

AMARNATH ASHRAM TRUST SOCIETY
v.
GOVERNOR OF UTTAR PRADESH AND ORS.

DECEMBER 3, 1997

[G.T. NANAVATI AND G.B. PATTANAIK, JJ.]

Land Acquisition Act, 1894 : Part VII and Sections 4 and 6.

Acquisition of land—For purpose of playground for students of a school run by a Society (Company)—Declaration under S.6 issued after completion of all formalities including execution of agreement for payment of cost of acquisition—Entire cost was to be borne by Society—Notification under S.4 stated land was required for public purpose—Held : Merely because land was needed for public purpose it cannot be said that the acquisition was for public purpose to the Society and not under Chapter VII—Land Acquisition (Company) Rules, 1963, R.4.

Section 48 and Part VII—Acquisition of land for company under Part VII—Government withdrew from acquisition without consent of company on the ground that acquisition was not sustainable since no part of cost of acquisition was borne by the Government—Held : Discretion of Government to withdraw from acquisition justiciable and not absolute—Can be challenged on ground that power was executed mala fide or in an arbitrary manner—Decision of Government not sustainable being arbitrary and not bona fide—Question of withdrawal of the State Government from acquisition without the consent of the company in such a case, not decided.

Administrative Law.

Administrative action—Where as a result of a decision taken by the Government the other party is likely to be prejudicially affected the Government has to exercise its power bona fide and not arbitrarily.

Practice and Procedure :

Inconsistent plea—Plea that is contrary to the case pleaded before High Court cannot be raised before Supreme Court.

The appellant was a society registered under the Society Registration Act, 1860 and was running a public school. The appellant wanted land

A adjacent to its school building for the purpose of a playground for its students. The appellant, therefore, moved the State Government to acquire that land for it. The State Government issued a notification under Section 4 of the Land Acquisition Act, 1894 stating that the land was needed for a public purpose and that the acquisition was for a company under Part VII of the Act. The State Government thereafter issued a declaration under B Section 6 of the Act after completing all formalities including execution of agreement for payment of cost of acquisition. The entire cost of acquisition was to be borne by the appellant-Society. The owner challenged this acquisition of land by a writ petition filed in the High Court During the pendency of the writ petition the State Government withdrew from acquisition and de-notified the land under Section 48 of the Act on the ground C that the acquisition would not be sustainable as no part of the cost of acquisition was to be borne by the State Government. The writ petition filed by the appellant challenging the aforesaid de-notification of the acquisition was dismissed by the High Court. Hence this appeal.

D On behalf of the appellant it was contended that when acquisition was under Part VII, i.e., when land was acquired for a company it was not open for the Government to withdraw from such acquisition especially when all formalities were completed including issuance of Section 6 notification without the consent of the appellant-Society (company); and E that the State Government withdrew from acquisition on a misconception of law that since the land was for a public purpose at least a part of the cost of acquisition was required to be borne by the State Government.

F On behalf of the respondent it was contended that the acquisition of land was for a public purpose and not under Chapter VII of the Act and, therefore, the decision of the State Government to withdraw from the acquisition was not arbitrary or illegal.

Allowing the appeal, this Court

G HELD : 1. It is now well established that if the cost of acquisition is borne either wholly or partly by the Government, the acquisition can be said to be for a public purpose within the meaning of the Land Acquisition Act, 1894. Admittedly, in the present case the entire cost of acquisition is to be borne by the appellant-society and, therefore, it is an acquisition for a company and not for a public purpose. Therefore, simply because in the notification H issued under Section 4 of the Act it was stated that the land was needed

for a public purpose, namely, for a playground for students of the appellant-society it cannot be said that the acquisition is for a public purpose and not under Chapter VII for the appellant-society in view of subsequent events and the declaration made under Section 6. [148-D-H; 149-A]

Pandit Jhandu Lal v. State of Punjab, [1961] 2 SCR 459, relied on.

2. In an acquisition under Part VII of the Act, position of the company or the body for which the land is acquired is quite different from that of the owner of the land. As a result of withdrawal from the acquisition whereas the owner of land is ordinarily not likely to suffer any prejudice or irreparable loss, the company for whose benefit the land was to be acquired, may suffer substantial loss. [151-D]

