

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

WRIT PETITION No.7531 of 2008

ORDER:

This writ petition, under Article 226 of the Constitution of India, is filed by the petitioner requesting to issue a writ of mandamus declaring the notification under Section 4(1) of the Land Acquisition Act, 1894 (for short, 'the Act'), *vide* Ref.G2/6344/2007, dated 03.10.2007, issued by the District Collector, Kakinada, East Godavari District, and his proceedings in Ref.G2/6344/2007, dated 28.02.2008, as arbitrary, illegal, *mala fide*, and as ones issued without application of mind & under colourable exercise of power and in violation of Article 300-A of the Constitution of India and consequently direct the respondents to drop the acquisition proceedings insofar as the land of the petitioner of an extent of Ac.4.54 cents, in Survey no.40/1 of Ponnada Village, U.Kothapalli Mandal, East Godavari District.

2. I have heard the submissions of Sri *S.Subba Reddy*, learned counsel appearing for the petitioner; and of the learned Government Pleader for Land Acquisition (AP), appearing for the respondents 1 to 3. I have perused the material record.

3. The case of the petitioner, in brief, is this: The petitioner is the absolute owner of the afore-stated Ac.4.54 cents of land in Survey no.40/1 of Ponnada Village, U.Kothapalli Mandal, East Godavari District. In the said land, he had raised Sapota garden and he is personally looking after the same. While so, the District Collector, Kakinada, East Godavari District - the 2nd respondent issued notification under Section 4(1) of the Act for acquisition of the

land of the petitioner. The same was published in Andhra Prabha Newspaper, on 08.10.2007, and Pledge Newspaper, on 09.10.2007. Notice under Form-3, dated 08.10.2007, was issued to the petitioner by the Revenue Divisional Officer, Kakinada, East Godavari District, 3rd respondent herein, directing the petitioner to submit objections, if any, with regard to acquisition of the petitioner's land on or before 12.11.2007. Another notice, dated 15.12.2007, was also issued by the 3rd respondent calling upon the petitioner to attend his office, on 24.12.2007. The petitioner filed his objections and further attended the office of the 3rd respondent, on 24.12.2007. Apart from filing objections, the petitioner also filed a sketch showing the location of the land. In the objections, dated 21.12.2007, the petitioner apart from urging other grounds, stated that Grama Khantham land in Survey no.39 of an extent of Ac.7.00 cents is available in the Village and that there are also lands of lesser value available in the Village. The 3rd respondent, at the time of enquiry, simply nodded his head and stated that he would consider the objections. The petitioner and some others are having land in Survey no.43. They all suggested to acquire that land to an extent of Ac.4.50 cents instead of the land, which was proposed to be acquired. Along with the objections, the petitioner also filed a letter addressed by the other affected objectors before the 3rd respondent. The petitioner has also shown photographs of the lands to the 3rd respondent. The sketch was filed to show that the land of the petitioner, which was shown in items 1, 3 & 4 of the sketch, was only proposed to be acquired leaving out from proposed acquisition, the items 2 & 5, which belong to another person and that, therefore, the acquired lands are not contiguous. The sketch clearly discloses that one piece of the land of the other person, which is in between the acquired items of land of the

petitioner, was omitted from acquisition. There is no reason for doing so. This exercise of power is a colourable exercise of power by the respondents 2 & 3. The land, which is sought to be acquired is a Sapota garden and is an orchard. It costs nearly Rs.12,00,000/- per Acre. The land in Survey no.43, which the petitioner and others offered to the Government, is only of a value of Rs.3,00,000/- per Acre. Even according to the 2nd respondent, the petitioner has got another land admeasuring Ac.3.80 cents in Survey no.43/1, which is also proposed for acquisition for KSEZ. Thus, the entire land, which belongs to the petitioner, is under proposal for acquisition. The respondents, under the principle of eminent domain, cannot acquire a person's entire land and leave him as a landless person. No inspection of the lands in Survey no.43 was ever made. Simply reliance was placed on the report of the Tahasildar with regard to existence of LIME KILNS. Even as per the report of the Tahasildar, out of 34 kilns only 2 are functioning. In fact, adjacent to the land in Survey no.43, houses are under construction. The petitioner also brought to the notice of the 3rd respondent the availability of land in Grama Khantham, viz., Ac.7.00 cents in Survey no.39. During the course of personal hearing, the objections are not at all dealt with in a proper manner. However, the respondents 2 & 3 rejected the objections. While overruling the objections, the above said contention of the petitioner is not at all considered. This shows non-application of mind by the said authorities and also colourable exercise of power. The respondents 2 & 3 acted in a *mala fide* manner. Without considering the objections in a proper manner, the objections are overruled. In Survey no.45, vast extent of land, wherein casuarinas tope is in existence, is available. The said fact was also brought to the notice of the 3rd respondent. The

