Narayan Govind Gavate and Others

Vs

State of Maharashtra and Others

Civil Appeal Nos. 1616-1621 of 1969.

(CJI A.N. Ray, M.H. Beg, Jaswant Singh JJ)

11.10.1976

JUDGMENT

BEG, J. –

1. There are nine appeals before us, after certification of fitness of the cases for appeals to this Court, directed against orders governed by the same judgment of a Division Bench of the High Court of Maharashtra disposing of writ petitions relating to four groups of lands, which were sought to be acquired under the provisions of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act').

2. A notification dated October 11, 1963, under Section 4 of the Act, was published in the Maharashtra Government Gazette with regard to the first group. The public purpose recited in the notification was "development and utilisation of said land as a residential and industrial area". The notification goes on to state :

> AND WHEREAS the Commissioner, Bombay Division, is of the opinion that the said lands were waste or arable lands and their acquisition is urgently necessary, he is further pleased to direct under sub-section (4) of Section 17 of the said Act, that the provisions of Section 5A of the said Act shall not apply in respect of the said lands.

Thereafter, a notification was issued Section 6 of the Act on December 19, 1963, followed by notices under Section 9(3) and (4) of the Act.

3. With regard to the second group of lands, identically similar notifications under Section 4 together with identically worded declaration-cum-direction, under Section 17(4) of the Act were issued on June 13, 1965. As proceedings with regard to land comprised in his group were not followed up by notification under Section 6 of the Act, it was conceded by Counsel, in the course of arguments on behalf of the State in the High Court, that the proceedings had become invalid. We are, therefore, not concerned with lands in this group in the appeals now before us. Nevertheless, it is not devoid of significance that the terms of the notification under Section 4(1) and the declarations-cum-directions, under Section 17(4) of the Act, in this group are also identical with those in the first two groups. This certainly suggests that directions under Section 17(4) could have been mechanically issued in all the groups in identical terms without out application of mind to the factual requirements prescribed by law.

4. The third group of land was also the subject-matter of identically similar notifications under Section 4 of the Act dated June 13, 1964, together with identically worded declarations-cum-

directions under Section 17(4) of the Act. This land was notified under Section 6 of the Act on September 28, 1964, followed by the notice under Section 9, sub-sections (3) and (4) of the Act on October 28, 1964.

5. With regard to the land in the fourth group, a notification under Section 4 of the Act took place on November 13, 1963, in substantially the same terms as those in the other three groups; but, there was no direction under Section 17(4) of the Act. Consequently, the appellant filed his objection on January 9, 1964. Later, a notification under Section 6 of the Act on July 13, 1964, was accompanied by identically worded vague declaration of urgency under Section 17(4) of the Act. This strange course of action suggests that notification under Section 17(4) was probably made only to save the botheration of the inquiry begun under Section 5A of the Act which should and could have been concluded quite easily before July 13, 1964.

6. In writ petitions before the High Court, the submission that no public purpose existed was not pressed in view of the decision of this Court in Smt. Somavanti v. State of Punjab [(1963) 2 SCR 774 : AIR 1963 SC 151]. In Shri Ramtanu Co-operative Housing Society Ltd. v. State of Maharashtra [(1971) 1 SCR 719, 723 : (1970) 3 SCC 323], acquisition of land for development of industrial areas and residential tenements for persons to live on industrial estates was held to be legally valid for a genuinely public purpose. This ground, therefore, need not detain us, although the appellants, who are owners of the properties acquired, have formally raised it also by means of the six appeals filed by them (Civil Appeals 1616-1621 of 1969). In agreement with the High Court, we hold that notifications under Section 4(1) of the Act were valid in all these cases.

7. The real question which has been argued before us is raised by the State of Maharashtra in its three appeals 1411 to 1413 of 1969, against the view taken by a Division Bench of the Bombay High Court in its judgment dated June 16, 1967. It had held that, although notifications under Section 4(1) of the Act were valid, yet, the Government of Maharashtra had not discharged its burden of showing facts constituting the urgency which impelled it to give declarations-cum-directions under Section 17(4) of the Act dispensing with the enquiries under Section 5A of the Act. Therefore, actions taken pursuant to those delectations under Section 17(4) of the Act were held to be invalid and quashed. The result was that parties were relegated to the position they could take up in the absence of declarations under Section 17(4) of the Act in the cases decided by the High Court. The correctness of this view is assailed before us.

