

DELHI HIGH COURT

S. S. Jain Subodh Shiksha Samiti

Vs.

State of Rajasthan

C.W.P. Nos. 8183, 8184, 8191, 8200 and 8468 etc. etc. of 2002
(Shiv Kumar Sharma, J.)

10.01.2003

ORDER

Shiv Kumar Sharma, J.

1. All these matters relate to the land acquisition proceedings initiated by the State of Rajasthan at the request of Jaipur Development Authority (for short JDA) for widening the stretch of Bhawani Singh Road from Rambagh Circle to Indira Circle in the city of Jaipur . The petitioners in all these 20 writ petitions have impugned the notification dated July 10, 2002, notice dated September 16, 2002, another Notification dated November 2, 2002 and the notice dated November 2, 2002 issued under the Land Acquisition Act, 1894 (for short the L.A. Act).

2. Bhawani Singh Road, which stretches from Bais Godown to Indira Circle is a part of the Main artery of Jaipur which runs from 'Ajmer Road' in the West to 'Jawahar Nagar Bye-pass' in the East of Jaipur . The stretch in dispute relates only to the part of the Road which is only 60 ft. wide. The rest of the Road in most of the places, is 100 ft. wide and in some of the places 165 ft. wide, JDA felt that the part of the Road which is 60 ft. wide was creating traffic chaos and congestion therefore it decided to widen the particular segment of the road from 60 ft. to 100 ft. and requested the State Government to acquire 20 ft. of land from both the sides of the Road and the State Government initiated land acquisition proceedings through Notifications and notices which are the subject matter of the instant writ petitions.

3. Impugned notifications and notices have been assailed by the petitioners on the following grounds -

(a) After the 74th amendment in the Constitution of India, the task of

'construction of roads and bridges in towns and cities has been handed over to the Municipality. Therefore, the JDA is non est in the eyes of law. It no longer has any jurisdiction or power to widen roads in Jaipur . Thus the JDA was not justified in requesting the State Government to acquire the land for its benefit and the impugned Notifications and notices were void ab initio.

(b) The acquisition proceedings suffer from virus of non-application of mind as prior to issuing Notification under Section 4 of the L.A. Act, the JDA has not carried out any survey to decide the area of land, required for the purpose of widening the road.

(c) No survey was carried out by the JDA as required under sub- section (2) of Section 4 of L.A. Act.

(d) After the State Government issued the notice under Section 5-A of L.A. Act inviting objections from the interested persons in regard to proposed acquisition, invoking the emergent provisions under Section 17 of L.A. Act was not justified.

(e) Notification under Section 17 of L.A. Act was void *ab initio* as it was not in terms of Section 17.

(f) Neither the State Government nor JDA revealed the nature of urgency in invoking the emergent power under Section 17. Thus invoking the said power amounts to colourable exercise of powers.

(g) Acquiring 20 ft. of land would place the private house, educational and medical institutions literally on the road and expose them to noise and air pollution.

(h) The action of JDA in widening the road would amount to violation of JDA Bye-laws.

(i) The proposed acquisition would mean the cutting of healthy trees on both sides of the road which would adversely affect the environment.

The respondents State of Rajasthan and JDA have submitted returns to the writ petitions denying the claim of the petitioners.

4. I have heard the rival submissions.

74th Amendment in Constitution of India

5. I proceed to consider the submissions advanced in regard to 74th amendment. The statement of objects and reasons of the 74th amendment reveals that in many states local bodies had become weak and ineffective on account of variety of reasons, including the failure to hold regular elections, prolonged suppression and inadequate devolution of powers and functions. As a result Urban and Local Bodies were not able to perform effectively as vibrant democratic units of self-government. Having regard to these inadequacies, it was considered necessary to incorporate the provisions relating to Urban Local Bodies in the Constitution particularly for -

- (i) putting on a firmer footing the relationship between the State Government and the Urban Local Bodies with respect
 - (a) the functions and taxation powers; and
 - (b) arrangements for revenue sharing;
- (ii) ensuring regular conduct of elections,
- (iii) ensuring timely elections in the case of suppression, and
- (iv) providing adequate representation for the weaker sections, scheduled castes, scheduled tribes and women.

