

(1994) 07 DEL CK 0041

In the Delhi High Court

Case No : Civil Writ Petition No's. 393 and 394 of 1987 and Civil Miscellaneous Appeal No's. 4738 and 4739 of 1991

Suresh Pahwa

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-07-1994

Acts Referred:

Land Acquisition Act, 1894 — Section 17(1)

Citation : (1994) 3 AD 708 : (1994) 55 DLT 362 : (1994) 30 DRJ 274

Hon'ble Judges : Jaspal Singh, J

Bench : Single Bench

Advocate : N.S. Vashisth, S.K. Mahajan, Meera Bhatia, Gajendra Kumar and A. Ahlawat, for the Appellant;

Judgement

Jaspal Singh, J.

(1) Both the petitions which I propose to dispose of by this order, revolve around the notifications issued u/s 4 read with section 17(1) and section 6 of the Land Acquisition Act(hereinaftercalled the Act) and raise interesting questions of law. However, first a brief resume" of the facts.

(2) The land in question, which is only around 8 bighas in all, falls within the Revenue Estate of village Bamnauli, Tehsil Mehrauli. On January 9, 1987 the Delhi Administration issued a notification u/s 4(1) read with section 17(1) & (4) of the Act for a public purpose namely" construction of a 400k.v. power sub-station for the Delhi Electric Supply Undertaking". It claimed that the Lt. Governor was of the opinion that the provisions of sub-section (1) of section 17 of the Act were applicable to the 451 bighas of land likely to be acquired and directed, under sub-section (4) of section 17, that the provisions of section 5A shall not apply. Consequent thereupon a declaration u/s 6 of the Act dated January 12, 1987 was issued for the same purpose. This was followed by yet another declaration dated September 18, 1987 made again u/s 6 of the Act. Admittedly, upon the acquisition of the land a power sub-station has already been constructed by the

Delhi Electric Supply Undertaking but the same has not so far been energized and made operational as for that a control room is required which is proposed to be constructed on the land under challenge and which is still lying vacant. It was argued that since the project was admittedly initiated as far back as in the year 1984 and the Departments consumed had all along gone through the proposal at a snails pace, there was no justification for invoking sub-sections (1) and (4) of section 17 of the Act. Support to the contention was sought to be drawn from two judgments, one from the Supreme Court and the other coming from this Court. However, before I deal with the contention raised, let me mention how the proposal for the setting up of the power sub-station fructified into its final shape.

(3) It appears from the record that in June 1984 the Secretary Land and Building, Delhi Administration was informed that the Delhi Electric Supply Undertaking proposed to establish four 400 k.v. sub stations and that each such sub station needed land measuring 1000 x 750 meters and that the Vice Chairman of the Delhi Development Authority had already approved the requirement. The communication So addressed to the Secretary, Land and Building also mentioned that site inspection had also been carried out. Request was consequently made for suitable instructions to the concerned department for early notification for acquisition old the land. It appears that later on the Delhi Electric Supply Undertaking revised its requirement of land and also located yet another site for setting up the power substation. This was approved by the Delhi Development Authority by Resolution old June 30, 1986. Intimation of the Resolution was conveyed to the Delhi Electric Supply Undertaking by letter dated August 14, 1986. It appears that in the meanwhile the Delhi Development Authority had also issued the " No Objection" certificate regarding land use of the land intended to be acquired. This done, the Delhi. Electric Supply Undertaking approached the Land Acquisition Collector for processing the case for notification "at the earliest". It was by letter dated November 20, 1986 that the Additional "District Magistrate-cum-Director (Panchayats) gave the information that the land in question had not been allotted to the Harijans/landless labourers under 20 Points Programme. This was followed by the notification of January 9, 1987.

