THE HIGH COURT OF SIKKIM AT GANGTOK

(Civil Extra Ordinary Jurisdiction)

DATED : 29.08.2013

CORAM

HON'BLE THE CHIEF JUSTICE
MR. JUSTICE PIUS C. KURIAKOSE

W.P. (C) No. 7 of 2012

1. Mr. Thupten Kalden Bhutia,
S/o Late Chewang Rinzing Bhutia,
R/o Near Triveni Hotel,
P.O. & P.S. Gyalzing,
West Sikkim.

2. Ms. Dikeela Kalden,
D/o Thupten Kalden Bhutia,
R/o Near Triveni Hotel,
P.O. & P.S. Gyalzing,
West Sikkim. ..... **Petitioners.**

- versus -

1. State of Sikkim,
through
the Chief Secretary,
Government of Sikkim,
Tashiling Secretariat,
Gangtok.

2. The Secretary,
Land Revenue and Disaster
Management Department,
Government of Sikkim,
Gangtok.

3. The Secretary,
Power & Energy Department,
Government of Sikkim,
Gangtok.

4. The District Collector,
Office of the District Collectorate,
West District,
Gyalzing.

5. The Managing Director,
Sikkim Power Development Corporation,
Gangtok,
East Sikkim.

6. The Union of India,
through:
The Secretary,
Ministry of Forest & Environment,
Government of India,
Paryavaran Bhawan,
C.G.O. Complex, Lodi Road,
New Delhi.

7. The Director,
M/s. Shiga Energy Pvt. Limited,
Rabdenling, Annex-II
Adjoining Royal Plaza,
Upper Syari,
Gangtok, East Sikkim. ..... **Respondents.**

For Petitioners : M/s. Bhaskar Raj. Pradhan, Sr. Advocate with T. R. Barfungpa, Yangchen D. Gyatso Bhutia, Yadev Sharma and Karma Tshering Bhutia, Advocates.

For Respondents : M/s. J. B. Pradhan, Addl. Advocate General with S. K. Chettri, Asstt. Govt. Advocate for Respondents No. 1 to 5.

Mr. Karma Thinlay, Central Govt. Advocate for Respondent No. 6.

M/s. A. Moulik, Sr. Advocate with Manish Kr. Jain, K. D. Bhutia, P. Kharka and Ranjit Prasad, Advocates for Respondent No. 7.

J U D G M E N T

Pius, CJ

The petitioners Mr. Thupten Kalden Bhutia and Ms. Dikila Kalden are father and daughter. The respondents are State of Sikkim (R-1), the Secretary, Land Revenue and Disaster Management Department (R-2), the Secretary, Power and Energy Department (R-3), the District Collector, West District (R-4), the Managing Director, Sikkim Power Development Corporation (R-5), the Union of India (R-6) and the Director, M/s Shiga Energy Pvt. Ltd. (R-7).

2. The petitioners have filed this writ petition challenging Annexure–1 notification issued by the second respondent under Section 4 (1) of the Land Acquisition Act, 1894 (for short, "the Act") pertaining *inter alia* to the proposed acquisition of a total extent of 5.5050 hectares of land in various plots standing in the name of the first petitioner. The writ petition is also for quashing Annexure–2 declaration promulgated by the second respondent under Section 6 of the Act in respect of the very same property. The writ petition also seeks a writ of certiorari quashing and cancelling the procedure initiated under Sections 8 and 9 of the Act. It seeks quashment by a writ of certiorari of the award passed under Section 11 of the Act. It also seeks orders against the respondents directing them to pay compensation for the damages caused to the property of the petitioners. It also seeks a direction to

the respondents for immediate cessation of further construction work on the property of the petitioners till the pendency of the writ petition.

3. According to the petitioners, they are Indian citizens and permanent residents of Gyalshing, West Sikkim. The first petitioner was in Sikkim Government Service and retired as an Additional Chief Conservator of Forest in 2002 and the second petitioner is his daughter. Their grievance is that very valuable immovable property forming part of their ancestral property, hereinafter referred to for the sake of convenience as "the acquired property", has been forcefully acquired by the State respondents for the purpose of implementing the 97 MW Tashiding Hydroelectric Project by the 7th respondent. According to them, the first petitioner and his wife have been frequently out of Sikkim and spending a considerable amount of their time with their daughters based in Dubai and the first petitioner became fully aware of the proceedings related to the acquisition of the acquired property only at the beginning of 2011, when he returned back to Gyalshing. The second petitioner, who completed her studies with the University of Delhi, has since then been residing in Delhi and till 2010 working for a Delhi based company by name Luminous Engineering & Technology. The second petitioner came to have some information regarding the acquisition proceedings in May, 2011 when she returned to Gyalshing from Delhi. According to her, ever since she came here, she has been making various unsuccessful written representations and objections and

even personal appearances before the authorities for preventing the ancestral land from being forcefully acquired.

4. The petitioners point out that the fourth respondent is the District Collector and the Land Acquisition Officer for the area, who had sought for acquisition of land at Omlok Block and other areas for and on behalf of the fifth respondent, Sikkim Power Development Corporation, a Corporation owned by the Government of Sikkim and controlled by the same Government for whom only the lands were proposed to be acquired initially. The petitioners submit that the seventh respondent, is the company which will be implementing the 97 MW Tashiding Hydroelectric Project. To show that the petitioners have an interest in the property under acquisition and those properties stands recorded in the name of first petitioner, the petitioners produced Annexure–3, copy of the Parcha Khatian of the said property. Petitioners further pointed out that along with the property covered by Annexure–3, the State respondents have forcefully acquired for the purpose of implementing the power project of the seventh respondent, plot No. 712 which the petitioners assert to be part of their ancestral property and has been in the possession of their family for generations on the premise that that property is Khasmal/Forest land. Petitioners point out that the emergency provisions under Section 17(4) has been invoked and the petitioners were denied the benefit of the enquiry under Section 5A of the Act resulting in denial of opportunity to the petitioners to raise objections regarding the proposed acquisition.

5. The petitioners submit that on 23.05.2011, the representatives of the seventh respondent Company approached them at their residence to inform that they are starting work on the petitioners land as it was a Mauharat (auspicious day), to which the petitioners objected. The petitioners told the representatives of the seventh respondent not to carry out any such activities on their property. Thereafter, as desired by one representative of the seventh respondent, the fourth respondent spoke to the first petitioner and requested the first petitioner to allow the seventh respondent to carry out activities on their land.

6. At that time, the petitioners made it clear to the Respondents No. 4 and 7 that they are not willing to part with their land and only after a proper survey is conducted, they will be in a position to take a decision whether they will agree for compulsory acquisition of their land or not. On 26.05.2011, the Amin/Surveyor of the locality accompanied by the employees of the seventh respondent came to the petitioners land for surveying the same. The petitioners were shocked to find that despite their objection, the employees of the seventh respondent trespassed into the petitioners land with a bull dozer and started excavating a portion of the same. On oral objection being raised by the petitioners, the representatives of the seventh respondent asked the petitioners to discuss the issue with the fourth respondent. The petitioners submit that thereafter, on 27.05.2011, the first petitioner put in a formal objection to the fourth respondent stating

inter alia that various discrepancies were found during the visit for survey and requested him that a detailed survey be conducted and all the operational works commenced by the seventh respondent be stopped till the disputes pertaining to the survey are finally settled. Even though the fourth respondent persuaded the petitioners very much to part with their land and accept the compensation calculated by them, the petitioners told him very plainly that they will not be part with their land. Annexure–4 is a copy of a written objection submitted by the first petitioner to the fourth respondent.

7. On 16.06.2011, the petitioners were informed by the tenants of their land that the employees of the seventh respondent were continuing work in their portions of the land and all crops and vegetations were destroyed and that the tenants were requested to vacate the land and informed them that the compensation have been received by the petitioners. Immediately, thereafter, the second petitioner approached the 4th respondent and apprised him of the illegal trespass by the seventh respondent and requested that appropriate action be taken immediately by the fourth respondent. As the above request was not of any avail, the second petitioner submitted Annexure–5 application dated 16.06.2011 to the fourth respondent. Since it was seen that no action was taken on Annexure–5, the second petitioner approached the Gyalshing Police Station with a complaint. The complaint was duly received and entered in the G.D. and Annexure–6 is a copy of the above complaint. The second petitioner

was told by the Gyalshing Police that no FIR could be lodged in the matter as the second petitioner already filed a complaint with the fourth respondent. In the absence of a specific direction, the second petitioner lodged Annexure–7 formal diary report on 20.06.2011. On noticing that the authorities will not take any action, the first petitioner submitted Annexure–8 representation before the Chief Minister of the State on 28.06.2011, though it was inadvertently dated as 28.07.2011.

8. It is pointed out by the petitioners that the fourth respondent informed the second petitioner that the first petitioner had signed an yellow form giving consent for the acquisition. According to the petitioners, no consent had been given at any point of time in the matter of acquisition except the signing in the yellow form some time in 2009, which was much prior to the acquisition process is initiated. On finding that the fourth respondent was seeking to rely upon the first petitioner's signature on the purported yellow form and interpreting that signature to be a consent of the first petitioner on acquisition, the second petitioner approached the second respondent's office and on perusing the relevant file, it was seen that the yellow form signed only by her father as a token of what was recorded therein i.e. the number of standing trees, crops, structures etc. The second petitioner was denied with a copy of the yellow form. Finally, through an application under RTI Act the petitioner could get a copy of the yellow form wherein the signature of the first petitioner is there and Annexure–9 is the same. As it has become clear that the intention of the fourth

respondent was to exploit the signature of the first petitioner at Annexure–9, the second petitioner again submitted a fresh representation before the fourth respondent on 07.07.2011 and Annexure–10 is a copy of the same.

9. It is submitted that the second petitioner received Annexure–11 letter dated 14.07.2011, requesting her to visit the Revenue Officer-cum-Assistant Director of the second respondent. As the second petitioner was soon leaving the station along with the first petitioner for the treatment of her mother, she informed the Revenue Officer about her non-availability on the summoned date through a written application. Annexure–12 is a copy of that letter. On return to Gyalshing, the second petitioner informed the fourth respondent through an application marked to the Revenue Officer-cum-Assistant Director dated 09.08.2011 that she was back and requested him to proceed with the Annexure–10 application. Annexure–13 is a copy of that application. The second petitioner met the fourth respondent in person. The fourth respondent informed the second petitioner that the work on the petitioners land will continue and that he received the entire compensation money and therefore, he informed the representatives of the seventh respondent to continue with the work. The second petitioner reiterated their stand of unwillingness to part with their land and to receive the compensation. On 19.08.2011 the first petitioner received Annexure–14 letter from the fourth respondent requesting him to collect the full compensation from his office.

