
(1983) 08 BOM CK 0043

In the Bombay High Court

Case No : Writ Petition No's. 335, 336 and 337 of 1983

Sharnappa V. Patrika

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 24-08-1983

Acts Referred:

Constitution of India, 1950 — Article 226

Evidence Act, 1872 — Section 114

Land Acquisition Act, 1894 — Section 12, 17, 4, 5A, 6

Citation : (1984) 86 BOMLR 106

Hon'ble Judges : M.N. Chandurkar, Acting C.J.;Kurdukar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.N. Chandurkar, Acting C.J.

1. All these three petitions challenge the validity of the land acquisition proceedings in connection with what has come to be known as "the Lower Terna Project," The notification u/s 4 of the Land Acquisition Act Was issued on December 13, 1981 and the notification recited that the Additional Commissioner, Aurangabad Division, was of the opinion that acquisition of the lands notified was urgently necessary and he further directed u/s 17(4) of the Land Acquisition Act that the provisions of 5A of the said Act shall not apply in respect of the said lands. The same notification also recited that if the Additional Commissioner, Aurangabad Division, was satisfied that the said lands were needed for the purpose specified in the notification, a final notification to that effect u/s 6 of the Land Acquisition Act will be published in the Maharashtra Government Gazette. The public purpose stated in the said notification is "Lower Terna Project quarry and dam site village Lohta and Hasalgaon Tq. Ausa". A notification u/s 6 of the Land Acquisition Act in respect of the lands in dispute came to be published on February 20, 1983. There was a corrigendum to the notification u/s 4 published in Maharashtra Government Gazette dated December

16, 1982 rectifying the mistake relating to the number and the area of two fields so far as the petitioner in Writ Petition No. 335 of 1983 was concerned. It is not in dispute that the notification u/s 6 of the Land Acquisition Act correctly specified the numbers of the lands in question.

2. It is necessary to briefly refer to certain facts relating to the implementation of the decision in regard to the Terna Major Irrigation Project in Osmanabad district. The Government of Maharashtra by resolution dated February 10, 1981 referred to the question of rapid development of under-developed region of Marathwada which, according to the resolution, had been engaging the attention of the Government. The resolution recites that with this end in view, the Government has announced special Measures programmers in relation to the felt needs of (this region and its specific problems. These measures and programmes were expressly mentioned in an annexure to this resolution. The Government Resolution further recites that the Government desires that these programmes should be implemented in a time-bound manner during the sixth Five Year Plan and the subsequent Five Year Plans, so that the relatively under-developed region of Marathwada is enabled to achieve a faster rate of growth and thereby attain optimum level of development, depending upon the resources, both natural and otherwise. By the same resolution Government constituted a Monitoring and Review Committee to monitor (the implementation of such programmes. The annexure to the resolution is itself headed as "special programmes for the speedy development of the Marathwada region". There are two irrigation projects mentioned in this annexure and item No. 2 reads as follows :-

To speed up the projects like Nandur, Vishnupuri and Lower Terna which had almost come to a standstill during the period of the previous Government.

3. The Lower Terna Project in question is a project which is estimated to cost more than Rs. 37 crores and has been sanctioned by the Planning Commission. It appears that originally there were 12 medium schemes which the Government had in mind, but on second thought, some of these schemes were decided not to be implemented and in their place the Lower Terna Project Scheme was framed. We are really not concerned with either the technical feasibility of the scheme or the exact area and the villages which would get benefit from the irrigation facilities which would be available after the completion of the project. But it may be mentioned that, according to the State Government, while under the present project irrigation facilities would be available for 38,500 acres of land, under the twelve medium schemes, which were proposed earlier, irrigation facilities would have been available for 27,400 acres of land. The submerged area in the present scheme is said to be 7,394 acres, while under the twelve medium projects, the submersion would be of 6,140 acres.

