Vasant Kunj Enclave Housing Welfare Society and Others Vs Union of India (UOI) and Others
 Geeta Batra and Others Vs Govt. of NCT of Delhi and Others

Court: Delhi High Court

Date of Decision: April 28, 2006

Acts Referred: Land Acquisition Act, 1894 â€" Section 11, 17(1), 17(2), 17(4), 4

Citation: (2006) 89 DRJ 406

Hon'ble Judges: T.S. Thakur, J

Bench: Single Bench

Advocate: V.K. Shailendra, Worthing Kasar and N.S. Dalal, for the Appellant; Sanjay Poddar, for LAC and Shobhna Takiar, for DDA, for the Respondent

Judgement

T.S. Thakur, J.
Difference of opinion on one of the points that fell for consideration in a batch of cases heard by a bench comprising

Swatanter Kumar and Madan B. Lokur, JJ has necessitated this reference to a third judge. The precise issue on which the two Hon"ble Judges

have differed and the facts giving rise to the controversy have been stated in the orders proposed by their lordships. It is, Therefore, unnecessary

to recount the same over again except to the extent it is absolutely necessary to do so for a correct appreciation of the submissions made at the

bar.

2. A large extent of land situate in revenue estate of village Malikpur Kohi also called Rangpuri, New Delhi was notified for acquisition by the

appropriate Government for the public purpose of construction of staff quarters for the employees serving in the Government of NCT of Delhi. The

preliminary notification issued u/s 4 on 1st June, 1995 also purported to invoke the powers vested in the Government u/s 17(1) and 17(4) of the

Land Acquisition Act. Aggrieved by the said notification and the declaration u/s 6 of the Act issued on 17th November, 2005, the land owners

filed a large number of writ petitions challenging the legality thereof on several grounds. All these grounds, except the one relating to the validity of

the notification invoking powers vested in the Government u/s 17(4) of the Act, were upon examination rejected by the Court. Insofar as the

question of validity of the notification u/s 17(4) was concerned, the judges comprising the bench differed in their opinions. This difference of

opinion also related to a part of the controversy only. Significantly, the judges comprising the bench were unanimous in holding that there was no

application of mind on the part of the authority invoking the powers u/s 17(4) of the Act before or up to the date of issue of the notification under

the said provision. Dealing with that aspect in WP(C) No. 4789/2005 and connected matters, Swatanter Kumar, J observed:

It is true that there is really not any material on record before me which could demonstrate that there was definite noting, application of mind and

the direction issued by the appropriate authority for dispensation of provisions of Section 5A in terms of Section 17(4) of the Act. Of course, in the

draft as well as final notification published u/s 4 of the Act, showing that the appropriate authority has exercised its powers u/s 17(4) of the Act,

was included. This by itself may not be sufficient to show reasonable and proper application of mind by the appropriate authority even in recording

its subjective satisfaction which is conspicuous by its very absence on the record. For the reasons stated in our judgment dated February 03, 2005

in WP(C) No. 7446/1999. I am of the view that this was not sufficient compliance of the provisions of Section 17(4) of the Act.

3. Madan B. Lokur, J concurred with the above view in a separate opinion recorded by him in the following words:

I am in agreement with his Lordship''s conclusion that when the Notification u/s 4 of the Act was issued on 1st June, 1995, the appropriate

Government did not apply its mind to the provisions of Section 17(4) of the Act. This means that consequently as on 1st June, 1995, the

appropriate Government did not apply its mind to dispensing with an enquiry u/s 5-A of the Act by resorting to Section 17(4) thereof.