8. The case of the State of Maharashtra is stated as follows in the affidavit filed by the Special Land Acquisition Officer :

> I deny the allegation that the urgency clause has been applied without any valid reason. I respectfully submit that whether an urgency exists or not for exercising the powers under Section 17(1) of the Act is a matter solely for the determination of the State Government or the Commissioner. Without prejudice to this, respectfully submit that as mentioned in the impugned notifications, the third respondent formed the opinion that the said lands were urgently acquired for the public purposes mentioned therein, and, accordingly, he was pleased to so direct under the provisions of Section 17(4) of the Act.

9. The respondent 3 referred to in the affidavit is the Commissioner of Bombay Division. It is significant that, in the affidavit filed in reply to the assertions of petitioners, denying the existence of such urgency as to attract the provisions of Section 17(4) of the Act, the position primarily taken

up, on behalf of the State of Maharashtra, was that the existence of the urgency is not a justiciable matter at all left for determination by courts. After that, there is a bare submission stating the alternative case that the third respondent had formed the opinion that the said lands were urgently required for the public purpose mentioned therein. But, no facts or particulars are stated to which the mind of the Commissioner could have been applied in forming the opinion that the situation called for declarations-cum-directions, under Section 17(4) of the Act, to dispense with inquiries under Section 5A of the Act in these cases. It is important to remember that the mind of the officer or authority concerned has really to be directed towards formation of an opinion on the need to dispense with the inquiry under Section 5A of the Act.

10. 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 material 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 secretion 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 meager, 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. The High Court had put its point of view in the following words :

> When the formation of an opinion or the satisfaction of an authority is subjective but is a conditions precedent to the exercise of a power, the challenge to the formation of such opinion or to such satisfaction is limited, in law, to three points only. It can be challenged, firstly, on the ground of mala fides; secondly, on the ground that the authority which formed that opinion or which arrived at such satisfaction did not apply its mind to the material on which it formed the opinion or arrived at the satisfaction, and, thirdly, that the material on which it formed its opinion or reached the satisfaction was so insufficient that no man could reasonably reach that conclusion. So far as the third point is concerned, no court of law can, as in an appeal, consider that, on the material placed before the authority, the authority was justified in reaching its conclusion. The court can interfere only in such cases where there was no material at all or the material was so insufficient that no man could have reasonably reached that conclusion. It is not necessary to refer to the authorities which lay down these propositions because they have by now been well established in numerous judgments and they are not in dispute before us at the Bar. In this case, however, there is no challenge on any of these three grounds. The dispute in this case therefore narrows down to the point as to the burden of proof. In other words, the dispute is whether it is the petitioner who has to bring the material before the Court to support his contention that no urgency existed or whether, once the petitioner denied that any urgency existed, it was incumbent upon the respondent to satisfy the court that there was material upon which the respondents could reach the opinion as

mentioned in Section 17(4).

12. On the evidence before it, the High Court recorded its conclusions as follows :

> In the case before as the petitioner has stated in the petition more than once that the urgency clause had been applied without any valid reason. The urgency clause in respect of each of the said two notifications concerning the lands in groups 1 and 2 is contained in the relative Section 4 notification itself. The public purpose stated in the notification is 'for development and utilization of the said lands as an industrial and residential area'. To start with, this statement itself is vague, in the sense that it is not clear whether the development and utilization of the lands referred to in that statement was confined to the lands mentioned in the schedule to the notification or it applied to a wider area of which such lands formed only a part. So far as the affidavit in reply is concerned, no facts whatever are stated. The affidavit only states that the authority, i.e. the Commissioner of the Bombay Division, was satisfied that the possession of the said lands was urgently required for the purpose of a carrying out the said development. Even Mr. Setalvad conceded that the affidavit does not contain a statement of facts on which the authority was satisfied or on which it formed its opinion. It is, therefore, quite clear that the respondents have failed to bring on record any material whatever on which the respondents formed the opinion mentioned in the two notifications. The notifications themselves show that they concern many lands other than those falling in the said first and third groups. It is not possible to know what was the development for which the lands were being acquired, much less is it possible to know that were the circumstances which caused urgency in the taking of possession of such lands. We have held that the burden of proving such circumstances, at least prima facie is on the respondents. As the respondents have brought no relevant material on the record, the respondents have failed to discharge that burden. We must, in conclusion, hold that the urgency provision under Section 17(4) was not validly resorted to.