4. The land acquisition proceedings which are challenged in Writ Petition No. 335 of 1983 relate to acquisition of survey Nos. 133 and 135 of village Hasalgaon. The first ground on which these proceedings are challenged by the petitioner is

the ground of mala fide. Mr. Solshe who appears on behalf of the petitioners in all the three petitions, has referred us to the averments in paragraph 13 of the petition, because according to the learned Counsel, these averments spell out a plea of mala fide of the present Minister in charge of Irrigation who hails from Nilanga taluka and the contention is that the effect of this project is that about 43,000 acres of land in Nilanga taluka would come under irrigation, whereas the land estimated to be irrigated by the said major project in Omerga taluka was only about 5,000 acres. The averment is that

the said Minister, therefore, is very much interested in pushing through the said major project so as to perpetuate his election to the State Legislature.

5. In the return filed on behalf of the State Government, it has been stated that the current position so far as the extent of irrigation facilities is concerned, is that 25,000 acres of land from Nilanga taluka. and 7,000 acres of land from Omerga taluka would come under irrigation. The statement made by the Assistant Commissioner (General), Aurangabad Division, further states that when the decision to have this Lower Terna Project at Makni was taken, respondent No. 4, who is the Minister concerned, was not at all a member of the Council of Ministers in Maharashtra and that the Chief Minister then was the present Minister for Planning in the Central Government Mr. S.B. Chavan. These averments in the affidavit in return have obviously been made to indicate that respondent No. 4 did not have any hand in the framing of the major project and having the dam so situated that either the fields belonging to the agriculturists of Makni are acquired, or that the land in Nilanga taluka was to be irrigated. There is no reason to doubt this statement. But, then it was contended by Mr. Solshe that the Minister for Irrigation, respondent No. 4, is interested in seeing that the project goes through speedily. We fail to see how the anxiety of a Minister in the Government to see that the irrigation project goes through speedily can even remotely smell of mala fide. Indeed the resolution of the Government of Maharashtra itself was intended to see that the projects and the programmes set out in the annexure were speedily developed. One cannot overlook the fact that in making the Government Resolution dated February 10, 1981, the very purpose which the State Government had in view was to bring about rapid development of the under-developed region of Marathwada. It is interesting to mention that by accident we noticed that the establishment of the Bench of the High Court at Aurangabad was also one of the items in the annexure to the resolution. Once the Government has accepted the position that the Marathwada region was under-developed region and that the speedy development of this region was necessary, the department within whose sphere the programmes and the projects specified in the annexure to the resolution fell, were bound to implement the Government Resolution. If a particular project is being speedily implemented, one fails to see how any person, or more so especially belonging to this region, can make any grievance with regard to the speed of development. We have not found anything, on the record to show that the acquisition of the petitioner's land is being done with any ulterior motive at the instance of respondent 4.

Indeed we have been told that the lands which are involved in these three petitions are the only lands which have not been taken possession of and that all the other lands which have been notified for acquisition have already been taken possession of and the work has commenced.

6. Mr. Solshe then contended that there was no justification for invoking the urgency clause and it is pointed out that the notification u/s 6 was itself issued almost a year and month after the notification u/s 4 of the Land Acquisition Act. In the affidavit filed on behalf of the State, a reference has been made to certain disturbances which took place at Makni, taluka Omerga, where the lands in question are situated in July 1981 and it is stated in the affidavit that as a result of the agitation directed against the location of the project in question at Makni. Government as well as private properties and properties of the employees of the Irrigation Department were damaged. A reference is also made to certain prosecutions which had to be instituted as a result of these disturbances against the members of what it was known as the Action Committee which included petitioner Sharanappa in Writ Petition No. 335 of 1983. The learned Advocate General wanted to rely on these averments and it was argued that the agitation was politically motivated and any attempt to hold an enquiry would have created further problems of law and order and an enquiry could not have taken place. The learned Advocate General also referred to the fact that the implementation of the project is one of the items of the thirty five point programme of the State Government for the speedy development of the Marathwada region and that is how the Government wanted to give top priority to the project and the project was treated as a matter of great urgency. That is why, according to the learned Advocate General, the provisions of Section 5A of the Land Acquisition Act were dispensed with.