(4) As noticed above, support was sought to be drawn from two judgments. The first is reported as State of Punjab and Another Vs. Gurdial Singh and Others, . The relevant observations appear in paragraph 16 of the report and run as under:

"The fourth point about the use of emergency power is well taken. Without referring to supportive case-law, it is fundamental that compulsory taking of a man's property is 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 where 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. Here a slumbering process, pending for years and suddenly

exciting itself into immediate forcible taking, makes a travesty of emergency power."

(5) The second is a Full Bench judgment of this Court. It is S.K. Gupta Vs. The Union of India and Others, where in it was held that "urgency" envisaged by sub-section (1) is subjective and that an enhanced degree of subjectivity prevails under sub-section (4) since it can only be resorted to if "in the opinion" of the appropriate Government the provisions of sub-section (1) or sub-section (2) are applicable.

(6) Let us be clear about one thing and it is that section 4 permits acquisition only for a "" public purpose" and that ""purpose of acquisition being one thing and "urgency" another, every public purpose can not be taken to be per se urgent. This being the position there has to be, independent of "purpose" requirement, subjective satisfaction of the Lt. Governor with regard to the urgency itself.

(7) It was contended that the notification does not spell out any such satisfaction nor does it in fact speak of any urgency. Is it so? Let me reproduce the relevant portion. It is: .

"THE Lt. Governor, being of the opinion that the provisions of sub-section (1) of Section 17 of the said Act are applicable to this land, is further pleased under sub-section 4 of the said section to direct that the provisions of Section 5A shall not apply." The courts do, undoubtedly, play with words but not at the cost of their essence. The days of the "mechanical" approach to judging are gone (see Pound "Mechanical Jurisprudence" (1908) 8 C.R 605 . True, the notification does not employ the word "urgency". So what? Where is the need for parrot-like repetition of a word when the notification in its essence spells out the urgency by obvious resort to sub-sections (1) and (4) of section 17 of the Act. After all it does speak of the "opinion" formed and when reference is made to specific provisions of law and the action taken there under, there is no need to reproduce the language employed in the provision. The notification to my mind, makes it clear that the authorities intended to convey the idea that a situation had arisen which required prompt acquisition of land and surely, as the reading of the writ petitions would reveal, the petitioners clearly understood its message.

(8) One thing more. The language of sub-section (1) of section 17 itself makes it clear that it only speaks of the establishment of the formation of opinion regarding urgency which, however, must be before the order is made. The formation of opinion with regard to urgency is thus the condition precedent to the ultimate resort to section 17(1) of the Act. Section 17(1) positively does not require that satisfaction with regard to that condition must be recited or that there must necessarily be a mention of "urgency", in the notification. I rue, it is most desirable that there should be a recital as even emphasised by the Supreme Court in Dora Phalauli Vs. State of Punjab and Others, , for it would be good both to the person affected as well as to the government in the sense that

whereas it would present a clear picture to the former and thereby make it easier for him to show that what is recited is not correct, it would be beneficial to the latter also for in the face of such recital the presumption that the conditions were satisfied would arise. But supposing the recital of "urgency" is not there? Will this so-called lapse render the notification illegal ab-initio? The learned counsel for the petitioner says yes. In support he has drawn my attention to a Division Bench decision of this court in *Banwari Lal & Sons v. Union of India* (1992) 1 Lal 344 which supports his contention. The date of this judgment is February 4, 1991. The learned Judge who wrote the judgment for the Bench was a party to yet another judgment reported as *Shakuntala B. Moda Vs. Union of India and Others*, . It is of May 28, 1991. Though it makes no mention of the earlier judgment, in *Banwari Lal & Sons*, it observes:

"It is true as argued by the counsel for the petitioner Mr.N.S.Dalal that there is no mention of the word "urgency" in the impugned notification dated 23.12.1986. However, can a notification be declared to be bad in law simply on that score? Our answer to the above query is an emphatic ."No". We feel that a mere omission to mention the word "urgency" would not ipso facto render a particular notification illegal or invalid if the urgency can be shown otherwise by the words Used in the impugned notification".