13. It has been submitted on behalf of the State that we need decide nothing more than a simple question of burden of proof in the cases before us. We do not think that a question relating to burden of proof is always free from difficulty or is quite so simple as it is sought to be made out here. Indeed, the apparent simplicity of a question relating to presumptions and burdens of proof, which have to be always viewed together is often deceptive. Oversimplification of such questions leads to erroneous statements and misapplications of the law.

14. Our Evidence Act is largely a condition with certain variations, of the English law of evidence, as it stood when Sir James Fitzjames Stephens drafted it. Therefore, in order to fully grasp the significance of its provisions we have to sometimes turn to its sources in English law which attained something resembling clarity only by stages.

15. In Woolmington v. Director of Public Prosecutions [1935 AC 462], Lord Sankey pointed out that rules of evidence contained in early English cases are quite confusing. He observed : "It was only after that courts began to discuss such things as presumption and onus". He also said that "the word onus is used indifferently throughout the books, sometimes meaning the next more or step in the process of proving and sometimes the conclusion".

16. In Phipson on Evidence (11th Edn.) (at page 40, paragraph 92), we find the principles state in a

manner which sheds considerable light on the meanings of the relevant provisions of our Evidence Act :

> As applied to judicial proceedings the phrase 'burden of proof' has two distinct and frequently confused meanings : (1) the burden of proof as a matter of law and pleading - the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; (2) the burden of proof in the sense of adducing evidence.

It is then explained :

> The burden of proof, in this sense, rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. 'It is an ancient rule founded on considerations of good sense, and it should not be departed from without strong reasons'. It is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting in any circumstances whatever. If, when all the evidence, by whomsoever introduced, is in, the party who has this burden has not discharged it, the decision must be against him.

17. The application of rules relating to burden of proof in various types of cases is thus elaborated and illustrated in Phipson by reference to decided cases (see p. 40, para 93) :

> In deciding which party asserts the affirmative, regard must of course be had to the substance of the issue and not merely to its grammatical form, which later the pleader can frequently vary at will, moreover a negative allegation must not be confounded with the mere traverse of an affirmative one. The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him; e.g. in an action against a tenant for not repairing according to covenant, or against a horse-dealer that a horse sold with a warranty is unsound, proof of these allegations is on the plaintiff, so in actions of malicious prosecution, it is upon him to show not only that the defendant prosecuted him unsuccessfully, but also the absence of reasonable and probable cause; while in actions for false imprisonment, proof of the existence of reasonable cause is upon the defendant, since arrest, unlike prosecution, is prima facie a tort and demands justification. In bailment cases, the bailee must prove that the goods were lost without his fault. Under the Courts (Emergency Powers) Act, 1939, the burden of proving that the defendant was unable immediately to satisfy the judgment and that inability arose from circumstances attributable to the war rested on the defendant. But it would seem that in an election petition alleging breaches of rules made under the Representation of the People Act, 1949, the court will look at the evidence as a whole, and that even if breaches are proved by the petitioner, the burden of showing that the election was conducted substantially in accordance with the law does not rest upon the respondent. Where a corporation does an act under statutory powers which do not prescribe the method, and that act invades the rights of others, the burden is on the corporation to show that there was no other practical way of carrying out the power which would not have that effect.