6. Part IX-A of the Constitution deals with Municipalities. Article 243-P defines 'Municipality' as meaning an institution of self government constituted under Article 243-Q. Article 243-R deals with composition of municipalities. Article 243-S relates to constitution and composition of Wards Committees. Articles 243-T, 243-U and 243-V respectively deal with reservation of seat, duration of municipalities and disqualification of membership. Article 243-W deals with powers, authority and responsibilities of Municipalities. It provides thus -

"243-W Powers, authority and responsibilities of Municipalities etc.- subject to the provisions of this Constitution, the Legislature of the State may, by law, endow -

- (a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to -

- (i) the preparation of plans for economic development and social- justice;
 - (ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the twelfth Schedule;
- (b) the committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the twelfth schedule."

Article 243-ZF mandates that, "Notwithstanding anything in this part, any provision of any law relating to Municipalities in force in a State immediately before the commencement of the Constitution (Seventy Fourth Amendment) which is inconsistent with the provisions of this Part, shall continue to be in force or until amended or repealed by competent legislature or until the expiration of one year from such commencement whichever is earlier."

7. On the strength of Article 243-W learned counsel for the petitioners canvassed that only the Municipal Corporation, Jaipur can deal with the areas specified in the 12th Schedule which provides for -

- (1) Urban planning including town planning.
- (2) Regulation of land use and construction of buildings.
- (3) Planning for economic and social development.
- (4) Roads and bridges.
- (5) Water supply for domestic, industrial and commercial purposes.
- (6) Public health, sanitation conservancy and solid waste management.
- (7) Fire services.
- (8) Urban forestry protection of the environment and promotion of ecological aspects.
- (9) Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
- (10) Slum improvement and up-gradation.

(11) Urban poverty alleviation.

(12) Provisions of urban amenities and facilities such as parks, garden, play grounds.

(13) Promotion of cultures, educational and aesthetic aspects.

(14) Burials and burial grounds, cremations, cremation grounds and electric crematoriums.

(15) Cattle ponds; prevention of cruelty to animals.

(16) Vital statistics including registration of births and deaths.

(17) Public amenities including street lighting, parking lots, bus stops and public conveniences.

(18) Regulation of slaughter houses and tanneries.

(Underlining is mine)

8. In order to appreciate the submissions of the learned counsel for the petitioners it will be appropriate to consider the provisions contained in Article 246 of the Constitution. Article 246 clearly demarcate the extent of Legislative competency of the State Legislature. As per Article 246 the State Legislature is competent to exclusively enact laws on the subjects enumerated in List II of 7th Schedule and to enact laws subject to laws made by the Parliament on topics enumerated in List III of 7th Schedule. Entry 5 in List II permits the State Legislature to enact laws dealing with the local government, that is to say the constitution and powers of Municipal Corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self- government or village administration."

9. Jaipur Development Authority Act, 1982 (for short 'JDA Act') came to be enacted in view of Entry 5 of List II of the 7th Schedule and it got the assent of the president on October 12, 1982. JDA Act was promulgated to provide for the establishment of an Authority for the purposes of planning, co-ordinating and supervising the proper orderly and rapid development of the Jaipur Region and executing plans projects and schemes for such development and to provide for matters connected therewith.

10. Conjoint reading of 12th Schedule and Entries to Lists II and III of the 7th Schedule goes to show that many areas of both the Schedules are common. For

example Entry 14 of 12th Schedule and Entry 10 in List II of 7th Schedule deal with burials and burial grounds, cremation grounds and electric crematoriums. "Entry 15 of 12th Schedule and Entry 17 in List III of 7th Schedule deal with "Prevention of cruelty to animals." Some of the entries in 12th Schedule are wider in scope than the similar entries in Lists II and III of 7th Schedule. A close look at Article 243-W demonstrates that the Article commences with the words, "subject to the provisions of this Constitution." It is thus evident that the powers under Article 243-W are subject to Part III of the Constitution and it also implies that the power to enact law under Article 243-W is subject to Article 246.