With respect, I am inclined to follow the view spelled out in *Shakuntala B. Moda's* case for it chooses a path which leads to, with respect, the destination desired and envisioned by the statute.

(9) The discussion which follows would, I firmly believe and hopefully correctly, also show that the strides which the courts have made starting from the so called justifiability of Government's satisfaction to the taking of judicial notice with regard to urgency would not brook defeat of a notification merely on the hyper technical view of the language employed or not employed at all. True, as pointed out by Justice Cardozo in his "The Nature of the Judicial Process" 141 (1921) that a judge is "not to innovate at pleasure", and that he is not "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness", but, I do feel, and with respect, that the view preferred by me, gives effect to, to borrow the words of Chief Justice John Marshall, "the will of the legislature; or in other words, to the will of the law" [*Osborn v. The Bank of the United States* (1824) 22 U.S. 738

(10) Going back to the Division Bench judgment in the case of *Banwari Lal and Sons* (supra), it relies principally upon the judgment of the Supreme Court in *Dora Phalauli Vs. State of Punjab and Others*, wherein it was laid down that the urgency must be clearly spelt out. Though, as far as the notification before me is concerned, it clearly distinguishes the present petitions from that case, it may be of interest to note that in the subsequent Division Bench judgment in *Shakuntala B. Moda's* case (supra) also the said Supreme Court judgment and the observations made therein were noticed but a different view was taken. I hat besides, I feel that the objection is squarely met by five judges Bench judgment

of the Supreme Court in *The Swadeshi Cotton Mills Co. Limited Vs. The State of U.P. and Others*, which, I must say, was, however, not cited by either side. It observed:

"THE power to pass an order under S.3 arises as soon as the necessary opinion required there under is formed. This opinion is naturally formed before the order is made. If Therefore such an opinion was formed and an order was passed thereafter the subsequent order would be a valid exercise of the power conferred by the section. The fact that in the notification which is made thereafter to publish the order, the formation of the opinion is not recited will not take away the power to make the order which had already arisen and led to the making of the order. The validity of the order Therefore does not depend upon the recital of the formation of the opinion in the order but upon the actual formation of the opinion and making of the order in consequence. It would Therefore follow that if by inadvertence or otherwise the recital of the formation of the opinion is not mentioned in the preamble to the order the defect can be remedied by showing by other evidence in proceedings where challenge is made to the validity of the order, that in fact the order was made after such opinion had been formed and was thus a valid exercise of the power conferred by I lie law. The only exception to this course would be where the statute requires that there should be a recital in the order itself before it can be validly made."

(11) But then, was there really subjective satisfaction on the part of the Lt. Governor with regard to urgency? The question gives birth to yet another question. And it is: To what extent the Court can probe and examine the claim of subjective satisfaction? It was suggested on behalf of the petitioners that the question of "urgency" is "justifiable" in the sense that this court while examining it may substitute its own opinion for that of the Lt. Governor. It was also suggested that since in the notification the word "urgency" was conspicuous by its absence, the burden of proof would be on Government. It was, however, not disputed that it would be open to the Government to establish aliened that, in fact, there was "urgency". On the other hand, it was sought to be suggested on be hall of the Respondents that the satisfaction required being subjective, this court should accept the same, it being within the domain of absolute discretion of the Lt. Governor and that, in any case, the satisfaction so arrived at was justified in view of the material on record. To say that satisfaction being subjective it would thus be within the absolute discretion of the Lt. Governor, is anathema. In the oft-repealed words of Justice William Douglas, "Absolute discretion, like corruption, marks the beginning of the end of liberty" [*State of New York v. United State*, (1951) 342 U.S. 882 I He said in yet another case, *United States v. Wunderlich*, (1951) 342 U.S. 98:

"LAW has readied its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute a man has always suffered ... Absolute discretion is a ruthless master. It is more destructive old freedom than any of man's other

inventions."

Our own Supreme Court too has exploded this myth. But that, a little later.