18. Turning now to the provisions of our own Evidence Act, we find the general or stable burden of

proving a case stated in Section 101 as follows :

> 101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The principle is stated in Section 102 from the point of view of what has been sometimes called the burden of leading or introducing evidence which is placed on the party initiating a proceeding. It says :

> 102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

In practice, this lessor burden is discharged by merely showing that there is evidence in the case which supports the case set up by the party which comes to court first, irrespective of the side which has led that evidence. An outright dismissal in limine of a suit or proceeding for want of evidence is thus often avoided. But, the burden of establishing or general burden of proof is heavier. Sometimes, evidence coming from the side of the respondents, in the form of either their admissions or conduct or failure to controvert, may strengthen or tend to support a petitioner's or plaintiff's case so much that the heavier burden of proving or establishing a case, as distinguished from the mere duty of introducing or showing the existence of some evidence on record stated in Section 102 is itself discharged. Sufficiency of evidence to discharge the onus probandi is not, apart from instances of blatant perversity in assessing evidence, examined by this Court as a rule in appeals by special leave granted under Article 136 of the Constitution. It has been held that the question whether an onus probandi has been discharged is one of fact (see AIR 1930 PC 91 [Wali Mohd. v. Modd. Baksh, 57 IA 86]). It is generally so.

19. "Proof", which is the effect of evidence led, is defined by the provisions of Section 3 of the Evidence Act. The effect of evidence has to be distinguished from the duty or burden of showing to the court what conclusions it should reach. This duty is called the "onus probandi", which is placed upon one of the parties, in accordance with appropriate provisions of law applicable to various situations; but, the effect of the evidence led is a matter of inference or a conclusion to be arrived at by the Court.

20. The total effect of evidence is determined at the end of a proceeding not merely by considering the general duties imposed by Sections 101 and 102 of the Evidence Act but also the special or particular ones imposed by other provisions such as Sections 103 and 106 of the Evidence Act. Section 103 enacts :

> 103. The burden of proof as to may particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

And, Section 106 lays down :

> 106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

21. In judging whether a general or a particular or special onus has been discharged, the court will not only consider the direct effect of the oral and documentary evidence led but also what may be indirectly inferred because certain facts have been proved or not proved though easily capable of proof if they existed at all which raise either a presumption of law or of fact. Section 114 of the Evidence Act covers a wide range of presumptions of fact which can be used by courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. It is, therefore, said that the function of a presumption often is to "fill a gap" in evidence.

22. True presumptions, whether of law or of fact, are always rebuttable. In other words, the party against which a presumption may operate can and must lead evidence to show why the presumption should not be given effect to. If, our example, the party which initiates a proceeding or comes with a case to court offers no evidence to support it, the presumption is that such evidence does not exist. And, if some evidence is shewn to exist on a question in issue, but the party which has it within its power to produce it, does not, despite notice to it to do so, produce it, the natural presumption is that it would, if produced, have gone against it. Similarly, a presumption arises from failure to discharge a special or particular onus.

23. The result of a trial or proceeding is determined by a weighing of the totality of facts and circumstances and presumptions operating in favour of one party as against those which may tilt the balance in favour of another. Such weighment always takes place at the end of a trial or proceeding which cannot, for purposes of this final weighment, be split up into disjointed and disconnected parts simply because the requirements of procedural regularity and logic, embodied in procedural law, prescribe a sequence, a stage, and a mode of proof of each party tendering its evidence. What is weighed at the end of one totality against another and not selected bits or scraps of evidence against each other.

24. Coming back to the cases before us, we find that the High Court had correctly stated the grounds on which even a subjective opinion as to the existence of the need to take action under Section 17(4) of the Act can be challenged on certain limited grounds. But, as soon as we speak of a challenge we have to bear in mind the general burdens laid down by Sections 101 and 102 of the Evidence Act. It is for the petitioner to substantiate the grounds of his challenge. This means that the petitioner has to either lead evidence or show that some evidence has come from the side of the respondents to indicate that this challenge to a notification or order is made good. If he does not succeed in discharging that duty his petition will fail. But, is that the position in the cases before us ? We find that, although the High Court had stated the question before it to be one which "narrows down to the point as to the burden of proof", yet, it had analysed the evidence sufficiently before it to reach the conclusion that the urgency provision under Section 17(4) had not been validly resorted to.