7. It was also sought to be contended by the learned Advocate General that the petitioner had already made a claim for compensation before the Land Acquisition Officer and an award has already been made on May 19, 1983 and the petitioner has suppressed this fact from the Court. The argument appeared to be that the petitioner having come to this Court after the award was already made, he should be held disentitled to any relief in the nature of quashing the notification u/s 4 and Section 6 of the Land Acquisition Act. Now we are not inclined to entertain the argument that the petitioner should not be heard in this petition on the ground that an award has already been made, but that fact is not being considered by us and it may be pointed out at this stage that Mr. Solshe, learned Counsel appearing on behalf of the petitioners, had earlier required time to file an additional affidavit, because his contention was that petitioner Sharanappa has not taken part in the proceedings before the Land Acquisition Officer after he filed a statement of claim. We have verified the correctness of this statement and it is not now in dispute that beyond making a statement of claim before the Land Acquisition Officer, petitioner Sharanappa has not taken any part in the proceedings for determining the compensation.

8. We are also unable to accept the contention of the learned Advocate General that the agitation which took place prior to the notification u/s 4 of the Land Acquisition Act was a circumstance which became relevant for deciding whether the urgency clause should be invoked or not. The agitation had taken place sometime in July 1981. The notification u/s 4 of the Land Acquisition Act was issued in December 1981 and merely because the Government would have faced some difficulty in making an enquiry u/s 5A it could not claim to be relieved of the statutory obligation to hold an enquiry if it had no other justification for not holding an enquiry u/s 5A of the Land Acquisition Act.

9. There is, however, some substance in the argument of the learned Advocate General that the project in question has been treated as a matter of great urgency and that was why the provisions of Section 17(4) of the Land Acquisition Act were invoked in the instant case.

10. Now the scope of an enquiry in a case where the provisions of Section 17(4) of the Land Acquisition Act have been invoked is that the expression of opinion of the State Government can be challenged as ultra vires in a court of law if it could be shown that the State Government never applied its mind to the matter or that action of the State Government is mala fide, (see *Raja Anand Brahma Shah Vs. State of Uttar Pradesh and Others*, *In Narayan Govind Gavate and Others Vs. State of Maharashtra and Others*, , the Supreme Court, while dealing with the challenge permissible in a case where Section 17(4) of the Act has been invoked, observed as follows (page 139) : "...

It is true that, in such cases, the formation of an opinion is a subjective matter, as held by this Court repeatedly with regard to situations in which administrative authorities have to form certain opinions before taking actions they are empowered to take. They are expected to know better the difference between a right or wrong opinion than courts could ordinarily on such matters. Nevertheless, that opinion has to be based upon some relevant materials in order to pass the test which courts do impose. That test basically is - Was the authority concerned acting within the scope of its powers or in the sphere where its opinion and discretion must be permitted to have full play? Once the court comes to the conclusion that the authority concerned was acting within the scope of its powers and had some material, however meagre, on which it could reasonably base its opinion, the courts should not and will not interfere. There might, however, be cases in which the power is exercised in such an obviously arbitrary or perverse fashion, without regard to the actual and undeniable facts, or, in other words, so unreasonably as to leave no doubt whatsoever in the mind of a court that there has been an excess of power. There may also be cases where the mind of the authority concerned has not been applied at all, due to misunderstanding of the law or some other reason, to what was legally imperative for it to consider.

11. Having regard to the test laid down by the Supreme Court in the present case we must bear in mind that the lands of the petitioners are not the only

