

# **HIGH COURT OF JAMMU AND KASHMIR AT JAMMU**

## **Case:- OWP No.228/2009 & connected CMAs**

Date:13.05.2013

Sat Paul and others Vs. State and others

**Coram:**

## **Hon'ble Mr. Justice Muzaffar Hussain Attar**

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**Appearing counsel:**

For the Petitioner(s) : Mr. M. K. Sharma, Advocate.

For the Respondent(s) : Mrs. Aruna Thakur, Advocate  
for respondent No.3.

Whether to be approved for reporting : Yes

## **Oral:-**

1. Notification No.04 of 2006 dated 29.12.2006 issued under Section 4(1) of the State Land Acquisition Act, 1990 (for short 'Act of 1990') and acquisition proceedings are called in question on many grounds, which include the non compliance with Part VII of the Act of 1990. The land has been acquired by the State Government for the benefit of respondent No.3, a Company. The petitioners have challenged the acquisition proceedings on many grounds.
  2. From amongst various grounds of challenge, one ground, viz., non compliance with Part VII of the

Act of 1990 being of clinching nature, other issues are not considered and are left open.

3. Learned counsel for the petitioners submitted that there is total non compliance with the provisions contained in Part VII of the Act of 1990, which render the entire proceeding illegal. Learned counsel, in support of his contention, that even after the publication of the Award, acquisition proceedings can be challenged, referred to a judgment of Hon'ble Supreme Court in case titled '**Patasi Devi Vs. State of Haryana and Ors.**' reported in **AIR 2013 Supreme Court 856.**
4. Learned counsel for respondent No.3 submitted that after the publication of the Award, the proceedings cannot be called in question in writ petition. Learned counsel also submitted that Government has entered into satisfaction that the land is required for the public purpose, the Court cannot review such a decision. Learned counsel submitted that this Court has not entertained the claim of the other persons in identical

circumstances by dismissing **OWP No.698/2006** vide order dated 26.02.2010. Learned counsel also produced photo-stat copy of the said order, which is taken on record.

5. In order to appreciate the issue raised, it is imperative to take note of Part VII of the Act of 1990 and Articles 19(1)(f) and 31 of the Constitution of India:-

**“PART VII**  
**ACQUISITION LAND FOR COMPANIES**

39. The provisions of sections 4 to 35 (both inclusive) shall apply to the acquisition of land by Government for the purposes of transferring it on lease or otherwise to any company on such terms and conditions as the Government may determine after the said company has executed the agreement hereinafter mentioned.

Explanation.- Acquisition of land by the Government for a company under this part shall be deemed to be a public purpose as defined in this Act.

40. (1) The Government shall not acquire land for a company under this part unless they are satisfied either on the report of the Collector under Section 5-A sub-section (2) or by an enquiry held as hereinafter provided-

(a) that such acquisition is needed for the construction of some work, and that such work or its product is likely to prove useful to the public; or

(b) that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workmen employed by the company or for the provision of amenities directly connected therewith.

(2) Such enquiry shall be held by such officer and at such time and place as the Revenue Minister shall appoint.

(3) Such officer may summon and enforce the attendance of witnesses and compel the production of documents by the same means and, as far as possible, in the same manner as is provided by the Code of Civil Procedure, in the case of a Civil Court.

#### **41. Agreement with the Government**

If the Government are satisfied after considering the report, if any, of the Collector under section 5-A, sub-section (2) or on the report of the officer making an inquiry under section 40 that the proposed acquisition is needed for the construction of a work and that such work or its product is likely to prove useful to the public or that the purpose of the proposed acquisition is to obtain land for the erection of dwelling houses for workmen

employed by the company or for provision of amenities directly connected therewith, the Government shall require the company to enter into an agreement with them, providing to the satisfaction of the Government for the following matters, namely:-

- (i) the payment to the Government in the case of lease of such premium and rent as the Government may determine with due regard to the cost of acquisition and in the case of transfer other than lease the cost of acquisition;
- (ii) the transfer by lease or otherwise on such payment of the land to the company;
- (iii) the terms on which the land shall be held by the company;
- (iv) where the acquisition is for the construction of any work, the time within which and the conditions on which the work shall be executed and maintained, and the terms on which the public shall be entitled to use such work or its product; and
- (v) where the acquisition if for the purpose of erecting dwelling houses or the provision of amenities connected therewith, the time within which the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided.

42. Every such agreement shall, as soon as

may be after its execution, be published in the Government Gazette and shall be thereupon (so far as regards the terms on which the public shall be entitled to use the work) or its products have the same effect as if it had formed part of this Act.

