

(1989) 01 OHC CK 0012
In the Orissa High Court
Case No : O.J.C. No. 3404 of 1988

Sk. Abdul Hamid and Another APPELLANT
Vs
The Land Acquisition Collector, Balasore and Another RESPONDENT

Date of Decision : 12-01-1989

Acts Referred:

Land Acquisition Act, 1894 — Section 17(4), 4(1), 5A

Citation : AIR 1989 Ori 255 : (1989) 67 CLT 659

Hon'ble Judges : K.P. Mohapatra, J;A.K. Padhi, J

Bench : Division Bench

Advocate : A. Pasayat, for the Appellant; D.P. Sahoo, for the Respondent

Final Decision : Allowed

Judgement

K.P. Mohapatra, J.—In this writ petition the petitioners have challenged Annexures 1 and 2, notifications under Sections 4(1) and 5A read with Section 17(4) of the Land Acquisition Act (hereinafter referred to as the "Act").

2. Facts. The petitioners are owners of Ac. 0.065 decimals of land appertaining to several plots situate in mauja Sankarpur of Bhadrak town. It became necessary for the Notified Area Council of Bhadrak (for short "N.A.C.") for excavation of public drain for passage of excess rain water from certain areas within Bhadrak for which purpose it was necessary to acquire two acres of land. Accordingly, a letter (Annexure D) dt. 29-8-1986 was addressed by the Executive Officer, Bhadrak N.A.C., to the Land Acquisition Officer, Balasore, along with a sketch map. Resolutions to the same effect were also passed by Annexure 4 dt. 23-2-1987 as well as Annexure C dt. 30-7-1985. As a result of the communication referred to above (Annexure D), the State Government issued notification u/s 5A dt. 12-9-1988 and another notification dated 22-8-1988 (Annexure 2) applying the emergency clause u/s 17(4) of the Act so as to take immediate possession of the land. The petitioners have contended that there was no emergency for acquiring their land in question as there was no necessity for excavation of a public drain as per the sketch map. On the other hand, the

problem of passage of excess rain water would be solved by making some alternative arrangement by excavating a small drain thereby avoiding acquisition of a large tract of land belonging to different persons. In any event, the petitioners should have been given opportunity as envisaged u/s 5A of the Act for making objections to the land acquisition.

3. The opposite parties have filed their counter and have stated therein that there was real necessity for excavation of the public drain for passage of excess rain water from a locality inside Bhadrak town and the purpose being of public nature it was necessary to acquire the land of the petitioners on an emergent basis by applying the provisions of Section 17(4) of the Act.

4. Mr. Pasayat, learned counsel appearing for the petitioner, has contended that the "N.A.C. passed the resolutions (Annexure C) as early as in 1985, and well as in 1987 (Annexure 4), and the letter (Annexure D) was addressed by the Executive Officer, Bhadrak N.A.C. to opposite party 1 in 1986 only. Had there been any emergency for acquisition of land, the matter should not have been kept pending for so long a period. Therefore, this was not a fit case for applicability of the emergency Section 17(4) of the Act and the petitioners are entitled to make their objections in pursuance of Section 5A thereof. In support of his contention, he has placed reliance on *Periathambi Mudaliar Vs. Special Tahsildar (L.A.) Planning Scheme, Coimbatore and Another*, , *K. Seshagiri Maller and Others Vs. Special Tehsildar for Land Acquisition, Kozhikode and Another*, , *K. Seshagiri Mailer v. Special Tahsildar for Land Acquisition, Kozhikode and Narayan Govind Gavate and Others Vs. State of Maharashtra and Others*, ,

5. The factual position is almost not in dispute. It will appear from the records that by Annexure C dt. 30-7-1985 the N.A.C. resolved to move the government for acquisition of lands for the purpose of excavation of a public drain for passage of excess rain water. The resolution was repeated by another resolution dt. 23-2-1987 (Annexure 4). Prior to these dates, on 1-8- 1985 the Executive Officer had addressed a letter to opposite party 1 which appears to be a requisition for acquisition of lands for the aforesaid purpose. If the matter having originated in the middle of the 1985 could await till the middle of 1988 when Annexures 1 and 2 came into being, it cannot be said, according to law, that there was emergency for acquisition of lands so as to apply the provisions of Section 17(4) of the Act. In the case of *Periathambi Mudaliar (AIR 1965 Mad 328)* (supra) a learned Judge of the Madras High Court interpreted Section 17(4) of the Act and observed thus : --

