Such preliminary notifications challenged in W.P. (C) Nos. 3059, 4388, 4459, 5093, 5094, 5095, 5096, 5097, 5098, 5099, 5100, 5104, 5409, 5410, 5411 and 6035 of 2015 pertain to mouza Chudanga Sahi and is concerned with Land Acquisition Case No. 5 of 2015. In W.P. (C) No. 4830 of 2015 the petitioner has challenged the preliminary notification pertaining to mouza Basuli Sahi connected with Land Acquisition Case No. 4 of 2015. In W.P. (C) No. 4829 of 2015, W.P. (C) No. 5101 of 2015, W.P. (C) No. 5102 of 2015 and W.P. (C) No. 5103 of 2015, the petitioners have challenged the preliminary notifications pertaining to mouza Manikanika Sahi covering Land Acquisition Case No. 3 of 2015.

2. With regard to L.A. Case No. 3 of 2015, a perusal of records reveals that all the four writ applications, namely, W.P. (C) Nos. 4829, 5101, 5102 and 5103 of 2015 have been filed much after the Collector (opposite party No. 3) pronounced his order/report with regard to objections on 10.3.2015.

Similarly, with regard to L.A. Case No. 4 of 2015, a perusal of records reveals that W.P.(C) No. 4830 of 2015 was filed much after the opposite party No. 3 pronounced his order/report on 10.3.2015 with regard to objections.

With regard to L.A. Case No. 5 of 2015, it may be noted here that the first Writ Application pertaining to the said L.A. case No. 5 of 2015 was filed on 20.2.2015 styled as W.P. (C) No. 3059 of 2015. In the said case, on 9.3.2015 this Court directed the Collector, Puri that he should hear objections on 10.3.2015 but should not pass any final order without the leave of this Court till 11.3.2015. A perusal of original file pertaining to L.A. Case No. 5 of 2015 reveals that though opposite party No. 3 has concluded the hearing of objection on 10.3.2015, however order/report was not pronounced and the same was kept in sealed cover. However, during pendency of this case along with an additional affidavit dated 8.5.2015, the petitioner filed a copy of publication of declaration made by the State Government under Section 19 of the "Act" dated 4.5.2015 (Annexure-13) notwithstanding continuation of the interim order. In response to that, an additional affidavit was filed on 11.5.2015 by opposite party No. 3, wherein he offered unconditional apology for bona fide mistake pertaining to publication of above noted notification under Section 19 of the "Act" issued in L.A. Case No. 5 of 2015. Later on, on 13.5.2015, notification of the Government dated 12.5.2015 was filed indicating withdrawal of notification under Annexure-13. Further, by an affidavit dated 13.5.2015, opposite party No. 3 made it clear that the earlier notification dated 4.5.2015 has been withdrawn on 12.5.2015 and therefore as on date after withdrawal of notification under Section 19(1) of the "Act", there existed no decision of the Government of Orissa as per Section 15(3) of the "Act", which also stood withdrawn. Opposite Party No. 3 in his affidavit also indicated that so far as W.P. (C) No. 3059 of 2015 is concerned, the report under Section 15(2) of the "Act" would be pronounced, if permitted and the same would be sent denovo under Section 15(2) of the "Act" for decision and only thereafter Government would pass its decision under Section 15(3) of the "Act" and notification under Section 19(1) of the "Act" would be issued thereafter. In the said affidavit, opposite party No. 3 pointed out that widening of the road surrounding the Jagannath Temple is extremely important from security point of view. Thus, so far as L.A. Case No. 5 of 2015 is concerned, the above is the position at present. In other words, with regard to L.A. Case No. 5 of 2015 the report under Section 15(2) of the "Act" on objections filed remains unpronounced whereas in the cases covered by L.A. Case Nos. 3/2015 and 4/2015 as indicated earlier, the report/order under Section 15(2) of the "Act" on objections have been pronounced. However, in all these writ applications, one thing is clear that these writ applications were filed challenging the notification under Section 11(1) of the "Act" after filing objections.

3. At the outset it is made clear that learned counsel for the parties agreed and submitted that since issues involved in all these writ petitions are one and the same, W.P. (C) No. 3059 of 2015 should be taken as lead case in which the pleadings are complete. Learned counsel for the parties also agreed that the decisions rendered in W.P. (C) No. 3059 of 2015 would govern all the cases.

