

## **DELHI HIGH COURT**

S. K. Gupta

Vs.

Union of India, (Delhi)

Civil Writ Petn No. 785 of 1972

(T. V. R. Tatachari C. J., T. P. S. Chawla and Avadh Behari Rohatgi, JJ.)

24.12.1976

### **JUDGEMENT**

#### **T. P. S. Chawla, J.**

1. This petition under Article 226 of the Constitution raises some frequently recurring questions under the Land Acquisition Act, 1894. It concerns four plots of land in Tigri, a village near Delhi. The petitioner, Major S. K. Gupta, purchased these and other lands from the Delhi Sainik Co-operative House Building Society Limited. Title was conveyed to him by a sale deed executed on 29th Apr. 1971. As the lands are neither contiguous nor part of the same field, they are described in the correspondence preceding the sale as 'scattered land'.

2. In Jan. 1972, Delhi Administration decided to acquire a large area of land in village Tigri, including the four plots owned by the petitioner. Three notifications, all dated 28th Feb. 1972, were published in the Delhi Gazette of 16th Mar. 1972. Their distinctive numbers are (iii), (iv) and (v) which are suffixed to the number of the file from which they emanate. The numerical order accords with the statutory legal sequence.

3. Notification (iii) is a composite notification issued under Sections 4 and 17 (4) of the Land Acquisition Act. It intimates to 'all whom it may concern' that the land described therein 'is likely to be acquired' for a public purpose, namely, 'the Planned Development of Delhi'. Certain officers are then authorized 'with their servants and workmen to enter upon and survey any land in the locality and do all other acts required or permitted' by Section 4. The last paragraph of this notification is important, and it reads as follows:

"The Lt. Governor, being of the opinion that provisions of Sub-section (1) of Section 17 of the said Act are applicable to this land, i further pleased under sub section (4) of the said section, to direct that the provisions of Section 5-A shall not apply.'

4. The declaration under Section 6 of the Act that the land 'is needed for a public purpose' is made in notification (iv), and, further, the Collector is directed under Section 7 'to take order for the acquisition of the said land'.

5. Finally, notification (v) which is of vital importance, states that :

"In exercise of the powers conferred by Sub-section (1) of Section 17 of the Land Acquisition Act, 1894, the Lt. Governor, Delhi, is pleased to direct the Land Acquisition Collector, Delhi to take possession of the land the specification of which is given in his notification No. F. 9 (67) /70-L. and B (iv) of even date on the expiration of 15 days from the publication of the notice under Sub-section (i) of Section 9 of the said Act."

6. At the preliminary hearing of the petition it was contended on the basis of *Munshi Singh v. Union of India*,<sup>1</sup> that all these notifications were invalid because the 'Planned Development of Delhi' was too vague and indefinite a statement of the public purpose, especially as a copy of the Master Plan for Delhi had not been appended to the notification under Section 4. A Division Bench of this court had held earlier in *Uttar Pradesh Samaj Co- operative House Building Society Ltd., New Delhi v. Union of India*, that the 'Planned Development of Delhi' was a sufficient narration of the public purpose. Envisaging that this decision might possibly need reconsideration in the light of the later judgment of the Supreme Court, the admitting bench (of which Chief Justice S. N. Andley and I were members) directed that the matter be heard by a Full Bench. Subsequently, in *Raj Kumar v. Union of India*, a Division Bench of this Court has carefully examined the implications of Munshi Singh's case and again affirmed that, in the context of the situation existing in Delhi, the 'Planned Development of Delhi' is a sufficient indication of the public purpose. Presumably, it was for this reason that, at the final hearing, no argument was addressed to us on this point.

7. It is pleaded in the petition that the notifications were not 'issued and signed by the proper authority'. There is no further amplification of this plea. Considering that there is a presumption under Section 114 of the Evidence Act,

1872 that 'official acts have been regularly performed', a plea so meagre as this does not even force an answer: see *Ishwarlal Girdharlal Joshi v. State of Gujarat* <sup>4</sup> However, in the counter-affidavit sworn by the Deputy Secretary (Land and Building), Delhi Administration, the allegation is denied. Copies of two notifications dated 19th Aug. 1954 and 1st Nov. 1956, annexed to that affidavit, show that the President has 'directed' the Lieutenant-Governor under Article 239 (1) of the Constitution to 'exercise the powers and discharge the functions of the Central Government under the provisions of the Land Acquisition Act 1894' within the Union Territory of Delhi. In argument, counsel for the petitioner merely submitted that the published versions of the notifications in the Delhi Gazette did not indicate who, if anyone, had signed them. From the official files produced before us it is clear that on 15th January, 1972 the Lieutenant-Governor 'approved' of the proposal to acquire the land, and the original notifications were signed by Mr. R. N. Puri, Deputy Secretary (Land and Building), Delhi Administration on 28th Feb. 1972. For some reason which we do not know, the printer of the Delhi Gazette omitted the name and designation of the person who had signed the notifications. But since the originals were duly signed, the omission by the printer is inconsequential. The validity of the notifications cannot depend on the printer's aberrations.

8. A more substantial point canvassed was that Sub-section (1) of Section 17 of the Act could not be applied to the petitioner's lands as they were not 'waste or arable'. If a case falls within that sub-section, possession of the land sought to be acquired can, as a departure from the normal rule in Section 16, be taken even before compensation has been awarded by the Collector. It provides that:

"In cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in Section 9, Sub-section (1), take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the Government, free from all encumbrances."

9. After the judgment of the Supreme Court in *Raja Anand Brahma Shah v. State of Uttar Pradesh*, <sup>5</sup> it is indisputable that the sub-section can only be applied to land which is 'waste or arable', and that this is a 'jurisdictional fact' which it is competent for the High Court to review. In that case the Supreme Court said:

'In our opinion, the condition imposed by Section 17 (1) is a condition upon which the jurisdiction of the State Government depends and it is obvious that by wrongly deciding the question as to the character of the land the State Government cannot give itself jurisdiction to give a direction to the Collector to take possession of the land under Section 17 (1) of the Act. It is well established that where the jurisdiction of an administrative authority depends upon a preliminary finding of fact the High Court is entitled, in a proceeding of writ of *certiorari* to determine, upon its independent judgment, whether or not that finding of fact is correct.'

And, the notification under Section 17 (1) was quashed as the land was held to be 'forest' land. This case was followed in *Maria Silvia v. Union of India*, AIR 1968 Goa 91, and there are observations to the like effect in *G. Ramalakshamma v. Govt. of Andhra Pradesh*,<sup>6</sup>

10. None of the notifications in the present case mentions that the land to which it pertains is waste or arable. All that is said in notification (iii) is that the Lieutenant-Governor is 'of the opinion that provisions of sub section (1) of Section 17 of the said Act are applicable to this land'. In *Navnitlal Ranchhodlal v. State of Bombay*,<sup>7</sup> and *Thirumalaiah v. State of Mysore*<sup>8</sup> the relevant notifications recited that there was 'urgency' but made no reference to the nature of the land. In both, the argument that this showed non-application of mind by the Government to this aspect of the sub-section was regarded as forceful, though in neither was the decision rested solely on that ground.