25. The High Court had remarked that the public purpose itself was vaguely stated, although it could not, in its opinion, be challenged on that ground. As we have already indicated, the purpose was sufficiently specified to be, prima facie, a legally valid purpose. We do not think that the vagueness of the purpose, as stated in the notification under Section 4(1), really affected the judgment of the High Court so must as the absence of facts and circumstances which could possibly indicate that this purpose had necessarily to be carried out in such a way as to exclude the application of Section 5A of the Act. The High Court had rightly referred to the absence of any statement of circumstances which could have resulted in such urgency that no enquiry under Section 5A of the Act could reasonably be held.

26. The High Court had relied on the following passage from Barium Chemicals Ltd. v. Company

Law Board [AIR 1967 SC 295, 309 : 1966 Supp SCR 311] :

> .... An action, not based on circumstances suggesting an inference of the enumerated kind will not be valid. In other words, the enumeration of the inference which may be drawn from the circumstances, postulates the absence of a general discretion to go on a fishing expedition to find evidence. No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out...... Since the existence of 'circumstances' is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness.

27. The High Court also cited the following passage from the judgment of Spens, C.J. in King Emperor v. Sibnath Banerjee [1944 FCR 1, 42 : AIR 1943 FC 75], which was relied upon on behalf of the State to contend that it was the duty of the petitioners to remove the effect of a recital in an order showing that conditions precedent to the exercise of a power had been fulfilled :

> It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid making of that order. In the normal case, the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy be accepted by a court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a prima facie case that the recital is not accurate. If, however, in any case, a detenu can produce admissible evidence to that effect, in my judgment the mere existence of the recital in the order cannot prevent the court considering such evidence and, if it thinks fit, coming to a conclusion that the recital is inaccurate.

28. The High Court opined that the presumption of regularity, attached to an order containing a technically correct recital, did not operate in cases in which Section 106 Evidence Act was applicable as it was to the cases before us. We do not think that we can lay down such a broad general proposition. An order or notification, containing a recital, technically correct on the face of it, raises a presumption of fact under Section 114 illustration (e) of the Evidence Act. The well-known maxim of law on which the presumption found in illustration (e) to Section 114 of Evidence Act is : "Omnia praesumuntur rite esse acta" (i.e. all acts are presumed to have been rightly and regularly done). This presumption, however, is one of fact. It is an optional presumption. It can be displaced by circumstances indicating that the power lodged in an authority or official has not been exercised in accordance with the law. We think that the original or stable onus laid down by Section 101 and Section 102 of the Evidence Act cannot be shifted by the use of Section 106 of the Evidence Act, although the particular onus of proving facts and circumstances lying especially within the knowledge of the official who formed the opinion which resulted in the notification under Section 17(4) of the Act rests upon that official. The recital, if it is not defective, may obviate the need to look further. But, there may be circumstances in the case which impel the court to look

beyond it. And, at that stage, Section 106 Evidence Act can be invoked by the party assailing an order or notification. It is most unsafe in such cases for the official or authority concerned to rest content with non-disclosure of facts especially within his or its knowledge by relying on the sufficiency of a recital. Such an attitude may itself justify further judicial scrutiny.

29. In Sibnath Banerjee's case also, facts which led an authority to pass a detention order could be said to lie especially within its knowledge. If there could be certain facts, in Sibnath Banerjee's case, which Sibnath Benerjee as well the official making the order knew, it could, similarly, be urged that, in the cases before us some facts could be known to both sides. We do not think that the principle laid down in Sibnath Banerjee's case can be circumvented by merely citing Section 106 of the Evidence Act as the High Court did. We think that the totality of circumstances has to be examined, including the recitals, to determine whether and to what extent each side had discharged its general or particular onus. It has been repeatedly laid down that the doctrine of onus of proof becomes unimportant when there is sufficient evidence before the court to enable it to reach a particular conclusion. The principle of onus of proof becomes important in cases of either paucity of evidence or in cases where evidence given by two sides is so equibalanced that the court is unable to hold where the truth lay.

30. In the cases before us, if the total evidence from whichever side any of it may have come, was insufficient to enable the petitioners to discharge their general or stable onus, their petitions could not succeed. On the other hand, if, in additional to the bare assertions made by the petitioners, that the urgency contemplated by Section 17(4) did not exist, there were other facts and circumstances, including the failure of the State to indicate facts and circumstances which it could have easily disclosed if they existed, the petitioners could be held to have discharged their general onus.

