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Basant Kumar Jena and anr. Vs. State of Orissa and anr.

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Court : Orissa

Decided On : Mar-22-1995

Reported in : AIR1995Ori288; 1995(II)OLR324

Judge : V.A. Mohta, C.J. and ;R.K. Dash, J.

Acts : Land Acquisition Act, 1894 - Sections 18 and 31(2); Evidence Act, 1872 - Sections 115; Constitution of India - Article 226

Appeal No. : Original Jurisdiction Case No. 5194 of 1993

Appellant : Basant Kumar Jena and anr.

Respondent : State of Orissa and anr.

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : R.N. Mohanty, ;K.C. Satpathy and ;K.P. Mohanty, Advs.

Disposition : Petition allowed

Judgement :

V.A. Mohta, C.J.

1. Plot No. 6 under Khata No. 33 with a house standing thereon in village Kendupadar, District Phulbani, a tribal area, was jointly owned by the two uneducated tribals - the petitioners Basant Kumar Jena and Upendra Jena. This

property was acquired by the State Government for a public purpose under the Land Acquisition Act (the Act). Compensation for the entire property was determined by the Award at Rs. 10,146/-. Half of the amount was paid to petitioner Basant Kumar Jena on 5-9-1989 and half to Upendra Jena on 12-12-1990. Basant Jena had received the amount under oral protest, and Upendra Jena under written protest. Basanl filed an application under Section 18 of the Act on 12-9-1989 to the Collector for making a reference to the Court for determination of the amount of compensation for the whole of the property. The Collector refused to make a reference on the ground that Basant had not received the amount under protest and, therefore, reference was incompetent in view of the second proviso to Section 31(2) of the Act and hence this petition under Section 226 of the Constitution.

2. Having regard to the above basic factual matrix, it seems to us that hyper-technical approach - not warranted by the provision - has been adopted by the Collector. The petitioners were co-owners of the property since no division had taken place between them. Consequently none of them had definite right, title or interest in any particular portion of the property and each had a right, title and interest in every part andparcel of the property. Compensation was determined by the Collector in the Award at Rs. 10,146/- for the whole property. He, however, paid half and half compensation to the co-owners without the petitioners asking for such distribution. Within seven days of the receipt of the half amount, one of the co-owners filed an application under Section 18 of the Act pertaining to the whole of the property. Application undoubtedly lacks clarity as well as details. But, there can be no doubt that the application for reference was on behalf of both, as asserted by them in this petition. The promptitude with which the application was made clearly indicates that the applicant was not satisfied with the Award. Upendra received the amount later on, but did not file separate application which clearly shows that he bona fide believed that the second application for reference separately by him was not necessary. Upendra had received the amount much later and under written protest. It appears, by that time, some knowledgeable person must have apprised him of the risk involved in not putting the protest in writing.

3. The instant case pertains to rustic, uneducated Adivasis, who were quite obviously not aware of the fine intricacies of our procedural law regarding the manner of raising protest against insufficiency of compensation at the time of its receipt. The presumption that every one knows law is a myth. This is more so in case of persons like the petitioners. The sole purpose behind second proviso to Section 31(2) of the Act is to bar a person from making a reference under Section 18 in case he has consciously waived his right. One who waives a right is estopped from asserting it later on is the principle behind that proviso. Waiver is an intentional relinquishment of a known and existing right or privilege. Waiver is an inference to be drawn from the totality of circumstances, unless statute validly requires its expression in a particular manner. Having regard to the totality of the background, it seems very clear to us that this is not a case where the owners have waived the right to challenge the Award by accepting the amount in full and final settlement of the claim. In this background, the assertion of the petitionersthat Basant Jena had accepted the amount under protest will have to be accepted.

4. Law does not require the protest to be in writing. To hold so would amount to rewriting the provision. Written protest, of course, is the best proof. Oral protest may be difficult to substantiate, but is permissible in law. Contrary view would not only defeat the purpose of the provision but would also work very hard against the citizens.

5. There is yet another angle to the controversy. It is not the case of the Collector that he had explained to the rustic Basant Jena the provisions of Sections 28 and/or 31(2) of the Act. Having regard to the object of the provisions and the type of persons he was dealing with the tribal area, it was his duty to do so. Failure to perform this obligation would disentitle him from raising the question of such a bar to the maintainability of reference. Unless it is clear that the owner knows about the provisions or that the provisions were explained to him, waiver of the right cannot be presumed and the Collector would have no right to reject the reference on grounds like this and would also not be entitled to raise the question of bar when controversy arises.

6. In this context, progressive thinking of the legislature on one procedural aspect under the Act may be noticed. Section 28A of the Act has been inserted by Act No. 68 of 1984 by which compensation can be re-determined on the basis of Award of the Court even where a person has not made an application under Section 18. The applicability of Section 28A to pending cases has been a matter of unending controversy. But, about its purpose, there is unanimity all through. In the case of Mewa Ram v. State of Haryana, (1986) 4 SCC 151 : AIR 1987 SC 45, it is clearly observed that the section is intended and meant for the benefit of the inarticulate and poor people who by reason of their poverty and ignorance have failed to take advantage of the right of reference to Civil Court under Section 18 of the Act.

7. Keeping all these aspects in view, we quash the impugned order passed by theCollector and direct him to make a reference to the Civil Court in accordance with law as contemplated under Section 18 of the Act.

8. A preliminary objection was raised by the State to the maintainability of this petition on the ground of existence of alternate remedy of revision before the High Court under Sub-section (3) of Section 18 (which has been inserted in the Act by Orissa Act 19 of 1948). No doubt, by this provision, a revision is provided against the order of the Collector to the High Court treating the Collector as a Court subordinate to the High Court within the meaning of Section 115 of the Code of Civil Procedure. But, it is trite to notice that mere existence of alternate remedy is no bar to the maintainability of the writ petition under Art. 226/227 of the Constitution. All depends upon totalities of circumstances. It would be unjust and unfair to subject the petitioners to the drudgery of another round of litigation in respect of acquisition of their property twelve years back. A long period of five years has elapsed even after passing of the Award. The amount is comparatively small, though for the petitioners it must be big. This petition itself is pending since 1993 and the matter is yet pending only at reference stage. There are many miles to go for the Civil Court to decide the matter and the petitioners to get the fruit of the enhanced compensation, if any. Hence, we overrule the preliminary objection.

9. To conclude, the writ petition is allowed. No costs. The impugned order is quashed and set aside and the Collector is directed to make reference in

accordance with law without further loss of time.

10. Copy of this judgment be sent to the Secretary, Revenue Department of the State of Orissa with a direction to circulate it to every Land Acquisition Officer in the State.

R.K. Dash, J.

11. I agree.

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