
(2012) 06 KL CK 0237

In the High Court Of Kerala

Case No : Writ Petition (C) No. 29890 of 2010 and 11709 of 2011

Sharlet

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 07-06-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 19

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

Citation : (2012) 3 KLJ 73

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : N. Nandakumara Menon, P.K. Manoj Kumar and Hena Bahuleyan, for the Appellant; A.A. Mohammed Nazir, K.A. Abdul Salam, Sunil V. Mohammed, P.A. Ahamed and Government Pleader V.K. Rafeek, for the Respondent

Judgement

Antony Dominic, J.—Issues raised in these Writ Petitions are connected. Therefore, these cases were heard together and are disposed of by this common judgment, treating W.P.(C). 29890/10 as the leading case. Petitioners in these Writ Petitions challenge the land acquisition proceedings initiated at the instance of the second respondent in W.P.(C). 29890/10 for the acquisition of a portion of their properties for providing a road access to the IIIrd phase of the Techno Park.

2. Ext. R2(a) is a Master Plan that was got prepared by the Techno Park for the development of its 3rd phase. It appears that based on Ext. R2(a), the third respondent sought sanction of the first respondent to acquire an extent of 20 Ares of land in R.S. No. 251/part in Block No. 17 of Attipra Village in Thiruvananthapuram Taluk by invoking the urgency clause u/s 17(4) of the Land Acquisition Act.

3. In the counter affidavit filed by the District Collector, the third respondent in W.P.(C). 29890/10, it is stated that considering the urgency of the case, as explained by the requisitioning authority, the Commissioner (Land Revenue), being satisfied that the land is urgently required, ordered in exercise of the

powers u/s 17(4) of the L.A. Act to dispense with the objections herein u/s 5A in this case, as per the Government Order No. G.O. (MS.) 30/2008/ITD dated 7.8.2008.

4. Insofar as the petitioners are concerned, the petitioner in W.P.(C). 29890/10 presently owns about 15 cents of land which falls within the alignment of the proposed road and the petitioner in W.P.(C). 11709/11 owns 10.5 cents in the alignment and both of them are residing in the houses in their respective plots. Ext.P1 in W.P.(C). 29890/10 is the notice dated 27.4.2009 issued u/s 6(1) of the Survey and Boundaries Act to the petitioner therein. It appears that there upon, he filed Ext.P2 appeal to the Land Revenue Commissioner followed by Ext.P4 representation to the District Collector and Ext.P5 representation before the Chief Minister. Ext.P6 shows that Ext.P5 representation was forwarded to the Chief Executive of the Technopark and that acting upon the representations thus made, Ext.P7 notice was issued by the District Collector to inform the petitioner that a local inspection of the property will be made. Accordingly, a local inspection was conducted and Ext.P8 is the report made by the District Collector to the Principal Secretary to Government, Revenue (B) Department. In this report, the District Collector has stated thus:-

The petitioner's grievance is that because of the proposal of the proposed land acquisition, her house where she is staying with husband and in-laws would go and there would be no place for them to live in there are other grievance like alternate sites open for less objections are available in the locality in the very next survey number, her in laws (husband and family) were earlier evicted in 1960's connected with the land acquisition of Thumba Rocket Station. All the grievances have been examined in the presence of all concerned and the finding are listed below.

(1) There is a land acquisition in progress as indicated by the petitioner. The acquisition is for the purpose of connecting road from Bye pass to the Phase III of Technopark.

(2) As per the alignment it is certain that almost the entire part of the petitioner's house would go due to acquisition. (It is noted that the acquisition would touch the house not only of the petitioner but also that of the neighbour who is staying adjacent of the petitioner, on the southern side.)

(3) With regard to the complaint, that alternate sites which are open for less objection are available it has been noted that there is substance and petitioner has substantiated her statement by pointing out an alternate site, which is very close by. In this alternate site here is nobody staying and to evade acquisition, the land holder has started construction of a house and may be 40-50% of construction is done. Absolutely, there is no dwelling in this alternate site merits consideration as there would be no issue of resettlement and rehabilitation.