11. On the other hand, in *Murari Lal Gupta v. State of Punjab*, a Full Bench has held, it is enough that Section 17 (1) is 'specifically mentioned in the notification', and the fact that it does not 'further specify' whether the land is waste or arable does not make it invalid. I think this is the better view. Support for it can be derived by analogy from *Ganga Bishnu Swaika v. Calcutta Pinjrapole Society*,<sup>10</sup> There, it was argued, that whereas under Section 6 of the Act the appropriate Government had to be 'satisfied' about the matter respecting which it made a 'declaration', the impugned notification used, instead, the words 'it appears' and was, therefore, bad. The Supreme Court said 'it is not necessary that satisfaction of the Government must *ex facie* appear in the declaration made under that section', and the contention 'that it is imperative that the satisfaction must be expressed in the declaration or that otherwise the notification would not be in accord with Section 6 is not correct'. By parity of reasoning, I would hold,

it is not essential that the direction under Section 17 (1) should state that the land is waste or arable for the sub-section contains no such injunction. It follows that when the question is agitated before a court, it is open to the Government to establish, despite the absence of a recital, that the land is of the kind within the sub-section.

12. In the counter-affidavit filed on behalf of Delhi Administration it is maintained that 'the land in dispute was waste or arable land'. The incertitude of this affirmation was seized upon by counsel for the petitioner to urge that, since, even when the affidavit was filed the Administration was not definite whether the land was 'waste' or 'arable', a fortiori the matter had received no attention at all when the notifications were issued. At first blush the argument seemed unanswerable. Indeed, in *Sadrudin Suleman v. J. H. Patwardhan*,<sup>11</sup> an affidavit worded in precisely the same way was treated as 'itself an important indication of the non-application of mind' and 'not indicative of any decision whatever'. These observations remain intact although that case was overruled in *Ishwarlal Girdharlal Joshi v. State of Gujarat*,<sup>12</sup> on the question whether 'arable' land would include land 'actually cultivated'.

13. But in the present case there is an explanation given which is very plausible. It will be remembered that the notifications cover not only the petitioner's lands but a much larger area. Counsel for Delhi Administration said that some of the lands to which the notifications applied were 'waste' and others were 'arable', and that is why it was necessary to use both words in the counter-affidavit. He said the words 'land in dispute' used therein were meant to refer to all the land which was the subject of the notifications, and it was intended to say that some of it was 'waste' and some 'arable', and not that the petitioner's lands were either 'waste or arable'. While accepting that the grammatical construction of the sentence did give the latter impression, he submitted it was merely the result of defective expression.

14. This submission is borne out by the papers on the file of Delhi Administration. Before the notifications were issued, the Collector was asked to submit a draft notification respecting the land at Tigri. Under cover of a letter dated 26th November 1971 he sent two draft notifications: one in respect of lands which were 'waste and arable' to which Section 17 (1) could be applied, and the other in respect of lands on which there were 'jhuggis' and 'bhattas' which precluded the application of that sub-section. It is very significant that in

speaking of the former the conjunction used is 'and', not 'or'. That means the land comprised both 'waste' and 'arable'. I am persuaded that this is what the counter-affidavit was really intended to convey, and am not prepared to attach too much weight to the form of words employed.

15. However, the question still remains, what was the nature of the petitioner's lands? Apart from saying that his lands are not 'waste or arable', the petitioner has alleged that they are 'habitable' and a portion is 'being used for the purpose of fishery'. In his application for interim stay of dispossession, though not in his petition, it is also alleged that he has 'built his hutment for residence and is running his farm and fisheries on this land'. Except his father's affidavit, the petitioner has not placed on record any proof of his allegations. As against this, Delhi Administration has relied on two documents annexed to a supplementary affidavit filed on its behalf in the course of the hearing, with leave. One document consists of copies of entries in the Khasra Girdawari for the period 1971-72 regarding the four plots owned by the petitioner. In the appropriate column it is recorded that each of them is irrigated by 'tube-well' ('Az Nal Kop'). The other document is an award, made by the Land Acquisition Collector on 17th Nov. 1972, determining the compensation payable for the land acquired by notifications (iii), (iv) and (v). In this award, three of the plots owned by the petitioner are described as 'abpash' and one as 'Ghair-abpash'. Both these terms signify that the lands were arable. An opportunity was afforded to the petitioner to rebut the contents of these documents by filing a further affidavit, but he chose to file none. The conclusion is, therefore, irresistible that his lands were 'arable' and to them Section 17 (1) could be applied.

16. Another question debated turns on Section 17 (4). This sub-section enacts 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 5A shall not apply, and, if it does so direct, a declaration may be made under Section 6 in respect of the land at any time after the publication of the notification under Section 4, sub section (1).'

On reading this sub-section it seemed to me that notification (iv), the one containing the declaration made under Section 6, might be invalid as it had been

published at the very same time and in the very same Gazette as notification (iii) issued under Section 4. It will be observed that Section 17 (4) says in unmistakable terms that 'a declaration may be made under Section 6 in respect of the land at any time after the publication of the notification under Section 4, sub section (1)'. Impliedly that prohibits the making of a declaration under Section 6 before or at the same time as the 'publication' of the notification under Section 4.

17. In the petition this point is not touched upon at all. No doubt in the course of the narrative it is said that the notifications 'have been issued simultaneously', but the only grievance built upon this statement is that the petitioner was thereby prevented from filing objections under Section 5A to the proposed acquisition of his lands. Neither there nor in the grounds, is it contended that any of the notifications was invalid because it had been 'published' at the same time as the others. Nevertheless, as the question was one purely of law, we allowed it to be argued.

18. After listening to the arguments my original view has remained unaltered, though I find myself overborne by authority to hold otherwise. The word 'after' is a common English word meaning 'later in time'. It is the antithesis of 'before'. I do not think that, without doing utter violence to its meaning, 'after' can possibly be made to include that which coincides in time, or, in a word, the 'simultaneous'. It is legitimate to assume that the legislature used so simple a word in its proper acceptation, and did so advisedly.

The reason appears from *N. V. Durga Prakasa Rao v. State of Andhra Pradesh*<sup>13</sup> A 'declaration' under Section 6 can only be made after the Government is 'satisfied' that any particular land 'is needed for a public purpose'. When objections are filed under Section 5A, the satisfaction can be reached only after considering the objections. Inevitably, that causes some time to elapse 'after the publication of the notification under Section 4'. But even if the application of Section 5A is dispensed with by a direction under Section 17 (4), so that no objections can be filed, some time, albeit a day, must still be allowed for the Government to be 'satisfied' before making a 'declaration'.

As was said in the decision just cited:

'In either case the making of a declaration under sub section (1) of Section 6 is mandatory and is subsequent to and conditional on the satisfaction of the

Government as envisaged by the first part of the sub-section.'

There, the declaration under Section 6 was quashed as it had been made 'before' the publication of the notification under Section 4. In that case, as also in *Ramabrahmam v. State of* <sup>14</sup> it was reiterated, that Section 17 (4) permits a 'declaration' under Section 6 to be made only 'after' the notification under Section 4 has been 'published'. A statement to the like effect occurs in *Bharat Singh v. State of Haryana*, <sup>15</sup> with the addition of the words 'and not along with it'.

19. Simultaneous notifications were considered in *B. K. Abdul Azeez v. State of Mysore*, The notification under Section 4 and the declaration under Section 6 had been published in the same issue of the official Gazette. It was held that on this account the declaration under Section 6 was illegal. With reference to Section 17 (4) it was said:

'The wording of the section is quite clear and stress must be laid on the word "after" appearing after the words "at any time" and before the words "publication of the notification", etc., in Section 17 (4) and there can be no doubt that the declaration under Section 6 has to be made after the publication of the notification under Section 4 (1).'