4. Things did not however rest at that, for Swatanter Kumar, J went a step further to examine whether the appropriate Government had applied its

mind to the question of dispensing with the enquiry u/s 5-A at any time before the issue of the declaration u/s 6 of the Act. His lordship was of the

view that there was no prohibition against issuing a common notification u/s 4, 17(1) and 17(4) of the Act nor was there any prohibition against the

invocation of the powers u/s 17(4) at any stage prior to the issue of a declaration u/s 6 of the Act provided the same was for good and valid

reasons. This is evident from the following passage appearing in the opinion recorded by Kumar J.:

There is apparently no prohibition in issuing a notification u/s 4 of the Act which in turn contains both the clauses as postulated u/s 17(1) and 17(4)

of the Act. Equally true is that they could be invoked at any stage prior to issuance of the declaration u/s 6 of the Act and obviously for good and

valid reasons.

5. The learned judge went on to hold that the notes recorded in the contemporaneous record clearly established that the Government had, before

the issue of the declaration u/s 6 of the Act, applied its mind to the question of dispensing with the enquiry u/s 5-A and come to the conclusion that

it was necessary to do so. The learned judge observed:

These are the reasons recorded by the authorities on which the decision was taken where after a declaration u/s 6 of the Act was published in

accordance with the provisions of the Act. Thus, it could hardly be disputed that there has been application of mind by the appropriate

Government in invoking the provisions of Section 17(4) of the Act prior to issuance of a declaration u/s 6 of the Act.

6. Having said so, the court held that it would have been certainly more appropriate if the authorities had applied their mind right at the initial stage

itself, but even if the application of mind is deferred to a later stage, the same was permissible and would not invalidate the invocation of the

powers vested in the Government u/s 17(4) of the Act. The Court observed:

It would have been certainly more appropriate if the authorities would have applied their mind right at the initial stage rather than carrying this

defect by virtue of subsequent application of mind but within the time frame specified under the provisions of the Act.

7. Significantly, the Court treated the notification u/s 17(4) of the Act to be the beginning rather than the culmination of the exercise by which the

enquiry u/s 5-A was dispensed with. This is evident from the following lines appearing in the judgment proposed by Kumar J.:-

It could be safely said that the foundation of the opinion was laid at the initial stages but specific direction upon due subjective satisfaction of the

matter was issued at a later stage. Such later stage being permissible in law would not invalidate the invoking of powers by the appropriate

Government u/s 17(4) of the Act.

8. Having thus rejected the contentions urged on behalf of the petitioners, Swatanter Kumar J. dismissed the petitions.

9. Madan B. Lokur, J did not subscribe to the reasoning or the conclusion indicated above. In a separate opinion authored by his lordship, a two-

fold question was framed. The first facet of that question was whether the Government had indeed applied its mind to the question of dispensing

with an enquiry u/s 5-A at any time between 1st June, 1995 and 17th November, 1995. The second facet related to the validity of any such

exercise. The notes on the file were then looked into by the learned judge to answer the first limb of the question in the negative. The Court said:

A reading of the above nothings clearly shows that except for a solitary noting dated 17th October, 1995 prepared by the OSD (Lit.) there is no

mention of Section 17(4) of the Act. Moreover, the context in which the OSD (Lit.) has referred to Section 17(4) of the Act is with reference to

the fact that the Notification u/s 4 issued on 1st June, 1995 makes a mention of Section 17(4) of the Act.

Under the circumstances, on going through the nothings from the original file, it is not possible for me to infer any application of mind by the Lt.

Governor between 1st June, 1995 and 17th November, 1995 to the provision of Section 17(4) of the Act and to dispense with an enquiry u/s 5-A

thereof.

10. Reliance was also placed upon the view taken by his lordship in Vasant Kunj Enclave Society v. Union of India WP(C) 1953/1997 and the

decisions referred to therein to say that an order u/s 17(4) of the Act could not be inferred and that subjective satisfaction of the appropriate

Government must be explicitly recorded. The Court further held that even if the notes recorded in the official files constitute application of mind, in

the absence of any communication of the decision discernible from the same, it would have no meaning whatsoever. In conclusion, the learned

judge allowed the writ petitions and quashed the declaration u/s 6 of the Act leaving it open to the respondents to take such action as may be open

to them in law.

