

(1980) 09 OHC CK 0005
In the Orissa High Court
Case No : O.J.C. No. 43 of 1977

Shri Dhobei Sethi

APPELLANT

Vs

The State of Orissa and Another

RESPONDENT

Date of Decision : 11-09-1980

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226

Evidence Act, 1872 — Section 106

Land Acquisition Act, 1894 — Section 11, 16, 17, 17(1), 17(2)

Citation : (1980) 50 CLT 375

Hon'ble Judges : R.N. Misra, J;P.K. Mohanti, J

Bench : Division Bench

Advocate : G.N. Misra, for the Appellant; D.P. Mohapatra, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

P.K. Mohanti, J.—By these two writ petitions under Article 226 of the Constitution, the Petitioners challenge the validity of the compulsory acquisition of their lands under the emergency procedure.

2. On 16th July, 1970, the Government of Orissa in the Revenue Department issued notification No. 39217-LA-133/70 u/s 4 of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") declaring that 2.02 acres of land appertaining to Survey Nos. 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2318, 2501, 2506, 2507, 2508, 2509, 2510, 2530, 2531, 2532, situated at village Pubakhand were needed for a public purpose, viz, construction of Tahasil Office and staff quarters at Niali. On the same day, another notification bearing No. 39218/LA(B)-133/70 was issued declaring that the provisions of Section 5-A of the Act would not apply in respect of the said lands. The notification u/s 6 of the Act was issued on 3.4.1972 and published in the Gazette on 27.4.1972. A notice u/s 9(1) of the Act was published at the locality in December, 1975. Possession of the land was taken over on 16.12.1976.

3. The Petitioners' contentions are that there was actually no urgency and the notification u/s 17(4) of the Act was an abuse of the power; that there was no justification for dispensing with the application of Section 5-A of the Act; that the Tahasil Office and staff quarters having already been constructed over Government plot No. 1673 in Khata No. 371 there was no necessity for acquisition of their lands; that no notices under Sections 4 and 9 of the Act were ever served on them; that they have been forcibly dispossessed of their lands; and that no construction has so far been made on their lands which are still lying vacant.

4. The opposite parties have filed counter contending that the writ petitions are liable to be dismissed on account of delay and laches; that acquisition of lands was urgently necessary to save the staff of Niali Tahasil from sufferance due to lack of accommodation and the State Government issued the notification u/s 17(4) of the Act after arriving at an objective decision regarding existence of urgency; that a general notice was published at the site soon after the publication of the notification u/s 4(1) of the Act and a notice u/s 9(I) was also published at the site; and that the acquisition of the lands has been made in accordance with law and possession has been taken over on 16-12-1976.

5. Though in the writ petitions the acquisition proceeding were challenged on various grounds, the learned Counsel for the Petitioners confined his arguments to the following points:

(1) Whether there was any justification for applying the urgency clause and for dispensing with the compliance of Section 5-A, of the Act?

(2) Whether the "public purpose" had already been served before taking of possession of the Petitioners' lands?

6. Before considering the rival contentions of the parties, it is necessary to refer to the relevant provisions of the Act. The normal procedure for acquisition of lands is contained in Sections 4, 5-A, 6, 7 and 16. Section 4 of the Act provides that whenever it appears to the appropriate Government that 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 and the Collector shall give public notice of the substance of such notification at a convenient place in the concerned locality. Section 5-A provides that any person interested in any land which has been notified u/s 4(1) as being needed or likely to be needed for a public purpose or for a company may within 30 days after the publication of the notification, object to the acquisition of the land. The objections are, to be made to the Collector in writing. The Collector then has to give the objector an opportunity of being heard. After the enquiry, the Collector has to submit a report to the Government containing his recommendations on the objections. According to Section 6, when the Government is satisfied after considering the report, if any, made u/s 5-A(2) that any particular land is needed for public purpose, a declaration shall be made to that effect. The declaration is required to

be published in the official Gazette. The said declaration of the Government that the land is required for public purpose or for a company is conclusive evidence that the land is needed for a public purpose or for a company. After such declaration is published, Government issues an order to the Collector u/s 7 to take order for the acquisition of the land. Then the Collector has to start proceedings for determining the compensation payable to the owners of the lands after giving notices u/s 9 to the persons interested in the lands. The Collector after holding an enquiry gives award determining the compensation payable to the owners of the lands. Section 16 provides that when the Collector has made an award u/s 11 of the Act, he may take possession of the land which shall thereupon vest absolutely in the Government free from all encumbrances.