11. As per Article 243-W the Legislature of a State may by law endow the municipalities with powers to implement the schemes relating to the matters listed in 12th Schedule. The word 'may' in my opinion bestows discretion on the State Legislature. This provision is an enabling provision and it does not impose a mandatory duty on the Legislature to enact laws on topics listed in the 12th Schedule. Article 256 imposes a duty on the State Executive "to exercise its powers so as to ensure compliance with the laws made by the Parliament and any existing laws which apply in that State". There is no provision in the Constitution which spells out the consequence of non-compliance by a State Legislature with the mandate issued by the Parliament.

12. In Article 243-ZF the words "law relating to Municipalities" have been used. Framers of the Constitution were well aware of the distinction between 'Municipality' and 'Improvement Trust'. Entry 5 in List II of 7th Schedule clearly uses the two words distinctly "Municipal Corporation, improvement trust" Article 243-ZF only prohibits inconsistency between the provision contained in Part IX-A and the Municipal Laws and it gives an option to the State Legislatures to amend or repeal those provisions of laws relating to Municipalities which are inconsistent with the provisions of Part IX-A. The words "Laws relating to Municipalities" cannot be interpreted to mean Laws relating to improvement trust or other Local Bodies or Statutory Corporation. Since JDA Act is not part of law relating to Municipalities, Part IX-A of the Constitution is not applicable on the JDA Act and question of inconsistency between the two does not arise. I do not find any merit in this argument that only Municipality can deal with areas specified in the 12th Schedule. None of the Provisions of Part IX-A contain a bar that no other local authority or Statutory Body shall deal with the matters listed in 12th Schedule.

Section 17 of the Land Acquisition Act, 1894

13. That takes me to the provisions contained in Section 17 of the L.A. Act which provide that the Government can acquire and possess the land by involving urgency clause prior to the payment of compensation or making of the award under Section 11. Section 17 provides as under :-

"17. Special Powers in cases of urgency. (1) 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 land needed for a public purpose. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

(2) Whenever owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station, or the appropriate Government considers it necessary to acquire the immediate possession of any land for the purpose of maintaining any structure or system pertaining to irrigation, water supply, drainage, road communication or electricity, the Collector may immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the appropriate Government, enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances :

Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least fortyeight hours' notice of his intention so to do, or such longer notice as may be reasonably sufficient to enable such occupier to remove his movable property from such building without unnecessary inconvenience.

(3) In every case under either of the preceding sub-sections the Collector shall at the time of taking possession offer to the persons interested, compensation for the standing crops and trees (if any) on such land and for any other damage sustained by them caused by such sudden dispossession and not excepted in Section 24; and, in case such offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained.

(3A) Before taking possession of any land under sub-section (1) or sub-section (2), the Collector shall, without prejudice to the provisions of sub-section (3),-

(a) tender payment of eighty per centum of the compensation for such land as estimated by him to the persons interested entitled thereto, and

(b) pay it to them, unless prevented by some one or more of the contingencies mentioned in Section 31, sub-section (2), and where the Collector is so prevented, the provisions of Section 31, sub-section (2), (except the second proviso thereto), shall apply as they apply to the payment of compensation under that section.

(3B) The amount paid or deposited under sub-section (3A), shall be taken into account for determining the amount of compensation required to be tendered under Section 31, and where the amount so paid or deposited exceeds the compensation awarded by the Collector under Section 11, the excess may, unless refunded within three months from the date of the Collector's award, be recovered as an arrear of land revenue.

(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable the appropriate Government may direct that the provisions of Section 5-A 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 date of the publication of the notification under Section 4, sub-section (1)."