This corresponds exactly with my view. Precisely the same reason that I have indicated for the use of the word 'after' is found stated in that judgment. Speaking of the interval which that word imposes, the court said:

'It appears to us that this gap was and is intended for the benefit of the Government. After the notification under Section 4 (1) the Legislature must have intended to give some time to the State Government to consider if there existed a public purpose and if the land had really to be acquired. No doubt, the simultaneous publication of the notification under Section 4 (1) and the declaration under Section 6 is not in order and the same is open to objection inasmuch as it contravenes the provisions of Section 17 (4).'

20. Yet, this 'illegality' was held not to 'vitate' the proceedings. The reasons for this conclusion were stated as follows:

'Considering the context in which Section 17 (4) comes in and the wording of that section, we do not agree that the provisions of that section are mandatory in the sense that a contravention of the same would vitiate the proceedings already

taken. At the most, it is an irregularity not affecting the merits of the acquisition inasmuch as it has not prejudiced the petitioner.'

As to the correctness of this passage, I entertain serious doubt. No authority has been cited in support of it. Many cases rule that the provisions of the Act must be strictly complied with before the land of a citizen can be acquired: see *Maneklal Amratlal v. Collector of Ahmedabad*,<sup>17</sup> *N. V. Durga Prakasa Rao v. State of Andhra Pradesh*,<sup>18</sup> One of the unrelaxable safeguards is that the Government should apply its mind and be 'satisfied' that the land is 'needed for a public purpose' before a declaration under Section 6 is made. The opening words of Section 6 - 'when the appropriate Government is satisfied' - themselves show that the satisfaction is a condition precedent to the making of a 'declaration': see *Ganga Bishnu Swaika v. Calcutta Pinjrapole Society*,<sup>19</sup> It was conceded in *N. V. Durga Prakasa Rao v. State of Andhra Pradesh*,<sup>20</sup> that 'the provisions of Section 6 (1) and Section 17 (4) are mandatory'. Nor is it right to assume that if no objections can be filed under Section 5A, there will be no new material to consider at the stage of Section 6. Pursuant to the notification under Section 4 (1) there will invariably be the result of the 'survey' and 'other acts' done under Section 4 (2) calling for the application of the Government's mind anew. There is always legal prejudice caused to a person if the Government does not apply its mind to a matter at the stage at which the statute enjoins it should. He is thereby deprived of the protection which the statute, in its wisdom, affords.

21. I think I have said enough to vindicate my view. But as I said at the start, it cannot prevail, for the Supreme Court has ruled to the contrary in *Smt. Somawanti v. State of Punjab*,<sup>21</sup> In that case, too, the notification under Section 4 and the declaration under Section 6 had been published in the Gazette of the 'same date'. The contention was that they 'cannot be made simultaneously'. Overruling this contention, the majority judgment said:

'Undoubtedly the law requires that notification under Sub-section (1) of Section 6 must be made only after the Government is satisfied that particular land is required for a public purpose. Undoubtedly also where the Government has not directed under Sub-section (4) of Section 17 that the provisions of Section 5A need not be complied with the two notifications, that is, under sub section (1) of Section 4 and Sub-section (1) of Section 6 cannot be made simultaneously. But it seems to us that where there is an emergency by reason of which the State

Government directs under Sub-section (4) of Section 17 of the Act that the provisions of Section 5A need not be complied with, the whole matter, that is, the actual requirement of the land for a public purpose must necessarily have been considered at the earliest stage itself that is when it was decided that compliance with the provisions of Section 5A be dispensed with. It is, therefore, difficult to see why the two notifications cannot, in such a case, be made simultaneously. A notification under Sub-section (1) of Section 4 is a condition precedent to the making of notification under Sub-section (1) of Section 6. If the Government, therefore, takes a decision to make such a notification and, thereafter, takes two further decisions, that is, to dispense with compliance with the provisions of Section 5A and also to declare that the land comprised in the notification is in fact needed for a public purpose, there is no departure from any provision of the law even though the two notifications are published on the same day.'

A little later the following passage occurs:

'But the law does not make the prior publication of notification under sub-section (1) of Section 4 a condition precedent to the publication of a notification under Sub-section (1) of Section 6. Where acquisition is being made after following the normal procedure the notification under the latter section will necessarily have to be published subsequent to the notification under the former section because in such a case the observance of procedure under Section 5A is interposed between the two notifications. But where Section 5A is not in the way there is no irregularity in publishing those notifications on the same day.'

22. If I may venture to say so with respect, the attention of the court does not appear, at least, from the judgment, to have been drawn to the actual relevant words in Section 17 (4), and no emphasis seems to have been placed on the word 'after' used therein. Also, it was apparently not mentioned to the court that after the notification under Section 4 (1) is published, even if no objections are allowed to be filed additional material would arise for consideration under Section 6 (1) because of the 'survey' and 'other acts' done under Section 4 (2). Nor were any of the authorities, to which I have referred, cited. Nevertheless, the judgment is binding on us, for, as was said in the same case in another connection:

'The binding effect of a decision does not depend upon whether a particular

argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided.'

I do not think it is possible to distinguish that case on the ground that there, unlike the present case, the declaration under Section 6 was actually made one day after the 'preliminary declaration' under Section 4, though both were published together. The point is that the 'publication' was simultaneous. Nor can I see any other ground of distinction. Moreover, it has been followed in *Vijay Cotton and Oil Mills Ltd. v. State of Gujarat*,<sup>22</sup> Accordingly, I am bound to hold that the declaration under Section 6 is not invalid despite having been made and published at the same time as the notification under Section 4.

23. That brings me to the last and main point in the case: whether there was 'urgency' justifying resort to Section 17 (1) and (4)? Immediately a preliminary question arises: is 'urgency' justifiable, and, if so, within what limits? Here the authorities are legion and not always reconcilable or self-consistent. Taking those discussed before us, I will try to glean the principles, ignoring matters of detail. Almost without fail they use the terms 'objective' and 'subjective', a terminology now firmly embedded in the law. It is worth pondering for a while what these terms mean.

24. In his 'Dictionary of Modern English Usage' (2nd ed. 1965), H. W. Fowler says:

'Objective and subjective (adj.) are terms of philosophy and physiology distinguishing concepts and sensations that have an external cause from those that arise only in the mind ..... They have become Popularised Technicalities, treated as stylish substitutes for commoner and more precise words such as (un) biased, (dis) interested, (im) partial, (un) prejudiced.'

He then illustrates his comment with quotations. This explanation of the present connotation of these words is as simple and lucid as any one can find.

25. The 'Oxford English Dictionary' gives many meanings of 'objective'. In medicine it is 'Applied to symptoms "observed by the practitioner, in distinction from those which are only felt by the patient" '. In philosophy it is

'Opposed to "subjective" in the modern sense: That is or belongs to what is presented to consciousness, as opposed to consciousness itself; that is the object of perception or thought as distinct from the perceiving or thinking subject,

hence, that is, or has the character of being, a "thing" external to the mind; real.'

It is interesting, as the following note explains, that, in the course of time; 'objective' and 'subjective' have nearly interchanged their meanings:

'The Scholastic Philosophy made the distinction between what belongs to things subjectively (subjective), or as they are "in themselves", and what belongs to them objectively (objective), as they are presented to consciousness. In later times the custom of considering the perceiving or thinking consciousness as pre-eminently "the subject" brought about a different use of these words, which now prevails in philosophical language. According to this, what is considered as belonging to the perceiving or thinking self is called subjective, and what is considered as independent of the perceiving or thinking self is called in contrast objective. As to this transition of use (which primarily concerns the word subjective, and affects objective as its antithesis) resulting in what is almost an exchange of sense between the two adjectives, see Hamilton Reid's Wks. 806 note, R. L. Nettleship Philos. Lect. and Remains I. 193.'