**42.A. Acquisition of land for a corporation or a local authority etc**

The provisions of section 39 to 42 (both inclusive) shall apply to the acquisition of land by Government for the purposes of transferring it on lease to any corporation or local authority.”

“Article 19(1). All citizens shall have the right-

(a to e).....

(f) to acquire, hold and dispose of property;

(g) .....

“Article 31

(1) No person shall be deprived of his property save by authority of law.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and give; and no such law shall be called in question in

any court on the ground that the compensation provided by that law is no adequate.

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect-

(a) the provisions of any existing law other than a law to which the provisions of clause (6)

apply, or

(b) the provisions of any law which the State may hereafter make-

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 2999 of the Government of India Act, 1935."

6. Articles 19(1)(f) and 31 of the Constitution of India continue to be applicable to the State of J&K, which provides that a person has right to

hold the property and further shall not be deprived of the same without paying compensation. Owner of the immovable property can be deprived of the same only in accordance with procedure established by the law. In the State of Jammu & Kashmir, the Act of 1990 provides mechanism for acquiring the land for public purpose. Part VII of the Act of 1990 provides complete scheme for acquiring land for the benefit of a Company. Section 39 of the Act of 1990 provides that the provisions of Sections 4 to 35 (both inclusive) shall apply to the acquisition of land by the Government for the purposes of transferring it on lease or otherwise to any Company on such terms and conditions as the Government may determine after the said Company has executed the agreement. This provision makes Sections 4 to 35 of the Act of 1990 applicable to the acquisition proceedings initiated for the benefit of a Company.

7. Section 40 of the Act provides that Government shall not acquire the land for Company under

this Part unless it enters satisfaction either on the report of the Collector under Section 5-A, sub-section (2) or on inquiry held in the manner prescribed in the said Section. Section 40 provides for acquisition of land by the Government for the Company, if the Government is satisfied after considering the report, if any, of the Collector under Section 5-A, sub section (2) or on the report of the officer making an inquiry under Section 40 that the **proposed acquisition** is for the construction of a work and that such work or its product is likely to prove useful to the public or that the purpose of the **proposed acquisition** is to obtain land for the erection of dwelling houses for workmen employed by the Company or for provision of amenities directly connected therewith. The Government thereafter has to ask the Company to enter into an agreement with it. The Government has to record satisfaction in respect of the clauses (i) to (v) of Section 41.

8. The effect of provisions of Land Acquisition Act is

to denude the land owner of the title and possession over the same, which right otherwise is guaranteed by Article 19(1)(f) of the Constitution of India. The provisions of the Act of 1990 have, thus, to be construed strictly. Any deviation or omission on the part of the Authority in complying with the provisions of the Act of 1990 will definitely render the acquisition proceedings illegal. The power to acquire immoveable property flows from Article 19(1)(f) of the Constitution of India.

9. In absence of such authority, the Government or any other authority would not be in a position to take immoveable property of any person. It is in this backdrop, it is held that provisions of Act of 1990 have to be followed in letter and spirit.
10. Admittedly, no agreement has been entered into by the Company with the Government as provided under Section 41 of the Act of 1990. The expression in Section 41 is ‘proposed acquisition’. Section 41 does not provide that the Agreement is to be entered into after publication

of the Award.

11. The argument of learned counsel for respondent No.3 that the Agreement is to be entered with the Government only after the publication of the Award, cannot be accepted on the plain language of Statute. The Court has to enforce the plain language of Section 41. Section 41 envisages that the moment the Government enters into satisfaction in respect of **proposed acquisition**, a duty is cast on both the Company and the Government to enter into an agreement as provided in clause (v) of Section 41. The expression used in Section 41 is "**Proposed Acquisition**". It does not provide that agreement is to be entered into after publication of Award. The property can be acquired only when conditions contained in clause (i) to (v) of Section 41 are complied with. The Government is guardian of rights of people. The land can be taken only when Company undertakes to guarantee the statutory conditions, otherwise, land cannot be acquired. Part VII of Act of 1990,

peculiar and special in nature, has been devised to safeguard the rights of land owner.

12. In case '**Rattan Chand Vs. State of J&K and other**' (**OWP No.698/2006**), this was not the issue raised, so the judgment referred will not constitute the precedent so far as merits of the present case are concerned.
13. The argument that after the publication of the Award, the same cannot be challenged in a writ petition is negatived in view of the law laid down in **Patasi Devi's** case (*supra*). The Government is duty bound to enter into satisfaction on the report of the Collector in terms of Section 5-A, sub section (2) or on the report of the officer making an inquiry under Section 40. The Notification under Section 4(1) of the Act of 1990 for this purpose alone has to be maintained to allow the competent authority to proceed in the matter.
14. For the aforesaid reasons, the writ petition is disposed of in the following manner:-
  - i) By issuance of writ of certiorari, all

notification/ declarations and award published after the issuance of Notice under Section 4(1) of the Land Acquisition Act, are quashed.