10. On 21.08.2011, Annexure–15 letter dated 19.08.2011 was received from the office of the Revenue Officer-cum-Assistant Director requesting him to come and collect the compensation amount. On 30.08.2011 the Revenue Officer-cum-Assistant Director telephonically informed the petitioner that a meeting will be arranged between the fourth respondent, the representatives of the seventh respondent and the land owners on 31.08.2011 at Kagyethang Omlok Block and that their grievances will be heard. As directed by the Revenue Officer, the second petitioner visited the site on 31.08.2011. The second petitioner voiced the grievances of the petitioners including the grievances that the seventh respondent had compelled their tenants to vacate their lands. The fourth respondent informed the second petitioner that no instructions had been given to the tenants to vacate their land and notice will be sent to the tenants to vacate the land. The fourth respondent further stated that the Government had already acquired the land and that is why the seventh respondent will continue with their work. The fourth respondent directed the first petitioner and his daughter to meet him in his office on the following day. Accordingly, the second petitioner together with her other sisters visited the office of the fourth respondent on 01.09.2011 and submitted Annexure–16 application. The fourth respondent told the petitioners that he will be referring the matter to the Court and that they can expect a notice from the Court in that connection. After their meeting with the fourth respondent the second petitioner on 01.09.2011 submitted Annexure–17

application under the RTI Act for getting their entire documentation relating to the acquisition process. On 06.09.2011 the first petitioner received Annexure–18 letter from the fourth respondent requesting him to come and collect the compensation amount within 7 (seven) days failing which the amount would be handed over to the Court under Section 18 and 31 (2) of the Act. On 09.09.2011, the fourth respondent sent notices to the tenants of the petitioners requesting them to vacate the land by 25.09.2011 and it is submitted that the tenants were compelled to vacate the land on 15.09.2011.

11. The second petitioner submitted Annexure-19 application under RTI act seeking copies of the various items of correspondence and proceedings pertaining to the land acquisition. Annexure-19 was followed by Annexure-20 yet another application submitted by the second petitioner asking for details of the MOU, records, orders, notifications etc. To those applications, the second petitioner was served with Annexure-21 communication and on a perusal of the materials furnished through Annexure-21, the second petitioner became aware that apart from the unjustified nature of invocation of the urgency clause there are relevant important facts relating to 97 MW Tashiding HEP which were narrated by the petitioners in the writ petition as follows: -

(i) The seventh respondent submitted the proposal on 13.11.2006 to the Secretary, Power and Energy Department stating that they have identified Tashiding HEP with a

capacity of 60 MW and offered to develop the same on the approved terms and conditions of the State Government.

(ii) That after considering the above proposal of the seventh respondent, the Government issued Annexure – 22, letter of intent, to the second respondent on 16.11.2006.

(iii) Within 13 days of the date of issue of letter of intent the capacity of the project was increased from 60 MW to 80 MW and the proposal was submitted to the sixth respondent (MoEF) on 29.11.2006 without any intimation to the Government and accordingly the sixth respondent has given Annexure – 23, clearance on 09.01.2007.

(iv) Again on 13.02.2007 the Director of the seventh respondent wrote to the Government that after investigation and studies they found that the capacity of the project should be 88 MW and the project report has been submitted to the sixth respondent. These enhancements of the capacity were done without the approval of the Government.

(v) On 21.11.2007, the then Secretary of the third respondent Power and Energy Department made serious observations disclosing dubious nature of the dealings of the seventh respondent and also their bad antecedents.

It was observed that there is a close and unlawful relation between the seventh respondent and one 'Dans Energy Pvt. Ltd.'. Both companies seem to be controlled by the same group of people. It was observed that Dans Energy Pvt. Ltd. was closely linked with the seventh respondent and has already bagged 96 MW Jorethang Loop HEP and their performance in the matter of implementation of that project was thoroughly unsatisfactory. It was observed that in the light of the observation it appears that the seventh respondent is not capable to develop the project and as such Tashiding HEP may have to be withdrawn. However, the matter was sought to be put up to the notice of Hydro Committee for deliberation and further action. Produced Annexure-24 collectively in the writ petition is a copy of the aforesaid observation reflected in the note-sheet of the fifth respondent.

12. It is then submitted that on the basis of the observations in Annexure – 24 the matter was placed before the Hydro Committee for deliberation on withdrawing the Tashiding HEP. The Hydro Committee discussed the proposal for withdrawal of the letter of intent and the matter was sent for approval to the Cabinet. It is submitted that the Cabinet approved on 18.01.2008 and sanctioned proposal seeking administrative proposal for withdrawal of Tashiding HEP from the seventh respondent vide Cabinet Memo No. 201/GOS/E7P/06-07 and the same had been intimated to the seventh respondent vide letter dated 25.01.2008. Annexure–25 collectively are the copy of the Cabinet

Memo and intimation letter. But the petitioners point out that as requested by the seventh respondent, the third respondent submitted the proposal to the Government for review of the Government's earlier decision. Annexure-26 produced in the writ petition is copy of the seventh respondent's request letter and the proposal for reconsideration. Pursuant to that on 30.08.2008 the Cabinet approved the proposal for reconsideration of withdrawal of letter of intent. Annexure–27 collectively is the document pertaining to the same. Thereafter, it is submitted that the agreement for implementation of the Tashiding HEP was finally executed between the Government of Sikkim and the seventh respondent on 03.09.2008 for enhanced installed capacity of 88 MW. It is submitted that on 13.03.2009 records revealed that survey of various lands including the lands of the petitioner was conducted and the petitioner and the other land owners were made to sign the yellow form. It is submitted that thereafter on 09.07.2010 the notification under section 4(1) and the request of the Government under Section 17(4) were submitted. Annexure–28 collectively are copies of letter dated 03.03.2011 submitted by the Managing Director of the seventh respondent to the third respondent to confirm the subsequently signed implementation agreement of 03.09.2008. The file reveals that the subsequently signed implementation agreement was promulgated. The file also reveals that under Section 17(4) of the Act, urgency clause was removed and the enquiry under Section 5A was dispensed with. It is pointed out that under Section 9 of the Act, the fourth respondent

ought to have caused public notice in convenient places on or near the land to be taken and under Section 9(2), such notices are to state the particulars of the land so needed and shall require all persons interested in the land to appear personally or through agent before the Collector at the time and place therein. The Collector is to require statement of claims to be made in writing and signed by the parties or through their agents.

13. The petitioners point out that it is mandatory provision under Section 9 (3) of the Act that the Collector shall serve notice regarding the enquiry (award enquiry) on all such persons interested therein. Section 9(4) is also referred to by the petitioners that in case any person resided elsewhere, the notice has to be sent to him by post in a letter addressed to him at his address last known. It is submitted that none of the requirements of the provisions of Section 9 of the LA Act were complied with by the fourth respondent. In this case notices were not served upon the petitioners or any of their family members. It is submitted that it was only after the second petitioner gave her application under the RTI proceedings that the petitioners came to know what had happened in the case of their property. What was issued by the fourth respondent was only a general notice under section 9 and not individual notice. Annexure–29 is a copy of that general notice. It is urged that the fourth respondent, who was fully aware of the objections raised by the petitioners ought to have made sure that the procedure contemplated by Section 9 was followed. It is submitted on 23.06.2011

as requested by the seventh respondent (Vice President of the seventh respondent) the fourth respondent issued Annexure–30, No Dispute Certificate, in respect of the land under acquisition. Then it is pointed out the No Dispute Certificate was issued by the fourth respondent, District Collector fully being aware of all the questions of disputes. It is then submitted that thereafter an award under Section 11 of the Act was made on 07.07.2011 and the total compensation awarded is Rs.3,38,23,704/-. The petitioner came to have the knowledge about the award only through the second petitioner received information from the fourth respondent under the provisions of the RTI. Annexure–31 is copy of the award notice. The petitioners submit that a perusal of the various documents received by them under the provisions of RTI Acts and then revealed that there was no application of mind at all by the concerned (Respondents No. 1, 2 and 4) regarding the existence of urgency. Not even a single material relating to the orders passed for invoking the urgency clause was there. It is submitted that R-1, R-2 and R-4 had not formed any opinion regarding the existence of urgency under Section 17 (1). It is contended that invocation of urgency clause under Section 17(4) was totally unwarranted. It is then pointed out that the records revealed that on 13.03.2009 very much prior to the issuance of the notice under section 4(1), the land under acquisition was surveyed by the State respondents. According to the petitioners the above survey prior to the issuance of notice under Section 4(1) was totally unauthorised.

14. The entire proceedings including those of environmental clearance have been issued in a totally irregular manner without application of mind and this was resulted in serious prejudice and loss to the petitioners. Urging grounds (a) to (q), the writ petition has been filed seeking the reliefs already indicated.

15. Respondents No. 1 to 4 have filed a joint counter affidavit through Mr. D. K. Rai, Officer on Special Duty, Land Revenue & Disaster Management Department, Government of Sikkim. Through this counter affidavit, those respondents repudiated the various grounds raised by the petitioners in the writ petition. According to them, for the development of the 97 MW HEP at Tashiding, Memorandum of Understanding (for short, MOU) was signed between the State Government and seventh respondent on 03.09.2008. At clause 3.3 of the above MOU, it is provided that the Government in association with SPDC shall acquire, and in accordance with the provisions of Land Acquisition Act under the State Government and other applicable laws, such private lands within the State of Sikkim as may be required by the Company for construction, operation, maintenance of the project and transfer such acquired land (except forest land) in favour of the company for implementing the project. It is contended that under Section 4(1) of the Act, a notice was issued on 26.07.2010 pursuant to the above MOU. It is pointed out that since it is a time bound project of national importance, urgency clause under Section 17(4) was felt

necessary to be invoked, thereby dispensed with enquiry under Section 5A of the Act also. It is pointed out that the commercial operation of the project was to be achieved within a period of 72 months from the date of lease agreement under the clause 4.7 of the MOU. It is pointed out that the declaration under Section 6 of the Act was promulgated and notice under clause (1), (2) of Section 9 of the Act was issued, in accordance with law. It is contended that, thereafter, on 07.07.2011, the fourth respondent passed an award under Section 11 and 12 of the Act. After the award was made, compensation for the land of the petitioner along with the land of other persons which fell within the area of the development of the project was received from the seventh respondent and the land was handed over to the power developers, seventh respondent. It is claimed that the entire land acquisition proceedings have been completed in all respects as per the Act.