3. However, in the instant case it is not necessary to go into this larger question whether in such a case the State Government can withdraw from acquisition without the consent of the company as the justification given by the Government is otherwise not sustainable. The reason given by the Government for withdrawing from the acquisition is that as no part of the cost of acquisition was to be borne by the Government the acquisition could not have been sustained as for a public purpose. In this case the acquisition was not for a public purpose but it was an acquisition for a company under Chapter VII of the Act. In respect of an acquisition for a company under Chapter VII of the Act the law does not require that the State should also bear some cost of the acquisition to make it an acquisition for public use. Thus the decision of the Government to withdraw from acquisition was based upon misconception of the correct legal position. Such a decision has to be regarded as arbitrary and not *bona fide*. Particularly in a case where as a result of a decision taken by the Government other party is likely to be prejudicially affected, the Government has to exercise its power *bona fide* and not arbitrarily. Even though Section 48 of the Act confers upon the State wide discretion it does not permit it to act in an arbitrary manner. Though the State cannot be compelled to acquire land compulsorily for a company its decision to withdraw from acquisition can be challenged on the ground that power has been exercised *mala fide* or in an arbitrary manner. [151-E-H]

Srinivasa Cooperative House Building Society Ltd. v. Madan Gurumurthy Sastry, [1994] 4 SCC 675 and *Special Land Acquisition Officer, Bombay v. Godrej and Boyce*, [1988] 1 SCR 590, held inapplicable.

A 4. The contention of the respondent that the acquisition of land was for a public purpose and not under Chapter VII of the Act cannot be accepted because such a plea was not raised before the High Court. Therefore, it is really not open to the respondent to raise a contention before this Court, which is contrary to the case pleaded before the High Court. [149-G]

B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8496 of 1997.

C

From the Judgment and Order dated 16.4.96 of the Allahabad High Court in C.M.W.P. No. 16241 of 1992.

R.F. Nariman, S.P. Mithal, C.K. Nayak and R.N. Keshwani for the Appellants.

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A.B. Rohtagi, R.B. Misra and E.C. Agrawala for the Respondents.

The Judgment of the Court was delivered by

NANAVATI, J. Leave granted.

Heard learned counsel for both the sides.

E

The appellant is a society registered under the Society Registration Act, 1860. It is running a public school at Mathura in the name of Amar Nath Vidya Ashram. The school is duly recognised by the Central Board of Secondary Education, New Delhi. It is challenging in this appeal the judgment and order passed by the High Court in Civil Misc. Writ Petition

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No. 16241 of 1992.

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The appellant wants land adjacent to its school building for the purpose of a playground for its students. The land belongs to respondent No. 5. So it tried to obtain it from respondent No. 5 by offering a price higher than its market value but did not succeed. It, therefore, moved the State Government to acquire that land for it. The Government agreed and issued Notification under section 4 of the Land Acquisition Act on 1.8.1986 notifying its intention to acquire that land for a public purpose namely "playground of students of Amar Nath Vidya Ashram (Public School), Mathura". Thereafter, inquiries under section 5-A and under Rule 4 of the

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Land Acquisition (Company) Rules, 1963 were made. The Government

also entered into an agreement with the appellant as required by section 40(1) of the Act on 11.8.1987. It then issued a Declaration under section 6 on 4.9.1987 mentioning fact that the report made under sub-rule (4) of Rule 4 of the Land Acquisition (Company) Rules, 1963 was considered by the Government that the Land Acquisition Committee constituted under Rule 3 of the said Rules was consulted, that the agreement entered between the appellant and the Governor was duly published that the Governor was satisfied that the land mentioned in the schedule is needed for construction of a playground for students of Amar Nath Vidya Ashram (Public School), Mathura by the Amar Nath Ashram Trust, Mathura. This acquisition of land was challenged by the owner by a writ petition filed in the Allahabad High Court. An interim order was passed directing the parties to maintain *status quo* as regards possession. During the pendency of the said petition, on 1.5.1992, the Government denotified the land from acquisition in exercise of its power under section 48 of the Land Acquisition Act. The appellant challenged that Notification by filing a writ petition in the High Court. The petition filed by the appellant and the one filed by the owner were heard together. The petition filed by the owner was dismissed as infructuous and the petition filed by the appellant was dismissed on the ground that the decision of the State Government to withdraw from the acquisition for the reason that the acquisition having been proclaimed as one for a public purpose a part of cost of acquisition was required to be borne by the State and as no such provision was made, it was not likely to be sustained if challenged, cannot be said to be contrary or illegal.