11. In Vasant Kunj Enclave Society and connected matters (supra), the lead judgment was authored by Madan B. Lokur, J. in which his lordship

held that there was no application of mind either by the Lt. Governor or by any of the officers of Delhi Government to the requirement of

dispensing with a hearing u/s 5-A of the Land Acquisition Act. Consequently, notification dated 27th June, 1996 relevant to that batch of cases

was quashed to the extent the same invoked Section 17(4) of the Act and denied to the petitioners their right to file objections u/s 5-A. Swatanter

Kumar J. did not subscribe to that conclusion. His lordship stuck to his view taken in the lead judgment in WP(C) No. 4789/2005 thereby

necessitating a reference even in that batch of cases.

12. Following their respective views as regards the validity of the notification u/s 17(4), a reference for resolving the difference of opinion was

made in WP(C) 2605/1997 and connected matters also. That is precisely how all these petitions have been referred for a third opinion to resolve

the difference.

13. I have heard learned Counsel for the parties at considerable length and perused the record. Clause 26 of the Letters Patent requires that in the

event of a difference of opinion arising between two judges comprising a Division Bench, the precise point upon which they differ shall be stated by

the judges comprising the bench and shall thereupon be heard by one or more of the other judges to be eventually decided according to the

opinion of the majority of the judges who heard the case, including those who first heard it. The difference of opinion arising from the orders

proposed by the two judges in these cases relates to the validity of the notification issued u/s 17(4) of the Land Acquisition Act dispensing with the

enquiry u/s 5-A thereof. Even in regard to the said question, the difference of opinion is confined to whether there was any application of mind on

the part of the competent authority between the date of the impugned notification u/s 17(4) and the date of the issue of the declaration u/s 6 of the

Act. Mr. Sabharwal, learned senior counsel appearing for the respondent/DDA argued that the present references must remain confined primarily

to finding out whether there was any application of mind by the competent authority at any time before the issue of the declarations u/s 6 of the

Land Acquisition Act in each one of these cases. The further issue whether any such exercise could be validly undertaken after the competent

authority had invoked the provisions of Section 17(4) and issued a notification has not, according to the learned counsel, been examined by the

Court. He submitted that while Swatanter Kumar, J. has taken the view that such an exercise was legally permissible M.B. Lokur, J. has simply

observed that the Government having invoked the powers u/s 17(4) of the Act on 1st June, 1995, there was no occasion for it to apply its mind or

to re-examine the issue on any later date. The validity of the exercise does not according to Mr. Sabharwal, arise for consideration in the true

sense.

14. The seminal question that falls for consideration is whether there was any application of mind on the part of the competent authority to the need

for dispensing with the enquiry u/s 5-A of the Act at any time after the issue of the notification u/s 17(4). Before I examine that question by

reference to the contemporaneous record, it is necessary to briefly recapitulate the legal position as regards the nature of the powers vested in the

Government u/s 17(1) and 17(4) of the Act and the manner in which the said powers can be validly exercised.

15. Sections 17(1) and (4) with which we are concerned in the present petitions read 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) XXXX

(3) XXXX

(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 5A shall not apply, and, if it does so direct, a declaration may e

made u/s 6 in respect of the land at any time after the date of the publication of the notification u/s 4, Sub-section (1).

16. It is evident from the above that in the event of an urgency, the Government is empowered to direct the Collector to take possession of any

waste land needed for a public purpose even when no award has been made u/s 11 of the Act. Such land thereupon vests absolutely in the

Government free from all encumbrances. The net effect of any action taken under this provision is that the vesting of land, which is otherwise

provided for in Section 17 and which, in the ordinary course, takes place after the award u/s 11 is made, gets accelerated and can take place 15

days after the publication of the notice u/s 9.

17. In cases where Section 17(4) is invoked, the Government can direct that the provisions of Section 5-A shall not apply and if it does so direct,

a declaration can be made u/s 6 in respect of the land at any time after publication of the notification u/s 4(1).