16. It is then pointed out that for the project, a total number of 94 private lands measuring 28.5120 hectares including 5.5050 hectares owned by the petitioners have been acquired and possession taken over thereof. Apart from the private holdings, 4.3492 hectare of forest land was also acquired. The cost of the entire private land and the forest land acquired is Rs.15,35,31,461/- and Rs.1,12,50,674/- respectively. The total compensation amount calculated in respect of the petitioners land is Rs.3,38,23,704/-. It is pointed out that all the other owners of the plots have already collected their compensation amount from the fourth respondent. It is then contended that the entire acquisition

process was known to the full knowledge of the first petitioner, who was present in the preliminary survey, joint inspection of the land and signed the prescribed form on 12.03.2009 and the first petitioner was present on the dais during the public hearing on 18.06.2010. The first petitioner's son Rinzing Dhadul Kalden was also keenly associated with the acquisition process and he submitted a joint petition on 30.03.2011 expressing their great pleasure at the Government initiative to send the project to their village and requested that adequate compensation be paid with demand for employment, contract and free electricity for the affected families. Annexure A-1 produced in the counter affidavit is a public hearing attendance.

17. It is then submitted that notwithstanding the fact that the petitioner participated in the entire land acquisition proceedings without any demur and after the land acquisition proceedings being over, the second petitioner, the daughter of the first petitioner started objecting to the acquisition proceedings for one reason or the other primarily on the ground that they do not want to part with their ancestral land. The fourth respondent explained the position and requested time and again to the petitioner to receive the compensation but with no avail. Finally, the fourth respondent had to inform the petitioners that unless they receive the compensation within seven days, the compensation shall be deposited with the competent court and the matter will be referred under Section 18 and 31(2) of the Act. As the petitioners did not come forward to receive the compensation and having no option the

compensation amount was deposited in the Court of learned District Judge, South and West Sikkim under Section 31(2) of the Act on 07.03.2012.

18. It is submitted that the objection of the petitioners giving opportunity to enquiry under Section 5(A) of the Act cannot be entertained as Section 5(A) was dispensed with when the notification under Section 4 was issued. It is pointed out that the notice under Section 4(1) of the Act invoking the urgency clause under Section 17(4) was issued as far back on 26.07.2010. The first petitioner, a retired Government officer, who retired from post of Addl. Chief Conservator of Forest in the Forest Department, Government of Sikkim, was aware of the acquisition proceeding and participated in the spot verification, public hearing etc. The first petitioner in spite of being aware of the notification dated 26.07.2010 did not raise any objection but instead he only cooperated and participated in such proceedings. The second petitioner daughter of the first petitioner, was also aware of the proceedings. Challenging the notification under Section 4 after almost 2 (two) years and after the entire acquisition proceedings is completed and the award having being passed, the writ petition is not maintainable under Article 226 of the Constitution of India.

19. It is then contended that once the final award under Section 12 was passed, the land was vested with the Government free of all encumbrances and the possession of the lands acquired for the

hydro project have already been handed over to the sixth respondent, the power developer through SPDC for construction and the development of the said project. Therefore, the writ petition is belated and not maintainable under Article 226 of the Constitution. A copy of the final award has been produced as Annexure-A2.

20. The counter affidavit raised certain preliminary objections as follows: -

> Most of the preliminary objections were raised on the basis of delay and laches on the part of the petitioner and plea of estoppel as according to the counter affidavit. The petitioner had participated without demand in the counter affidavit. Various averments were denied parawise and it is contended that the writ petition is required to be dismissed with cost.

21. The seventh respondent through its Director has filed a detailed counter affidavit on 24.03.2012. Through this counter affidavit, the various averments, asseverations etc. raised by the petitioners were repudiated and documents Annexures-7/12 to 7/18 were produced. On noticing the above counter affidavit, the petitioner has produced a rejoinder through the second petitioner Smt. Dikeela Kalden. Along with these are produced documents Annexures-33 to 39. These are followed by a further counter affidavit on behalf of the respondents No. 1 to 4 and along with this further counter affidavit dated 26.03.2012, the respondents No. 1 to 4 have produced Annexure-1 and Annexure-2

documents. Annexure-1 is a copy of the public hearing notice and the Annexure-2 is a copy of the final award passed under Section 12 of the Act. The seventh respondent has also filed an additional counter affidavit on 28.03.2012 reiterating the contentions already raised and along with this counter affidavit are produced Annexure-R17/19 photographs which will show that the work on the project has proceeded to a considerable extent.

22. It was very extensive submissions which were addressed before me by Shri B. R. Pradhan, learned senior counsel for the writ petitioner, by Shri J. B. Pradhan, learned Addl. Advocate General and also by Shri A. Moulik, learned senior counsel for the seventh respondent. Shri B. R. Pradhan, learned senior counsel pointed out that admittedly no public notice of the substance of such notification issued under Section 4 were given at convenient places in the Omlok Block where the petitioners land sought to be acquired is situated. According to him, it is also an admitted fact that no public notice of the substance of declaration made under Section 6 of the Act was given at convenient places in the Omlok Block where the petitioner's land under acquisition is situated. He further pointed out that the notice under Section 9 was only a general notice pasted on the notice board of the District Collector's Office and admittedly, no public notice was given at convenient places near the land proposed to be acquired in compliance with the mandate of Section 9(1) of the Act. Mr. Pradhan submitted that it was evident on the face of the general notice under Section 9

that the mandate of Section 9(2) gave a clear 15 days time to persons interested to appear personally or through agent before the Collector at a time and place mentioned therein has not been complied with. Mr. Pradhan highlighted that admittedly no enquiry under Section 11 of the Act was conducted before the impugned award was passed. The records reveal that in spite of having passed the impugned award on 07.07.2011, in none of the correspondence issued by the State respondents to the petitioners, the State respondents ever notified the petitioners of the passing of the award. According to the learned senior counsel, under the above circumstances, no knowledge of the publication of Section 4 and Section 6 notification, issuance of Section 9 notice and passing of final award under Section 11 can be imputed on the petitioners. It is argued that due to non compliance by the State respondents of the mandates of Sections 4, 6, 9 and 11 of the L.A. Act, the petitioners were kept completely in the dark regarding the land acquisition proceedings including passing of the final award. Knowledge and consent of the first petitioner were sought to be imputed based on his signature on Annexure-9. Annexure-9, the yellow form is a document which is dehors the law. Referring to Sections 4 and 4(2) of the Act, Mr. Pradhan submitted that as the notification under Section 4 was issued only on 26.07.2010, the spot verification and the signing of the yellow form on 13.03.2009 can only be illegal and dehors the Act. Hence the same has no consequence in law. According to the learned senior counsel, as the State respondents have failed to comply with the

mandatory provisions under Sections 4, 6, 9 and 11 of the Act, the State respondents is estopped from defending the present petition on the ground of delay and laches on the part of the petitioners.

23. Mr. Pradhan submitted that *mala fides* and fraud are writ large in the present land acquisition proceeding and therefore, the entire proceeding is vitiated. Learned senior counsel submitted that though the notice under Section 4 and declaration under Section 6 provide that the land is needed for a "public purpose" for the construction of hydro electric project (HEP) by SPDC, the documents received through RTI being Annexures-22 to 28 and agreement dated 03.09.2008 make it evident that the acquisition was for a private company and not for construction of any HEP by SPDC, a Government company. The agreement also makes it clear that although the agreement is on Built Own Operate and Transfer (BOOT) basis for the entire period of 35 years or thereafter for further extended period, more than 88% of the revenue generated by the HEP goes to coffers of the seventh respondent. Mr. Pradhan referred to the above agreement further and submitted that it is evident therefrom that the acquisition in the present case was for the benefit and purpose of a private company and not for public purpose. Section 3 of the Act makes it evident that the expression "public purpose" does not include acquisition of land for company. In this regard, the learned senior counsel highlighted that the deletion of the phrase "or for a company" by Act 68 of 1984 from Section 17(1) of the Act. According to him, it is clear that the special

powers in case of urgency can be used only for public purpose and not for a company. The invocation of Section 17 along with issuance of Section 4 notification by the State respondents was not only illegal but also *mala fide* in its intent and purpose and it is submitted that in the entirety of the records in the present land acquisition proceedings, there is no evidence even to remotely suggest any application of mind by the State respondents either for considering where there was real urgency which would brook no further delay of even a few days or weeks or for doing away with the provision of Section 5A of hearing of objections of the persons interested. Counsel submitted that although Section 17 was invoked on 26.07.2010 along with Section 4 (1) of the Act, there was no compliance of offering to the persons interested compensation for standing crops and trees or any other damage or of tendering payment of 80% of the compensation.

24. Counsel argued that the contention that the writ petition should fail as possession has already been taken is without substance. According to the learned senior counsel, taking over possession means taking over possession lawfully under the provisions of the law. As admittedly the notification under Sections 4 and 6 having solemnly declared that the construction was to be done by SPDC, a Government company, possession could have been taken only by such officers of SPDC duly authorised under Section 4 of the Act. The records reveal that it is seventh respondent, a private company, who was not authorised under law, who illegally trespassed on the petitioners' land

not only dehors the land acquisition act but also the mandate of the Section 4 notification issued by the State Government. Neither the records nor the pleadings reveal that possession was taken by SPDC. There was no panch-nama on record nor any handing over, taking over document, counsel argued.

25. Mr. Pradhan submitted that under Section 17 of the Act, the Collector can take possession of any land needed for a public purpose and thereupon, such land shall vest absolutely in the Government free from all encumbrances. In the present case, the records reveal that the possession of the petitioners land was not taken for any public purpose but was for the purpose of the private company, the seventh respondent. Records reveal that the seventh respondent initiated the proposal in the year 2006 itself. The agreement between the seventh respondent and the State Government was entered in the year 2008 and in spite of the same, the notification under Section 4 was issued only on 26.07.2010. It is thus clear from the records that having declared urgency on 26.07.2010 and doing away with the compliance of natural justice under Section 5A, the State thought it fit to pass its declaration under Section 6 of the Act as late as on 26.05.2011, almost after an year of issuance of Section 4 notification. According to the learned senior counsel, from the facts it is evident that there was neither any urgency nor was there any reason to do away with the 30 days enquiry under Section 5A of the Act.