26. In transferred senses, when used 'Of a person, a writing, work of art etc.', 'objective' has, according to the same Dictionary, come to mean:

'Dealing with, or laying stress upon, that which is external to the mind; treating of outward things or events, rather than inward thoughts or feelings; regarding or representing things from an objective stand point ..... Treating a subject so as to exhibit the actual facts, not colored by the feelings or opinions of the writer.'

Or, as Funk and Wagnall's 'Standard College Dictionary' puts it more briefly:

'Free from or independent of personal feelings, opinions, prejudice, etc.; detached; unbiased.'

'Subjective' of course, means the opposite.

27. These notions have been transported as 'Popularized Technicalities' into the law. From the cases, the distinction between what is 'objective' and 'subjective' cannot be clearly drawn. It is doubtful whether any of them could survive philosophical dissection. The words are only used to designate a decision according to its dominant characteristic, for, in reality, no decision, be it judicial or administrative, is wholly 'objective' or 'subjective'. Both elements coexist in

varying proportions, and the classification is merely relative.

28. An opinion or judgment is called 'objective' when it is based on facts which can be perceived by the sense, or those inferable there from. Such facts are 'external' to the 'mind' of the person or authority forming the opinion or judgment. They, as well as the opinion or judgment, are, therefore, intrinsically capable of review in the exercise of supervisory jurisdiction. A good example is afforded by Section 17 (1) of the Land Acquisition Act. Unless the land is 'waste' or 'arable' an order under that section cannot be made. Whether land is 'waste' or 'arable' is an 'external' and observable fact. So it has been held that an opinion as to whether it is one or the other is 'objective' and is open to examination by the High Court on a motion for certiorari: see *Ramalakshamma v. Govt. of Andhra Pradesh*,<sup>23</sup>

29. In contrast, those opinions and judgments are described as 'subjective' in which the 'personal' element predominates. They represent the reactions of an individual or body of individuals to a situation, and not a 'detached' assessment of 'external' phenomena. A host of imponderables enters into the decision, most of them unknown and unknowable. The nature of the matter and the decision is such as to make judicial review impracticable and inexpedient. Since the real reasons for the decision would rarely be discernible, an error could seldom be exposed. A review would only substitute the "reactions" of a superior authority for those of an inferior, and produce uncertainty and confusion. Therefore, in general, but subject to the exceptions to be gathered from the cases, a 'subjective' opinion or judgment is not justiciable. Again, Section 17 (1) provides an instance. It can be resorted to only when there is 'urgency'. This is not an 'external' fact, but a 'sensation' produced in the mind by a combination of circumstances. Different minds would not necessarily be induced with the same 'sensation' by a given combination. Accordingly, the decision as to 'urgency' has been held to be 'subjective': see *Printers House Pvt. Ltd. v. Misri Lal Dalip Singh*<sup>24</sup> *Jatadhar Mitra v. State of West Bengal*, *Acchanaik v. State of Mysore* AIR 1975 Karnataka 140.

30. But to treat 'subjective' decisions as absolutely final is also fraught with grave consequences. It could provide shelter for non-application of mind, arbitrariness, dishonesty or even tyranny. Justice could be wholly subverted. No wonder, then, that the present trend of judicial opinion favours an increasing degree of judicial control. This trend was noticed by V. S. Deshpande, J., in

*Delhi Transport Corporation v. Delhi Administration*<sup>26</sup> Nevertheless, scrutiny is still restricted to a number of grounds, and not at large, as the cases to which I now turn will show.

31. The earliest is *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust*,<sup>27</sup> An Ordinance in force in Singapore said that 'Whenever it appears to the Board' that a building is 'unfit for human habitation' the Board may 'declare' it to be 'insanitary'. This phraseology is indicative of a 'subjective' judgment. In the case before it, the Privy Council held that the 'declaration' was not justified as it had been made by 'applying a wrong and inadmissible test'. A writ of prohibition was ordered to issue. The basis of the decision was that the Board had gone 'beyond the limits imposed' by the Ordinance, although it was emphasized at the same time, that, within the powers conferred, the Board could 'determine questions gravely affecting the property and rights of the inhabitants'. Thus, a 'subjective' decision may be annulled if it can be shown to be in excess of power.

32. In *Emperor v. Sibnath Banerji*,<sup>28</sup> , the question was whether certain orders of detention made under Rule 26 of the Defense of India Rules (1939) were valid. That rule enabled the Government to make an order of detention if it was 'satisfied' that it was necessary to detain a person for any of the specified reasons. It transpired from the affidavit filed on behalf of the Government that, pursuant to directions issued by the Home Minister, 'routine orders' for detention had been made respecting two persons 'as a matter of course' on the 'recommendation by the police' and the matter had not been considered 'independently of the police recommendation'. On this account the orders were held to be invalid. The case establishes that the failure of the appropriate authority to apply its mind invalidates a 'subjective' decision.

33. During the second world war the attitude was temporarily more constrictive. The defense of the realm was the paramount consideration overshadowing all others. Typical of the cases of that period is the well-known *Liversidge v. Anderson*<sup>29</sup> It arose out of the detention of a person under wartime legislation. He sued to recover damages for false imprisonment maintaining that his detention was unlawful. The defense relied on an order of detention made under regulation 18B of the Defense (General) Regulations 1939. Detention could be ordered under that regulation if the Secretary of State had 'reasonable cause to believe any person to be of hostile origin or associations' and that by reason

thereof it was 'necessary to exercise control over him'. On an application for particulars of the defense, the crucial question was whether, by the words 'reasonable cause to believe', this regulation imposed an 'objective condition precedent of fact' or a 'subjective' one. Or, as Viscount Maugham put it -

'..... whether ..... the words require that there must be an external fact as to reasonable cause for the belief, and one, therefore, capable of being challenged in a court of law, or, whether..... the words in the context in which they are found point simply to the belief of the Secretary of State founded on his view of there being reasonable cause for the belief which he entertains.'

34. The majority of the House of Lords held that the regulation vested an 'executive discretion' and 'there is no appeal from the decision of the Secretary of State in these matters, provided only that he acts in good faith'. Viscount Maugham could not believe 'that those responsible for the order in council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law'.

35. Lord Atkin was the lone dissident. It is his dissent that has made the case famous. In a judgment memorable for its learning, dialectical skill, felicity of language and libertarian sentiment, he proceeded to show 'that "reasonable cause" for a belief, when the subject of a legal dispute, has always been treated as an objective fact, to be proved by one or other party and to be determined by the appropriate tribunal'. In his view ' "reasonable cause" for an action or belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right'. He had no doubt that the words gave 'rise to a justifiable issue'. As to the 'subjective' meaning contended for by the Secretary of State he said 'it has never at any time occurred to the minds of counsel or judges that the words are even capable of meaning anything so fantastic'. But he accepted that when the words used in the Defense (General) Regulations were 'If it appears to the Secretary of State to be necessary .....' or 'If the Secretary of State is satisfied .....' an 'unlimited discretion' was conferred on the Secretary of State 'assuming, as everyone does, that he acts in good faith'.

36. Not for the first time in legal history, subsequent cases uphold the dissent. In *Nakkuda Ali v. M. F. De S. Jayaratne*.<sup>30</sup> Lord Radcliff, speaking for the Privy Council, explained or, rather, explained away, the *Riverside* case (1943-3

All England Reporter 338) saying that the meaning attributed by the majority to the words 'reasonable cause to believe' was induced by 'the context and attendant circumstances of Defense Regulation 18B' and that 'there is no general principle that such words are to be so understood'. The Privy Council's own view was intimated in the following passage:

'After all, words such as these are commonly found when a legislature or law-making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith: but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. Their Lordships therefore treat the words in reg. 62, "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" as imposing a condition that there must in fact exist such reasonable grounds known to the Controller, before he can validly exercise the power of cancellation.'