18. It is manifest from a bare reading of the two provisions that it is not necessary that the Government must make a direction u/s 17(4) the

moment it decides to make a direction u/s 17(1) of the Act. There is no gainsaying that if the Government takes a decision to invoke only Section

17(1), the requirement of an enquiry u/s 5-A would still have to be satisfied before a declaration u/s 6 can be issued. It is only when the

Government also invokes provisions of Section 17(4) that it becomes unnecessary to conduct the enquiry envisaged by Section 5-A.

19. The provisions of Section 17(4) notwithstanding the right to file objections and the right to a hearing u/s 5-A has been recognised as a valuable

right by the Supreme Court in Nandeshwar Prasad and Another Vs. The State of Uttar Pradesh and Others, That position was reiterated by their

lordships in Union of India (UOI) and Others Vs. Mukesh Hans etc., where the court declared that an enquiry u/s 5-A of the Act was not an

empty formality. It is a substantive right which can be taken away only for good and valid reasons and within the limitation prescribed u/s 17(4) of

the Act. The Court repelled the contention that the existence of an urgency or unforeseen emergency u/s 17(1) and (2) of the Act would

automatically justify dispensing with an enquiry u/s 5-A. The Court observed:

A careful perusal of this provision which is an exception to the normal mode of acquisition contemplated under the Act shows that mere existence

of urgency or unforeseen emergency though is a condition precedent for invoking Section 17(4), that by itself is not sufficient to direct the

dispensation of the Section 5-A enquiry. It requires an opinion to be formed by the Government concerned that along with the existence of such

urgency or unforeseen emergency there is also a need for dispensing with Section 5-A enquiry which indicates that the legislature intended the

appropriate Government to apply its mind before dispensing with Section 5-A enquiry. It also indicates that mere existence of an urgency u/s 17(1)

or unforeseen emergency u/s 17(2) would not by itself be sufficient for dispensing with Section 5-A enquiry. If that was not the intention of the

legislature then the latter part of Sub-section (4) of Section 17 would not have been necessary and the legislature in Sections 17(1) and (2) itself

could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically Section 5-A enquiry will be

dispensed with. But then that is not the language of the section which in our opinion requires the appropriate Government to further consider the

need for dispensing with Section 5-A enquiry in spite of the existence of unforeseen emergency.

20.The court emphasised the need for due and proper application of mind on the part of the Government while invoking powers vested in it under

the provisions of Section 17(1), (2) and (4) and held:

Therefore, in our opinion, if the appropriate Government decides to take away this minimal right then its decision to do so must be based on

materials on record to support the same and bearing in mind the object of Section 5-A.

21.There is, in the light of the above pronouncement, no difficulty in holding that for dispensing with an enquiry u/s 5-A and denying to the owners

their valuable right to file objections to oppose the acquisition proceedings, the least the Government must establish is that it had done so after due

and proper application of mind to the facts justifying the need for such dispensation. Both the learned judges comprising the Division Bench have

recognized the need for a due and proper application of mind by the Government before an order u/s 17(4) of the Act can be said to have been

validly made. All that I need to add is that due and proper application of mind must invariably precede the issue of an order u/s 17(4). I say so

because if the Government have, in the purported exercise of their power u/s 17(4) dispensed with an enquiry today, they cannot cure the infirmity

arising from the non-application of mind on the basis of an exercise which they may undertake tomorrow. Any such notification in order to be valid,

must follow proper application of mind, for otherwise a notification which is bad on the date it is issued, can be made good by the authority who

issued the same on the basis of an exercise undertaken by it post facto. It is well-settled that the validity of an order must be tested on the touch

stone of the ground stated in the order and by reference to the material available on the date the order was passed and not what may be supplied

in the form of an affidavit or other material gathered subsequently. Similarly, if an order is bad on account of non-application of mind by the

authority passing the same, it cannot be rendered good by a subsequent consideration of the material facts. The Government may make a fresh

order upon due and proper application of mind after the earlier order is either withdrawn or is quashed by a competent court but so long as the

earlier order or notification remains in force, its invalidity arising from non-application of mind cannot be cured by a subsequent exercise. I am,

Therefore, inclined to agree with the view expressed by Lokur, J that a notification u/s 17(4) having been issued by the Government on 1st June,

1995, there was no occasion for it to embark upon an exercise aimed at determining whether or not an enquiry u/s 5-A could be dispensed with.