26. Learned senior counsel referred to Section 6 of the Act and once again submitted that a declaration under Section 6 has to be made either for public purpose or for a company. Since in the instant case, that declaration under Section 6 stated that the land was needed for public purpose and not for a company, such declaration could not be made unless the compensation to be awarded for such property to be paid wholly or partly out of public revenues or some fund controlled or managed by a local authority. It is an admitted fact in the present case that the entire compensation amount to be awarded for such property has been deposited by the seventh respondent a private company dehors the proviso to Section 6. According to learned senior counsel, the declaration under Section 6 is void *ab initio*.

27. Mr. Pradhan went on to submit that there has been no compliance of Section 9 except for pasting a general notice in the notice board of the office of the District Collector. The position is admitted that there has been failure to comply with the mandates of Sections 9(1), 9(2), 9(3) and 9(4) of the Act. It is thus obvious that the petitioners were not made aware of any day fixed for the award enquiry. Section 11 of the Act mandates that award can be passed only after an enquiry conducted by the Collector. The impugned final award does not record any enquiry conducted. Under Section 11(2), the Collector could do away with making further enquiry and directly make an award only in the case where the Collector is satisfied that all the persons interested in the land who appear before him have agreed in

writing on the matters to be included in the award of the Collector, in the forms prescribed by rules, made by the appropriate Government. In the present case, the Collector has failed even to ensure that the persons interested appear before him, leaving alone agreeing in writing as above. A bare perusal of the award will show that no enquiry has been conducted. Keeping in view the market value of the land and the true area of the land acquired, the calculation of the apportionment of the compensation in clause 8 of the award shows that the Collector has not taken into account only three components, i.e. total value of the land, total value of the standing properties and 30% solatium. The other statutory components have been kept out. Learned senior counsel referred to Section 23 of the Act and submitted that the relevant aspects provided in that Section, which are to be taken into account for passing award, have not been taken into account at all by the Collector. In this context, the learned senior counsel highlighted that the damage sustained by the persons interested on account of acquisition, in their other property is a relevant consideration which has not at all been taken into account by the Collector while passing the award.

28. Counsel referred Section 23(1)A and submitted that the Collector has not chosen to award the additional amounts under Section 23(1)A. Learned counsel then referred to Section 34 of the Act under which section the Collector, who was bound to pay interest thereon @ 9% per annum from the time of taking possession for first year until it shall have been so paid or deposited and for the succeeding years @

15%, has not chosen to award any interest at all before taking possession of land by the seventh respondent, so submitted the learned counsel.

29. The counsel argued that it is unequivocally clear from the materials that the acquisition was for the seventh respondent, a private company. The provision under Section 39 of Chapter VII of the Act need to have been complied with which was not admittedly done. The State while issuing notifications under Section 4 and 6 has suppressed the material fact that the acquisition was for a company and not for public purpose. Mr. Pradhan argued that as the declaration of the government under Section 6 was that the acquisition was for public purpose and not for a company, the execution of the agreement between the company and the State Government cannot exclude the application of various provisions of the Act as mandated under Section 39 of the Act. Learned counsel went on to refer the Section 40 of the Act. Referring this Section, counsel submitted in view of the specific declaration under Sections 4 and 6 notifications that the acquisition was for public purpose and not for a company, Section 43 of the Act has no applicability. Learned senior counsel went to refer Section 44 (b) and submitted that the present acquisition is totally dehors Section 44 (b).

30. Mr. Pradhan relied on various decisions mostly of the Hon'ble Supreme Court in support of various propositions canvassed by him. He referred to a Division Bench judgment of the Supreme Court in

Darshanlal Nagpal (Dead) by Lrs. vs. Government of NCT of Delhi & ors. : (2012) 2 SCC 327. Learned counsel submitted on the authority of the above decision that urgency provisions can be invoked only if a very small delay of few weeks or months may frustrate the public purpose for which land is sought to be acquired, and not otherwise. Referring to paragraphs 10, 12, 24, 26, 27, 28, 29, 30, 35, 36, 42, 43 and 44 of the judgment, Mr. Pradhan submitted that greater degree of care is required by the State when the provisions of Section 17 of the Act is invoked for compulsory acquisition of private land. Learned senior counsel relied also on a judgment of the Supreme Court in **Om Prakash & anr. vs. State of U.P. & ors. : (1998) 6 SCC 1**. Counsel submitted that basic condition for invocation of Section 17(4) is existence for urgency. Court has every power to examine as to whether there was any material before the appropriate authority to enable it to arrive at its subjective satisfaction for invoking the urgency provision. Counsel submitted with reference to paragraphs 13, 14 and 16 of the judgment that delay of more than one month for issuing notification under Section 4 read with Section 17(4) pursuant to proposal for invocation of urgency provision, delay of more than 9 months after issuance of notification under Section 4, if delay not explained will amount to no justification of invocation of Section 17(4).

31. While relying on the judgment of the Supreme Court in **Dev Sharan & ors. vs. State of Uttar Pradesh & ors. : (2011) 4 SCC 769**, Mr. Pradhan submitted that the expression “public purpose” in

acquisition of land is to be examined on the touchstone of the expanded view of fundamental rights. Such acquisition can be made only by following the mandates of the statute. Mr. Pradhan relied also on judgements of the Supreme Court in **Ram Dhari Jindal Memorial Trust vs. Union of India & ors. : (2012) 11 SCC 370; Darshanlal Nagpal (supra); Laxman Lal (Dead) through Lrs. vs. State of Rajasthan & ors. : (2013) 3 SCC 764; Raghbir Singh Sehrawat vs. State of Haryana & ors. : (2012) 1 SCC 792; Radhy Shyam (Dead) through Lrs. & ors. vs. State of Uttar Pradesh & ors. : (2011) 5 SCC 553; The Land Acquisition Collector vs. Smt. Parvati Devi : AIR 1964 HP 32; Steel Authority of India Ltd. vs. Sutni Sangam & ors. : (2009) 16 SCC 1, Vyalikaval Housebuilding Coop. Society vs. V. Chandrappa & ors. : (2007) 9 SCC 304; Collector (District Magistrate) Allahabad & anr. vs. Raja Ram Jaiswal : (1985) 3 SCC 1** and **Devendra Singh & ors. vs. State of Uttar Pradesh & ors. : (2011) 9 SCC 551** for the various propositions canvassed by him. Relying on the judgment of the Supreme Court in **Anil Kumar Gupta vs. State of Bihar & Others : (2012) 12 SCC 443**, Mr. Pradhan argued that the land owner can also challenge the notice issued under Section 9 of the Act and the award passed under Section 11 of the Act on the ground that he had not been heard or that the acquisition proceedings are a nullity. Even the vesting of the land in the Government can be challenged on the ground that the possessions had not been taken in accordance with the prescribed

procedure. The invocation of the urgency clause can be challenged on the ground that there was no urgency.

32. Mr. J. B. Pradhan, learned Addl. Advocate General could address me on behalf of respondents No.1 to 4. According to Mr. Pradhan, even though various grounds are raised regarding the non-compliance of certain provisions of the land acquisition act as well as irregularities in the land acquisition proceedings, on perusal of various representations submitted by the petitioners and their own pleadings in paragraph 17 at page 11 of the Writ Petition it will be seen that the main grievances of the petitioners are that they do not want to part with their ancestral properties. Therefore, according to the learned Addl. Advocate General, in the proceedings under Article 226 of the Constitution, it is necessary to examine the conduct of the petitioners during the land acquisition proceeding and also their *bona fides* in presenting this instant writ petition. Learned Addl. Advocate General highlighted the clause 3.3 of the Memorandum of Understanding (MOU) dated 03.09.2008 executed between the Government of Sikkim and the seventh respondent. He referred to Clause 3.4 and 5.3 also. Learned Addl. Advocate General submitted that pursuant to the MOU, the Government of Sikkim initiated proceeding for acquisition of land required for HEP. Mr. J. B. Pradhan pointed out that as early as on 13.03.2009, the Government conducted preliminary survey and joint inspection of the land. The above preliminary survey and joint inspection were done with full knowledge of the first petitioner in whose

name the lands under acquisition stand recorded. Learned Addl. Advocate General submitted that during the spot verification held on 12.03.2009, the first petitioner participated in the proceeding and endorsed the preliminary survey/joint inspection by signing on the Spot Verification Report and in this regard, he relied on Annexure-9 annexed to the Writ Petition itself. According to the learned Addl. Advocate General, Annexure-9 is a document depicting spot verification/joint inspection of the land recorded in the name of the land owner as mentioned in Column 2. In Column 3, plot numbers to be acquired had been identified. Column 4 gives the measurement of the land. Column 7 reflects details of the standing properties for the purpose of valuation of compensation. The first petitioner participated in such spot verification without any protest and endorsed the said document. Learned Government counsel submitted the signature of the first petitioner figures at Column 9.

33. Mr. Pradhan further submitted that after completion of the joint inspection/spot verification, on 18.06.2009 a public hearing was conducted. Here again, the first petitioner was physically present in the said hearing and he was seated on the dais. Learned Addl. Advocate General submitted that the petitioner was seated on the dais as he had retired from the Forest Department, Government of Sikkim as Chief Conservator of Forest. Addl. Advocate General referred to Annexure-A1 along with the counter affidavit for the State Government and submitted that the first petitioner had put in his endorsement regarding attending

the public hearing on 18.06.2009 in the public hearing attendance register. Counsel pointed out that the signature of the first petitioner with designation Retd. Chief Conservator of Forest appeared at Sl. No.17. Addl. Advocate General submitted that Shri Rinzing Dadul Kalden, son of the first petitioner, who does not figure as a petitioner in the writ petition, was keenly associated with acquisition process along with his father and had submitted a joint petition on 30.03.2011 expressing their great pleasure at the Government's initiative to send project to their village and requested for payment of adequate land compensation with a demand for employment, contract and free electricity etc. to the affected families. Addl. Advocate General submitted that the Government issued Annexure-1, notification under Section 4 of the Act on completion of the preliminary survey/spot verification of the lands required for the project and the public hearing on 18.06.2009. The above notification would show that the Government had also invoked urgency clauses under Section 17(4) declaring therein that the provision of Section 5A of the Act shall not apply to the proceedings. The notification was published in apart from the Government Gazette as well as in Sikkim Herald, a Government newspaper widely circulated all over Sikkim including the said area. Addl. Advocate General submitted that on 26.05.20011, declaration under Section 6 of the Act was published in the Government Gazette. Thereafter, notice on 18.06.2011 under Section 9 was issued as Annexure-29.