(12) Of course, in the Full Bench judgment of the Punjab High Court in *Printers House Private Ltd. v. Misri Lal Dalip Singh* Air 1970 Pun the majority view was that "urgency" was "justifiable" meaning thereby an appellate court's power to "substitute its own opinion for that of the appropriate authority" and though it appears that the Full Bench of this Court in *S.K. Gupta Vs. The Union of India and Others*, proceeded on that legal assumption, the present legal opinion does not favor such an approach. In *Rajasthan Housing Board and Others Vs. Shri Kishan and Others*, , the Apex Court has observed:

"It must be remembered that the satisfaction u/s 17(4) is a subjective one and that so long as there is material upon which the Government could have formed the said satisfaction fairly, the court would not interfere nor would it examine the material as an appellate authority."

This then, is the complete answer to the first limb of the argument of the petitioner and to the theory of absolute discretion Canvassed from the side of the respondents. As for I he second limb, the court, in a case like the present one, has to be satisfied merely to the extent that the Lt. Governor had some material before him on the basis of which hi" could have formed the Said satisfaction "fairly". The so-called " burden of proof" is limited only to that extent. And once it is discharged, the court goes no further, for, the scope of probe itself is limited.

(13) In the counter affidavit filed on behalf of the respondents, reference is first made to the various staves through which the proposal for acquisition passed including the resolution passed by the Delhi Development Authority. It then proceeds to say in paragraphs 3, 7 and 17(e) that the above Notification dated 9.1.1987 was issued for the acquisition of land for construction of the Electric sub Station thereupon and I lie provisions of section 17(1) and (4) were invoked keeping in mind the project and the urgency exhibited by the D.E.S.U. for the construction of 400 k.v.sub-Station for supply of electricity to the neighboring areas and villages.

(14) Under the head-note "Reply to Grounds", the Counter-affidavit makes following assertions:

"GROUND of the writ petition is without any merit and is wrong and denied. It is denied that provisions of section 17 of L.A.Act cannot be invoked in the circumstances of the present case, The grounds of urgency and expediency for construction of a 400 k.v., D.E.S.U. Sub-station have already been explained in the preceding paras.

(15) The allegation made in Ground E of the Writ petition is wrong and denied. The project of D.E.S.U. is a high priority and a public purpose project and the provision of Section 17 of the Land Acquisition Act were correctly invoked in the circumstances of the case. The averment made in para G of the Grounds is

wrong and denied. The Project of D.E.S.U. is a high priority public utility Project and the 400 K.V. Power Station to be constructed at the site would benefit the consumers of electricity in the entire Delhi. Therefore, the land was required urgent and top priority basis. Averment made in Ground H of the writ petition are wrong and denied. The Notification u/s 17(9) of the L.A. Act was issued by the Lt. Governor, after due deliberation and application of mind to the circumstances of the case and on the basis of evidence on record. Averment made in Ground I are wrong and denied and merit no consideration in the light of the submission made by the Respondent in their reply affidavit. The grounds of urgency and disposing of Section 5A of the Land Acquisition were duly and seriously considered by the Lt. Governor. Averments made in ground K of the writ petition are wrong and denied. The grounds of urgency have already been explained in the preceding paras. The project of D.E.S.U. was a high priority public purpose land public utility Project the land for which was urgently required by D.E.S.U. It may be noticed that at the instance of the learned counsel for the petitioner and as the learned counsel for the respondents too had no objection, I have gone through the original file which shows that on November-25, 1986 the Chief Engineer (Civil) had written to the Under Secretary (Land and building) Delhi Administration about the establishment of Power Sub Station of 400 K. V. at Bamnauti "in order to meet the growing demand of Delhi" The programme was to establish the Sub Station by March, 1989.. It was pointed out that the construction period required "including all development activities" was 24 months and that "accordingly the work on the project should commence in March 1987 in order to maintain the targets set out for the job. This letter was before the Lt. Governor. The detailed note of the Under Secretary (LA) pointedly referring to the urgency was also before him Request was specifically made therein for resort to section 17(1). After making reference to the programme to establish the sub station by March, 1989 and the need to commence the work by March, 1987 the note said:

"In view of the urgency and also we are already short of power for supplying to the consumers and it is necessary to complete the sub station as early as possible. Therefore there is absolutely essential to issue the notification u/s 17(1) on urgent basis so that the land could be handed over to D.E.S.U. within a specified period."