- ii) The official respondents are at liberty to re-consider the whole issue in the light of the provisions of the State Land Acquisition Act, 1990 and observations made in this order. The petitioners will be at liberty to re-agitate the matter on all issues available to them including those taken in this petition, if cause survives.

**( Muzaffar Hussain Attar )  
Judge**

Jammu  
13.05.2013  
\*Narinder\*

**HIGH COURT OF JAMMU AND KASHMIR AT  
JAMMU**

**Case:- OWP No.373/2013 & CMA No.495/2013**

Date:13.05.2013

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Building Operation Controlling Authority  
Vs.  
Tarvinder Kour and others

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**Coram:**

**Hon'ble Mr. Justice Muzaffar Hussain Attar**

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**Appearing counsel:**

For the Petitioner(s) : Mr. S. S. Nanda, Advocate.  
For the Respondent(s): Mr. U. K. Jalali, Sr. Advocate  
with Mr. Amit Rasotra, Advocate.

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- i) Whether approved for reporting  
in Press/Journal/Media :
  - ii) Whether to be reported in  
Digest/Journal : **Yes**
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**Oral:**

1. Petitioner issued Notice to owner of building under Section 7(1) of the J&K Control of Building Operation Act, 1988 (for short 'Act of 1988) dated 26.02.2013 wherein he was informed that he has allegedly converted the residential building into commercial one by opening the "SPA" (Beauty Parlour) on first floor without the permission of Jammu Municipal Corporation, and has changed the land use from residential to commercial one.

It was also alleged in the Notice that the alleged illegal construction has seriously affected the planned development of the Jammu City and it contravened the zoning regulation. Notice, however, was received by the tenant (respondent No.1 in the writ petition). The Commissioner, Municipal Corporation Jammu, in exercise of power under Section 8(1) of J&K Control of Building Operation Act, 1988 read with Jammu Municipal Area Building Operations Controlling Authority No.4<sup>th</sup> dated 27.11.1999, ordered for sealing of the premises. Respondent No.1 challenged the said order of sealing in appeal before the J&K Special Tribunal at Jammu. The Special Tribunal vide order dated 07.03.2013, set aside the order of sealing. The petitioner was directed to de-seal the premises forthwith. It is this order, which is called in question in the present petition on the principle ground that there being no provision for filing of an appeal against order under Section 8(1) of the Act of 1988, the J&K Special Tribunal could not

entertain the appeal and pass the order, which is impugned in the present petition.

2. Mr. Jalali, learned Senior Advocate appearing for tenant, vehemently argued that the provisions of Sections 7 & 8 of the Act of 1988 are to be read together. Learned counsel submitted that in fact, Section 8 of the Act of 1988 has to be read as proviso to Section 7 of the Act and any order of sealing passed would be appealable under Section 13 of the Act of 1988. Learned counsel further submitted that in case two provisions are not read in the manner as suggested by him then a person whose premises is sealed in terms of Section 8 of the Act of 1988, would be rendered remedy-less. Learned counsel prayed for dismissal of the present writ petition.
3. In order to appreciate the issues raised, Sections 7, 8 & 13 of the Act of 1988 are taken note of:-

**7. Order of demolition of building in certain areas**

(1) where the erection or re-erection of any building has been commenced or is being carried on or has been completed without

the permission referred to in section 4 or in contravention of any conditions subject to which any permission has been granted, the Authority shall issue a notice in writing calling upon the person to show cause within a period of 48 hours, why the building should not be altered or demolished as may be deemed necessary to remove the contravention.

(2) The Authority shall cause the notice to be affixed on the outer door of the some conspicuous part of the building whereupon the notice shall be deemed to have been duly served upon the owner or the occupier of the building.

(3) If the person to whom the notice has been given refuses or fails to show cause within a period specified under Sub-Section (1) or if after hearing that person, the Authority is satisfied that the erection or re-erection of the building is in contravention of the provisions of this section, the Authority shall by order direct the person to demolish, alter or pull down the building or part thereof so far as is necessary to remove the contravention within a period not exceeding five days as may be specified in the order and if the person fails to comply with the direction,

The Authority itself cause the erection or re-erection to be demolished after the expiry of the said period and may for that purpose use such Police Force as may be necessary which shall be maid available to him by the Police Department on requisition.

(4) All expenses incurred for such demolition shall be recoverable from the owner and /or the occupier in the same manner as arrears of land revenue.