"The use of the emergency powers cannot be lightly resorted to and can be applied only in cases of real urgency, for their application would mean that the person whose land is acquired is deprived of an opportunity to make his representations in respect of the existence of public purpose or the need to acquire a particular land or to suggest an alternative land for acquisition. That is a valuable right for the owner. That right can only be deprived of for proper reasons. That does not mean that in forming the opinion the Collector or the

Government are expected to give elaborate reasons. But there must be something on the record to show that the opinion of the Collector or the Government has been reasonably and fairly formed and neither arbitrarily or capriciously. As I said, this Court will look to such material so as to satisfy itself as to the proper exercise of the power."

In the case of K. Seshagiri Maller and Others Vs. Special Tehsildar for Land Acquisition, Kozhikode and Another, a learned Judge of the Kerala High Court similarly examined the provisions of Section 17(4) and made the following important observations : --

".....Under Section 17(4) of the Act, the Government have to form an opinion about the applicability of Section 17(4) or 17(2). And when they so form an opinion and decide to dispense with the provisions of Section 5A, they must be fully aware that a very valuable right statutorily conferred on a citizen to object to the acquisition proposed is taken away, Section 5A gives only 30 days" time to a person affected or interested to file his objection to the proposed acquisition, by a notification u/s 4(1). It appears to me, therefore, that any urgency that demands a dispensation with Section 5A must necessarily be an urgency which will not brook a delay of 30 days. In other words, the statute itself impliedly speaks about the circumstances under which the dispensation can be made. The conduct of the Government here indicates that they have waited nearly for two months to publish this and at the same time have taken away a valuable right conferred on the citizens. An urgency to suit the convenience of the Government and at the same time depriving the citizen of a very valuable right, is not the one contemplated by the Act. I think the exercise of power in such circumstances is an abuse of the powers conferred by Section 17(4), at any rate, a colourable exercise of such power.

In the case of Narayan Govind Gavate and Others Vs. State of Maharashtra and Others, the question before the Supreme Court was whether acquisition of land for development of an area should be done on emergent basis by application of Section 17(4) of the Act. It was held that in such cases emergent action barring in exceptional circumstances should not be taken to take possession of lands. On the other hand, the imperative provisions of Section 5A of the Act should be resorted to so as to give opportunity to the party concerned to object to the land acquisition. As we have already indicated, the proposal for excavation of the public drain, originated in 1985 which was given a shape in the year 1988 by issuance of notifications Annexures 1 and 2. If there was so much of delay between issuance of the proposal and the finalisation of it, delay of another 30 days could have been tolerated and by that the aggrieved party could have got opportunity of placing his case by making objection as to whether it was necessary for making acquisition of the land or if there was any other alternative remedy for draining out the excess rain water. As a result of interpretation of Section 5A of the Act, we find that such a remedy is open to the aggrieved party whose land is going to be acquired. He can place before the Land Acquisition

Collector his objections which may include absence of necessity for acquisition of the land and also any other alternative remedy to solve the same problem. In this particular case, if opportunity would have been given to the petitioners as envisaged u/s 5A of the Act, they could have appeared before opposite party 1 so as to make their objection stating that there was no necessity for acquiring the land in question and by excavating & short public drain in another part the mischief of accumulation of excess water could have been avoided.

6. For all these reasons, we are satisfied that this was not a fit case for application of Section 17(4) of the Act and, therefore, Annexure 2 is liable to be quashed. Before parting with the case we would like to observe that in pursuance of Annexure 1 opposite party 1 should give opportunity to the petitioners to make their objection as envisaged in Section 5A of the Act and thereafter proceed according to law.

7. In the result, the writ petition is allowed subject to the observations made above and Annexure 2 is hereby quashed. Parties to bear their own costs.

A.K. Padhi, J.

8. I agree.