4. Now coming to W.P. (C) No. 3059 of 2015, it may be noted that in this case, the petitioner has approached this Court challenging the preliminary notification dated 8.1.2015 issued under Section 11(1) of the "Act" after she filed a detailed objection to the same under Annexure-5. Mr. A.P. Bose, learned counsel for the petitioner in W.P. (C) No. 3059 of 2015 submitted that the preliminary notification under Section 11(1) issued by the opposite party No. 1 was legally vulnerable as the same has been issued violating the requirements under Section 11(1) of the "Act". According to him, the said preliminary notification has been issued without giving details of the land and the said notification has not been published as required under Section 11(1)(b) and Section 11(1)(c) of the "Act". Mr. Bose, learned counsel for the petitioner further submitted that the notification under Section 11(1) of the "Act" was never published in vernacular language in daily newspapers. Further, in the said notification the total area has not been indicated nor also the name of raiyat. Therefore, according to him the procedure as delineated under Section 11(1) of the "Act" has not been followed for which notification under Section 11(1) of the "Act" was required to be quashed. Secondly, he submitted that a perusal of notification under Section 11(1) of the "Act" would show that the land was required for widening of road for Nabakalabara purpose. According to him such a purpose could not be covered under the infrastructure project as required under Section 10A(e) of the "Act". On this account, Mr. Bose submitted that the present case was not covered under Section 10A of the "Act" and accordingly opposite party No. 1 had gone wrong in not following the Chapter-II and Chapter-III of the "Act". Further, he submitted that the present notification fell foul of provisions of Ancient Monuments and Archaeological Sites and Remains Act, 1958, for short, the "1958 Act".

5. Per contra, Mr. J.P. Patnaik, learned Additional Government Advocate raised a preliminary objection that as per settled principles of law, the writ application/ writ applications was/were not maintainable against preliminary notifications, which were in the nature of mere proposals. Further, he submitted that even otherwise the writ applications having been filed after filing of objections under Section 15(2) of the "Act", such writ applications were not maintainable. He also contended that the petitioners could not be allowed the luxury of availing two parallel proceedings. According to him, the grievance, if any, of the petitioner would arise only after publication under Section 19(1) of the "Act". In this context, he mainly relied on decisions as reported in Babu Barkya Thakur Vs. The State of Bombay and Others, AIR 1960 SC 1203 : (1961) 1 SCR 128 and H.M.T. Ltd. rep. by its Deputy General Manager (HRM) and Another Vs. Mudappa and Others, (2007) 3 JT 112 : (2007) 2 SCALE 573 : (2007) 9 SCC 768 : (2007) AIRSCW 1058 : (2007) 1 Supreme 1016 . Mr. Patnaik, further referring to the

counter affidavit dated 30.3.2015 filed by opposite party Nos. 3 and 4 and additional affidavit filed by opposite party No. 3 and 4 dated 17.4.2015 submitted that preliminary notification under Section 11(1) of the "Act" satisfied the requirements of Section 11(1) of the "Act". He also submitted that the notification under Section 11(1) of the "Act" should be read as a whole, which made it clear that the land was required to be acquired for widening of the road. According to him, widening of the road would clearly come under infrastructure project as per notification dated 1.4.2013 issued by the Ministry of Finance (Department of Economic Affairs), Government of India. He submitted a copy of the same before this Court. He also contended that the acquisition of area in question did not violate the provisions of "1958 Act".

6. In reply Mr. Bose as well as Mr. G.C. Rout on behalf of the petitioners submitted that the petitioners despite filing objections could always approach this Court under Article 226 of the Constitution of India as there was an apprehension of they being dispossessed. According to them a citizen could file a writ application under Article 226 of the Constitution of India whenever there was a threat to his right. Here according to them threat of dispossession loomed large. In this context, they relied on the observation made by the Hon"ble Supreme Court in Para-15 of its judgment in a case reported in State of Madhya Pradesh Vs. Bhailal Bhai and Others, AIR 1964 SC 1006 : (1964) 6 SCR 261 : (1964) 15 STC 450 .