lands which were being acquired for the purpose of Lower Terna project. As already pointed out, about 7500 acres of land would go under submersion and as a part of the process of acquisition of these 7500 acres of land from twelve different villages that lands in question are being acquired. The project is a vast project now approved by the Planning Commission and it is estimated to cost about Rs, 37 Crores. The fact that the project constitutes a public purpose can never be disputed. There is no allegation of malafides in the sense that the petitioners' lands are being taken for ulterior purposes or for unjustifiable reasons. The main idea behind going through the project speedily was to speed up the development of the Marathwada region which has been described as an undeveloped part of the State of Maharashtra. The resolution of the Government of Maharashtra to speed up the said project along with the annexure attached to it shows that there were several programmes or schemes which had come to a standstill on account of inaction and, therefore, it was decided to speed up the implementation of the developmental schemes. As project relating to irrigation on a large scale like the one in the instant case is one of vital importance. It has to be remembered that in the budget for the year 1983-84 a provision of Rs. 1500 crores was made for irrigation and hydro power projects for which the Government has given top priority. Out of this, Rs. 299.5 crores are earmarked for major projects and about Rs. 26 crores for minor projects. If the Government has thus treated the project as one of top priority needing immediate attention, it is not possible for us to hold that there was no material before the Government or the Additional Commissioner to come to the conclusion that the provisions of Section 5A should be dispensed with in the instant case. It is undoubtedly true that the notification u/s 6 was issued ? on February 20, 1983. The interval of a year and two months between the notification u/s 4 and the notification u/s 6 will not on the facts of the present case constitute any infirmity in the land acquisition proceedings. The records disclose that there was correspondence between the Government of Maharashtra and the Central Government and it appears that the Sangharsha Samiti had taken the matter to the Central Government as will appear from Exhibit 4 which is a letter addressed by the Minister for Irrigation in the State Government to the Union Minister for Irrigation. The letter dated May 20, 1982 addressed by the Secretary, Irrigation and Power Department, Bombay to the Secretary to Government of India shows that after the Notification u/s 4 was issued, the matter was discussed and finally the Planning Commission approved of the project on February 20, 1983, that is, eight days before the notification u/s 6 was issued. Having regard to these facts, in our view, it is not open to the petitioners -to challenge the acquisition proceedings on the ground that there has been delay in issuing the notification u/s 6. In any case, having regard to the nature of the project and complete absence of malafides and as the project is now well on its way to we do not think that we will be unjustified if we decline to interfere in our jurisdiction under Article 226 of the Constitution of India.

12. Mr. Solshe has referred us to the decision in Yesho Nathu Mahajan and

Another Vs. The State of Maharashtra and Others, . In that decision a Division Bench of this Court has held that the fact that the purpose for which the land is acquired is laudable is not by itself sufficient to attract the applicability of the urgency clause and it was further pointed out that when an application of urgency clause is challenged, the minimum expected from the State is the disclosure of the circumstances that weighed with it while doing so and abstract justification replete with conjectures is no answer. While there can hardly be any doubt about the proposition laid down in that decision, it is equally true that the question whether there was sufficient reason and ground for invoking the urgency clause, considering the case as one of the exceptional urgency, has to be determined on the facts of each case. In the instant case, as we have already observed, there was anxiety to see that undeveloped part of the State is blessed with project in the larger interest of this region and if having treated the project as one of the priority and the need for urgent execution of the project was highlighted by the Government Resolution of February 1981, those facts, in our view, would be sufficient to do away with the requirements of Section 5A of Land Acquisition Act.

13. It was (then contended by Mr. Solshe that there is a positive averment made in the petition that the requirements of Section 4(1) have not been complied with. Now, this argument relates to the latter part of Section 4(1). Section 4(1), inter alia, requires that the Collector shall cause public notice of the substance of such notification u/s 4 to be given at convenient places in the same locality. Mr. Solshe has pointed out that the petitioners have filed a statement made by the Gram sevak of Gram Panchayat, Hasalgaon, to the effect that between December 13, 1981 and February 20, 1983, there was no proclamation or any notice with regard to the Lower Terna Major Project stuck in Hasalgaon, The Learned Advocate General has referred us to an averment made in the affidavit that the land Acquisition Officer had sent to the Tahsildar, Ausa, a copy of the notice u/s 4(1), 9(3)(4) and 12(2) for being served on the persons named in the notice and there was also a direction given to the Tahsildar that a public notice should be put on the notice board in the office of the Gram Panchayat. From the record of the Land. Acquisition Officer, this notice along with the list of the persons was produced before us and the learned Advocate General contended that though there is no statement in the affidavit that the directions of the Land Acquisition Officer were complied with, a presumption would arise u/s 114 of the Evidence Act that in due course the directions of the Land Acquisitions Officer must have been complied with.