(4) Regarding the eviction/displacement faced by petitioner's family at the time of land acquisition for Thumba Rocket Station, the petitioner has produced a

document issued by VSSSC stating that Mr. Clement husband of the petitioner was an affected party. Accordingly, petitioner's family is facing eviction a second time in their life time. In the overall, it is seen that the certificate given as item no. 3 regarding objection to land acquisition, furnished by the Requisition Authority at the time of giving the request for land acquisition Form II of the Rule 4(1) is not correct in the sense that when there is land open for less objection is available, the same was not considered. Instead of preferring land without any dwelling unit, when it is available now the proposal is to affect 2 houses one totally and another one partially. It would call for rehabilitation issues, which could have been avoided totally by choosing the alternative site as suggested by the petitioner. In this circumstances, it is decided to propose government to give a direction to the Requisition Authority to consider a change of alignment, as indicated by the petitioner. This is possible at this stage because the requisition authority has not started any tangible work at the site for Phase III.

5. It appears from Ext.R2(c) dated 19.12.2009 that subsequent to Ext.P8 report, a meeting was convened by the Principal Secretary, IT, in which though no inference is made to the report, it was decided that the width of the road in the area, where two houses are situated on both sides, shall be reduced so that, the residential building of the petitioner in W.P.(C). 29890/10 will be saved. Still later, in the newspapers of 30.7.2010, Ext.P9 notification u/s 4(1) dated 21.7.2010 was published proposing to proceed with the acquisition, invoking the urgency clause u/s 17(4) of the Land Acquisition Act. It is at that stage these Writ Petitions were filed challenging the proceedings.

6. Heard the learned counsel for the petitioners, the learned counsel appearing for the Technopark and also the learned Government Pleader appearing for respondents 1, 3 and 4.

7. The main contentions raised on behalf of the petitioners are that the alignment was fixed without taking note of the alternate alignments suggested by them. They also contended that Ext.P8 report was ignored by the authorities. The second contention raised was that the respondents have acted illegally in invoking the urgency clause u/s 17(4) of the Act and dispensing with the enquiry u/s 5A thereof.

8. Insofar as the fixation of alignment is concerned, the contention raised by the requisitioning authority in its counter affidavits filed is mainly that the alignment has been fixed in terms of the Master Plan prepared by the Architect. They are also disputing the factual correctness of the assertion made by the petitioners that two other proposals were, mala fide given up by the requisitioning authority. It is therefore, stated that the alignment having been fixed in terms of the Master Plan, any change in the alignment will affect the implementation of the project for the development of the IIIrd phase of the Technopark.

9. Insofar as the invocation of the urgency clause is concerned, it is stated that the Technopark is implementing the project involving a capital investment of

more than Rs. 250 crores. It is also stated that unless the access road is laid in time, the project cannot be commissioned and that it was in view of the urgency of the matter, they sought invocation of urgency clause u/s 17(4). Further it is also contended that pursuant to the representations made by the petitioners, a meeting was convened by the Secretary to the Government and that to the extent possible, modifications have been made to the proposal. According to him, therefore, in effect and substance, an enquiry which is similar to the one as contemplated u/s 5A has already been conducted and that too by an officer in the rank of Secretary to the Government. Therefore, he contended that no useful purpose will be achieved even if an enquiry u/s 5A was conducted and that the dispensation of the enquiry u/s 5A has not caused any prejudice to the petitioners.

10. Of the two contentions that are mainly raised, I shall first deal with the contention of the petitioners regarding the alleged illegality in invoking the urgency clause u/s 17(4) and dispensing with the enquiry u/s 5A of the Act.

11. Section 4 of the Land Acquisition Act provides publication of preliminary notification and as per this provision, when it appears to be appropriate to the Government or to the Collector the land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette circulating in the locality in the manner as provided therein. Section 5A of the Act provides that any person who is interested in any land notified u/s 4(1)(a), may within 30 days of the date of publication of the notification object to the acquisition of the land or of any land in the locality as the case may be. Sub-section (2) provides that 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 any person or any person authorised by him in this behalf and after hearing all such objections and making such further enquiry if any, as it thinks necessary, either make a report in respect of the land which has been notified u/s 4(1) or make different reports in respect of different parcels of such land to the Government or to the Board of Revenue as provided therein. Section 17(4) of the Act provides that in case of any land to which, in the opinion of the appropriate Government or Board of Revenue, the provisions of sub-sections(1) and (2) of Section 17 are applicable, the appropriate Government or the Board of Revenue as the case may be, direct that provisions of Section 5A shall not apply and if it does so direct, a declaration may be made u/s 6 in respect of the land at any time after the date of the publication of the notification u/s 4.