Section 17 of the Act provides a special procedure for acquisition of lands in cases of urgency and is in the nature of an exception to the normal procedure. According to Sub-section (1) of Section 17, in cases of urgency whenever the appropriate Government so directs, the Collector, though no such award has been made, may on the expiration of 15 days from the publication of the notice mentioned in Section 9(1) take possession of the land. Such land thereupon vests absolutely in the Government free from all encumbrances. Sub-section (4) of Section 17 contemplates cases of extreme urgency. It provides that in the case of any land to which, in the opinion of the appropriate Government, the provisions of Sub-section (1) or Sub-section (2) are applicable, the appropriate Government may direct that the provisions of Section 5-A would 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 publication of the notification u/s 4(1).

7. The condition precedent to the exercise of powers u/s 17(1) is that "the Government must be satisfied that the possession of the land is required urgently. Under Sub-section (4) of Section 17 of the Act, before the Government can direct that the provisions of Section 5-A of the Act are to be dispensed with, it has to be satisfied that the case is one of extreme urgency. The urgency must be such-that the purpose of acquisition cannot book the period of 30 days for filing objection and the reasonable period of the enquiry, as contemplated u/s 5-A. The provisions of Section 17(4) deprive a person of his statutory right of filing objections and of being heard, and, therefore, are to be resorted to only when the condition precedent to the exercise of the power is fulfilled. In the case of *Dora Phalauli Vs. State of Punjab and Others*, , the Court laid down that the right of a person having any interest in the property to file an objection u/s 5-A of the Act should not be interfered with in a casual or cavalier manner. In the case of *State of Punjab and Another Vs. Gurdial Singh and Others*, , the Court observed:

...Without referring to supportive case-law, it is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency there

public interest does not brook even the minimum time needed to give a hearing land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry u/s 17 of the Act....

8. The legal position is wen settled that the question of urgency is a matter for the subjective satisfaction of the Government and it is not open to the Courts to examine the propriety or correctness of the satisfaction on an objective appraisal of facts. Opinion of the Government can only be challenged as ultra vires in a Court of law, if it can be shown that the Government never applied its mind to the matter or that the action of the Government is mala fide. Raja Anand Brahma Shah Vs. State of Uttar Pradesh and Others, , Narayan Govind Gavate and Others Vs. State of Maharashtra and Others, .

9. If, therefore, in a case there was actually no urgent necessity for acquisition of lands, but the Government mechanically applied the urgency clause, this Court can interfere. If the opinion about the existence of urgency was formed without materials or on irrelevant matters or on mala fide grounds or is ex facie arbitrary, this Court will not hesitate to strike down the notification u/s 17. If the question of urgency has been decided on grounds which are non-existent or irrelevant or on material on which it would be an impossible conclusion to reach, it could legitimately be inferred that the mind has not been applied at all.

10. Keeping the above principles in mind, it is to be considered whether there was any justification for applying the urgency clause and for dispensing with the requirements of Section 5-A of the Act. There can be no doubt that construction of office building and staff quarters is a public purpose, but what was the urgency in the matter so as to dispense with the operation of Section 5-A is the crucial question for consideration. The initial burden of proof to show existence of urgency is on the Government u/s 106 of the Evidence Act, as pointed out by tohe Supreme Court. in Narayan Govind Gavate etc. v. State of Maharashtra and Ors. The return filed by the opp. parties does not disclose the circumstances justifying the waiver of Section 5-A. There is nothing to show that the necessity of constructing the office building and staff quarters was so acute that construction of the same could not brook compliance of Section 5-A and as such Government were satisfied about the urgency and exercised the power u/s 17 of the Act. Section 5-A allows only 30 days" time to a person affected to file his objection Therefore, the emergency that would justify the elimination of the enquiry u/s 5-A must necessarily be an urgency which will not permit the delay of 30 days and a reasonable time thereafter for the summary enquiry.