It was thereafter that the Lt. Governor wrote: "Approved. I hope there are no structures on this land. The compensation should be in keeping with the rates which we have recently given sd/- 4/1/87" For what has been referred to by me above, it is clearly demonstrated that at that time there was a great urgency felt by the authorities regarding the setting up of the power sub-station. The Lt. Governor acted on the material before him. In the circumstances of the case neither can it be said that there was no sufficient material before the Lt. Governor to form the satisfaction fairly nor can the resort to section 17(1) be debunked as unwarranted. 15. This, however, is still not the end of the matter. As noticed in the opening paragraphs, it was urged that the fact that the

Government kept on "dragging its feet" right from 1984 till January 1987 when the notification was finally issued, showed that there was no urgency.

(16) This capital city of India, ever bursting in its seams, is facing acute power problem. It affects the rich and the poor and saps away the strength not only of the citizenry making its life a death sentence but also chokes its already sick industrial / manufacturing units. Delhi rightly reminds one of what a poet of profound distress Samuel Beckett wrote, "I can't go on, I'll go on." Cannot the courts take judicial notice of this problem? The learned counsel for the petitioner says Np. I tend to disagree. And I find judicial authority by my side. In *Kasireddy Papaiah (Died) and Others Vs. The Government of Andhra Pradesh and Others*, , Chinnappa Reddy, J. speaking for the High Court of Andhra Pradesh while dealing with the problem of housing for the Harijans observed thus:

"That the housing conditions of Harijans all over the country continue to be miserable even today is a fact of which courts are bound to take judicial notice. History has made it urgent I hat, among other problems the problem of housing Harijans should be solved expeditiously. The greater the delay the more urgent becomes the problem. Therefore, one can never venture to say that the invocation of the emergency provisions of the Land Acquisition Act for providing house sites for Harijans is bad merely because the officials entrusted with the task of taking further action in the matter are negligent or tardy in the discharge of their duties, unless, of course, it can be established that the acquisition itself is made with an oblique motive. The urgent pressures of history are not to be undone by the inaction of the bureaucracy. I am not trying to make any pontific pronouncements. But I am at great pains to point out that provision for house sites for Harijans is an urgent and pressing necessity and that the invocation of the emergency provisions of the Land Acquisition Act cannot be said to be improper, in the absence of mala fides, merely because of the delay on I tie part of some government officials."

And the Supreme Court in *State of U.P. Vs. Smt. Pista Devi and Others*, while referring to the observations reproduced above, put to them its own seal of approval. Surely negligence, tardiness or inaction of the official machinery whether before the issuance of the notification or thereafter would not come in the way. It was observed by the Supreme Court in *Deepak Pahwa and Others Vs. Lt. Governor of Delhi and Others*, :

"The other ground of attack is that if regard is had to the considerable length of time spent on interdepartmental discussion before the notification u/s 4(1) was published, it would be apparent that there was no justification for invoking the urgency clause u/s 17(4) and dispensing with the enquiry u/s 5A. We are afraid, we cannot agree with this contention. Very often persons interested in the land proposed to be acquired make various representations to the concerned authorities against the proposed acquisition. This is bound to result in a multiplicity of enquiries, communication and discussions leading to delay in the execution of even urgent projects. Very often the delay makes the problem more

and more acute and increases the urgency of the necessity for acquisition. It is, Therefore, not possible to agree with the submission that mere pro-notification delay would render the invitation of the urgency provisions void."