12. The importance and necessity to conduct the enquiry u/s 5A of the Land Acquisition Act has been dealt with by the Apex Court in various judgments and the right conferred on the land owners u/s 5A has already been equated with fundamental rights. In this context, it is relevant to refer to the judgment in Babu Ram and Another Vs. State of Haryana and Another, , where the Apex Court laid down the following principles;

...it has been emphasized that a right u/s 5A is not merely statutory but also has the favour of fundamental rights under Articles 14 and 19 of the Constitution. Such observations had been made in reference to an observation made in the earlier decision in Gurdial Singh case and keeping in mind the fact that right to property was no longer a fundamental right, an observation was made that even if the right to property was no longer a fundamental right, the observation relating to Article 14 would continue to apply in full force with regard to Section 5A of the LA Act.

That in the said decisions, such right was elevated to the status of a fundamental right is in itself sufficient to indicate that great care had to be taken by the authorities before resorting to Section 17(4) of the LA Act, and that they had to satisfy themselves that there was an urgency of such nature as indicated in Section 17(2) of the Act, which could brook no delay whatsoever.

13. Subsequently, in the judgment in Kamal Trading Private Limited (now known as Manav Investment and Trading Company Ltd.) Vs. State of West Bengal and Others, , the Apex Court held that it must be borne in mind that the proceedings under the LA Act are based on the principle of eminent domain and that Section 5A is the only protection available to the person whose lands are sought to be acquired. It was further held that it is the minimal safeguard afforded to him to protect himself from arbitrary acquisition by pointing out to the authority concerned, that public purpose is absent in the proposed acquisition or that the acquisition is mala fide. The Apex Court also held that the Act being an expropriatory legislation, its provisions will have to be strictly construed.

14. Having thus seen the importance and the requirement of the enquiry u/s 5A, I shall now proceed to examine the circumstances in which the urgency clause provided u/s 17(4) can be invoked by the authorities. This question came up for consideration of the Apex Court in its judgment in Sri Radhy Shyam (Dead) through L.Rs. and Others Vs. State of U.P. and Others, , where in paragraph 77 it was held as follows;

From the analysis of the relevant statutory provisions and interpretation thereof by this Court in different cases, the following principles can be culled out:

(i) Eminent domain is a right inherent in every sovereign to take and appropriate property belonging to citizens for public use. To put it differently the sovereign is entitled to reassert its dominion over any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good - Dwarkadas Shrinivas v. Sholapur Spg. And Wvg.Co. Ltd, Charanjit Lal Chowdhury v. Union of India and Jilubhai Nanbhai Khachar v. State of Gujarat.

(ii) The legislations which provide for compulsory acquisition of private property by the State fall in the category of expropriatory legislation and such legislation must be construed strictly - DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana; State of Maharashtra v. B.E.Billimoria and Dev Sharan

v. State of U.P.

(iii) Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, it must be remembered that compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the society or people suffering from other handicaps, then the court is not only entitled but is duty-bound to scrutinize the action/decision of the State with greater vigilance care and circumspection keeping in view the fact that the landowner is likely to become landless and deprived of the only source of his livelihood and/or shelter.

(iv) The property of a citizen cannot be acquired by the State and/or its agencies/instrumentalities without complying with the mandate of Sections 4, 5A and 6 of the Act. A public purpose, however, laudable it may be does not entitle the State to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, the State can invoke the urgency provisions and dispense with the requirement of hearing the landowner or other interested persons.

(v) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even a few weeks or months. Therefore, before excluding the application of Section 5A, the authority concerned must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry u/s 5A will, in all probability frustrate the public purpose for which land is proposed to be acquired.

(vi) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power u/s 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the authorities concerned did not apply their mind to the relevant factors and the records.

(vii) The exercise of power by the Government u/s 17(1) does not necessarily result in exclusion of Section 5A of the Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-section (4) of Section 17 makes it clear that it merely enables the Government to direct that the provisions of Section 5A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of the exercise of power u/s 17(1).