This is entirely in consonance with what Lord Atkin had said.

37. In *Ridge v. Baldwin*,<sup>31</sup> Lord Reid dismissed the *Riverside* case, (1943) 3 All England Reporter 338 as 'the very peculiar decision of this House', and frankly announced 'that a temporary abandonment of the rules of natural justice was one of the sacrifices which war conditions required' so that the cases of that period should not be 'regarded as of any great weight'.

38. The view of the Supreme Court runs parallel, and probably goes further. There is a trilogy of cases under the Companies Act 1956 which is instructive. The first is *Barium Chemicals Ltd. v. Company Law Board*<sup>32</sup> It was concerned with an order made under Section 237 of that Act by the Company Law Board acting on behalf of the Central Government. So far as relevant, that section provides that the Central Government may appoint inspectors to investigate the affairs of a company 'if, in the opinion of the Central Government there are circumstances suggesting' what is stated thereafter. All the Judges were agreed that the 'opinion' was 'subjective', and the majority held that it was open to a limited judicial review. Shelat, J., extensively reviewed the cases, including the

ones to which I have referred, and then said:

'Therefore, the words, "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was not 'formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative.'

Enumerating the grounds for interference he said:

'If it is shown that the circumstances do not exist or that they are such that it is impossible for anyone to form an opinion there from suggestive of the aforesaid things, the opinion is challengeable on the ground of non- application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.'

Apart from these he mentioned 'mala fides, dishonesty or corrupt purpose'.

39. The second case is *Rohtas Industries Ltd. v. S. D. Agarwal etc.*,<sup>33</sup> which also turned on Section 237 of the Companies Act. It endorsed the view of the majority in the Barium Chemicals Ltd., case AIR 1967 Supreme Court 295. Both the *Liversidge* (1943-3 All England Reporter 338) and the *Nakkuda Ali*<sup>34</sup> cases were noticed. As to the former, Hegde, J., said it did not 'serve as a real guide for interpreting the provisions of law' with which the Court was concerned, and Bachawat, J., distinguished it on the ground that 'decisions on emergency legislation stand on a peculiar footing'. The latter case was followed. Another case mentioned was *Commr. of Customs and Excise v. Cure and Deeley Ltd.*,<sup>35</sup> which is of interest because it manifests the modern approach. There, Sachs, J., said:

'.....I reject the view that the words "appear to them to be necessary" when used in a statute conferring powers on a competent authority, necessarily make that authority the sole judge of what are its powers as well as the sole judge of the way in which it can exercise such powers as it may have.'

Thus, even the very 'subjective' and slender limitation on the exercise, of power derivable from the word 'appear' is not beyond judicial surveillance.

40. Last of the trilogy is the *Rampur Distillery and Chemical Co. Ltd. v. Company Law Board, New Delhi*,<sup>36</sup> in which Section 326 of the Companies Act came for consideration. For the appointment of a managing agent in respect of any company, Sub-section (1) of that section makes it necessary to obtain the approval of the Central Government. Sub-section (2) instructs the Central Government not to accord its approval 'unless it is satisfied' about certain matters, in particular 'that the managing agent proposed is, in its opinion, a fit and proper person to be appointed.....!'. Rejecting the submission that these expressions meant that the 'satisfaction' was 'subjective' and 'immune from the scrutiny of the court', the Supreme Court held it must be 'the result of an objective appraisal of the relevant materials'. 'There by the Central Government', it was ruled, 'is not made the final arbiter of the existence of the grounds on which the satisfaction may be founded'. The grounds for interference by the court specified in the earlier cases were repeated.

41. It must not be supposed that the principles to be collected from these cases are confined, in their application, to the field of company law. In every branch of law similar principles are invoked. Most recently, in *M. A. Rasheed v. State of Kerala*,<sup>37</sup> whilst dealing with Rule 114 (2) of the Defense of India Rules 1971, under which an order may be made if the Government 'is of opinion that it is necessary or expedient so to do for securing the defense of India etc.', the Supreme Court observed:

'Where powers are conferred on public authorities to exercise the same when "they are satisfied" or when "it appears to them", or when "in their opinion" a certain state of affairs exists, or when powers enable public authorities to take "such action as they think fit" in relation to a subject matter, the Courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated.'

The Rohtas Industries case AIR 1969 Supreme Court 707 was followed, and a passage from the dissenting judgment of Lord Atkin in the *Liversidge* case ((1943) 3 All England Reporter 338) was cited with approval. Echoing the *Barium Chemicals Ltd.* case, AIR 1967 Supreme Court 295, it was added, that 'Administrative decisions in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant considerations'.

42. With regard to sub-sections (1) and (4) of Section 17 of the Land Acquisition Act, the principles are the same. I have already shown that 'urgency' envisaged by Sub-section (1) is subjective. 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- sec. (2) are applicable. Yet, in Raja Anand Brahma Shah's case, AIR 1967 Supreme Court 1081 the Supreme Court said:

'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 virus* 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.'

43. Of the two grounds referred to in this quotation, non-application of mind has been elaborated by the High Courts in later cases. For instance, in the main judgment of the Full Bench in *Printers House Pvt. Ltd. v. Misri Lal Dalip Singh*<sup>38</sup> Shamsher Bahadur, J., says that:

'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.'

He expressly held that the question of 'urgency' was 'justiciable'. Mahajan, J., agreed. Though Narula, J., said the 'issue is not justiciable', he conceded that interference was permissible on essentially the same grounds. The context shows that he was using the word 'justiciable' in a special sense, that is, an appellate court's power to 'substitute its own opinion for that of the appropriate authority'. This case was followed in *Acchanaik v. The State of Mysore*,<sup>39</sup> which extends the categories of non-application of mind to include opinions that are 'ex facie arbitrary'. And there are many other cases. The resulting position is on level with the cases under company law. At the same time one should not forget the admonition in *Jage Ram v. State of Haryana*<sup>40</sup> that 'the conclusion of the Government in a given case that there was urgency is entitled to weight, if not conclusive'.

44. It is not recited in any of the notifications in the present case that there was 'urgency'. If there had been such a recital, although it would not have been conclusive, the burden of proving that it was wrong would have lain on the

petitioner: see *Jaichand Lal Sethia v. State of West Bengal*, <sup>44</sup> *Emperor v. Sibnath Banerji*, <sup>41</sup> *Jatadhar Mitra v. State of West Bengal*, <sup>42</sup> and *Ishwarlal Girdharlal Joshi v. State of Gujarat*, *Supreme Court* 870. The absence of a recital leaves the burden of proof on the Government but does not bar it from establishing aliunde that there was, in fact, 'urgency': see *Murari Lal Gupta v. State of Punjab*,<sup>45</sup> (overruled on a different point in *The Printers House Private Ltd v. Misri Lal Dalip Singh*, *AIR 1970 Punjab 1 (FB)* ); and *Balwantrao Chunilal Bhatt v. State of Gujarat* *AIR 1970 Gujarat 175*. To discharge the burden, the circumstances constituting the 'urgency' must not merely be asserted, but proved: see *Narayan Govind Gavate v. State of Maharashtra*, (1971) 73 *Bom. L. R.* 872.