instructions in the circular Memo of the 1st respondent – Secretary of the State of Andhra Pradesh, Revenue (L.A), Secretariat, Hyderabad, are not followed by the respondents 2 & 3 while proposing to acquire the subject land of the petitioner. Form-7 notice was issued and the enquiry was scheduled, on 16.04.2008, without considering the objections of the petitioner in a proper manner. Hence, the petitioner is constrained to file the writ petition.

4. No counter is filed by the respondents. However, learned Government Pleader, having placed on record a copy of the written instructions of April, 2008, contended as follows: 'It is true that the land of the petitioner was proposed for acquisition for provision of house sites to 400 persons of weaker section. The Draft Notification under Section 4(1) of the Act was approved by the District Collector, East Godavari District, Kakinada, on 03.10.2007, and was published in Gazette on 03.10.2007; in Andhra Prabha Telugu Daily Newspaper, on 08.10.2007; in Pledge English Daily Newspaper on 09.10.2007; and in the locality on 12.10.2007. A notice for enquiry under Section 5A of the Act was given/served to the land owners and interested persons, on 12.10.2007. The land owner has not attended personally before the Revenue Divisional Officer-cum-Land Acquisition Officer, Kakinada; but, only filed his objections. The land owner has not attended before the Land Acquisition Officer for personal hearing on the date fixed for personal hearing. Therefore, another notice, dated 15.12.2007, was issued directing to attend for personal hearing, on 24.12.2007. Thereafter the land owner attended before the Land Acquisition Officer and filed his objections. The RDO-cum-Land Acquisition Officer, the 3rd respondent, examined the objections and submitted his remarks to the District Collector. The

District Collector, after careful examination of the objections of the land owners and the remarks of the RDO-cum-Land Acquisition Officer, issued orders, dated 28.02.2008, rejecting the objections, as they are devoid of merit. Draft declaration under Section 6 of the Act was approved by the District Collector, on 26.03.2008. Award enquiry notices under Sections 9(1) & 10 of the Act were issued for publication in locality and prominent places and notices under Sections 9(3) & 10 of the Act for service on the land owners and interested persons and award enquiry was fixed on 16.04.2008. At this stage, the petitioner filed the writ petition.

5. Learned Government Pleader further submitted as follows: -
The objections are duly considered and overruled. There is no colourable exercise of power. Since the land of the petitioner is only found fit for providing as house sites, his land was chosen for acquisition for the proposed public purpose. The RDO-cum-Land Acquisition Officer clearly stated in his report that the alternate land in Survey no.43 proposed by the petitioner and others was inspected by the Tahasildar and it was found that there are 34 LIME KILNS in the said land and that 100 SC families are depending upon them and that 2 only out of 34 kilns are functioning and that the remaining are under repair and that the land proposed by petitioner and others is a sand cast in 10 meters height and that an interim order was granted by the High Court, on 17.07.2007, in SAMP.no.1400 of 2007 against the encroachers in respect of the said land and, therefore, the alternate land shown by the petitioner and others is not suited for acquisition. The petitioner has got other land. Therefore, his livelihood is not affected by the acquisition of the proposed land. He is a Retired Police person. He is getting pension. The lands notified

are only suited for proposed public purpose. Hence, the objections are considered and rejected, after personal hearing and careful consideration. There is no colourable exercise of power. Hence, the writ petition is liable to be dismissed.'

6. Learned Government Pleader also submitted that Indiramma Housing Scheme is not being continued, but the Government is continuing the other housing schemes and that since this Court granted an interim order, on 10.04.2008, with regard to the stay of dispossession, no further proceedings for acquisition of the subject land were taken and hence, no Award has been passed.