Mr. R.F. Nariman, senior advocate, appearing for the appellants, submitted that when acquisition is under part VII, i.e., when land is acquired for a company and when all the formalities have been completed including execution of an agreement for payment of cost of the acquisition and section 6 notification has also been issued, it is not open to the Government to withdraw from such acquisition without the consent of the company for which the land has been acquired. He submitted that the power vested in the Government to withdraw from acquisition is not absolute and is fettered by implicit restrictions and hence it is justiciable. He further submitted that in this case the State Government decided to withdraw from the acquisition under a misconception of law that as the acquisition, at the stage of section 4 notification was proclaimed to be for a public purpose, at least a part of the cost of acquisition was required to

A be borne by the State or was required to be paid out of the public funds or public revenue; and, therefore, the decision taken by it was vitiated and ought to have been quashed by the High Court. On the other hand, the learned counsel appearing for the State of Uttar Pradesh submitted that the State is under no obligation to give any reason for withdrawing from the acquisition and when it is shown that the power was exercised *bona fide* it is not open to the Court to invalidate such an action even if the reason given by the State is found to be erroneous. He submitted that section 48 contains no words of limitation as regards the exercise of power and the only limitation put upon the power of the State Government is that it can exercise that power till possession of the land sought to be acquired is taken and not thereafter. He also submitted that if as a result of withdrawal from acquisition any damage is suffered by any party then he can be paid damages for the loss caused to him, and that there is one more reason why the decision of Government to withdraw from acquisition cannot be interfered with by the court of law.

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It is now well established that if the cost of acquisition is borne either wholly or partly by the Government, the acquisition can be said to be for a public purpose within the meaning of the Act. But if the cost is entirely borne by the company then it is an acquisition for a company under part VII of the Act. It was so held by this Court in *Pandit Jhandu Lal v. The State of Punjab*, [1961] 2 SCR 459. This decision was relied upon by the learned counsel for the State to support his contentions but it is difficult to appreciate how it supports him. It is held in that case that it is not correct to say that no acquisition for a company for a public purpose can be made except under part VII of the Act. In that case a part of the cost was to be borne by the government and, therefore, it was held that it was not necessary to comply with the provisions of part VII of the Act. Admittedly, in the present case the entire cost of acquisition is to be borne by the appellant society and, therefore, it is an acquisition for a company and not for a public purpose. That is also borne out by the notification issued under section 6 of the Act which states "that the land mentioned in the schedule below is needed for the construction of play-ground for students of Amar Nath Vidya Ashram (public school). Mathura in district Mathura by the Amar Nath Ashram Trust, Mathura". Therefore, simply because in the notification issued under Section 4 of the Act it was stated that the land was needed for a public purpose, namely, for a play-ground for students of Amar Nath Vidya Ashram (public school), Mathura, it

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cannot be said that the acquisition is for a public purpose and not under Chapter VII for the appellant-society in view of subsequent events and the declaration made under section 6. The learned counsel for the State also relied upon the decision of this Court in *Srinivasa Cooperative House Building Society Ltd. v. Madam Gurumurthy Sastry*, [1994] 4 SCC 675, wherein this Court has held that though there is "no provision in the Act to say that when a land is required for a company, it may also be for a public purpose. However, even the acquisition for a company, unless utilisation of the land so acquired is integrally connected with public use, resort to the compulsory acquisition under Chapter VII cannot be had". It was submitted on the basis of this observation that even in case of an acquisition for a company an element of public purpose has to be there and if for that reason it was believed by the Government that it was necessary for it to make substantial contribution from public revenue so as to avoid the charge of colourable exercise of powers, the decision of the Government to withdraw from the acquisition cannot be said to be arbitrary or illegal. The aforesaid observation was made by this Court in the context of requirement of Section 40 of the Act and they cannot be construed to mean that no land cannot be acquired by the State Government without making substantial contribution towards the cost of acquisition. We cannot read something more in the said observation than what they were intended to convey. The provisions of part VII and particularly the provisions regarding payment of the entire costs of the acquisition would otherwise become redundant.

As the acquisition in this case was for the appellant-society which is running a school, it was an acquisition for a company and as disclosed by the agreement the entire cost of the acquisition was to be borne by the appellant-society. The declaration made under section 6 clearly referred to the inquiry made under Rule 4 of the Land Acquisition (Companies) Rules, 1963 and the agreement entered into between the appellant-society and the State. Moreover, it was not pleaded by the State before the High Court that the acquisition in this case was for a public purpose and not under Chapter VII of the Act. Therefore, it is really not open to the counsel for the State to raise a contention which is contrary to the case, pleaded before the High Court. In the reply affidavit filed before the High Court, it was stated on behalf of the State that the acquisition was for a registered society and as such it was covered within the meaning of Company as defined by section 3(E)(ii) of the Land Acquisition Act and that the

A purpose of acquisition was covered under section 40(I)(b) of the Act because acquisition for play-ground of students of a school is a purpose which is likely to prove useful to the public.