14. It is well settled that there should be material before the Government justifying the order under Section 17 of LA Act dispensing with the provisions of Section 5-A. If the Public purpose on the face of it shows that the land is needed urgently, that by itself is relevant circumstances for justifying the action under Section 17(4) of the LA Act.

15. Before examining the case law on the subject, it is necessary to have a birds eye view of the Scheme of LA Act. Section 4(1) provides that whenever it appears to the Government that land in any locality is needed or is likely to be needed for any public purpose a notification to that effect shall be published. As per Section 5-A, the person interested in the land so notified may submit objections to the acquisition of the land within thirty days from the date of publication of the notification to the Collector, who after hearing such objections, shall made a report to the Government. The Government shall consider the report and after being satisfied, make declaration under Section 6

that land is required for a public purpose. Special powers under Section 17, as indicated hereinabove, have been given to the Government in cases of urgency after dispensing with the provisions of Section 5-A.

16. In *First Land Acquisition Collector v. Nirodhi Prakash Gangoli* ¹ their Lordships of the Supreme Court indicated that existence of urgency is in a matter of subjective satisfaction of appropriate Government. Decision of Government to dispense with an inquiry under Section 5-A by invoking the urgency provision can be challenged only on grounds of non-application of mind and mala fide. Burden lies on the persons alleging *mala fide* to prove the same on the basis of specific materials. So long purpose of acquisition and urgency to acquire continues to exist, exercise of power under Section 17 cannot be held to be mala fide. Mere delay on the part of the Government, subsequent to its decision to dispense with the inquiry under Section 5-A by exercising power under Section 17 would not invalidate the decision itself.

17. *Rajasthan Housing Board v. Shri Kishan* ² was the case wherein their Lordships of the Supreme Court had occasion to interpret Sections 17(4) and 5A and it was held that Government satisfaction regarding urgency is subjective and where it was formed fairly and based on material the Court would not examine the material as an appellate authority.

18. In *U.O.I. v. Ghanshyam Das Khedia* ³ it was held that Notification need not specifically recite nature of urgency. If record discloses consideration by the Government on the matter of urgency, High Court cannot sit as a Court of appeal over the subjective satisfaction of the Government.

19. *Mohan Singh v. State of Rajasthan* ⁴ was the case where the Division Bench of this Court dealing with Sections 17, 5A of the L.A. Act observed that in case of laying down bye-pass to resolve traffic congestion, judicial notice can be taken of urgency of situation. Minor delay in issuing Notification under Section 17 after one issued under Section 4(1) not to necessarily imply absence of urgency calling for exercise of power under Section 17(1).

20. In *Chameli Singh v. State of U. P.* ⁵ the Hon'ble Apex Court observed that the acquisition is part of the eminent domain of the State power and individual's right of an owner must yield place to the larger public purpose.

21. In *Bhagat Singh v. State of U. P.* ⁶ it was held that subjective satisfaction for dispensing with the inquiry under Section 5A is based on sufficient material and

cannot be faulted.

22. In *Jai Narain v. Union of India* ⁷ their Lordships of the Supreme Court indicated that the power under Section 4 of the Act can be exercised when it appears to the Government that the "land in any locality is needed or is likely to be needed for any public purpose" it is no doubt correct that the expression "is needed" indicates the existing need whereas the expression "is likely to be needed" refers to the future need. When the latter expression is used in the Notification under Section 4 of the Act, it may be suggestive of the fact that there may not be emergency to acquire the land, but the question of urgency cannot be determined solely by the expressions used in the notification under Section 4 of the Act. The emergency must be reflected in the need of the acquisition. The existence of urgency is a matter which is entirely based on the subjective satisfaction of the Government. The Courts do not interfere unless the reasons given are wholly irrelevant and there is no application of mind. When a notification under Section 4 of the Act uses the expression "is likely to be needed" it may be necessary, in a given case to examine the records or the attendant circumstances to satisfy that there was material before the Government justifying the order under Section 17, dispensing with the provisions of Section 5-A of the Act. If the public purpose on the face of it shows that the land is needed urgently, that by itself is a relevant circumstance for justifying the action under Section 17(4).