The Government had, in the instant case, issued a notification on 1st June, 1995, and taken a decision to dispense with the enquiry u/s 5-A of the

Act, no matter without due and proper application of mind in that regard. There was, in that view, no room for any application of mind after the

event nor could any such exercise validate the notification already issued.

22.That brings me to the question whether the competent authority had indeed applied its mind to the need for dispensing with an enquiry u/s 5-A

at any time after the issue of the notification u/s 17(4) of the Act, assuming for the sake of an argument that such application of mind would make

any difference. In the opinion of my esteemed brother Swatanter Kumar, J, the notes recorded on the file on 7th October, 1995, 17th October,

1995 and 8th November, 1995, when carefully examined, establish that the Lt. Governor had applied his mind and recorded reasons for the need

to dispense with the enquiry u/s 5-A of the Act. At the hearing before me, the respondents did not refer to any other additional material apart from

the notes mentioned above in support of the above conclusion. What Therefore requires to be seen is whether the notes in question can constitute

a due and proper application of mind by the Lt. Governor to the need for dispensing with the enquiry. These notes have been extracted in the

judgment authored by Swatanter Kumar, J, but may, for facility of easy reference, be extracted again. First of these notes recorded by the OSD

on 7th October, 1995 reads as under:

Apart from above we have received several representations for reconsideration of the invoking of emergency clause under LA Act, 1894 in

connection with land proposed to be acquired village Malikpur Kohi in revenue estate of Rangpuri through notification dated 1.6.1995. They say

that declaration u/s 6 has been delayed and not issued even after 2 months after issue of notification u/s 4(1). Therefore there is no justification for

invoking emergency clauses hence emergency clauses may be withdrawn. The representations are placed in the linked file of the D.C. Office for

perusal (page 1 to 12/C).

The stand taken by the Dept. invoking emergency clauses is with the approval of L.G. i.e. the Appropriate Govt. The appropriate Govt. has

judicially exercised this power by issuing notification u/s 4(1) & applying 17(1) & (4) of the Act. There is no question of any delay. Invoking the

provisions of S/17(4) does not preclude the right of the Govt. to invoke the provision of Section 17(1). The declaration u/s 6 can be issued at any

time after the issue of notification u/s 4(i) and not later than one year from the date of notification under Sec. 4(1). So we have grounds to contest

these writ petitions and pray the court to vacate the stay or interim stay passed by the Court.

JS(L&B) (on leave)7.10.95 Secy (L&B)OSD

23. It is obvious that the note refers to certain representations received from the owners against the Government"s decision to invoke emergency

provisions of the Land Acquisition Act in connection with acquisition of land situate in Village Malikpur Kohi in the revenue estate of Rang Puri.

The note points out that the Government has exercised its power for issuing a notification u/s 4, 17(1) and 17(4) of the Act and that there were

sufficient grounds to contest the writ petitions and to pray for vacation of the interim stay by the court. There is little that can be deduced from the

above note in support of the argument that the competent authority had applied its mind to the question of dispensing with the enquiry u/s 5-A

before the issue of the notification under Sections 4, 17(1) and 17(4) of the Act. The judges comprising the bench are also unanimous in their

conclusion that till 1st June, 1995, there was no application of mind by the Government to the question whether enquiry u/s 5-A should or should

not be dispensed with. The note dated 7th October, 1995 does not establish that there was application of mind at any time before 1st June, 1995

nor can the same be called-in-aid to demonstrate that such application of mind had taken place at any time post issue of the notification.