45. In the counter-affidavit filed on behalf of Delhi Administration it is alleged that -

'The land in dispute along with other large chunk of land was urgently required for extension of Jhuggi and Jhonpari Camping site and as such, Section 17 of the Land Acquisition Act was correctly applied in the present case. People living in Jhuggi and Jhonpari clusters in Delhi are removed as and when the land, on which these clusters are situated, is required for a project by the concerned authority. The Jhuggi and Jhonpari dwellers, if eligible under the rules, are carried to Jhuggi and Jhonpari site. These are emergency operations and the extension of the Jhuggi and Jhonpari Camping site was urgently required and hence this land had to be acquired. .... The answering respondent, before issuing the notifications under Sections 4, 6 and 17 of the Land Acquisition Act, was fully satisfied that land was required for the execution of the scheme of Planned Development of Delhi.'

As a specimen of drafting, this piece is not to be recommended as a model for emulation. The specific facts and circumstances giving rise to the 'urgency' are not revealed, and the tenor is vague and general. When did it become necessary to extend the Jhuggi and Jhonpari Camping site, and why? Which was the slum area 'required for a project by the concerned authority', and when? What was the project, and when was it decided to be implemented? Before undertaking the project, why could adequate arrangements to accommodate the slum-dwellers not have been made in advance? For how many slum-dwellers was a camping site needed, and for how long? These obvious questions come to the mind on a cursory reading of the counter affidavit, and are left unanswered. A proper

return should dispel questions, and not generate them.

46. True, the 'planned development of Delhi' is a public purpose, but the phrase is not a synonym for, and does not of itself import, 'urgency'. For decades the 'development' of Delhi has been 'planned', and certainly there will be more decades before the process is complete, if, indeed, it ever is. Moreover, the 'purpose' of acquisition is one thing: 'urgency' is another: see *Seshagiri Maller v. Special Tehsildar for Land Acquisition, Kozhikode*,<sup>46</sup> Acquisition is permitted by Section 4 only for a 'public purpose'. Every public purpose is not *per se* urgent. Otherwise, Section 17 would have prescribed a routine procedure and not conferred 'special powers' as its side-note proclaims.

47. Preferring not to decide this point solely on the basis of an inadequate return, we gave leave to Delhi Administration to file the supplementary affidavit already mentioned. Attached to this affidavit is the copy of a letter dated 7th September 1971 addressed by the Executive Officer (New Leases), Delhi Development Authority, to the Secretary, Land and Building Department, Delhi Administration. By this letter the acquisition was initiated. After saying that an area measuring 42.30 acres in village Tigri, of which details were enclosed, 'is urgently required for the "Planned Development of Delhi" ' the letter proceeds:

'The proposal for acquisition on priority basis has been approved by the Financial Adviser of your Department. You are kindly requested to arrange for acquisition of land after issuing notification under section. 4, 6 of the Land Acquisition Act, 1894. The possibility of acquiring the land under section 17 of the Act may also kindly be explored.'

48. On receipt of this letter the Land Acquisition Collector was asked 'to send the draft notification under Sections 4, 6, 17 (1)'. In his reply dated 26th Nov. 1971 the Collector separated lands which were waste or arable, to which Section 17 (1) and (4) could be applied, from the rest, and submitted two draft notifications. He said nothing whatsoever about urgency. The copy of an office-note prepared on 1st Jan. 1972 is also attached to the supplementary affidavit. It suggests, in accordance with the Collector's report, that the waste or arable lands 'be acquired by invoking provisions of Section 17 (1) of the Land Acquisition Act whereas the remaining area may be acquired in the normal course'. There was no reference made to any urgency. On 15th Jan. 1972 the

Lieutenant-Governor put the word 'approved' under this note and signed it. Thereafter, the notifications impugned were issued.

49. It is patent that at no stage did any one consider the question whether there was urgency or set down the facts and circumstances by which it was caused. No material was placed before the Lieutenant-Governor on which he could possibly find that the matter was urgent. The documents produced by Delhi Administration display a total non-application of mind to this aspect of Section 17. A precisely similar situation occurred in *Periathambi Mudaliar v. Special Tahsildar (L.A.) Planning Scheme, Coimbatore*,<sup>47</sup> where also the land was required for rehabilitating slum dwellers. The proceedings, other than the notification under Section 4, were quashed. In *Jamnadas Devsibhai v. Commr. Nagpur Division, Nagpur*,<sup>48</sup> the position was quite different. It was established there that a 'time-bound' scheme had been framed by the Government for providing houses to landless workers in rural areas, and delay would frustrate that purpose. Besides, comprehensive affidavits were filed disclosing how the matter had been dealt with at various stages.

50. The inference that there was no urgency is re-enforced by the course of the proceedings here. On 1st Sept. 1972, when the petition was admitted, an ex-parte interim order was made restraining the dispossession of the petitioner from his lands. Notice of the application for stay was served on the respondent for 4th Oct. 1972. On that date no one appeared for the respondents and the *ex parte* order was confirmed. Though the petition remained pending for three years, at no time was an application made to have that order set aside. Had the need for the land been urgent, some attempt would surely have been made to secure possession. The inertia of Delhi Administration proves that there was no pressing need, and the inevitable conclusion is that there was no urgency.

51. Hence, Section 17 (1) and (4) could not be resorted to in the present case. Except the notification under Section 4, all the proceedings taken are invalid. Accordingly in my opinion, this petition should be allowed and notifications (iii), (iv) and (v) should be quashed, saving the first three paragraphs of notification (iii) which pertain to Section 4 of the Act. The respondents will, of course, be entitled to proceed afresh from that stage in accordance with law. Having regard to all the circumstances in particular that the petitioner has succeeded only on one point and much time was spent over the others, I would leave the parties to bear their own costs.

**T. V. R. Tatachari, C. J.** :- . I agree.

**Avadh Behari Rohatgi, J.** :- I have had the pleasure of reading the elaborate and convincing judgment of my learned brother Chawla J. I would however like to add a few words of my own on judicial review of subjective discretion.

54. The terms "subjective" and "objective" gave rise to a debate in the course of arguments. In the philosophy of mind subjective denotes what is referred to the thinking subject, the Ego. The objective belongs to the object of thought, the Non-ego. It is a tendency to lay stress upon what is external to the mind as opposed to the subjective sensations that arise only in the mind.

55. True it is that there is no such thing as purely subjective or purely objective. These elements are so mixed in us that it is difficult to say when the subjective element recedes and the objective element preponderates. The mind is conditioned by the object. The object in its turn influences the mind. There is action and interaction. But mankind has always striven to be objective as far as it has lain in its power. This thought has been expressed by Judge Cardozo in his inimitable style:

"The traditions of our jurisprudence commit us to the objective standard. I do not mean, of course, that this ideal of objective vision is ever perfectly attained. We cannot transcend the limitations of the ego and see anything as it really is. None the less, the ideal is one to be striven for within the limits of our capacity. This truth, when clearly perceived, tends to unify the judge's function." (Selected Writings p. 151).

56. But here we are not concerned with the philosophical systems of thought and their refinements. These two terms have gained currency and are now accepted as part of the legal nomenclature. Subjective power means in plain terms discretionary administrative action. It is subjective freedom of choice to take one course or another. There comes in at once the need for legal control. The need for control, and control according to law, will remain so long as men believe that uncontrolled power is an evil to be eradicated from civilized society. It is perhaps too often forgotten that one of the merits of the rule of law is that it is a curb upon power - irrespective of the person or institution who wields it. Law, it has been said, is the finest flower of human civilization.

57. It is true that no terminology is perfect. For want of better words writers and

judges have adopted these terms. What is after all in a name: that which we call a rose, by any other name would smell as sweet.