34. Mr. Pradhan, learned Addl. Advocate General would then submit that on 07.07.2011, the Land Acquisition Officer-cum-District Collector, the fourth respondent, passed an award. After the award was made and compensation paid, the land of the petitioners along with the land of the other people were taken over by the Government and handed over to the seventh respondent, the power developer. According to the learned Addl. Advocate General, such taking over and handing over of the entire land acquisition proceedings which were initiated on 12.03.2009 with full knowledge and participation of the first petitioner came to end on 07.07.2011. He submitted that the land was given to the seventh respondent for a lease of 35 years. Mr. Pradhan pointed out that the cost of the entire private land acquired by the Government is Rs.15,35,31,461/- while the cost of khasmal/forest land is Rs.1,12,50,674/-

35. According to Mr. Pradhan, the entire land acquisition proceeding was initiated on 12.03.2009 with full knowledge and participation of the first petitioner, the landlord. He and his son, Rinzing Dadul Kalden had also consented to such acquisition proceedings. It was clarified by the learned Addl. Advocate General that when such projects are developed, large tracts of land are acquired, in order to inform the public and seek their cooperation so that the project can be implemented smoothly, the consent of the land owners is sought for. Public hearings are conducted to inform the land owners and the public

to take them into confidence. It was such an exercise held on 18.06.2009 when the first petitioner and his son Rinzing Dadul Kalden participated in such proceedings and expressed their consent/willingness to part with their land. According to the Addl. Advocate General, these facts are not denied by the first petitioner. Thus, the entire land acquisition proceedings proceeded smoothly and culminated in the passing of the award on 07.07.2011. Surprisingly, it was only on 07.07.2011 that Smt. Dikeela Kalden, the second petitioner, who is the daughter of the first petitioner made a representation stating that they are not prepared to part with their ancestral land Annexure-10 was referred to. A perusal of the pleadings at paragraph 13 of the writ petition (Annexure-8) would reveal that the main grievance of the petitioners was not with regard to the acquisition of land but with regard to the dispute regarding ownership of plot no.712 which is also acquired for the project. According to the learned Addl. Advocate General, as per the revenue record, the plot no.712 was recorded as khasmal forest land did not belong to the family. Vide Annexure-8, the petitioners stated that dispute between the forest land and private land should be cleared. Considering the representation, the fourth respondent District Collector examined the matter and found that in the year 1950-52 survey as well as 1978-80 survey the said plot no.712 had been recorded as khasmal forest land and the claim of the petitioner that in 1950-52 survey, it was entered in their family's name turned out to be wrong/false. Accordingly, the first petitioner and his son were

informed. Therefore, according to the District Collector, the claim of the petitioner that in 1950-52 survey, the above plot was recorded in their family's name was found to be false and the first petitioner and his son Rinzing Dadul Kalden were informed.

36. According to Mr. J. B. Pradhan, it is apparent that the petitioner allowed the authorities to complete the land acquisition proceeding and to pass the award after payment of compensation to 97 land owners and after the possession was taken over and handed to the seventh respondent on 07.07.2011, they do not want to part with the their land. Addl. Advocate General highlighted that the petitioners in spite of having knowledge and participation in the land acquisition proceeding, approached this Court only on 28.02.2012, i.e. almost after 1½ years of issuance of notification. According to the learned Addl. Advocate General, the writ petition is highly belated and liable to be dismissed on the sole ground of delay and laches. Addl. Advocate General submitted that the writ petitioner filed challenging the notification for acquisition of land, if filed after the possession of land was taken over. In the present case, he pointed out that not only possession of the land was taken over, the land had already been transferred on lease to the seventh respondent, power developer, who had commenced their work. It is submitted that the seventh respondent is only executing, implementing and developing the hydro project on Build Own Operate and Transfer (BOOT) basis in accordance with hydro power policy of the State.

37. Meeting the argument of Mr. B. R. Pradhan that the acquisition was for a private company and the entire compensation having been paid by the seventh respondent-private company, public purpose was non-existent and hence the acquisition was bad for non-compliance. It is submitted that the State Government was obliged to acquire land for the seventh respondent in terms of Clause 3.3 of MOU dated 03.09.2008. Clause 3.4 provides for lease of the acquired land in favour of the seventh respondent. It is submitted that Section 43 of the Act provides that Section 39 to 42 shall not apply to acquisition of land where under any agreement with such company, the Government is bound to acquire land. It was further submitted that the acquired land was only transferred on lease basis for a period of 35 years and the ownership and title of the land remain with the Government.

38. Reliance was placed by the learned Addl. Advocate General on the judgment of the Hon'ble Supreme Court in **Nand Kishore Gupta & ors. vs. State of Uttar Pradesh & ors. : (2010) 10 SCC 282**. Mr. Pradhan, learned Addl. Advocate General would submit that he writ petition is liable to be dismissed for suppression of material facts as well as also for making false pleadings in order to overcome delay in approaching the Court. Counsel referred to the averments made in paragraph 8 of the writ petition, wherein the petitioners have stated that the first petitioner was made fully aware of the proceedings related to the acquisition of his ancestral land only in the starting of 2011 when

he returned to Gyalshing, West Sikkim. Add. Advocate General would read over to me paragraph 8 of the writ petition. According to the learned Addl. Advocate General, the statements in paragraph 8 on oath is contrary to the documents which the petitioner himself has filed as Annexure-9 at page 69 to 70 of the writ petition. Annexure-9 is a spot verification of land documents dated 12.03.2009. In the said spot verification, the first petitioner participated in such proceeding and signed the said documents. Annexure-9 details the plot number of the first petitioner, which are to be acquired giving details of standing properties (standing trees, crops, structure etc.) also. Addl. Advocate General submitted that it is an admitted fact that the first petitioner is not a layman, but is a retired Chief Conservator of Forest to the Government of Sikkim and, therefore, a person who has held such a high post in the State Government made such false statement before this High Court under Article 226 proceedings, which are discretionary in nature.

39. Mr. Pradhan would summarise his submissions and highlight as follows: -

(i) writ petition cannot be entertained at this belated stage and after passing the award and possession of have land having been taken over and handed over to the seventh respondent on lease basis for development of HEP on BOOT basis as per the hydro power policy of the State.

(ii) the petitioners are stopped from challenging the land acquisition proceeding as they have willingly participated and consented to such proceeding and has raised various objections only after the land got vested in the Government.

(iii) the writ petition is liable to be dismissed as the conduct of the petitioner is not above board and the present writ petition is not *bona fide*. It is also liable to be dismissed for the reason of false pleading in paragraph 8 of the writ petition in an attempt to explain the delay.

(iv) the writ petition is liable to be dismissed also as the seventh respondent, power developer is in possession of the land on lease basis and had started their construction work thereby altering the nature and character of the land. In such circumstances, this Court ought not to exercise discretionary jurisdiction considering the conduct of the petitioners, the delay and laches and considering the law laid down by the Hon'ble Supreme Court in exercise of writ jurisdiction in the land acquisition matters after the land is vested in the Government free from all encumbrances.

40. Strong reliance was placed by Mr. J. B. Pradhan, learned Addl. Advocate General on the judgment of the Supreme Court in **Municipal Corporation of Greater Bombay vs. Investment Development Investment Co. Pvt. Ltd. & ors. : (1996) 11 SCC**

501 and **Star Wire (India) Ltd. vs. State of Haryana & ors. : (1996) 11 SCC 698**. According to him, the proposition emerging from these two judgment is that the acquisition proceeding is completed and the land is vested in the State Government free from all encumbrances. Proceedings become final and not open to challenge under Article 226 on the ground of non-compliance with any statutory requirement such as non-existence of public purpose. For the same proposition, Mr. Pradhan relied on the judgment of the Supreme Court in **Swaika Properties (P) Ltd. & anr. vs. State of Rajasthan & ors. : (2008) 4 SCC 695** at paragraph 15 to 19. Reliance was placed by the Mr. J. B. Pradhan also on **Andhra Pradesh Industrial Infrastructure Corporation Ltd. vs. Chintamani Narasimha Rao & ors. : (2012) 12 SCC 797**. It was argued by Mr. Pradhan that land acquisition should have been challenged immediately after declaration under Section 6(1) of the Act is made. The judgment of this Court in **Athup Lepcha vs. State of Sikkim & ors.** and this was also relied on particularly paragraph 22(ii), (a) to (e) and (j) to (o). The judgment of the Supreme Court in **Nand Kishore Gupta *(supra)***, particularly at paragraphs 31, 59 to 62 and 75 was relied on by Mr. J. B. Pradhan to meet the argument that the acquisition is not for public purpose because of the fact that compensation is being given by a company.

41. Mr. A. Moulik, learned senior counsel addressed very elaborate submissions on behalf of the seventh respondent. According to Mr. Moulik, the petitioners have not prayed for quashment of

Annexure P-32 agreement dated 03.09.2008. What has been prayed for is only quashment of notification issued under Sections 4, 6, 8 and 9 of the Act and also for quashing the award passed under Section 11 of the Act and for payment of compensation for the damages caused to their property. Thus the petitioners have not prayed for any compensation for the land acquired by the Government.

42. Mr. Moulik submitted that this document produced by the petitioners will reveal that they had actively participated in the acquisition proceedings since its very inception. It is submitted that the first petitioner had taken part in the joint inspection on 12.03.2009. Referring the Annexure P-9 the yellow form disclosing the names of the owner of the land as the first petitioner, particulars of area as well as details standing properties on the land, etc., Mr. Moulik pointed out that the first petitioner is a signatory to Annexure P-9. This document will reflect that the Government had proposed to acquire his land and the first petitioner put his signature on the document. This means and indicates that the first petitioner was a consenting party to the proposed acquisition of his land. It he was not agreeable to the proposed acquisition he could raise protest against such spot verification but he had never protested it. Again on 18.06.2009 there was a public hearing by the Pollution Control Board relating to the proposed acquisition of land of the first petitioner and the other persons in which the first petitioner sat on the dais and signed at Sl. No. 17 as Chief Conservator of Forest (former).