The necessity for construction of the office building and staff quarters at Niali cannot be said to have arisen all of a sudden. There was no urgency. I such as, a natural calamity to meet with which the lands were urgently needed. The Tahasil office at Niali started functioning long before the acquisition of the lands and there is nothing to show that there was urgent necessity of shifting the office to a new building. Even if possess- Lion of the land was taken immediately, construction of the building could not be completed over night. The usual

procedure for construction of Government buildings is to get plan and estimate prepared by the Works Department, to get the same administratively approved by the competent authority and to obtain allotment of funds for the same from the State Government. In this process it takes a long time to start execution of building project. It is not shown that construction of the office building and staff quarters at Niali was a time-bound project and that allotments of funds for the same was going to lapse. Although possession of the land was taken in the year 1976, the building has not yet been constructed. It cannot, therefore, be said that the need was so, imperative that the lapse of time required for holding an enquiry u/s 5-A of the Act could not be suffered. It is significant to mention in this connection that though the notification u/s 17(4) was issued on 16-7-1970, the Government took about one year and nine months to publish the declaration u/s 6 and about seven years to take possession of the land. The summary proceedings u/s 5-A could be easily completed in the meantime. The fact that there was delay of about seven years in taking possession of the land leads to the conclusion that there was no urgency in the matter. If there was any urgency for taking possession of the lands one would have expected the authorities to take the earliest steps for taking possession of the lands, Admittedly the Petitioners' plots under acquisition are still lying vacant and we have not been informed that plan and estimate have been sanctioned for construction of any building on the same. We therefore hold that the procedure prescribed by Section 5-A was dispensed with in colourable exercise of power vested in Section 17(4) of the Act. The view we take is supported by authorities.

In the case of *Narayan Govind Gavate and Others Vs. State of Maharashtra and Others*, , Lordships held that the power conferred by Section 17 could be applied only in the case where by operation of natural force beyond the human control, the land had to be urgently taken possession of. Their Lordships also held (as per head note):

Where certain lands are sought to be acquired and the public purpose indicated in the notification is the development of area for industrial and residential purposes that in itself, on the face of it, does not call for any such action, barring exceptional circumstances, as to make immediate possession, without holding even a summary enquiry u/s 5-A of the Act, imperative. On the other hand, such schemes generally take sufficient period of time to enable, at least summary inquiries u/s 5-A of the Act to be completed without any impediment whatsoever to the execution of the scheme. Therefore, the very statement of the public purpose for which the land was to be acquired indicated the absence of such urgency, on the apparent facts of the case, as to require the elimination of an enquiry u/s 5-A of the Act.

In *Yesho Nathu Mahajan and Another Vs. The State of Maharashtra and Others*, , it was observed as follows:

...Purpose such as providing house sites or extension of gaathan cannot be said to spring into existence overnight unless, of course, it is a result of some

unexpected, exceptional or extraordinary situation or development such as, for instance, an earthquake or flood or some specific clearcut time-bound project likely to be rendered ipso facto nugatory and infructuous by even such lapse of time as would occur in the case of an acquisition sans or without the urgency clause. While applying the urgency clause, the State should, indeed, act with considerable care and responsibility.

11. The opinion of the Government about existence of urgency is founded on the Collector's letter No. 1625 dated 15-5-1970 referred to in para 5 of the return. On a perusal of the records of the land acquisition proceedings, it appears that the Collector had recommended for the emergency procedure on the grounds that: (1) the previous notifications under Sections 4 and 17 of the Act published in the year 1966 had become invalid, and (2) that the requiring officer had requested for acquisition of the land by the emergency procedure as the land was urgently required for immediate construction of the office building and staff quarters at Niali. It is found from the records that the need for acquisition was felt in the year 1966 and Government notification Nos. 39613 and 29614 u/s 4(1) and 17(4) respectively were issued on 23-6-1966 for acquisition of an area of 5.73 acres and the notifications were published in the Orissa Extraordinary Gazette No. 834 dated 15th July, 1966 But those notifications became invalid on 20-1-1969 by virtue of Land Acquisition (Amendment and Validation) Act, 1967, as no declaration u/s 6 of the Act was made by that date. Thus, it appears that though the urgency clause had been previously applied for acquisition of lands for the self-same public purpose, the authorities did not take any active steps in the matter with urgency. In the case of Marimuthammal Vs. The State of Madras and Another, , lands were acquired under the emergency procedure for providing house sites for harijans. Notification u/s 4(1) was issued on 22nd June, 1966 and after dispensing with the enquiry u/s 5-A, a declaration u/s 6 was also published on the same day. Possession of the land was taken on 3rd February, 1967. It was found that the question of acquiring the land for harijans had been pending from the year 1959 but the authorities slept over the matter and issued the impugned notifications in the year 1966. While quashing the notifications under Sections 4, 17 and 6 of the Act, the following observations were made by Alagiriswami, J (as he then was):