14. Now, it could have been easily possible for the Land Acquisition Officer to verify whether in fact those directions of December 9, 1981 have been complied with or not. The State Government would have been well advised" to make a positive statement as to whether the Tahsildar, Ausa, had complied with the directions of the Land Acquisition Officer. If the matter has rested on the decision of the Supreme Court on Narindrajit Singh and Ranjit Singh and Others Vs. The State of U.P. and Others, that even the latter part of the requirements of Section

4(1) is mandatory in character and non-compliance with that provision would create an infirmity in the notification u/s 4 of the Land Acquisition Act, the petitioner would have been entitled to the relief of quashing the notification u/s 6 of the Land Acquisition Act, The Learned Advocate General, however, brought to our notice a decision of the Supreme Court in Smt. Somavanti and Others Vs. The State of Punjab and Others, , in which the question was whether a notification u/s 4 and Section 6 could be issued simultaneously. That was a decision in which a notification u/s 4 of the Land Acquisition Act was issued on August 18, 1961 and the notification u/s 6 of the Land Acquisition Act was issued on the next day, i.e. August 19, 1961 and it was held by the Supreme Court that prior publication of a notification u/s 4(1) was not a condition precedent to the publication of a notification u/s 6(1) of the Land Acquisition Act. In paragraph 60 of the judgment, the argument advanced before the Supreme Court was that the Land Acquisition Act takes away from a person his inherent right to hold and enjoy that property and, therefore, the exercise of the statutory power by the State to take away such property for a public purpose by paying compensation must be subjected to the meticulous observance of every provision of law entitling it to make the acquisition. The further argument in that case was that a sequence of the statutory provisions, i.e. Section 4, Section 5A and Section 6 showed that the sequence has to be so followed that it must be clear that the Government has applied its mind to all the relevant facts and then come to a decision or arrived at its satisfaction even in a case where the provisions of Section 5A need not be complied with. In other words, the argument before the Supreme Court was that even where the provisions of Section 5A were not to be complied with, there must be an interval of time between a notification u/s 4 and a notification u/s 6. A further argument advanced before the Supreme Court was that even where the Government has not directed under sub Section (4) of Section 17 that the provisions of Section 5A need not be complied with, the two notifications i.e. u/s 4(1) and Section 6(1) cannot be made simultaneously. While dealing with this argument the Supreme Court pointed out that where there is an emergency by reason of which the State Government directs under Sub-section (4) of Section 17 of the Act that the provisions of Section 5A need not be complied with, the whole matter, i.e. the actual requirement of the land for a public purpose must necessarily have been considered at the earlier stage itself that is when it was decided that compliance with the provisions of Section 5A be dispensed with, The Supreme Court then observed as follows (at p. 171 para 10) :

It is, therefore, difficult to see why the two notifications cannot, in such a case, be made simultaneously, a notification under Sub-section (1) of Section 4 is. a condition precedent to the making of, notification under Sub-section (1) of Section 6. If the Government, therefore, takes a decision to make such a notification and thereafter, takes two further decisions, that is, to dispense with compliance with the provisions of Section 5A and also to declare that the land comprised in the notification is in fact needed for a public purpose, there is no

departure from any provisions of the law even though the two notifications are published on the same day. In the case before us the preliminary declaration u/s 4(1) was made on August 18, 1961 and a declaration as to the satisfaction of the Government on August 19, 1961, though both of them were published in the Gazette of August 25, 1961. The preliminary declaration as well as subsequent declaration are both required by law to be published in the official gazette. But the law does not make the prior publication of notification under Sub-section (1) of Section 4 a condition precedent to the publication of a notification under Sub-section (1) of Section 6. Where acquisition is being made after following the normal procedure the notification under the latter section will- necessarily have to be published subsequent to the notification under the former section because in such a case the observance of the procedure u/s 5A is interposed between the two notifications. But where Section 5A is not in the way there is no Irregularity in publishing those notifications on the same day.

(underlining ours).

