REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1103 OF 2009
(Arising out of SLP (C) No.16109 of 2006)

City Montessori School … Appellant

Versus

State of Uttar Pradesh & Ors. … Respondents

WITH

IA NO. 6 IN CIVIL APPEAL NO.6747 OF 1999

J U D G M E N T

S.B. Sinha, J.

1. Leave granted.

2. Appellant runs an educational institution situated at 11, Station Road in the town of Lucknow. The premises belong to one Smt. Urmila Bhalla and Smt. Sheela Kapoor. It measured 23,000 sq. ft. of land. The land together with constructions thereupon measuring about 16,000 sq. ft. was

given in tenancy in favour of the appellant. The rest of the area, namely, 6,000 sq. ft. was given in tenancy to Late Mr. N.K. Bhargava (predecessor-in-interest of Respondent No.8.

3. Allegedly, appellant became a defaulter in payment of rent. A suit for ejectment was filed by the landladies resulting in a decree for eviction passed against it by the learned Civil Judge, Lucknow by a judgment and decree dated 9.11.1970. A first appeal and a second appeal preferred thereagainst were dismissed by orders 4.5.1971 and 13.7.1976. The school, however, sent a requisition before the State of Uttar Pradesh for acquiring the entire 23,000/- sq. ft. of land on or about 22.7.1976. A notification under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter for the sake of brevity called and referred to as 'the said Act') was issued pursuant thereto on or about 7.9.1976 and published in the Official Gazette on 6.10.1979. A declaration in terms of Section 6 of the Act was issued in respect of the entire land measuring 23,000 sq. ft on 6.10.1979.

4. Shri N.K. Bhargawa, predecessor-in-interest of the contesting respondents filed a writ petition challenging the legality and/or validity of the said notifications under Sections 4 and 6 of the Act. A Division Bench of the said Court, by a judgment and order dated 26.5.1998 found the said

notifications under Sections 4 and 6 to be unsustainable and quashed the same, inter alia, holding :

> "The learned counsel for the respondent Society submitted that since the proceedings before the Land Acquisition Collector does not have the character of judicial proceedings in the formal sense, therefore, it was for the petitioner to pursue his objections in the right earnest and demand a hearing. The submission is devoid of merit because it is for the Collector to accord a reasonable opportunity of hearing to the affected party and not for the later to demand it as held by the apex court in the matter of Farid Ahmed versus Ahmedabad Municipal Committee, AIR 1976 SC 2095.
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> In his bid to wriggle out of the embarrassing situation the learned counsel then submitted that since at a later stage the land owners, who should have been the primarily aggrieved party, themselves acquiesced in the acquisition by withdrawing the compensation in early 1987 without any objection and refrained from questioning the vires of the acquisition at any stage, therefore, the petition itself should be thrown out as having become redundant or infructuous. We are not impressed with the submission firstly because as discussed hereinbefore, independent of the landowners, the petitioner being a lawful lessee on a part of the acquired area had his own locus standi to challenge the acquisition and secondly because the subsequent acquiescence of the land owners to an acquisition conceived and executed in illegality would lead its beneficiary nowhere.
>
> Hence for the reasons recorded above, the impugned acquisition being unsustainable requires

> to be and is accordingly set aside. Resultantly, the petition is allowed and both the notifications u/ss. 4 as well as 6 of the Land Acquisition Act dated 9.10.1976 and 6.10.1979 respectively contained in annexures 1 and 5 are quashed."

5. The landladies were, however, not impleaded as parties in the said writ application. They, in the meanwhile, entered into a settlement with the appellant.

Three special leave petitions were filed against the said judgment and order dated 26.5.1998 before this Court by, i.e., (1) State of Uttar Pradesh; (2) City Montessori School; and (3) Uttar Pradesh Parents Association. An interim order was passed on 3.8.1998 directing the parties to maintain status quo with regard to the possession.

6. Indisputably, during the pendency of the said special leave petitions, the State of Uttar Pradesh issued a notification denotifying the 6,000 square ft. of land in purported exercise of its power under Section 48 of the Act. There appears to be some dispute as to whether the said notification was issued at the instance of the State of Uttar Pradesh or on the basis of oral observations made by this Court. The proceeding-sheet dated 6.3.2003 reads is as under :

> "Mr. Rai Prakash Gupta, learned counsel started his arguments at 11.30 AM and concluded at 12.40 PM. Thereafter, Mr. Shanti Bhushan, learned senior counsel addressed the Court upto 2.35 PM. Mr. Dushyant Dave, learned senior counsel started his arguments and was on his legs when the Court rose for the day. The matters remained part-heard.
>
> List on 21.04.2003 at 2.00 PM as part-heard.
>
> Learned counsel appearing for the State of U.P. is directed to make available the entire record of land acquisition on the adjourned date of hearing.
>
> Written submissions, if any, be filed on or before 15.04.2003."

7. We may place on record that the contesting respondents herein contend that the matter was adjourned in view of oral observations made by this Court to the effect that 'the contesting respondent should not have any objection if the High Court's judgment is affirmed to the extent of 6,000 sq. ft. of land'. The State of Uttar Pradesh thereafter affirmed an affidavit stating therein that in terms of such observations made by this Court, a proposal was initiated for denotification of 6,000 sq. ft. of the total area of the land. It was recorded :

> "Permission to file affidavit dated 18th March, 2002 shown to the Court wherein it is stated that the State Government is proposing to denotify the area occupied by the respondents from out of the

> total land acquired. We adjourn this matter to 20th July, 2004."