...The authorities, who slept over it for four years in the first instance and for another three years even after their attention had been drawn, cannot certainly be allowed to put forward the excuse that the urgency provision was invoked because it was feared that there may be an outbreak of epidemic in that locality. It should not be made a cloak for the tardy actions of the authorities and as a cover for their laziness. A mere mechanical repetition that the provision for house sites for Harijans is urgent, as they are having in a congested quarter, should never be allowed as an excuse for dispensing with the enquiry u/s 5-A of the Act which would take only a month or two. I am not satisfied that in this case there was any emergency justifying the resort to the emergency provision.

His Lordship also remarked:

...This sort of lackadaisical procedure followed by resort to emergency provisions should never be tolerated and the persons responsible must be taught a lesson....

12. In the present case, no material has been placed before us to show that the urgency existing in the year 1966 continued till the year 1970 when the impugned notifications under Sections 4(1) and 17(4) were issued for acquisition of the Petitioners' lands along with other lands. The Collector in his letter No. 1525 dated 15-5-1970 did not give any justification for taking immediate possession of the land and for dispensing with the requirements of Section 5-A. He simply stated that he had been requested by the requiring officer to acquire the land by emergency procedure as the land was urgently required for immediate construction. The opp. parties have not disclosed the facts and circumstances which weighed with them in invoking and applying the urgency clause. There is nothing to show that the State Government examined the existence of urgency to dispense with the requirements of Section 5-A. In our opinion, there was no application of mind and the action of the State Government in applying the urgency clause is an abuse of the power u/s 17(4) of the Act and at any rate a colourable exercise of such power.

13. The next question for consideration is whether the public purpose mentioned in the notifications under Sections 4(1) and 17(4) of the Act had already been served and there was no necessity for acquisition of the lands of the Petitioners.

14. It was contended in the writ petitions that the Petitioners along with other land-owners having protested against acquisition of their lands, the then Governor of Orissa intervened and a Site Selection Committee was constituted for the purpose of selecting a suitable site for construction of the Tahsil office. The Committee in its meeting held on 11-2-1976 selected plot No. 2615 covering an area of 3 acres under Khata No. 881 in mouza Pubakhand for construction of Tahasil office building and quarters. The Tahasildar. Niali was a member of the Committee. The report of the Committee was approved by the Collector (O.P. No. 2) on 25-5-1976 and, according to the Petitioners, the proposal for construction of the Tahasil office building on the lands under acquisition was permanently abandoned. It also contended that the staff quarters had already been constructed on another Government plot bearing No. 1673. In replying to the above allegations, it is contended by the opposite parties in para 8 of the return that the Site Selection Committee was constituted to keep in view a second possible site for extension of Tahasil office and staff quarters in the same locality and that although the Collector, Cut tack had approved the report of the Committee yet no further action has been taken on it as the land selected by the Committee is recorded as Gochar and the proposal for exchange of Gochar land has not been finalised. In their subsequent affidavit dated 18-6-1979, the opposite parties have contended that the second site was selected for extension of Tahasil office while the acquisition of lands already made was for construction of the main Tahasil office itself and that the proposal for construction of the main

Tahasil office building on the acquired plots was never abandoned. The Petitioners' contention that the staff quarters had already been constructed on a Government plot bearing No. 1673 under Khata No. 371 has not been countered by the opposite parties. The report of the Site Selection Committee filed by the Petitioner in O.J.C. No. 43 of 1977 as Annexure - 4 to his writ petition clearly, shows that 24 quarters for the staff of the Tahasil office had already been constructed on plot No. 1673 covering an area of 3 acres under Khata No. 371. There is nothing to indicate in the report that plot No. 2615 was selected for extension of the Tahasil office building. As the main building had not been constructed by the date of the meeting, the question of selecting a site for extension of the building did not arise. The relevant portion of the report IS extracted below:

Previously the staff quarters of Niali Tahasil office was constructed in the village Majhikhonda in Khata No. 371 Plot No. 1673 covering an area 3 acres where 24 quarters were constructed.