58. Section 17, Land Acquisition Act is the main subject of this petition. The Government have purported to act under that section. That section confers "special powers in cases of urgency". That is essentially a statutory discretionary power conferred in subjective terms on the Government. How far such a power can be subject to judicial review is a constantly recurring theme in the field of administrative law.

59. The first term requiring clarification is "discretion". Any person empowered to make a decision possesses discretion, if on a given or proven set of facts, he has a choice between two or more alternative courses of action. Thus a decision-maker has no discretion if, on proof of facts a, b and c, he must take action 1, or on proof of facts d, e and f, he must take action 2. However, if the decision-maker is empowered, on proof of facts a, b and c, to take either action 1 or action 2, he possesses a choice or discretion.

60. The decision-maker's discretion is "objective" where the source of his power imposes defined or ascertainable pre-determined criteria by which, and solely by which, he must make his choice. The decision-maker's discretion is "subjective", however, when the source of his power confers upon him the freedom to determine his own criteria for choosing between the alternative courses of action open to him. Subjective discretions are usually conferred by such phrases as "if in his opinion", "if he thinks fit", "if he deems", "if he considers" and numerous other similar expressions whose common feature is that they confer upon the decision-maker the freedom to set his own limits, to determine his own criteria. (See Current Legal Problems 1975 p. 151).

61. The most striking modern example of judicial activism in this area of administrative law has been the decision of the Houses of Lords in *Padfield v. Minister of Agriculture*,<sup>49</sup> Under the statutory milk marketing scheme, the Milk Marketing Board fixed milk prices for each of eleven regions. Producers in the south-eastern region considered that they should be awarded a price increase. Since the majority of the Board did not agree with them, they made a complaint to the Minister asking him to appoint a committee of investigation. Under the Act, the Minister was empowered to appoint such a committee if he "in any case so directs". The Minister refused to appoint the committee, giving as one

of his reasons that if the committee reported in favor of an increase he would be expected to implement their recommendations and that this would place him in an embarrassing position. The House of Lords held that the Minister's discretion was not unfettered, and that mandamus should issue to him requiring him to determine the application by the south-eastern producers according to law, in that the reasons given showed that he had taken irrelevant considerations into account and was frustrating the policy of the Act.

62. Lord Reid, Lord Hudson, Lord Pearce and Lord Upjohn, moreover, expressed the view that once a *prima facie* case of misuse of power has been made out, it would have been open to them to infer that the Minister had acted unlawfully if he had declined to supply any justification at all for his decision. Lord Upjohn said that the Minister is a public officer charged by Parliament with the discharge of public discretion affecting Her Majesty's subjects; and

"if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion." (p. 1061-62).

63. The late lamented Prof. S.A. de Smith in his *Judicial Review of Administrative Action* (third edition) at p. 258 had this to say:

"Nowadays the Courts will not readily be deterred by subjectively worded statutory formulae from determining whether acts done avowedly in pursuance of statutory powers bore an adequate relationship to the purposes prescribed by statute."

64. The opening words of Section 17: "In cases of urgency, whenever the appropriate Government so directs, the Collector.....may" confer statutory discretionary power. Sub-section (4) says: "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.....". This clearly endows the Government with a discretion. A special power is deposited in the Government to act in cases of urgency.

65. Counsel argued that the decision of the Government on the question of existence of urgency cannot be contested in a court of law. In so arguing the counsel was echoing views which were current some years ago. But there have been important developments in the last 10 years which have transformed the

situation. These developments have been most marked in the review of executive and administrative action. In India the Supreme Court decision in *Barium Chemicals Ltd. v. Company Law Board*,<sup>50</sup> marks a positive advance in this direction. Take the case of statutory bodies. It is now well settled that an administrative authority which is entrusted by statute with discretion, must act according to law. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other hand. The discretion of the body is never unfettered. It is a discretion which is to be exercised according to law. This means at least this: the authority must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations, the decision cannot stand. No matter that the authority may have acted in good faith, nevertheless the decision will be set aside. That is established by *Padfield's* case which is a landmark in modern administrative law. (See *Breen v. A.E.U. per Lord Denning M.R.*<sup>51</sup>)

66. *Padfield's* case was followed in India by the Supreme Court in *Rohtas Industries Ltd. v. S. D. Aggarwal*, and *Rampur Distillery and Chemical Co., Ltd. v. Company Law Board*,<sup>53</sup>

67. In a recent decision: *M. A Rasheed v. State of Kerala*<sup>54</sup> C. J. said:

"Administrative decisions in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. The courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect. The standard of reasonableness to which the administrative body is required to conform may range from the courts' own opinion of what is reasonable to the criterion of what a reasonable body might have decided. The Courts will find out whether conditions precedent to the formation of the opinion have a factual basis."

68. This is an authoritative statement of the law. Apply this to the facts of the case in hand. Now the ground of urgency is stated in a key passage of the respondent's affidavit-in-opposition dated Dec. 22, 1972 in these words:

"There was great urgency for acquiring the lands as this land was required for extension of Jhuggi and Jhaupari Camping Site.

The land in dispute along with other large chunk of land was urgently required for extension of Jhuggi and Jhaupari Camping site and as such, Section 17 of

the Land Acquisition Act was correctly applied in the present case. People living in Jhuggi and Jhaupari clusters in Delhi are removed as and when the land, on which these clusters are situated, is required for a project by the concerned authority. The Jhuggi and Jhaupari dwellers, if eligible under the rules, are carried to Jhuggi and Jhaupari site. These are emergency operations and the extension of the Jhuggi and Jhaupari Camping site was urgently required and hence this land had to be acquired."

69. This paragraph gives us little indication of the factual situation which the administration was facing and which, it is said, was marked and characterized by urgency. What was the urgent need? What were the impelling and prompting forces which compelled the administration to resort to "special powers"? What was it that was thought to be of pressing importance? Answers to these questions one has been left to imagine.

70. The written evidence - and the record of the Government is the written evidence- does not support the case that there was urgency. It has to be shown that the decision-maker addressed himself to the question of urgency on which ground alone his action can be justified under Section 17. It must clearly appear that the pressure of necessity was actively present to his mind.

71. It was said that these are emergency operations and the land was urgently required. The course of the hearing, however, is suggestive of a different inference. If anything, it indicates to the contrary. No one has bothered to oppose stay when the court issued notice. None moved this court for early hearing on the ground of urgency or for vacation of stay. No one pressed the matter strongly upon the court's attention. On October 4, 1972, stay was confirmed when the respondent, though served, remained absent. For more than 4 years the scheme of extension of Jhuggi and Jhaupari Scheme slumbered peacefully. But, in times of pressing need - and this is what "urgency" means in plain English- nobody rests peacefully. The need is imperative. It calls for and demands immediate attention. Such is the abnormal stress. Such is the pressing importance.

72. Decision to take action in urgency is based on an opinion or appraisal formed in the mind about a particular matter. The opinion itself is a view or belief based on interpretation of observed facts and experience. This stresses the subjectivity of the opinion or conclusion. Opinion implies a conclusion

concerning something on which ideas may differ. But it does not exclude a careful consideration or weighing of evidence or pros or cons. As opinion is generally and widely accepted as factual, the Court can examine the material on which it is founded. It is subject to judicial review. As was said in *Rohtas Industries v. S. D. Aggarwal*,<sup>55</sup>

"If it is established that there were no materials upon which the authority could form the requisite opinion the court may infer that the authority did not apply its mind to the relevant facts. The requisite opinion is then lacking and the condition precedent to the exercise of the power .....is not fulfilled." (p. 721).