7. Heard Mr. Bose, Mr. G.C. Rout and Mr. Sharma, learned counsel for the petitioners and Mr. J.P. Patnaik, learned Additional Government Advocate for the State.

8. In the background of submission made by the parties, let us first examine the preliminary objection raised by Mr. Patnaik, learned Additional Government Advocate as to whether the writ application is maintainable as the writ petitioner is challenging the preliminary notification only that too after filing objections under Section 15(2) of the "Act". In this context, Mr. Patnaik has relied on two decisions as reported in Babu Barkya Thakur Vs. The State of Bombay and Others, AIR 1960 SC 1203 : (1961) 1 SCR 128 and H.M.T. Ltd. rep. by its Deputy General Manager (HRM) and Another Vs. Mudappa and Others, (2007) 3 JT 112 : (2007) 2 SCALE 573 : (2007) 9 SCC 768 : (2007) AIRSCW 1058 : (2007) 1 Supreme 1016 . In the case reported in Babu Barkya Thakur Vs. The State of Bombay and Others, AIR 1960 SC 1203 : (1961) 1 SCR 128 , the Hon"ble Supreme Court was dealing with a case under Land Acquisition Act, 1894 (for short the "1894 Act"). In the said case after filing objection under Section 5A of the "1894 Act", the petitioner filed a writ application before the Hon"ble Supreme Court under Article 32 of the Constitution of India challenging the constitutionality of the land acquisition proceeding with particular reference to the notification under Section 4 of the "1894 Act". There the Hon"ble Supreme Court has made it clear that the purpose of notification under Section 4 of "1894 Act" is to carry on a preliminary investigation. It is only under Section 6 of the

"1894 Act" that a firm declaration is made by the Government that the land is needed for a public purpose or for a Company. What is a mere proposal under Section 4 becomes the subject matter of a definite proceeding for acquisition after publication under Section 6. Therefore, the Hon'ble Supreme Court laid down that a defect in the notification under Section 4 is not fatal to the validity of the proceedings. Further, in that case the respondents raised the contention that after filing of objection, moving the writ application challenging entire proceeding was premature. The Hon'ble Supreme Court held that such contention raised on behalf of the respondents was not wholly devoid of merit. Under such circumstances, the Hon'ble Supreme Court dismissed the writ application with costs. It may be noted here that Section 11(1) of the "Act" speaks of preliminary notification like Section 4(1) of "1894 Act". Similarly Section 19(6) of the "Act" makes it clear that a declaration published under Section 19(1) of the "Act" would be conclusive evidence of that the land is required for a public purpose just like Section 6 of "1894 Act". Thus it can be safely said that the preliminary notification published under Section 11(1) of the "Act" is a mere proposal, which acquires definite shape only after publication of declaration under Section 19(1) of the "Act".

So far as the case reported in H.M.T. Ltd. rep. by its Deputy General Manager (HRM) and Another Vs. Mudappa and Others, (2007) 3 JT 112 : (2007) 2 SCALE 573 : (2007) 9 SCC 768 : (2007) AIRSCW 1058 : (2007) 1 Supreme 1016 is concerned, there the matter revolved around Section 28 of the Karnataka Industrial Area Development Act, 1966 (for short "the 1966 Act"). The facts of the said case are quoted below from the said judgment.

"3. To appreciate the controversy raised in the appeals, it is necessary to state relevant facts. The respondents are heirs and legal representatives of deceased Akkahonnamma who died somewhere in the year 1993. She was the owner of land bearing Survey No. 113/3 admeasuring 2 acres, 37 gunthas situated in Devarayapatna. Tumkur Taluk. In the year 1978, the Industrial Area Development Board, Karnataka ("Board" for short) acquired 120 acres of land of different survey numbers situated in Devarayapatna for the purpose of establishing a Watch Factory, namely, H.M.T. Ltd., (appellant herein). The land admeasuring 1 acre, 38 gunthas out of 2 acres 37 gunthas of Survey No. 113/3 owned by the respondents was also acquired in the acquisition proceedings. The remaining land to the extent of 39 gunthas was not acquired. It was, however, the case of the respondents that the General Manager, H.M.T. took possession of the entire area of 2 acres. 37 gunthas even though he was entitled to take possession of land only of 1 acre, 38 gunthas. He thereby unauthorizedly took over possession of 39 gunthas of land. A request was, therefore, made to the General Manager, H.M.T. to return possession of 39 gunthas to the owners. He, however, refused to hand over possession. By a communication dated July 20, 1984, the Board called upon the owners of the land to show cause as to why the actual extent of acquired land should not be continued to be occupied by the H.M.T. The owners did not oblige the Board and filed a suit against the