31. We think that the matter is not so simple as to be capable of decision on an examination of a mere recital in the order or notification as was urged on behalf of the State of Maharashtra. Indeed, even if a recital in a notification is defective or does not contain the necessary statement that the required conditions have been fulfilled, evidence can be led to show that conditions precedent to the exercise of power have been actually fulfilled. This was clearly laid down by this Court in Swadeshi Cotton Mill's case [Swadeshi Cotton Mills Co. Ltd. v. State Industrial Tribunal, (1962) 1 SCR 422 : AIR 1961 SC 1381 : (1961) 2 LLJ 419], where Wanchoo, J., speaking for the Constitution Bench of this Court said :

> The difference between a case where a general order contains a recital on the face of it and one where it does not contain such a recital is that in the latter case the burden is thrown on the authority making the order to satisfy the court by other means that the conditions precedent were fulfilled, but in the former case the court will presume the regularity of the order including the fulfillment of the conditions precedent; and then it will be for the party challenging the legality of the order to show that the recital was not correct and that the conditions precedent were not in fact complied with by the authority : see the observations of Spens, C.J. in King Emperor v. Sibnath Banerjee (supra) which were approved by the Privy Council in King Emperor v. Sibnath Banerjee [1945 FCR 195, 216-217 : AIR 1945 PC 156].

This Court also said there :

> Our conclusion therefore is that where certain conditions precedent have to be satisfied before a subordinate authority can pass an order, (be it executive or of the

> character of subordinate legislation), it is not necessary that the satisfaction of these conditions must be recited in the order itself, unless the stature requires it, though, as we have already remarked, it is most desirable that it should be so, for in that case the presumption that the conditions were satisfied would immediately arise and burden would be thrown on the person challenging the fact of satisfaction to show that what is recited is not correct. But even where the recital is not there on the face of the order, the order will not become illegal ab initio and only a further burden is thrown on the authority passing the order to satisfy the court by other means that the conditions precedent were complied with. In the present case this has been done by the filing of an affidavit before us.

32. It is also clear that, even a technically correct recital in an order or notification stating that the conditions precedent to the exercise of a power have been fulfilled may not debar the court in a given case from considering the question whether, in fact, those conditions have been fulfilled. And, a fortiori, the court may consider and decide whether the authority concerned has applied its mind to really relevant facts of a case with a view to determining that a condition precedent to the exercise of a power has been fulfilled. If it appears, upon an examination of the totality of facts in the case, that the power conferred has been exercised for an extraneous or irrelevant purpose or that the mind has not been applied at all to the real object or purpose of a power, so that the result is that the exercise of power could only serve some other or collateral object, the court will interfere.

33. In Raja Anand Brahma Shah v. State of U.P. [(1967) 1 SCR 373, 381 : AIR 1967 SC 1081] a Constitution Bench of this Court held :

> It is true that the opinion of the State Government which is a condition for the exercise of the power under Section 17(4) of the Act, is subjective and a court cannot normally enquire whether there were sufficient grounds or justification for the opinion formed by the State Government under Section 17(4). The legal position has been explained by the Judicial Committee in King Emperor v. Sibnath Banerjee (72 IA 241) and by this Court in a recent case - Jaichand Lal Sethia v. State of West Bengal [1966 Supp SCR 464 : AIR 1961 SC 483 : 1967 Cri LJ 520]. But even though the power of the State Government has been formulated under Section 17(4) of the Act in subjective terms 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 the action of the State Government is mala fide. If therefore in a case the land under acquisition is not actually waste or arable land but the State Government has formed the opinion that the provisions of sub-section (1) of Section 17 are applicable, the court may legitimately draw an inference that the State Government did not honestly form that opinion or the action forming that opinion the State Government did not apply its mind to the relevant facts bearing on the question at issue. It follows therefore that the notification of the State Government under Section 17(4) of the Act directing that the provisions of Section 5A shall not apply to the land is ultra vires.

34. In Brahma Shah's case, a condition precedent to the application of Section 17(4) was held to be unsatisfied inasmuch as the land in respect of which the proceeding was taken was found to be forest land which could not be classified as "arable or waste land".