23. In *Meerut Development Authority v. Satbir Singh* ⁸ the Hon'ble Supreme Court held that the urgency provisions should be invoked for housing development.

24. In *State of U. P. v. Smt. Pista Devi* ⁹ it was held that where delay of one year between dates of notification under Section 4 and declaration under Section 6, this delay would not vitiate the action taken under Section 17(1).

25. The crux of all these judicial pronouncements is that there should be material before the State Government justifying the order under section 17, dispensing with the provisions of Section 5-A and this Court can only interfere if there is non-application of mind by the State Government to the relevant facts.

26. It is therefore to be examined as to whether there was relevant material before the State Government when it invoked powers under sub-section (4) of Section 17 for dispensing with the inquiry under Section 5-A.

27. A bare look at the notification dated November 2, 2002 issued by the State Government dispensing with the inquiry under Section 5-A goes to show that the State

Government only agreed to the proposal of JDA for widening the stretch of Bhawani Singh Road from Ram Bagh Circle to Indira Circle. It does not appear on the face of the notification that any relevant material was ever placed before the State Government. It is evident that the State Government only considered the letter of JDA and readily agreed to the proposal. The State Government itself neither examined any material nor formed opinion whether the provisions contained in sub-section (1) or sub-section (2) of Section 17 were applicable or not? Forming opinion on the basis of material is the condition precedent under sub-section (4) of Section 17 which is not fulfilled in the instant cases. Their Lordships of the Supreme Court in *Rohtas Industries v. S. D. Agarwal*,¹⁰ propounded thus - (Para 46)

"If it is established that there was 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."

(Underlining is mine)

28. In the instant case it appears from the material on record that JDA has been visualizing the idea of widening the stretch of Bhawani Singh Road since 1993 but before it took any shape a piece of land adjacent to Bhawani Singh Road was allotted to the petitioner S. S. Jain Subodh Shiksha Samiti. It is also established that prior to issuance of notification, no survey was carried out as required under sub-section (2) of Section 4. The proposed acquisition would mean the cutting of healthy trees on both sides of the road. There also exists a Hospital. It is no doubt true that free flow of traffic is the need of the day not only in Bhawani Singh Road but in entire Jaipur City but at the same time aspect of noise and air pollution cannot be ignored. Children of Educational Institution, patients of Hospital and inhabitants of locality cannot be exposed to such pollution. It was necessary for the State Government to adopt proper devices to prevent noise and air pollution but this aspect was not at all considered. I am, therefore, satisfied that requisite opinion is lacking and condition precedent to the exercise of the power under sub-section (4) of Section 17 is not fulfilled. The State Government did not apply its mind to the relevant facts before issuing notification under sub-section (4) of Section 17.

29. In view of what I have discussed hereinabove I dispose of all these writ petitions in the following terms:-

(i) Impugned notification dated November 2, 2002 issued by invoking emergent provisions under Section 17 of the L.A. Act stands set aside;

(ii) The State Government shall however be at liberty to continue inquiry under Section 5-A of L.A. Act.

(iii) There shall be no order as to costs.

Order accordingly.

Cases Referred.

1. (2002) 4 SCC 160: (AIR 2002 SC 1314)
2. (1993) 2 SCC 84: (1993 AIR SCW 1163)
3. (1996) 2 SCC 285: (1996 AIR SCW 2719)
4. 1996 Western Law Cases (Raj.) UC 548
5. (1996) 2 SCC 549: (AIR 1996 SC 1051)
6. (1999) 2 SCC 384: (AIR 1999 SC 436)
7. (1996) 1 SCC 9: (AIR 1996 SC 697)
8. (1996) 11 SCC 462: (AIR 1997 SC 1467)
9. (1986) 4 SCC 251: (AIR 1986 SC 2025)
10. AIR 1969 SC 707