(viii) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that by itself does not justify the exercise of power by the Government under Sections 17(1) and/or 17(4). The court can take judicial

notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of audi alteram partem embodied in Section 5-A(1) and (2) is not at all warranted in such matters.

(ix). If land is acquired for the benefit of private persons, the court should view the invoking of Sections 17(1) and/or 17(4) with suspicion and carefully scrutinize the relevant record before adjudicating upon the legality of such acquisition.

15. The aforesaid judgment was followed by the Apex Court in its later judgment in *Darshan Lal Nagpal (dead) by L.Rs. Vs. Government of NCT of Delhi and Others*, .

16. A reading of these two judgments show that in cases where the powers u/s 17(4) is invoked, records produced should demonstrate a clear application of mind by the competent authority on the question of necessity and desirability of invoking the urgency provision. Further, these provisions can be invoked only if competent authority is satisfied that even a small delay of even few weeks or months may frustrate the public purpose. Therefore before excluding the enquiry u/s 5A, the authorities concerned should be fully satisfied that delay of few weeks or months which is likely to be taken for enquiry u/s 5A will have the possibility of frustrating the public purpose, for which the land is proposed to be acquired. Further, though the satisfaction of the appropriate Government in this behalf is subjective, but such satisfaction is a condition precedent to exercise of power u/s 17(4) and that when challenged, it is up to the appropriate Government to produce materials before the Court and satisfy the Court that the subjective satisfaction arrived at by it was on the basis of the materials available before it.

17. Having thus seen the principles laid down by the Apex Court, the question to be considered is whether the respondents have made out a case justifying the invocation of urgency clause u/s 17(4) of the Act. As already seen, the facts pleaded in the counter affidavit of the District Collector show that by order dated 7.8.2008, prior sanction was granted by the Government for the acquisition of 20 ares of land. Despite the administrative sanction so granted, notification under Sections 4(1) and 17(4) was issued only on 21.7.2010. This itself show that between the date of granting administrative sanction and the date of Section 4(1) notification, respondents themselves wasted more than 2 years which itself will belie the claim of urgency to invoke Section 17(4) of the Act. In regard to the issue regarding the satisfaction of the appropriate Government, on the question of urgency, the only material available before this court is the bald averment in the counter affidavit filed by the District Collector, the third respondent in Writ Petition(c). No. 29890/2010 that the Commissioner of Land Revenue was satisfied of the urgency, based on the urgency of the case as explained by the

requisitioning authority. This therefore means that the Commissioner of Land Revenue has mainly gone only by the claim made by the requisitioning authority and there was no independent application of mind in this respect. In other words, before invoking the urgency clause u/s 17(4), the Commissioner did not make any endeavour for a subjective satisfaction of the urgency justifying the invocation of Section 17(4).

18. For the aforesaid reasons I am not satisfied that the respondents have made out a case to invoke Section 17(4) and dispense with the enquiry u/s 5A of the Act. In that view of the matter, I set aside Ext.P9 notification in Writ Petition (c). No. 29890/2010 and direct that the respondents will proceed further to conduct the enquiry as contemplated u/s 5A of the Land Acquisition Act.

19. Although, it is true that the respondents contended that since a meeting has been convened by the Principal Secretary to the Government and Ext.R2(c) decision was taken, in effect the enquiry as contemplated u/s 5A has been conducted by the Principal Secretary to the Government himself. On this basis, it was argued that no prejudice has been caused to the petitioners. However, I am unable to accept this contention because the enquiry u/s 5A is a statutory enquiry and that enquiry is to be conducted by the authority authorized by the statute itself. An informal enquiry conducted by a Government official cannot be a substitute for such a statutory enquiry u/s 5A of the Act. In so far as the contention of the petitioners regarding the alignment is concerned, fixation of an alignment in a land acquisition proceeding is a matter for the experts and this principle has been laid down by this court in *Assyst International Pvt. Ltd. Vs. State of Kerala and Others*, . In this case, there is no material for this court to take a view that fixation of alignment is vitiated for any arbitrariness and mala fides. On the other hand, if the petitioners have any grievance, it is up to them to canvass it before the appropriate authority while the enquiry u/s 5A is conducted.

The Writ Petitions are disposed of as above.