authorities, being O.S. No. 341 of 1985 for declaration of title and also for possession of land. The suit was decreed by the Trial Court. An appeal filed against the said decree came to be dismissed by the First Appellate Court. The said order was not challenged and the decree became final. Execution proceedings had been initiated by the owners and by an order dated June 13, 1997, the Executing Court directed H.M.T. to hand over actual and peaceful possession of the land to the owners. The order passed by the Executing Court was challenged by the H.M.T. by filing a revision which came to be allowed and the matter was remanded to the Executing Court with a direction to the Executing Court to afford an opportunity to H.M.T. of hearing and to pass an appropriate order in accordance with law. Meanwhile, however, H.M.T. appears to have requested the State Government to acquire land and a notification under sub-section (1) of Section 28 of the Act for proposed acquisition of land for public purpose, viz. for developing industry came to be issued on November 13, 1997 which was published in Official Gazette on December 11, 1997. The owners of the land came to know about the issuance of notification and they invoked the jurisdiction of the High Court of Karnataka under Article 226 of the Constitution by filing a Writ Petition. It was alleged that the notification had been issued mala fide in order to deprive the owners of their rights to recover possession and to defeat the decree passed by a court of competent jurisdiction. A prayer was made for quashing and setting aside the notification directing the authorities to hand over possession of 30 gunthas of land of Survey No. 113/3 to the owners in view of the decree passed by a competent court which had become final".

Section 28 of "1966 Act" read as follows:--

"28. Acquisition of Land-(1) If at any time, in the opinion of the State Government, any land is required for the purpose of development by the Board, or for any other purpose in furtherance of the objects of this Act, the State Government may by notification, give notice of its intention to acquire such land.

(2) On publication of a notification under sub-section (1), the State Government shall serve notice upon the owner or where the owner is not the occupier, on the occupier of the land and on all such persons known or believed to be interested therein to show cause, within thirty days from the date of service of the notice, why the land should not be acquired.

(3) After considering the cause if any, shown by the owner of the land and by any other person interested therein, and after giving such owner and person an opportunity of being heard, the State Government may pass such orders as it deems fit.

(4) After orders are passed under sub-section (3), where the State Government is satisfied that any land should be acquired for the purpose specified in the notification issued under sub-section (1), a declaration shall, by notification in the Official Gazette, be made to that effect.

(5) On the publication in the Official Gazette of the declaration under sub-section

(4), the land shall vest absolutely in the State Government free from all encumbrances.

(6) Where any land is vested in the State Government under sub-section (5), the State Government may, by notice in writing, order any person who may be in possession of the land to surrender or deliver possession thereof to the State Government or any person duly authorized by it in this behalf within thirty days of the service of the notice.

(7) If any person refuses or fails to comply with an order made under sub-section (5), the State Government or any officer authorized by the State Government in this behalf may take possession of the land and may for that purpose use such force as may be necessary.

(8) Where the land has been acquired for the Board, the State Government, after it has taken possession of the land, may transfer the land to the Board for the purpose for which the land has been acquired".

In this case, HMT Ltd. (supra), the writ application was allowed by the learned Single Judge and the appeal carried by the appellant before the Division Bench of the High Court was also dismissed. Hon"ble Supreme Court allowed the appeal holding that the scheme of Section 28 of "1966 Act" is similar to the scheme of acquisition of land under the "1894 Act" under which preliminary notification is issued and opportunity of being heard is afforded to the persons interested in the land, whereafter final notification is issued. At the stage of raising objection against acquisition, it is open to the respondent therein to raise all contentions. In spite of such objections, if final notification is issued by the State, it is open to the aggrieved citizens to take appropriate proceedings or to invoke the proceeding of the High Court under Article 226 of the Constitution of India. In such background, Hon"ble Supreme Court held that the approach of the learned Single Judge and the approach of the Division Bench were not in consonance with law. Accordingly, the appeals were allowed and the authority was granted liberty to take appropriate proceeding in accordance with law. Thus this decision also makes it clear that the aggrieved citizens can take recourse to Article 226 of the Constitution of India after final notification is issued by the State. Under the "Act" that stage comes with publication of declaration under Section 19(1) of the "Act".