43. Mr. Moulik submitted that even the first petitioner had never raised any objection. Vide Annexure P-14, dated 17.08.2011 and Annexure P-18 dated 06.09.2011, the District Collector had written to the petitioner that their land was acquired with their full consent and they should accept the compensation amount. Annexures P-18 as well as P-14 request them once again to accept the entire compensation. The first petitioner had never protested to it saying that he had never consented to the said acquisition. Annexure P-4 dated 27.05.2011 the first letter issued by the first petitioner discloses that there are a lot of "discrepancies" in his land which he had observed during his visit along with representatives of seventh respondent and he wanted a detailed survey of his land, as such all operational works were requested to be stopped pending survey. This letter could not be considered to be an objection under the Land Acquisition Act, but it is only a request to the Government for survey of his land to resolve the alleged discrepancy. The next letter is Annexure P-5 dated 16.06.2011 in which the second petitioner *inter alia* claiming that acquisition process is "underway" but not complete. Annexure P-6 dated 16.06.2011 is FIR against the seventh respondent wherein the second petitioner claims that acquisition process is "underway" but not complete. In the daily report dated 19.06.2011, Annexure P-7, the second petitioner admits that the acquisition process is "underway" but not complete with SPDC. Here she admits that SPDC is the acquiring authority. Annexure P-8 dated 28.07.2011 is a letter written to the Chief Minister wherein the first

petitioner discloses that his land was being acquired for hydel project and the negotiation are underway and not complete. According to the first petitioner, there is dispute between forest and private land, which requires to be cleared.

44. According to Mr. Moulik, none of the Annexures P-4 to P-8 mentioned above filed from 27.05.2011 to 28.07.2011 disclosed any objection as per the Act against acquisition. On the other hand it is admitted that "negotiation" for acquisition was underway and not complete and there is some dispute between forest and private lands which indicates the dispute relating to plot No. 712. For the first time in letter dated 07.07.2011, Annexure P-10, the second petitioner states that they had decided not to part with their land at Omlok Block. This letter was received by the office on 08.07.2011 i.e. one day after award was passed. In response to the above letter of second petitioner the Government issued a letter to the second respondent dated 17.07.2011 requesting her to appear before the officer on 19.07.2011 for hearing to which she had replied vide letter Annexure P-12, dated 15.07.2011.

45. Vide Annexure P-14, dated 17.08.2011 and Annexure P-18 dated 06.09.2011, the District Collector (West) informed the first petitioner and his son that the land was acquired with their full consent and they were requested to receive full amount of compensation. They were also informed that the acquisition processes of land have been completed and they will not be allowed to retain their land. According

to Mr. Moulik, the petitioners were notified about the total amount of compensation and were requested to accept the compensation but as they are refused to accept the compensation, which is now deposited in the Court and the money is still lying in the court yielding no interest. This fact proves that the petitioners are not interested for compensation or interest thereon under various provisions of the Act. Hence, there is no ground or reason for references of this matter under any provision of the Act specially after limitation contained in Section 18 of the Act has set in and the petitioners never even put any representation for reference.

46. Mr. Moulik submitted that the son of the first petitioner on 30.03.2011 had submitted a joint petition before the District Collector welcoming the project and demanded employment of local people as well as contract works for local contractors and free electricity for local people, etc. etc. Mr. Moulik submits that the writ petition is highly belated one and the same is filed after the acquisition of land had attained the finality and that the Government had taken over the possession and handed over the possession to the developer, the seventh respondent, for development of the project. The land of the first petitioner had vested absolutely in the Government, free from all encumbrances and the agreement was in the year 2008 and the writ petition is filed in 2012. Mr. Moulik referred to the statistics of total extent of properties acquired and the compensation paid including the compensation for 4.3492 hectares of forest land which was taken for

the project. According to Mr. Moulik, the enormous expenditure incurred by the seventh respondent carried out from public funds for the construction of the project has been detailed at paragraph 5 (viii) of the counter affidavit of the seventh respondent. Learned senior counsel submitted that the seventh respondent has spent public money worth Rs.180 crores on construction of infrastructures like access road and bridges, construction of magazine house etc., which is also reflected in the counter affidavit of the seventh respondent.

47. According to Mr. Moulik, the magnitude of the work done by the seventh respondent and enormity of expenditure incurred will be borne by the averments of the counter affidavit of the seventh respondent. Learned senior counsel also submitted that the main powerhouse has been installed and located on the land acquired from the first petitioner. Annexure R-7 will show that most of the works of evacuation and foundation of civil works of powerhouse has been nearing completion and initial amount spent for installation of powerhouse project is Rs.80 crores and machineries for installation has been ordered for, in order to suit the purpose. Thus, the writ petition has been filed after completion of substantial portion of the works of the project. In order to drive home his point, the following particulars and dates are material to claim that the writ petition is hopelessly bad for delay - Mr. Moulik referred to Annexure P-22 dated 16.11.2006, Letter of Intent given to the seventh respondent; Annexure P-23 dated 09.01.2007, environmental clearance granted by MoEF; Annexure P-32,

agreement drawn between the parties; Annexure P-1 dated 26.07.2010 Notification under Section 4(1), read with Section 17(4), elimination Section 5A; Annexure P-2 dated 26.05.2011 Notification under Section 6; Annexure P31 dated 07.07.2011 Award under Section 11 passed; then on 26.07.2011 date of handing over of possession to the seventh respondent; and on 27.02.2012 date of filing of writ petition.

48. Mr. Moulik placed reliance on judgment of the Supreme Court in **Ajodhya Bhagat & ors. vs. The State of Bihar & ors. : (1974) 2 SCC 501** to argue that the writ petition is not maintainable if filed after a long delay. For the same proposition, he relied the judgment in **Swaika Properties (P) Ltd. (supra)**. For the very same proposition, Mr. Moulik relied on the judgment of the Supreme Court in **Municipal Corporation of Greater Bombay (supra)**. Arguing that delay in filing the writ petition after the final award is fatal, Mr. Moulik relied on the judgment of the Supreme Court in **Municipal Council, Ahmednagar & anr. vs. Shah Hyder Beig & ors.**:**(2000) 2 SCC 48**.

49. According to Mr. Moulik, when huge land measuring 30.80 hectares was acquired from large numbers of persons, the petitioners land is negligible. Once award is passed and possession is taken and the land stand vested in the Government, even if there is some irregularity in the award it cannot be challenged. He also argued that failure to issue notice under Section 9(3) is not fatal. For the proposition Mr. Moulik relied on the judgment of the Supreme Court in

May George vs. Special Tahsildar & ors. : (2010) 13 SCC 98. Judgment of this Court in **Athup Lepcha vs. State of Sikkim** in **W.P. No. 05 of 2010**, was very strongly relied on by Mr. Moulik. Actual service of Notification under Section 4 of the Act is not necessary, according to Mr. Moulik. For this proposition he relied on the judgment of the Supreme Court in **Special Deputy Collector, Land Acquisition C.M.D.A. vs. J. Sivaprakasam & ors. : (2011) 1 SCC 330**. Mr. Moulik submitted that clearly the petitioners had notice.

50. Mr. Moulik would justify the invocation of urgency clause under Section 17 in this case. According to him, this is a time bound project. Annexure P-32 agreement containing the clause 4.17 relating to commissioning of project warrants that commercial operation of project shall be achieved within a period of 72 months from the date of agreement. If the company is unable to commission the project within aforesaid time period for reasons exclusively attributable to the company, it will be liable to pay penalty @ Rs.10,000/- per MW/month to the Government which amounts at Rs.9,70,000/- p.m. for a delay of one month. The Letter of Intent (LOI) dated 16.11.2006 (Annexure P-22) which also discloses penal provision at its clause 13. LOI was unfortunately cancelled without hearing the respondent vide Annexure-24 and Annexure-25. However the same was restored vide Annexure-27 dated 30.08.2008. Thus, the project suffered for the fault of Government for a considerable period and as such there has been already a delay in the progress of project. Such delay has rather

expedited urgency of the case. Relying on the judgment of the Supreme Court in **Deepak Pahwa vs. Lt. Governor of Delhi & ors. : AIR 1984 SC 1721** Mr. Moulik submits that delay makes problem and makes the matter more urgent. Senior counsel submitted that question of urgency under Sections 4(1) and 17 is a matter of subjective satisfaction of Government and the Court ordinarily does not look into it unless invocation of urgency clause is shown to be mala fide. Reliance was placed by Mr. Moulik in this context in **First Land Acquisition Collector & ors. vs. Nirodhi Prakash Gangoli & anr. : (2002) 4 SCC 160**. Section 5A enquiry would have delayed the matter inadvertently as many as 109 owners are involved in this case. Annexure P-26, according to Mr. Moulik, refers to the Central Government Policy declaring that the Government of India has accorded high priority to the development of Hydro Potential and has from time to time issued instructions to the State Government for speedy implementation of the Hydro Power Projects. As the State Government wanted to give importance to this policy and desired early development of Hydro Project on 23.07.2008. Annexure R-7/13 page 262 and Annexure R-7/14 page 263 are the letters by the District Collector as well as by the SPDC to dispense with section 5 (A) and to invoke Section 17 of the Act. SPDC wanted urgent completion of the project being time bound. Annexure R-7/18, page 269 shows that in a similar project, Government did not extend time. At paragraph 5, page 296 the Government in their reply has also expressed reason for urgent

development of the project. Hence, according to Mr. Moulik in this given situation there was urgency in the project. Reliance was placed by Mr. Moulik on **Athup Lepcha's case (supra)**, **Banda Development Authority, Banda vs. Moti Lal Agarwal & ors. : (2011) 5 SCC 394**, **Nand Kishore Gupta & ors. (supra)** and **Chameli Singh & ors. vs. State of U.P. & anr. : (1996) 2 SCC 549**.

51. Mr. Moulik would endeavour to meet the argument of Mr. B.R. Pradhan that the acquisition is for a private company. He referred clause 3.3 of the agreement dated 03.09.2008 (Annexure P-32) which provides that the Government in association with SPDC shall acquire land under the Act. Private lands may be required by the company for construction, operation and maintenance of project and transfer, such acquired land in favour of the company for implementing the project. Clause 3.4 provides that such land shall be leased out to the seventh respondent on a long term lease of 35 years. Clause 5.3 of the agreement provides that after the expiry of agreement period the project including its all assets and works shall be transferred to the Government free of cost and in good operating condition. Admittedly, the purpose for development of project is a public purpose. The private company is a mere developer. Section 43 of the Act provides that where the Government is bound to provide land to the company under any agreement with such company then provision of sections 39 to 42 of the Act shall not apply. In the present case under the agreement, the

Government is bound to provide land to the seventh respondent company for development of the project as per the lease agreement. Therefore, the provision of Chapter-VII is not applicable in the present case. Project shall operate on “BOOT” (Build, Own, Operate and Transfer) basis. In the case of **Athup Lepcha (supra)**, the Division Bench of this Court at pages 20 and 31 has held that though the developer is a private company, as the Government was under an agreement with private company bound to provide land to it, Chapter–VII is not applicable. Acquiring agency is SPDC. Seventh respondent is a Developer for generation of power for the people which is a public purpose. Company does not require the land for housing of its staff or for similar other private works but for the development of the project of public. Therefore, it cannot be said that the Government acquired land for a private company.