35. Learned Council for the State relied strongly on the judgment of this Court in I. G. Joshi v. State

of Gujarat [(1968) 2 SCR 267 : AIR 1968 SC 870], where this Court had pointed out how, in Sibnath Banerjee's case, the initial burden of the petitioner, arising from a prima facie correct order had been repelled by an affidavit filed by Mr. Porter, Additional Home Secretary, on behalf of the State, showing that the mind of the authority concerned had not been independent applied to the requirements of law but a routine order had apparently been passed on materials supplied by the police. We have carefully considered the following observations made by this Court in I. G. Joshi's case after noticing facts of Sibnath Banerjee's case (at p. 278) :

> The High Court, having before it allegations, counter allegations and denials, dealt first with the legal side of the matter. Then it readily accepted the affidavits on the side of Government. If it had reversed it approach it need not have embarked upon (what was perhaps unnecessary) an analysis of the many principles on which onus is distributed between rival parties and the tests on which subjective opinion as distinguished from an opinion as to the existence of a fact, is held open to review in a court of law. As stated already there is a strong presumption of regularity of official acts and added thereto is the prohibition contained in Article 166(2). Government was not called upon to answer the kind of affidavit which was filed with the petition because bare denial that Government had not formed an opinion could not raise an issue. Even if Government under advice offered to disclose how the matter was dealt with, the issue did not change and it was only this : Whether anyone at all formed an opinion and if he did whether he had the necessary authority to do so. The High Court having accepted the affidavits that Raval and Jayaraman had formed the necessary opinion, was only required to see if they had the competence. The High Court after dealing with many matters held that they had.

36. In I. G. Joshi's case it appears to us that the principal ground of attack on a notification was that it was not duly authenticated in accordance with the requirements of Article 166 and the Rules of Business. The notification was held not to have been vitiated on the grounds on which it had been assailed. It was observed that the High Court, after considering the evidence, was satisfied, on the evidence produced before it, that the required opinion had been formed even though it was not necessary for the Government, in view of the presumption of regularity attached to official acts, to produce anything more than the notification. We do not find that any of the matters placed before us now was in issue there. On the other hand, this Court held, on that occasion, that the mere assertion of the petitioner that the Government had not formed an opinion about the need for action under Section 17(4) of the Act "could not raise an issue". We do not think that we need express any opinion here on the question whether such an assertion can or cannot even raise a triable issue. All we need say is that a triable issue did arise and was decided by the High Court in the cases now before us. This issue was whether the conditions precedent to exercise of power under Section 17(4) had been fulfilled or not. We think that such a question can only be decided rightly after determining what was the nature of compliance with the conditions of Section 17(4) required by the Act.

37. We think that Section 17(4) cannot be read in isolation from Section 4(1) and 5A of the Act. The immediate purpose of a notification under Section 4(1) of the Act is to enable those who may have any objections to make to lodge them for purposes of an enquiry under Section 5A of the Act. It is true that, although only 30 days from the notification under Section 4(1) are given for the filing of these objections under Section 5A of the Act, yet, sometimes the proceedings under Section 5A are unduly prolonged. But, considering the nature of the objections which are capable of being successfully taken under Section 5A, it is difficult to see why the summary enquiry should not be

concluded quite expeditiously. In view of the authorities of this Court, the existence of what are prima facie public purposes, such as the one present in the cases before us, cannot be successfully challenged at all by objectors. It is rare to find a case in which objections to the validity of a public purpose of an acquisition can even be stated in a form in which the challenge could succeed. Indeed, questions relating to validity of the notification on the ground of mala fides do not seem to us to be ordinarily open in a summary enquiry under Section 5A of the Act. Hence, there seems to us to be little difficulty in completing enquiries contemplated by Section 5A of the Act very expeditiously.

38. Now, the purpose of Section 17(4) of the Act is, obviously, not merely to confine action under it to waste and arable land but also to situations in which in inquiry under Section 5A will serve no useful purpose, or, for some overriding reason, it would be dispensed with. The mind of the officer or authority concerned has to be applied to the question whether there is an urgency of such a nature that even the summary proceedings under Section 5A of the Act should be eliminated. It is not just the existence of an urgency but the need to dispense with an inquiry under Section 5A which has to be considered.