73. The modern drafting technique is to use subjective words such as 'if he is satisfied that .....' or 'if it appears to him that .....' or 'appears to him to be necessary'. Does it make the authority the sole judge of the extent of its power? The present day draftsman uses words which do not exclude jurisdiction in terms but positively repose undefined power in a named authority. But here, as usual, the courts react against attempts to disarm them, and they will intervene if it is shown that the administrator has acted arbitrarily, or has not given his mind to the question on which he must be satisfied or has declared himself to be satisfied on the wrong question or had no evidence or material for some vital finding. (See *Coleen Properties Ltd. v. Minister of Housing and Local Govt.*<sup>56</sup>

74. In the case of *M. A. Rasheed*(supra) Ray C. J. said :

"Where powers are conferred on public authorities to exercise the same when "they are satisfied" or when "it appears to them", or when "in their opinion" a certain state of affairs exists; or when powers enable public authorities to take "such action as they think fit" in relation to a subject-matter, the Courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated.'

75. Only in consideration of grave emergency are the courts likely to surrender control of administrative discretion as happened in England in *Liversidge v. Anderson*,<sup>27</sup> during the Second World War. The powerful dissent of Lord Atkin has justly made that case famous. "Amidst the clash of arms" he told us "the laws are not silent".

76. The Government is given a subjective discretion when it is empowered to

act in cases of urgency. Section 17 confers upon the Government complete freedom in law to act in cases of urgency; the Government is free to determine its own criteria for making of the choice whether to act or not. That this is the effect of the relevant section has been confirmed by the courts in several cases to which Chawla J. has referred.

77. In recent years the courts have not been deterred from reviewing the decisions of the administrators merely because the empowering legislation conferred subjective powers. The judiciary have stepped in to imply the purposes for which the legislature must in their view have intended the powers to be used. As was observed in a leading Canadian case "there is always a perspective within which a statute is intended to operate" (*Roncarelli v. Duplessis* <sup>58</sup> .per Rand J.). Thus the doctrine of judicial review upholds the parliamentary sovereignty. The doctrine establishes that the executive is not above the law, but subject to it. It is as much bound by the latest enacted word of Parliament as the Judiciary. Both pay homage to the sovereignty of the laws. Both are alike governed by the laws.

78. Although the question of urgency might confer a discretionary power on the Government, nonetheless the Lt. Governor cannot exercise the power and reach a decision without any evidence on that question. Where there must be grounds for a decision, there must also be some evidence upon which the finding that there are grounds can be based.

79. Urgency must be shown to be based on facts founded on evidence. The Courts can test the substantiality of those evidentiary foundations. Thus without questioning the merits of a decision-maker's subjective judgment, the courts can nonetheless require that there be substantial evidence to support the assumptions upon what the judgment or opinion is based. As the Supreme Court tersely put it:

"The conclusion of the Government in a given case that there was urgency was entitled to weight, if not conclusive." (*Jage Ram v. State of Haryana*, <sup>59</sup>).

80. The "no evidence rule" is a form of jurisdictional review, its rationale being that the decision-maker must justify his finding of jurisdictional fact upon which his exercise of power is based. If the subjective decision or apprehension of a factual situation is unsupported by evidence the decision will be set aside. (See *Narayan Govind Gavate v. State of Maharashtra* <sup>60</sup> and *Printers House*

*Pvt. Ltd. v. Misri Lal*).<sup>61</sup>

81. And now to sum up. The judiciary does not control the policy. It is not fitted to do so. On matters of policy it does not substitute its decision for that of the administration. It is concerned only to see that power is used for the purposes for which the statute confers it; that decisions are based on grounds deemed relevant by the statute which empower it and none others. And this is good law as well as sound administration.

82. On the question of the contemporaneous publication of three notices under Sections 4, 6 and 17, Land Acquisition Act, I agree with my brother Chawla J. that we are bound by the Supreme Court decisions where the question directly arose and was decided (See *Smt. Somawanti v. State of Punjab*,<sup>62</sup> and *Vijay Cotton and Oil Mills Ltd., v. State of Gujarat*,<sup>63</sup> If the question had been res integra we might have taken a different view. But as the point is covered by direct Supreme Court rulings we would not like to strike a new path.

83. Following the dictum of the Supreme Court that:

"the Courts will find out whether conditions precedent to the formation of the opinion have a factual basis",

my conclusion on the main case is this. There is no worthwhile evidence which would persuade me to hold that the Government have made out a case for the exercise of special powers of urgency under Section 17 of the Land Acquisition Act.

84. I agree with my brother Chawla J. in his reasoning and conclusion that the petition should be allowed and the parties be left to bear their own costs.

Petition allowed.

Cases Referred.

1. AIR 1973 Supreme Court 1150,
2. 1970 Delhi LT 554,
3. ILR (1974) 2 Delhi 81,
4. AIR 1968 Supreme Court 870.

5. AIR 1967 Supreme Court 1081,
6. AIR 1967 Andhra Pradesh 280.
7. AIR 1961 Bombay 89,
8. AIR 1963 Mysore 255,
9. AIR 1966 Punjab 59 (FB),
10. AIR 1968 Supreme Court 615.
11. AIR 1965 Bombay 224,
12. AIR 1968 Supreme Court 870,
13. AIR 1961 Andhra Pradesh 98
14. Andhra, AIR 1957 Andhra Pradesh 450,
15. AIR 1970 Punjab and Haryana 29,
16. AIR 1957 Mysore 12.
17. AIR 1954 Bombay 235;
18. AIR 1961 Andhra Pradesh 98.
19. AIR 1968 Supreme Court 615.
20. AIR 1961 Andhra Pradesh 98,
21. AIR 1963 Supreme Court 151.
22. (1969) 2 SCR 60.
23. AIR 1967 Andhra Pradesh 280.
24. AIR 1970 Punjab and Haryana 1 (FB);
25. AIR 1970 Calcutta 90;
26. , ILR (1973) 1 Delhi 838.
27. AIR 1937 P. C. 265.
28. AIR 1945 P. C. 156

29. (1943) 3 AER 338.
30. 1951 AC 66.
31. (1963) 2 All England Reporter 66,
32. AIR 1967 Supreme Court 295.
33. AIR 1969 Supreme Court 707,
34. (1951 AC 66)
35. (1962) 1 QB 340,
36. AIR 1970 Supreme Court 1789,
37. AIR 1974 Supreme Court 2249,
38. AIR 1970 Punjab 1 (FB),
39. AIR 1975 Karnataka 140,
40. AIR 1971 Supreme Court 1033,
41. AIR 1945 PC 156;
42. AIR 1970 Calcutta 90
43. AIR 1968
44. AIR 1967 Supreme Court 483;
45. AIR 1964 Punjab 477
46. AIR 1965 Kerala 92.
47. AIR 1965 Madras 328,
48. AIR 1976 Bombay 129,
49. 1968 AC 997.
50. AIR 1967 Supreme Court 295
51. (1971) 2 QB 175 (189-90).
52. AIR 1969 Supreme Court 707

53. AIR 1970 Supreme Court 1789.
54. AIR 1974 Supreme Court 2249 Ray
55. AIR 1969 Supreme Court 707 :
56. (1971) 1 WLR 433).
57. 1942 AC 206
58. (1959) SCR 122, 140.
59. AIR 1971 Supreme Court 1033).
60. (1971) 73 Bom LR 872
61. AIR 1970 Punjab and Haryana 1 (FB)
62. AIR 1963 Supreme Court 151
63. (1969) 2 SCR 60)