52. Mr. Moulik referred to paragraphs (vii) and (b) at pages 20 and 31 of the judgment of **Athup Lepcha (supra)**. Relying the judgment of the Supreme Court in **Nand Kishore Gupta (supra),** it was submitted by Mr. Moulik that in that case the Expressway was developed by a private company which had also paid compensation to land owners whose land was acquired. The Apex Court held that even if the private company/developer pays compensation still the private company does not become owner of the property and therefore it was not acquired for a private company.

53. Coming to the argument of Mr. B.R. Pradhan regarding the service of notice, Mr. Moulik submitted as regard the declaration under Section 6, the Government has already issued a corrigendum. According to Mr. Moulik, service of notice under Section 9(3) of the Act is not a must and reliance is placed in this connection on judgments of the Supreme Court in **May George (supra)**; in **State of T. N. & anr. vs. Mahalakshmi Ammal & ors. : (1996) 7 SCC 269** and also in **Nasik Municipal Corporation vs. Harbanslal Laikwant Rajpal & ors. : (1997) 4 SCC 199**. Mr. Moulik submitted that even if notice is not in conformity with the law, proceeding is not vitiated and actual service of notice is not required. For this proposition Mr. Moulik relied on judgment of the Supreme Court in **Special Deputy Collector, Land Acquisition C.M.D.A. (supra)**. Arguing that the prayer for quashing notification under Section 6 has to be made before the award is passed, Mr. Moulik relied the judgment of the Supreme Court in **Municipal Corporation of Greater Bombay (supra)**.

54. I have given my anxious consideration to the rival submissions addressed at the Bar, to the statutory provisions which are relevant and also to the judicial precedents cited before me by the both sides. I must say that some of the submissions of Mr. B. R. Pradhan, learned counsel for the petitioners were very sound and were very appealing. I have already dealt with all his submissions and hereafter, I propose to prefer to only those submissions which are found relevant and acceptable.

55. Under the scheme of the Land Acquisition Act, 1894, the declaration under Section 6 is of paramount importance because it is through such declaration that it is made known to owners under land under acquisition and the public generally that the land under acquisition is needed for a public purpose or for a company as the case may be. Section 6(2) provides that the declaration under Section 6(1) shall be published in the Official Gazette and two daily newspapers circulating in the locality in which the land is situated of which at least one shall be in the regional language newspaper. Sub-section (2) further provides that the Collector shall cause public notice of the substance of such declaration to be given at convenient places of the said locality, the district or other territorial area in which the land is situated, the purpose for which it is needed etc. The rules framed by the Government of Sikkim under the Land Acquisition Act, 1894 and notified vide Notification No. 1036/LR(s) dated 12.01.1978 provides that Form No. IV shall be used publishing the declaration under Section 6 when the land is acquired for any purpose other than a purpose of the Central Government and for using Form No. V when the land is acquired for a purpose of the Central Government. It is evident from materials on record and practically admitted that no public notice of the substance of declaration under Section 6 was made in respect of the land under acquisition.

56. The notices contemplated under Section 9 of the Act have more importance from the land owners' point of view that the declaration under Section 6. Section 9(1) mandates that public notice is to be given by the Collector at convenient places on or near the land is taken. Section 9(2) provides that notice shall state the particulars of the land so needed and shall require all persons interested in the land to appear before the Collector personally or through agent at a time and place mentioned in the notice and to state the nature of their respective claims of the land and claims to compensation etc. Section 9(3) provides peremptorily that the Collector shall serve a notice to the effect under Section 9(2) on the occupier of such land and on all such persons non or believed to be interested or to be entitled to act on the above persons so interested. Section 9(4) provides that in case the interested persons resided elsewhere and has no local agent, the notice shall be sent to him by registered post in his last known address.

57. In the instant case, it has become evident that what has been given is a general notice pasted on the notice board of the District Collector's office and that no public notice was given at convenient places as contemplated under Section 9(1). It has also become evident that individual notice under Section 9(3) was not served on the first petitioner who admittedly is a person interested in the land under acquisition. The right to property is no longer a fundamental right in this Country; however, Article 300A retains right to property as a constitutional right and that Article provides that no person shall be

deprived of his property save by authority of law. It is fundamental that where the State has deprived a citizen of property in exercise of the State's power of eminent domain, it shall be ensured that the owner of the land gets adequate compensation and has a say in the matter of determination of compensation. This principle underlines Section 11 of the Act. Section 11 provides that the Collector shall proceed with the award enquiry and the award to be passed by him shall be based on the above enquiry. Nothing has been brought out on record to show that any meaningful enquiry has been conducted under Section 11 by the District Collector before he passed the award which is also impugned in this case. Annexure 31 produced by the petitioners is not disputed, is a copy of the award. According to the award, the lands under acquisition belonging to the first petitioner has a total extent of 5.5050 Hectares in Omlok Block and what is awarded towards land value is Rs.1,80,43,397/- and what is awarded towards cost of standing properties (standing trees and other structures) is Rs.79,74,837/-, what is awarded towards solatium under Section 23(2) is Rs.78,05,470/-. Thus, the total compensation awarded is Rs.3,38,23,704/-. Surprisingly, it is not at all discernible from the award as to how the land value was determined by the District Collector-cum-Land Acquisition Officer. Rule 15 of Rules framed by the Government of Sikkim under the Land Acquisition Act provides for the manner in which lands under acquisition are to be valued. It is provided that the lands should be valued ordinarily by scanning the sales deeds pertaining to the similar types of

land in the locality prior to the promulgation of the notification and it is provided that if the above method of comparable sales cannot be adopted, the principle of capitalisation of the net annual profit should be adopted. The Rule provides for valuation of trees, houses and other structures situated on the land under acquisition also. Annexure–31 Award is absolutely silent as to how the District Collector cum Land Acquisition Officer valued the first petitioner's properties in this case. It would appear as if the compensation has been determined quite arbitrarily according to the whims and fancies of the District Collector-cum-Land Acquisition Officer. Both the Additional Advocate General as well as Mr. Moulik submitted before me that the first petitioner cannot have any legitimate grievance regarding the land value fixed by the Land Revenue Officer. They asserted that the first petitioner will not be able to get a higher land value than the land value awarded based on documents. That is a different matter. Award under Section 11 are to be passed on the basis of enquiry conducted regarding market value of the land as on the date of Section 4(1) notification and such award should ideally contain details of various sale documents perused by the Land Acquisition Officer for the purpose of arriving at market value of the land. If it is not on the basis of market value in documents that the Land Acquisition Officer passed award, then award should contain details of income from the property so that the awardee or the Court can have an idea as to how the compensation has been calculated for the method of capitalisation of income. What surprised me most about

Annexure–31 Award is that the same is not in conformity with the statutory provisions in the sense that what is seen awarded is only the value of the land plus solatium under Section 23 (2). The additional benefit to which the parties are statutorily entitled such as additional amount under Section 23A , the interest under Section 34 i.e. interest during the first year @ 9% per annum and thereafter @ 15% per annum are not seen awarded at all. The response of learned Addl. Advocate General and Mr. Moulik when the above glaring defects in Annexure – 31 was brought to their notice was that the award can always be remitted back to the Land Acquisition Officer for making necessary rectifications under Section 13A of the Act.

58. I am not inclined to accept the above suggestion of the learned Addl. Advocate General or Mr. Moulik. This is because the grievance of the petitioners regarding the award was not just that the same is not a reasoned one, referring to the documents relied upon or that the statutory benefits under Section 23 (1A) and the statutory interest under Section 34 was not given to them. They had two other serious grievances about the award. The first one was that on the strength of the present award wherein compensation was offered to them in respect of 5.5050 Hectares of land consisting of plot Nos. 720, 719, 707, 709, 710, 704, 706, 708, 711, 705 and 702 of Omlok Block, a further extent of property in Plot No. 712 extending to 4.3492 Hectares of Khasmal land which, according to the petitioners, belonged to them and was not Government land was also taken over without paying them

any compensation. Their second grievance was that their land has been acquired in such a fashion i.e. as island within a contiguous area with the result that the value of the un-acquired land has been considerably reduced or diminished.

59. I am of the view that the petitioners may have to be provided with another remedy more meaningful than rectification under Section 13A for redressal of the above two grievances which may or may not be genuine.

60. Another argument which was raised before me by Mr. B.R. Pradhan with all seriousness was that the land acquisition proceedings are vitiated by mala fides and fraud. It was pointed out in this context that while the declaration under Section 6 mentioned that the land is needed for public purpose for construction of HEP by SPDC, a Corporation owned by the Government of Sikkim, Annexures–22 to 28 and agreement dated 03.09.2008 will show that the acquisition was for the seventh respondent a private company and not for SPDC. It was also argued that during the entire period of 35 years covered by the agreement and thereafter for further period which are extendable, more than 88% power generated by HEP will go to the coffers of the seventh respondent private company. I must say now that the above submissions of Mr. B.R. Pradhan have been satisfactorily answered both by the Additional Advocate General and by Mr. Moulik.