39. Section 17(2) deals with a case in which an enquiry under Section 5A of the Act could not possibly serve any useful purpose. Sudden change of the course of a river would leave no option if essential communications have to be maintained. It results in more or less indicating, by an operation of natural physical forces beyond human control, what land should be urgently taken possession of. Hence, it offers no difficulty in applying Section 17(4) in public interest. And, the particulars of what is obviously to be done in public interest need not be concealed when its validity is questioned in a court of justice. Other cases may raise questions involving consideration of facts which are especially within the knowledge of the authorities concerned. And, if they do not discharge their special burden, imposed by Section 106, Evidence Act, without even disclosing a sufficient reason for their abstention from disclosure, they have to take the consequences which flow from the non-production of the best evidence which could be produced on behalf of the State if its stand was correct.

40. In the case before us, the public purpose indicated is the development of an area for industrial and residential purposes. This, in itself, on the face of it, does not call for any such action, barring exceptional circumstances, as to make immediate possession, without holds given a summary enquiry under Section 5A of the Act, imperative. On the other hand, such schemes generally take sufficient period of time to enable at least summary inquires under Section 5A 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 under Section 5A of the Act.

41. Again, the uniform and set recital of a formula, like a ritual or mantra, apparently applied mechanically to every case, itself indicated that the mind of the Commissioner concerned was only applied to the question whether the land was waste or arable and whether its acquisition is urgently needed. Nothing beyond that seems to have been considered. The recital itself shows that the mind of the Commissioner was not applied at all to the question whether the urgency is of such a nature as to require elimination of the enquiry under Section 5A of the Act. If it was, at least the notifications gave no inkling of it at all. On the other hand, its literal meaning was that nothing beyond matters stated there were considered.

42. All schemes relating to development of industrial and residential areas must be urgent in the

context of the country's need for increased production and more residential accommodation. Yet, the very nature of such schemes of development does not appear to demand such emergent action as to eliminate summary enquiries under Section 5A of the Act. There is no indication whatsoever in the affidavit filed on behalf of the State that the mind of the Commissioner was applied at all to the question whether it was a case necessitating the elimination of the enquiry under Section 5A of the Act. The recitals in the notifications, on the other hand, indicate that elimination of the enquiry under Section 5A of the Act was treated as an automatic consequence of the opinion formed on other matters. The recital does not say at all that any opinion was formed on the need to dispense with the enquiry under Section 5A of the Act. It is certainly a case in which the recital was at least defective. The burden, therefore, rested upon the State to remove the defect, if possible, by evidence to show that some exceptional circumstances which necessitated the elimination of an enquiry under Section 5A of the Act and that the mind of the Commissioner was applied to this essential question. It seems to us that the High Court correctly applied the provisions of Section 106 of the Evidence Act to place the burden upon the State to prove those special circumstances, although it also appears to us that the High Court was not quite correct in stating its view in such a manner us to make it appear that some part other initial burden of the petitioners under Sections 101 and 102 of the Evidence Act had been displaced by the failure of the State to discharge its duty under Section 106 of the Act. The correct way of putting it would have been to say that the failure of the State of produce the evidence of facts especially within the knowledge of its officials, which rested upon it under Section 106 of the Evidence Act, taken together with the attendant facts and circumstances, including the contents of recitals, had enabled the petitioners to discharge their burden under Sections 101 and 102 of the Evidence Act.

43. We may also observe that if, instead of prolonging litigation by appealing to this Court, the State Government had ordered expeditions enquiries under Section 5A of the Act or even afforded the petitioners some opportunity of being heard before acting under Section 17(4) of the Act, asking them to show cause why no enquiry under Section 5A of the Act should take place at all, the acquisition proceedings need not have been held up so long. In fact, we hope that the acquisition proceedings have not actually been held up.

44. On the view we take of the cases before us, we find no force in either the appeals by the owners of land or in those preferred by the State of Maharashtra. Consequently, we dismiss all the nine appeals before us. The parties will bear their own costs.

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