15. The obvious result of the decision of the Supreme Court in Somawati's case (supra) is that in a case where compliance with the provisions of Section 5A has been dispensed with, according to the Supreme Court, a notification u/s 4 and 6 can be published on the same day. If that is the law, then it is difficult to see how it can be contended that a non-compliance with the provisions of the latter part of Section 4(1) will create an infirmity in the land acquisition proceedings. It is undoubtedly true that in the decision relied upon by Mr. Solse there is a positive observation that the mere fact that the applicability of the provisions of Section 5A has been dispensed with u/s 17(4) of the Act at the time when the notification u/s 4 was issued, that does not authorise the dispensing with the provisions of Section 4(1) and that the provisions of Section 4(1) cannot be held to be mandatory in one situation and directory in another. It was pointed out that Section 4(1) does not contemplate any distinction between those proceedings in which upon the exercise of power u/s 17(4) the appropriate Govt directs that the provisions of Section 5A shall not apply and where such a direction has not been made dispensing with the applicability of Section 5A. We have no doubt that these observations seem to run counter to the decision of the Supreme Court in Somawati's case (supra). Indeed in the decision in Narinderjit Singh's case (supra) there is no reference whatsoever to the decision in Somawati's case. As already pointed out in Somawati's case it has been expressly held that where a provision of Section 5A has been dispensed with, a notification u/s 4(1) and 6(1) can be issued on the same day. In Narinderjit Singh's case (supra) the observations of the Supreme Court show that Section 4(1) does not contemplate any distinction whatsoever between a case where urgency clause is being invoked and in a case where it is not invoked.

16. The Learned Advocate General has also brought to our notice a later decision of the Supreme Court which takes the same view as in the decision in Somawati's case. That decision is in Babu Singh and Others Vs. Union of India

(UOI) and Others, . In that decision Somawati's case been expressly referred to and it has been held that if on applying the urgency clause enquiry u/s 5A has been dispensed with, the Government can make a declaration u/s 6 immediately after the notification u/s 4, and, therefore, there is no illegality in issuance of the notification u/s 4 and Section 6 on the same day. The two decisions, namely, one in Somawati's case and another in Babu Singh's case can be explained only on the footing that the latter part of Section 4(1) need not be complied with in a case where urgency clause has been applied and the enquiry under 5A of the Land Acquisition Act has been dispensed with. It is obvious that if in a case where urgency clause has been applied, it is permissible to issue a notification u/s 4(1) and a notification u/s 6(1) on the same day, compliance with the latter part of Section 4(1) is wholly impossible. The present case before us is squarely covered by the decisions in Somawati's case and Babusingh's case. It is true that the decision in Babu Singh's is of two Judges of the Supreme Court and the decision in Narinderjit Singh's case is also the decision of two judges and therefore, of the co-ordinate Bench. But what is against the present petitioner is that the earlier decision in Somawati's case is of a larger Bench, the Bench being constituted by four Judges of the Supreme Court. Assuming that there is a conflict of decisions between the two Division Benches of the Supreme Court, we are bound to follow the decision in Somawati's case. Therefore, notwithstanding the fact that it is not established that the latter part of Section 4(1) has been complied with, in view of the express ratio of the decision in Somawati's it is not possible for us to hold that there is any infirmity in the land acquisition proceedings following the applicability of the urgency clause.

17. With regard to petition No. 336 of 1983, the learned Advocate General has raised a preliminary objection as to the maintainability of that petition on the ground that even according to the petitioner the two survey Nos. 134 and 137 do not belong to petitioner Baburao, because Baburao himself has stated in the petition that these fields have fallen to the share of his sons who have already been recorded as owners in the record of rights. This fact is not in dispute. It is, therefore, difficult to see how Baburao in his individual capacity could file this petition and the petition is liable to be dismissed on this short ground. But apart from this technical infirmity in the petition, this petition must also be governed by the decision in Writ Petition No. 335 of 1983.

18. These were the arguments advanced before us. In view of which we have taken, all the three petitions, namely, writ petitions Nos. 335, 336 and 337 of 1983 are dismissed. The costs will, however, be awarded in Writ Petition No. 336 of 1983. There will be no order as to costs in the other two petitions.