In such background, let us examine the relevant provisions of the "Act" for the purpose of the present case. A perusal of Section 11 reveals that the notification under Section 11(1) is merely a preliminary notification and whosoever is aggrieved can file his/her objection under Section 15(2) of the Act within 60 days from the date of publication of preliminary notification. After hearing of objections and making such further enquiry, the Collector is supposed to make report/reports to the Government containing his recommendation on the objections together with the record of proceeding. Under Section 15(3) of the "Act" appropriate Government is to take a call on the objections made under

Section 15(2) of the "Act" and thereafter the said decision would be final. So under Section 15(3) of the "Act" the appropriate Government is to take final decision on the objections made under Section 15(2) of the "Act". Thereafter comes the stage of publication of declaration under Section 19(1) of the "Act" and as per Section 19(6) such a declaration would be conclusive evidence that the land is required for a public purpose. Thus it is reiterated that the preliminary notification under Section 11(1) of the "Act" is a mere proposal, which acquires definite shape only after publication of declaration under Section 19(1) of the "Act". In such background, following the dictum of the Hon'ble Supreme Court as reported in Babu Barkya Thakur Vs. The State of Bombay and Others, AIR 1960 SC 1203 : (1961) 1 SCR 128 and H.M.T. Ltd. rep. by its Deputy General Manager (HRM) and Another Vs. Mudappa and Others, (2007) 3 JT 112 : (2007) 2 SCALE 573 : (2007) 9 SCC 768 : (2007) AIRSCW 1058 : (2007) 1 Supreme 1016 as discussed above, it can safely be concluded that the challenge to the preliminary notification at this stage is not maintainable and this is more particularly so when the petitioner has filed her writ application after filing detailed objections. It goes without saying that petitioner can challenge the entire proceeding after declaration is published under Section 19 of the "Act" on such grounds as are available to her under law.

9. With regard to the decision cited by the learned counsel for the petitioners i.e. State of Madhya Pradesh Vs. Bhailal Bhai and Others, AIR 1964 SC 1006 : (1964) 6 SCR 261 : (1964) 15 STC 450 it may be noted here that during course of hearing they mainly advanced their argument relying only on the observation made by Hon'ble Supreme Court at Para 15 to the effect that even where there is only a threat of violation of a right and though the right of the party has not been actually infringed, an application under Article 226 would still lie and the Courts can give necessary relief. On this basis they asked that since the dispossession of petitioner loomed large, they can maintain the writ application. To such an argument, Mr. J.P. Patnaik, learned Additional Government Advocate pointed out that the opposite parties are bound under the provisions of the "Act" and they can take possession of the land of the petitioner as per provisions of the "Act" and the petitioner cannot be dispossessed without following the provisions of the "Act". A perusal of the scheme of the "Act" further shows that only under Section 38 of the "Act", the opposite party No. 3 can take possession after ensuring full payment of compensation and complying other things. Therefore the stage of dispossession is yet to come. Therefore, the apprehension of the petitioner of immediate dispossession without following the provisions of the "Act" is without any basis.

10. For the reasons indicated earlier, we hold the writ application is not maintainable at this stage and thus we are not inclined to set aside the preliminary notification under Section 11(1) particularly when the petitioner has rushed to this Court after filing her objection. It is however reiterated that the petitioner can challenge the entire proceeding after publication of declaration under Section 19 of the "Act" if she so desires, taking all contentions as are

available to her under law. It is made clear that since we have held that the writ application is not maintainable at the threshold, we have not gone into the merits of the claim of the petitioner. Accordingly, W.P. (C) No. 3059 of 2015 is disposed of and the interim order passed therein stands vacated. In tune with above observations, rest 20 writ applications are also disposed of and wherever there is an interim order, such order would also stand automatically vacated. No costs.