61. Clause 3.3 of MOU executed between the Government of Sikkim and the seventh respondent obliges the Government to acquire land for the seventh respondent. Clause 3.4 of the above MOU provides for lease of acquired land in favour of the seventh respondent. Section 43 of the Act provides that Sections 39 to 42 coming under Part-VII acquisition of land for company shall be applied where the Government is bound by act for the companies. It is seen that the acquired land was transferred to the seventh respondent on lease basis for a period of 35 years and the ownership and the title of the land has never been transferred in favour of the seventh respondent company. The judgment of the Supreme Court in **Nand Kishore Gupta (supra)** at paragraphs 31, 59 to 62 and 75 give support to the argument of the learned Addl. Advocate General in the above regard. In the above context, I read clause 5.3 of the MOU (Annexure P-32) which provides that after the expiry of the agreement period referred to in clause 2.2 the project including its all assets and works shall be transferred by the seventh respondent to the Government free of cost and in good operation conditions. The argument of Mr. Moulik was that the acquiring agency or the requisitioning authority is SPDC now succeeded by the Power and Energy Department of the Sikkim Government and that the status of the seventh respondent is that of only an expert developer which is recouping to itself the investment made by it by operating the project for 35 years and appropriating to itself the lion share of the benefits derived during those 35 years. A careful reading

of MOU will show that even during the period of 35 years of lease, the present one is not a case of the seventh respondent just walking off with the lion's share of the revenue generated. Clauses 3.22, 4.2.1, 4.2.2, 4.4, 4.7, 4.9, 4.11, 4.15 and 4.15.1 will show that the seventh respondent is committed to the Government of Sikkim in other respects beneficial to the Government and to the people directly or indirectly. I, therefore, turn down the arguments of Mr. B. R. Pradhan that the acquisition is for the seventh respondent, a private company and not for any public purpose. Even otherwise it is difficult to accept the arguments that the generation of electrical energy to be consumed by public generally or by the Government is not a public purpose.

61. Serious attack before me was on the decision of concerned respondents to invoke the urgency provisions under Section 17 of the Act and to dispense with the enquiry under Section 5A. The argument of Mr. B. R. Pradhan was that there was no urgency at all much less no urgency which cannot brook even delay of one or two months. According to him, the valuable right of the petitioners to object to the acquisition under Section 5A has been taken away without any valid reason. Mr. Pradhan submitted that there are no materials placed on record which would show that there has been proper application of mind by the concerned as to the existence of an urgency which justifies invocation of provision of Section 17 and dispensation with the enquiry under Section 5A. The learned Addl. Advocate General and more so Mr. A. Moulik, learned senior counsel would certainly endeavour to meet the

argument of Mr. Pradhan. In the above context, the argument of Mr. Moulik was that as per clause 4.7 of Annexure P-32 MOU, this was a time bound project and which warranted commissioning within 72 months from the date of the agreement. It was submitted that the failure on the part of the company to commission the project will entail the company to pay penalty which will quantify and will come to Rs.9,70,000/- per month for a delay of one month. Mr. Moulik even cited a decision of the Supreme Court in **Deepak Pahwa (supra)** to argue that the delay which has been occasioned in the accomplishment of the project prior to the commencement of the land acquisition proceedings itself can be justification (not attributable to anybody's part) for invocation of urgency clause and it is not a good argument to contend that after all there has been delay, let there be some more delay by conducting Section 5A enquiry. It was also argued on the strength of the judgment of the Supreme Court in **First Land Acquisition Collector (supra)** that the existence or otherwise of urgency is a matter of subjective satisfaction by the Government.

62. On considering the rival submissions addressed before me in context of the above arguments (the correctness of invocation of Section 17 urgency provisions and dispensing with the Section 5A enquiry), I am inclined to agree with Mr. B. R. Pradhan that the invocation of urgency provision and dispensation with Section 5A enquiry has not been properly done in this case. I do not find any materials except Annexure R-7/13 & 14 at pages 262 and 263 which are

the letters by the District Collector as well as the SPDC requesting the Government to dispense with Section 5A enquiry and to invoke Section 17 of the Act, on the basis of which, the Government could have applied its mind to the question as to whether there was such an urgency which is justified invocation of Section 17(4) and dispensing with Section 5A enquiry. I notice the principles of law laid down by the Supreme Court in **Darshan Lal Nagpal (supra)** and find that the records do not disclose proper application of mind by the Government regarding the urgency of the matter and justification for dispensing with Section 5A enquiry. Nevertheless I am not inclined to quash the order dispensing with Section 5A enquiry and invoking Section 17(4) for reasons which are stated towards the later part of this Judgment.

63. Both the Addl. Advocate General and Mr. A. Moulik, learned senior counsel would persuade me very much to non suit the writ petitioner at the very threshold on the grounds of delay and laches. In fact, both of them would go to the extent arguing that the failure to comply with the mandatory provisions under Section 9 regarding service of notice, under Section 6 regarding publication of the substance of the declaration in the locality etc. can be condoned because the first petitioner was having actual knowledge regarding the impugned land acquisition proceedings. In this context it was argued that the first petitioner is not a rustic villager. He occupied a high position in the Government having retired as Additional Chief Conservator of Forest. It was argued that his children including the second petitioner are also

highly educated and well informed persons who are having actual knowledge. While I have already turned down the above argument as regards the necessity to serve mandatory notice and to make mandatory publication regarding declaration under Section 6 and notification under Section 9, I feel that the to a considerable extent the above argument can be accepted when I consider whether there has been lethargy on the part of the petitioners in approaching this Court on time. Evidently, the challenge to the notification under Section 4, the declaration under Section 6, the award under Section 11, the invocation of urgency provision, the dispensation of the enquiry under Section 5A are all made only after the award is passed and the property in question has been taken over from the petitioners. In this context, I notice that the initial notification under Section 4(1) read with Section 17(4) dispensing with Section 5A is promulgated as early as on 26.07.2010. I have further noticed that declaration under Section 6 is on 26.05.2011 and that the award is passed on 07.07.2011 and also noticed that possession has been taken over pursuant to the award and the same has been handed over to the seventh respondent as early as on 27.12.2011.

64. While Mr. B. R. Pradhan sought to draw support to his argument that when glaring illegality such as non application of mandatory provision was noticed, it is open to challenge L.A. proceedings even after the whole proceeding are complete through the judgment of the Supreme Court in **Bharat Sewak Samaj vs.**

Lieutenant Governor & ors. : (2012) 12 SCC 675, I must say that the preponderance of judicial authority is to the effect that once award is passed and possession is taken over challenging the LA proceedings under constitutional jurisdiction of the High Court will not be a fruitful exercise. In this context, I rely on the judgment of the Supreme Court in **Ajodhya Bhagat (supra)**, **Swaika Properties (P) Ltd. (supra)**, **Municipal Corporation of Greater Bombay (supra)** and **Municipal Council, Ahmednagar (supra)**. I therefore, hold that notwithstanding the merit I have noticed in the contentions of the petitioners regarding the failure on the part of the respondents to comply with the mandates of Section 6, Section 9 and even Section 11 and also regarding the unjustifiable urgency invocation of Section 17 (4) and dispensing with the enquiry under Section 5A, I find myself unable to grant to the petitioners the main reliefs they have sought for i.e. the quashment of the notifications and proceedings including award, dispossession etc. under the Act.

65. The question to be considered by me now is whether I should straightway dismiss this writ petition notwithstanding having found that there has been flagrant violation of statutory provisions by the respondents in the contexts of Section 6, Section 9, Section 11, Section 17(4) and Section 5A. I am inclined to answer the above questions in negative and I proceed to grant possible relief to the petitioners. Coming to the grievance of the petitioners that Section 5A enquiry has been dispensed with without justification, I may observe

that though I have found those grievances is genuine, I am of the view that in view of the findings entered by me in this judgment regarding the public nature of the purpose and also regarding the identity of the requisitioning authority, giving opportunity to the petitioners to participate enquiry under Section 5A could not have been of much avail to them. Coming to the non-service of notice under Section 9 and the glaring irregularities in the matter of passage of the award, I am of the view that the petitioners can be granted relief by facilitating a reference under Section 18. I am not at all impressed by the arguments of the Additional Advocate General and Mr. Moulik that the patent defects in the award can be corrected in a rectification proceeding under Section 13A. In my opinion the proper relief that can be given to the petitioners is to enable them to go in for a reference under Section 18 in which the reference Court in Sikkim, which is competent District Court will go into all relevant questions.

66. Mr. Moulik, for obvious reasons, was trying best to dissuade me from a reference under Section 18. He submitted that the reference cannot be granted as the petitioners have not sought for reference under Section 18 as is required under the law. The above argument was apparently strong. Nevertheless, I am turning the same down. It is not clear from the record as to whether any formal application under Section 18 was filed by the petitioners. But the Land Acquisition Officer did inform the petitioners that a reference under Section 18 and 30 is being made. I am of the view that in view of the patent irregularities

perpetrated by the respondents in the matter of service of notice the invocation of urgency clauses and also in the matter of the award which I have found to be not in conformity with the statutory provisions, I am inclined to facilitate a reference under Section 18.

67. In case the first petitioner makes a request within 3 (three) weeks from today under Section 18 for a reference to the District Collector, the District Collector shall refer this case to the competent Court under Section 18. If such a reference application is received by the District Collector concerned within 3 weeks from today, that application shall be favourably considered by the District Collector. The matters to be referred will be–

(i) The market value of the property acquired from the possession of the first petitioner;

(ii) The petitioners eligibility for compensation in respect of the Khasmal land in Plot No. 712;

(iii) The claim of the petitioners that on account of acquisition in the present fashion the value of the un-acquired property has become diminished;

(iv) The claim of the petitioners whether they are entitled for compensation for diminution of the land value injurious affection.

(v) As in the case of Khasmal land comprised in Plot No. 712 the rival claims of title can be raised between the Government and the first petitioner. A combined reference be sent under Section 18 read with Section 30.

It is needless to mention that in the reference apart from the petitioners, the State Government as well as the seventh respondent shall also be made parties.

68. So the final result of the above discussion is as follows: -

Notwithstanding findings entered by this Court in favour of the petitioners in the context of their contentions regarding Section 6, Section 9, Section 17(4), Section 5A and Section 11 the relief sought for by them in the writ petition under (b), (c), (d) and (e) are declined. It is further ordered that if the first petitioner either singly or along with the second petitioner makes an application for reference under Section 18 read with Section 30 to the District Collector –cum- Land Acquisition Officer within 3 (three)weeks from today for referring the case pertaining to the acquisition of their property in Omlok Block, that application shall be favourably considered and as combined reference under Section 18 read with Section 30 shall be made by the District Collector-cum-Land Acquisition Officer

without undue delay. While making reference, the directions hereinabove in this judgment shall be complied with. The Reference Court, which comes to be in seizin of the reference, shall dispose of the reference giving opportunity to both sides to adduce whatever evidence they want to adduce for substantiating their rival claims.

69. The writ petition is disposed of as above. No costs.

70. It is clarified that this judgment will act in personam only and will not be of avail to the other land owners whose property has been acquired for this project.

Sd/-

(Pius C. Kuriakose)
Chief Justice
29.08.2013

Approved for reporting : Yes / ~~No~~.
Internet : Yes / ~~No~~.

pm/jk