7. Learned counsel for the petitioner, in reply, while reiterating the contentions of the petitioner, stated as follows: "One of the main contentions of the petitioner is that as shown in the sketch filed along with the objections and also with the material papers, the land of the petitioner in three items 1, 3 & 4 was only proposed for acquisition leaving out from acquisition adjacent land in two more items of other persons including one item of the other person, which is between the acquired items of land of the petitioner. Further, the land of one of the persons, which is of an extent of Ac.01.00 cents and which is adjacent to the road, was also omitted from acquisition. The land of the petitioner, which is in three items 1, 3 & 4 and which is proposed for acquisition is, therefore, not a contiguous land. Such omission of lands of two other persons from acquisition and the acquisition of the lands of the petitioner alone though not contiguous clearly manifests that the exercise of power by the respondents 2 & 3 is a colourable exercise of power and that on that ground alone, the acquisition proceedings are liable to be set aside.'

8. I have given earnest consideration to the facts and submissions.

9. The first and foremost grievance of the petitioner is that the acquisition of the lands of the petitioner alone, after omitting from proposed acquisition, the adjacent land of other persons as well as one item of land, which is in between the acquired items of the land of the petitioner, is a colourable exercise of power. His contention is that when a notice under Section 5A of the Act was issued, the petitioner filed detailed objections and that in the said objections, this objection was also raised and that during the personal hearing, the petitioner reiterated the said objection by pointing out the topographical details of the five items of land mentioned in the sketch and also by filing photographs, but, the said objection was not at all considered by the RDO-cum-Land Acquisition Officer while overruling the objections; and that, therefore, the report of the Collector submitted to the Government is denuded of its statutory sanction. The undisputed sketch filed by the petitioner reflects that the three pieces of land of the petitioner shown as items 1, 3 & 4 in the sketch are only proposed for acquisition and that lands in items 2 & 5 of two others are excluded from proposed acquisition and that the land of the petitioner in three items, which is proposed for acquisition, is not a contiguous piece of land. Thus, it is established that the land of the petitioner proposed for acquisition is not contiguous. Yet, in the matter of acquisition, such a course was adopted by the respondents 2 & 3. The said facts demonstrate that the power exercised by the respondents is a colourable exercise of power. Though a serious objection is raised by the petitioner in the above regard, the same was not at all considered by the respondents

2 & 3 and their reports/records are silent on the said aspect. No reasons much less valid reasons are forthcoming for such a discriminative exercise of power. The defence of the respondents is also conspicuously silent on this aspect. Hence, it follows that the petitioner's contention merits consideration. It is profitable to refer to the decision of the Supreme Court reported in ***State of Punjab and Another v. Gurdial Singh and Others***¹, wherein the Supreme Court while considering a question whether the acquisition in the said case is bad for bad faith held as follows:

"8. The question, then, is what is mala fides in the jurisprudence of power ? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions is the attainment of ends beyond the sanctioned purposes "of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in Law when he stated : "I repeat that all power is a trust that we are accountable for its exercise that, from the people, and for the people, all springs, and all must exist".

9. Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to effect some object which is beyond the

¹ (1980) 2 SCC 471

purpose and intent of the power, whether this be malices-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action *mala fides* or fraud on power, vitiates the acquisition or other official act.”

Further while emphasising the importance of effective hearing, the Supreme Court held as follows:

“It is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons.”

The ratio in the said decision squarely applies to the facts of the present case. Accordingly, this Court finds that on this ground alone, the relief can be granted to the writ petitioner.

10. The further case of the petitioner is that the notification under Section 4(1) of the Act was issued by the District Collector, East Godavari District; but, the RDO has issued the notices for enquiry under Section 5A of the Act. Learned counse has invited the attention of this Court to Section 3(c) of the Act, which reads as under:

“the expression “Collector” means the Collector of a district, and includes a Deputy Commissioner and any officer specially appointed by the appropriate Government to perform the functions of a Collector under this Act.”

Further, Section 3(a) of the Act, as amended by the State of A.P. [Act 22 of 1976], which deals with delegation of functions, reads as under:

“Delegation of functions: The State Government may, by notification in the Andhra Pradesh Gazette, direct that any power conferred or any duty imposed on them by this Act, shall in such circumstances and under such conditions, if any, as may be specified in the notification, be exercised or discharged by the District Collector.’

In view of the above provisions of law, it is undisputed that the power of delegation is not with the Collector; that the State Government has to discharge the function of delegation by notification in the Gazette; and, that on such delegation only, the delegated authority can exercise and discharge the functions, which are to be discharged by the District Collector. In the case on hand, admittedly, there is no notification by the Government delegating the powers of the Collector to the RDO. However, RDO-cum-Land Acquisition Officer conducted the 5A enquiry by exercising the powers of Collector without any authority conferred upon him by a notification of the State Government. It is contended that on this ground alone, the acquisition proceedings, which are illegal, are liable to be set aside. Suffice if it is noted that this contention of the petitioner merits consideration.