On the question of giving reasons the learned counsel for the State heavily relied upon the decision of this Court in *Special Land Acquisition Officer, Bombay v. Godrej and Boyce*, [1988] 1 SCR 590. In that case this Court examined the nature and extent of the power of the Government to withdraw from acquisition after issuance of notification under section 4 of the Act. In that case the State Government had passed an order under section 48 of the Act withdrawing the lands of Godrej and Boyce from acquisition. The owner thereupon challenged the withdrawal order as *mala fide* and prayed for quashing of the same. The writ petition was allowed by a Single Judge of the High Court and his decision was affirmed by a Division Bench. In an appeal filed by the State this Court held that under the scheme of the Act neither the notification under section 4 nor the declaration under section 6, nor the notice under section 9 is sufficient to divest the original owner of, or other person interested in, the land of his right therein. Section 16 makes it clear beyond doubt that the title of the land vests in the Government only when possession is taken by the Government and till that point of time, the land continues to be with the original owner and he is also free to deal with the land just as he likes. So long as the possession is not taken over, the mere fact of a notification issued under section 4 or a declaration under section 6, does not divest the owner of his rights in the land to take care of it and confer on the State Government any right whatsoever to interfere with the ownership of the land or safeguard the interests of the owner. Section 48 gives liberty to the State Government to withdraw from the acquisition at any stage before the possession of the land is taken by it. By such withdrawal, no irreparable prejudice is caused to the owner of the land and, if at all the owner has suffered any damage in consequence of the acquisition proceedings or incurred costs in relation thereto, he will be compensated therefor under section 48(2) of the Act. This Court further observed that the State can be permitted to exercise its power to withdraw unilaterally. It further observed that having regard to the scheme of the Act it is difficult to see why the State Government should at all be compelled to give any cogent reasons for its decision not to go ahead with the acquisition of any land. It is well settled in the field of specific performance of contracts that no person will be compelled to acquire any land, as a breach of contract can always be

compensated for by damages. That is also the principle of section 48(2) of the Act. In that case the Court found that the withdrawal was *bona fide* and was justified in view of the facts and circumstances of the case. That was a case where the decision of the Government to withdraw from acquisition was challenged by the owner of the land on the ground that the withdrawal was *mala fide* and it was bad because no show cause notice was served to the company before the withdrawal order was passed. It was in that context that this Court made the above quoted observations. That was not a case where proceedings were initiated to acquire land for a company under part VII of the Act. Therefore, it is not an authority laying down the proposition that in all cases where power is exercised under section 48 of the Act it is open to the State Government to act unilaterally and that it can withdraw from acquisition without giving any reason or for any reason whatsoever.

In an acquisition under part VII of the Act, position of the company or the body for which the land is acquired is quite different from that of the owner of the land. As a result of withdrawal from the acquisition whereas the owner of land is ordinarily not likely to suffer any prejudice or irreparable loss, the company for whose benefit the land was to be acquired, may suffer substantial loss.

However, it is not necessary to go into this larger question whether in such a case the State Government can withdraw from acquisition without the consent of the company as the justification given by the Government is otherwise not sustainable. As stated earlier the reason given by the Government for withdrawing from the acquisition is that as no part of the cost of acquisition was to be borne by the Government the acquisition could not have been sustained as for a public purpose. We have already pointed out that in this case the acquisition was not for a public purpose but it was an acquisition for a company under Chapter VII of the Act. In respect of an acquisition for a company under Chapter VII of the Act law does not require that the State should also bear some cost of the acquisition to make it an acquisition for public use. Thus the decision of the Government to withdraw from acquisition was based upon misconception of the correct legal position. Such a decision has to be regarded as arbitrary and not *bona fide*. Particularly in a case where as a result of a decision taken by the Government other party is likely to be prejudicially affected, the Government has to exercise its power *bona fide* and not arbitrarily. Even though

- A section 48 of the Act confers upon the State wide discretion it does not permit it to act in an arbitrary manner. Though the State cannot be compelled to acquire land compulsorily for a company its decision to withdraw from acquisition can be challenged on the ground that power has been exercised *mala fide* or in an arbitrary manner. Therefore, we cannot accept the submission of the learned counsel for the State that the discretion of the State Government in this behalf is absolute and not justiciable at all.

- C We, therefore, allow this appeal and quash the impugned order dated 16.4.1996. However, we make it clear that it will be open to the State Government to reconsider this question of withdrawal from acquisition and take an appropriate decision in accordance with law. In view of the facts and circumstances of the case, there shall be no order as to costs.

Writ Petition © No. 716 of 1996

- D As we are allowing the appeal the learned counsel for the petitioner does not press the writ petition at this stage and reserves his right to challenge the validity of section 48 if such an occasion arises in future. The writ petition is, therefore, dismissed as not pressed.

V.S.S.

Appeal allowed and Petition dismissed.