To the same effect were the observations made by the Supreme Court in *Jage Ram and Others Vs. State of Haryana and Others*, . The Court pointed out:

"THE fact that the State Government or the party concerned was lethargic at an earlier stage is not very relevant for deciding the question whether on the date on which the notification was issued, there was urgency or not."

In any case, the notification having been issued as far back as January, 1987 and the power problem of Delhi having assumed more alarming proportions in the meanwhile it is no longer possible for the court to take the view that the scheme for setting up the power sub station does not appear to demand such emergent action as to eliminate summary inquiries u/s 5A of the Act, more so when the power sub station has already been set up and only its energy station remains which has been held up on account of the challenge through these writ petitions.

(17) Two more points raised by the learned counsel for the petitioner remain to be noticed.

(18) It may be recalled that a declaration u/s 6 was followed by yet another under the same provision. It was contended that no authority vested in the Government to issue two declarations pertaining to the same land and that, in any case, since it was not mentioned in the tatter declaration that it was being issued in supersession of the first, the first declaration would be the only one which would be looked at. And, with respect to the first declaration it was argued that since the notification under section 4 was published in a newspaper on January 27, 1987, the declaration u/s 6 having been made on January 12, 1987, was bad. That it was so, was not disputed by the other side. Rather, it was contended on behalf of the respondents that it was on account of this legal infirmity that the second declaration was made.

(19) The first declaration u/s 6 being admittedly bad, the question is as to whether another declaration could be validly made. And, on this I need not detain myself for long since the Supreme Court in *State of Gujarat and Another Vs. Bhogilal Keshavlal and Another*, has clearly laid down that if the first declaration is invalid, the second can be validly made. The court observed thus:

"....THE first notification u/s 6 dated August 21, 1961 being invalid, the Government was not precluded from making a second notification. Due to the invalidity of the notification u/s 6, the notification u/s 4 still held the field and on its strength another notification u/s 6 could be issued....."

(20) The learned counsel for the petitioners, however, contended that since the second declaration did not mention anywhere that it was in supersession of the earlier declaration or that it was concealing the earlier declaration, it could not be said that the second declaration had in any way, effected the earlier declaration.

True, the second declaration. does not use the word like: "in supersession of the earlier declaration" nor does it say specifically that the earlier order was being cancelled but then, I do feel that what the petitioners are goading me to do is to en into a web of sheer technicalities and in the process Stultify the manifest purpose of the second declaration. I refuse to tread such slavishly literal a path. It is the intention and not the words which is paramount necessitating the judge to walk, to borrow the words of Cardozo again, "not into ambush, morass and darkness, but into safety, the open spaces, and the light" [See: Cardozo, "The Growth of the law" 144 (1924)¹. Professor Tedeschi tells us: " Interpretation is the copying of another's thought into the range of our spiritual life. and it can be done only by our thought process". He also informs that: "Interpretation is not a mechanical nor even a psychological process. It is reconstruction of another's thought normative thought, if we are dealing with legal interpretation....." (Tedeschi, "Legal Essays" 1 (1978). See also: Levy, "The Nature of Judicial Reasoning 32 U.Chi. L.Rev. 395, 396(1965)¹

(21) Guided by the light seen above, two things emerge out dearly. First, the intention apparently was to supercede/cancel the declaration issued earlier and secondly, the issuance of the second declaration had the effect of superseding/ cancelling the first declaration.

(22) The last point which remains to be tackled revolt es around the Master Plan. It was contended that since in the said Plan the land in question is shown to be "Green Belt and Rural", the same could not be changed by establishment of a power Sub-station. The answer is that the Delhi Development Authority itself gave permission for its establishment by issuing a no-object ion certificate relating to land user. Anyhow since the power Sub-station has already been put up on the land which is not the subject-matter of these petitions and the land in question is needed to set up a control room to make the Sub-station operative and since all this is in public interest, the objection cannot be allowed to stand.

(23) The writ petitions are dismissed but with no order as to costs.