Tahasildar, Niali has also shown a private land near the present Tahasil Inspection Bungalow which is a good site no doubt but the land acquisition proceeding is required for the purpose. This proceeding is a time taking procedure where Government has to pay heavy compensation for the land exclusively.

Hence the land in village Pubakhand in Khata No. 881 Plot No. 2615 covering an area is finally selected for the construction of Tahasil office building and quarters.

The report reveals that though the land appertaining to plot No. 2615 is recorded as Gochar, yet it is covered with sand-hills and not fit for being used as a grazing ground. The contents of the report (Annexure-4) have not been specifically denied by the opposite parties. Even assuming that plot No. 2615 comprising an area of 3 acres was being used as Gochar, no explanation has been offered by the opp. parties as to why the proposal for exchange of Gochar land has not been analysed so far. We accept the Petitioners' contention that plot No. 2615 was finally selected for construction of, Tahasil office building and the quarters for the staff had already been constructed on another Government plot bearing No. 1673 covering an area of 3 acres and thus the proposal for construction of office building and staff quarters on the acquired plot had been abandoned and as such the purpose for which the acquisition was undertaken has already been served without raising any construction on the lands under acquisition.

15. It was urged on behalf of the opposite parties that the writ petitions are liable to be dismissed on account of delay and laches. It was submitted by the learned Addl. Government Advocate that the notification u/s 6 of the Act having been published on 27-4-1972, the writ petitions filed on 17-1-1977 and 27-11-1978 cannot be entertained by the Court particularly when the acquisition proceeding has been completed and the possession has been taken Over. He cited authorities in support of his contention that unreasonable delay in filing petition under Article 226 of the Constitution disentitles the Petitioner to relief

There can be no dispute over the proposition that a writ petition is liable to be dismissed on the ground of delay and laches. It appears, however, that in the present case the Petitioners and the other land owners submitted several representations to the Revenue authorities during the period from 10-7-1972 to 10-7-1973. Shri T. Kanungo, Ex-M.L.A. of the area had forwarded one of such representations to the Governor of Orissa and in reply the Governor in his D.O. letter (vide Annexure. 3 to the writ petition in O.J.C. No. 43/77) intimated that he was looking into the matter. It also appears from the original records of the land acquisition proceedings that on 18-8-1976 the land owners sent a representation to the Minister of Revenue, Orissa mentioning therein that they were poor Harijans; that they were to construct their residential houses on the lands in question as their thatched houses were in dilapidated condition due to cyclone and heavy rain; that: they had no other land except the lands in question for construction of houses and that since suitable vacant sites belonging to Government were available at the locality for construction of Tahasil office building there was no necessity for acquisition of their lands. It also appears that on 27-9-1976 the Petitioners along with other land owners had submitted another representation to the Chief Secretary, Government of Orissa and the Private Secretary to the Chief Secretary in his letter No. 1616/CS dated 29-9-1976 called for a report from the Collector of Cuttack. Moreover, as already stated, on the representation of the land-owners, a Site Selection Committee was constituted and the Committee in its meeting held on 11.2-1976 finally selected a plot of land belonging to Government for the purpose of construction of the Tahasil office building and the report of the Site Selection Committee was duly approved by the Collector. Thus, the previous proposal for construction of the building on the acquired plots was abandoned. In the circumstances set forth above, it cannot be said that the Petitioners are guilty of delay and laches.

16. In view of our findings that the notification u/s 17(4) of the Act was issued in colourable exercise of power, it must be held to be void and non-existent in the eye of law. Consequently the procedure prescribed by Section 5-A of the Act ought to have been followed and opportunity to the Petitioners given for filing objection and notification u/s 6 should have been issued only after enquiry u/s 5-A. A notification issued u/s 6 of the Act without taking recourse to the procedure prescribed u/s 5-A would be invalid in law. We have also held that the proposal for construction of office building and staff quarters on the acquired plots had been abandoned before taking possession of the land and that the public purpose indicated in Section 4 of the Act has been already served. We, accordingly, allow the writ petitions and quash the land acquisition proceeding so far as the Petitioners' lands are concerned and direct that the Petitioners be restored to possession of their respective plots within two months from the date of service of the writ. Petitioners are entitled to costs. The hearing fee is assessed at Rs. 100/- in each case.

R.N. Misra, J.

17. I agree.