11. It is pertinent to note that Sub-Section (2) of Section 5A of the Act makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing of the objections and making further inquiry, he has to make a report to the appropriate Government containing his recommendations on the objections. The hearing contemplated under the said provision of law is necessary to enable the Collector to effectively deal with the objections raised against the proposed acquisition and to make a report. The enquiry and the report of the Collector are not empty formalities, as the Collector is required, by his report, to notify the appropriate

Government his recommendations. It is only upon receipt of the said report that the Government can take a final decision on the objections and make a declaration under Section 6 of the Act. As contemplated under law, at the time of hearing, the objector can make an effort to convince the Land Acquisition Officer to make recommendations against the acquisition. Further, the objector can produce evidence to show that suitable piece of Government land is available and the same can be utilised for the desired project or scheme. Therefore, the Collector is required to give an opportunity of hearing to the objectors and objectively consider their pleas against the acquisition of their lands. Only thereafter, the Collector should make recommendations supported by brief reasons as to whether the land proposed should be acquired or not and whether or not the plea put forward by the objectors merits acceptance or not. The hearing contemplated under the provision of law must be effective and it is not an empty formality. Any recommendation made by the Collector, without duly considering the objections of the objectors and the submissions made at the hearing, will denude the decision of the appropriate Government of statutory finality, is the settled legal position. The settled legal position emphasises the importance of the enquiry under Section 5A, which is to be conducted by the Collector unless delegated by a notification of the State Government to the RDO. In the case on hand since the RDO-cum-Land Acquisition Officer, who conducted the enquiry, is not enjoined with such function and is not authorized to conduct the enquiry, it can be said that the enquiry conducted by the RDO has no statutory sanction. In the decision in **Hindustan Petroleum Corporation Limited v. Darius Shapur Chennai and others**², the main question which fell

² 2005 (7) SCC 297

for consideration before the Supreme Court was whether the objections raised by the Appellant objecting to the acquisition of land on various grounds have been considered by the Government. The Supreme Court while emphasising the importance of hearing under Section 5A of the Act held as follows:

“It is trite that hearing given to a person must be an effective one and not a mere formality. Formation of opinion as regard the public purpose as also suitability thereof must be preceded by application of mind as regard consideration of relevant factors and rejection of irrelevant ones. The State in its decision making process must not commit any misdirection in law. It is also not in dispute that Section 5-A of the Act confers a valuable important right and having regard to the provisions, contained in Article 300A of the Constitution of India has been held to be akin to a fundamental right.”

Even assuming for a moment that the RDO is competent to conduct an enquiry, as already noted, the RDO has failed to consider one of the vital and serious objections of the petitioner and submitted a report to the Collector and the Collector acted upon the said report obviously without independent application of mind. Therefore, it is apparent that there is no effective and objective consideration of the objections and, hence, the said enquiry under Section 5A held by the RDO stands vitiated.

12. Learned counsel for the petitioner further submits that at present the Government is not continuing the Indiramma Housing Scheme and that new housing schemes are being implemented. He has drawn the attention of this Court to Section 11A of the Act, which reads as under:

“11A - Period within which an award shall be made

The Collector shall make an award under section 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse:

Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act, 1984, the award shall be made within a period of two years from such commencements.

Explanation: In computing the period of two years referred to in this section, the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a court shall be excluded.”

He further submitted that this Court granted orders of stay of dispossession only and not a blanket stay order staying the further acquisition proceedings pursuant to the impugned notification; however, no further proceedings pursuant to the notification were undertaken by the respondents; hence, and as the Award was not passed within a period of two years as envisaged under the above Section of law, the acquisition proceedings lapsed; therefore, if the Government require the subject lands for the desired purpose or any other purpose, it is for the Government to initiate land acquisition proceedings afresh under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, and that therefore, the Writ Petition deserves to be allowed.

13. On the above analysis and for all the reasons afore-stated, this Court finds that the writ petitioner is entitled to the relief claimed.

14. In the result, the Writ Petition is allowed.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order.

M.SEETHARAMA MURTI, J

Date: 27th September, 2018

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THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI**WRIT PETITION No.7531 of 2008**Date: 27th September, 2018

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