#### **8. Power to seal unauthorized construction**

(1) It shall be lawful for the Authority concerned, at any time, before or after making an order of demolition under Section 7 to make an order directing the sealing of such erection, re-erection or work or of premises in which such erection, re-erection or work is being carried on or has been completed for the purpose of carrying out the provisions of this Act, or for preventing any dispute as the nature and extent of such erection or work.

(2) Where any erection, re-erection or work on any premises in which any erection, re-erection or work is being carried out, has

or, have been sealed, the authority concerned may for the purpose of demolishing such erection or work in accordance with the provisions of this Act, order such seal to be removed.

(3) No person shall remove such seal except,-

(a) under an order may by the Authority concerned under sub Section (2); or

(b) under an order make in an appeal under this Act.

### **13. Appeals**

(1) An appeal against the order of an Authority made under [section 5 or] section 7 shall lie to such person as the Government may by notification in the Government Gazette, appoint in this behalf (hereinafter called “the Appellate Officer”) within seven days after the date of the aforesaid order of the authority. The memorandum of appeal need not be accompanied by copy of order appealed from.

(2) Where any appeal is preferred from an order of an Authority, the appellate officer shall not stay the enforcement of that order unless the Authority concerned is given an opportunity of being heard:

Provided that where the erection or re-

=erection of any building was not completed on the day on which an order was made under Section 7 for the demolition of such building the appellate officer shall not make any order for the stay of enforcement of such order unless such security, as may be sufficient in the opinion of the appellate officer, has been given by the appellant for not proceeding with such construction, erection or work pending the disposal of appeal.

(3) Every appeal under this section shall be disposed of by the appellate officer as expeditiously as possible.

(4) The costs of any appeal under this section shall be in the discretion of the appellate officer.

4. Section 4 of the J&K Special Tribunal Act, 1988 (for short ‘Special Tribunal Act of 1988’) provides for ‘Establishment and Composition of the Tribunal’. Section 3 of the Special Tribunal Act of 1988 provides for filing of appeals, revisions etc. before the Tribunal.

5. Section 13 of the Act of 1988 makes a provision for filing an appeal against the order of an Authority made under Section 5 or Section 7 to

the Government or to the Appellate Authority. In terms of the provisions of Special Tribunal Act, 1988, these appeals are to be filed before the J&K Special Tribunal constituted in terms of Section 4 thereof.

6. Section 5 of the Act of 1988 provides for granting or refusing the permission for raising construction. Section 7 provides for passing order of demolition of building in certain areas. Section 13, thus, authorizes filing of an appeal only in the circumstances and situation envisaged under Sections 5 and 7 of the Act of 1988. Section 13 does not provide for filing an appeal against order passed under Section 8(1) of the Act of 1988.
7. The point is no longer res integra that the appeal is creature of statute and can be filed only when authorized by the statute. Admittedly, in this case, no appeal is authorized to be filed against order passed under Section 8(1) of the Act of 1988, which provision of the said Act authorizes the competent authority to order for sealing of premises. Sub-section (3)(b) of Section 8 provides

that the seal shall not be removed except under an order made by the Authority concerned under this Act or in terms of order passed in an appeal under this Act. The power of sealing of premises in terms of Section 8(1) of Act of 1988 is to ensure that the illegal construction which is commenced is halted in its tracks. The purpose underlying conferring power of sealing is to ensure that there is no violation of the civic law and no person is permitted to reap the benefits of illegal action.

8. The order of sealing under Section 8(1) of the Act of 1988, as already stated, being not appealable order in terms of the provisions of Act of 1988, the appeal filed before the J&K Special Tribunal at Jammu was incompetent. The J&K Special Tribunal was lacking jurisdiction to entertain such an appeal.
9. The argument of learned counsel for the respondents that when the Authority orders for sealing of premises, the aggrieved person is left without remedy, cannot be accepted. Remedies

are available to such a person. He can even invoke the extraordinary writ jurisdiction of this Court and Court in appropriate case can entertain such petition and pass orders in accordance with the law.

10. In view of the aforesaid discussion, Rules is made absolute. This writ petition is disposed of in the following manner:-

i) By issuance of writ of certiorari, the impugned order dated 07.03.2013 passed by the J&K Special Tribunal, Jammu, on File No.STJ/102/2013 titled 'Tarvinder Kaur Vs. Commissioner, JMC & anr.' is quashed.

ii) It is made clear that the respondent would be at liberty to invoke appropriate remedy in case she is still aggrieved of the sealing order.

**( Muzaffar Hussain Attar )  
Judge**

Jammu  
13.05.2013  
\*Narinder\*