24. The next note that was referred to and relied upon is dated 17th October, 1995 which reads as under:

We should take possession of areas not under stay, which mainly appear to be zones I (Gaon Sabha 368) & II (Private 75) Zone III which has

farm houses sanctioned etc. by MCD will have to wait. In those cases we should be prepared to allow a Section 5(i) enquiry and hearing subject

to the writ petitions, i.e. Those that have applied for hearing could be heard. But those who have filed writs have to await court orders. We

discussed today.

25. Here again, it is difficult to see how application of mind regarding holding of an enquiry u/s 5-A can be inferred. That is true even in regard to

the note dated 8th November, 1995 put up to the Lt. Governor and approved by him on 9th November, 1995. The note and the order passed on

the same by the Lt. Governor read as under:

May kindly see notes from pre page 24/N and approve foll. course of action:

a) Issue of notification u/s 6 & 17(i) for Zone I and II (gaon sabha land & vacant private land in small portion for PWD)

b) Taking over of possession of area not covered by court stay in Zone I and II.

c) Issue of corrigendum in respect of Zone III, covering 39 farm houses and land appurtenant, affording the owners an opportunity for filing

objections under Sec. 5A of the LA Act.

d) Instructions may also issue to DDA to ensure that no further construction comes up in the area being acquired in Zone III, during the period of

acquisition & hearing of objections. This area already stands declared as a development area.

LG 8.11.95

a) and

b) approved.

c) The opportunity may be given to all those owing land.

d) as approved.

Secy. L&B 9.11.95

26. I find it difficult to read in this note anything concerning the question whether or not an enquiry u/s 5-A of the Act qua the land belonging to the

petitioners should be conducted. The note does not even address itself to that question leave alone propose to the Lt. Governor any particular

course of action in regard thereto. All that the note proposes is the issue of a notification u/s 6 and 17(4) for Zone I and II, taking over of

possession of area not covered by court order in Zone I and II, issue of a corrigendum in respect of Zone III and affording the owners an

opportunity for filing objections u/s 5-A of the Act. The note also seeks approval of instructions to the DDA to ensure that no further construction

comes up in Zone III during the time the objections are heard. Significantly, Lt. Governor has approved the note which inter alias implies that those

owning farm houses in Zone III may be given an opportunity of filing objections u/s 5-A. The order passed by the Lt. Governor however does not

demonstrate application of mind leave alone record any reasons for dispensing with such an enquiry u/s 17(4) of the Act in regard to other area

notified for acquisition. Just because the Lt. Governor agreed to afford an opportunity to the farm house owners for filing objections u/s 5-A, it

cannot be said that a proper consideration of the question had taken place nor can it demonstrate application of mind by the competent authority.

Any inference from these notes which are sketchy and which do not directly address the issue in the manner it ought to be, would be far-fetched

and unsustainable. If the law requires, as it does in the instant case, that the authority passing the order should apply its mind properly, such

application of mind cannot be readily inferred. That is especially so when the order passed by the authority affects valuable civil rights of the

citizens. As a matter of fact, the greater the potential of mischief, the more careful and objective should the authority passing the order be. There is

also no gainsaying that while acquisitions made for public purpose are at times inevitable, hardship is more often than not implicit for expropriated

owners in any compulsory acquisition. Adherence to the requirements of law and the procedure established for the purpose must, Therefore, be

scrupulously ensured lest the procedural safeguards that the law provides to the owners against arbitrary acquisitions are reduced to bare rituals. I,

Therefore, agree with the view expressed by brother Madan Lokur, J that there was no due and proper application of mind on the part of the Lt.

Governor to the question of dispensing with the enquiry either before the issue of the notification u/s 17(4) or at any time thereafter.

27. The matter shall now be placed before the bench comprising Swatanter Kumar and Madan Lokur, JJ for further orders on the subject.