8. As would appear from the affidavit affirmed by Shri Shashank Bhargava, the matter was listed on 21.7.2004 but was adjourned for two months. The matter was again adjourned on 21.9.2004 for a further period of three months taking note of the fact that the State Government had proposed to denotify the area occupied by the respondent from out of the total land acquired. In this connection, respondents have stated :

> "It was stated to us that the State Government was proposing to denotify the area occupied by the Respondents from out of the total land acquired. Even though decision has been taken, till date the denotification has not taken place. We grant one final opportunity and adjourn these Appeals for three months to enable the Government to denotify the area occupied by the Respondents. In the event if it is not denotified by the next date, the Chief Secretary to remain present in this Court personally."

9. A notification was issued under Section 48 on 5.11.2004.

The judgment of this Court in the Civil appeal since reported in [(2005) 3 SCC 444] was pronounced on 22.2.2005.

Indisputably, however, appellant herein filed a writ application questioning the said notification dated 5.11.2004 before the High Court. By reason of the impugned judgment, the said writ application has been dismissed.

10. Mr. Shanti Bhushan, learned senior counsel appearing on behalf of the appellant, would urge :

(1) The High Court committed a manifest error in so far as it failed to take into consideration that the appellant had locus standi to question the validity of the said notification being the person aggrieved and furthermore as the purported notification dated 5.11.2004 having been issued in violation of the principles of natural justice, the same was a nullity and as such should have been set aside as prayed for in the writ petition wherefor leave was granted by this Court.

(2) The judgment of this Court does not anywhere indicate that in relation to issuance of the said notification, the appellant had any role to play or had consented thereto or agreed for release of the said land.

(3) In view of the fact that the validity of the notification issued under Section 4(1) and declaration under Section 6 of the Act having been upheld by the Supreme Court, the appellant was entitled the relief

prayed for in the writ petition, purported to the order of this Court dated 22.2.2005.

11. Mr. S.B. Upadhyay, learned senior counsel appearing on behalf of the State of Uttar Pradesh, on the other hand, would contend that this Court having passed the order in terms of the contention made by all the respondents therein including the appellant herein, no relief can be granted in its favour.

12. Mr. Mukund, learned counsel appearing on behalf of the contesting respondents, urged :

(1) A consent order must be read in its entirety and the judgment and order of this Court dated 22.2.2005 so read having regard to the backdrop of events would clearly show that the appellant was the real beneficiary thereof and in that view of the matter, it cannot be permitted to approbate or reprobate at the same time.

(2) The purported liberty granted by this Court to challenge the legality or the validity of the notification dated 5.11.2004 cannot be construed to mean that the appellant is entitled to challenge a part of the order while taking benefit of the other.

(3) In any view of the matter, this Court, having regard to the peculiar facts and circumstances of this case, should not exercise its discretionary jurisdiction under Article 136 of the Constitution of India.

Appellant is a private person. The notification under Section 4 and declaration in terms of Section 6 of the Act were issued in terms of the provisions contained in Part VII of the Act.

13. Section 40 of the Act provides for an enquiry in the manner prescribed in the Rules framed under the Act known as Land Acquisition (Companies) Rules, 1963.

The Act makes a distinction between an acquisition made for a public purpose and an acquisition made for the benefit of a company. Acquisition made at the instance of a company must be done in strict compliance of the provisions contained in the Act and the Rules framed thereunder. The Act being an expropriatory legislation and particularly when resorted to for the benefit of a private person requires scrupulous satisfaction of the statutory requirements.

In Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chennai & Ors. [(2005) 7 SCC 627], its was held :

> "**29.** The Act is an expropriatory legislation. This Court in *State of M.P. v. Vishnu Prasad Sharma* observed that in such a case the provisions os the statute should be strictly construed as it deprives a person of his land without consent [See also *Khub Chand* v. *State of Rajasthan* and *CCE* v. *Orient Fabrics (P) Ltd.*]
>
> There cannot, therefore, be any doubt that in a case of this nature due application of mind on the part of the statutory authority was imperative."

In Devinder Singh & Ors. v. State of Punjab & Ors. [(2008) 1 SCC 728], it was held :

> "**43.** Expropriatory legislation, as is well known, must be strictly construed. When the properties of a citizen are being compulsorily acquired by a State in exercise of its power of eminent domain, the essential ingredients thereof, namely, existence of a public purpose and payment of compensation are principal requisites therefor. In the case of acquisition of land for a private company, existence of a public purpose being not a requisite criterion, other statutory requirements call for strict compliance, being imperative in character."

14. The High Court in its judgment and order dated 26.5.1998, in no uncertain terms, held :

> "The irresistible inference would, therefore, be that no amount of so-called laudable object of the respondent Society in running its affairs could justify the instant acquisition if it was not shown

to be covered by the situation and purpose envisaged by Section 40(1)(a) of the Act which as mentioned hereinbefore restricts the acquisition only to the purpose of erection of dwelling houses for the workmen employed by it or for the provision of amenities directly connected therewith; and certainly the expansion of the school building belonging to the respondent society was not covered under the either of these two situations.

The contention that the Society was being run on charitable basis is neither supported by any material on record nor has any worthwhile bearing on the statutory scheme as discussed in the proceeding para. In the Constitution of the society produced before the Land Acquisition Collector there is not even a whisper about the charitable nature of the Institution. Neither in the documents nor in any averment raised before this court in the counter affidavit filed at different stages by the respondent Society any indication was given that any seats for the admission of students in any class were ever reserved for the students belonging to the weaker/poorer section of society or whether they are given any concession in the matters of admission, fees or other educational facilities at any stage of their career. On its own showing the Society is rather using its "savings" either for hiring better qualified staff or for the welfare of the said staff which in any case does not reflect its charitable character.

Be that as it may, the acquisition being for a private company as expressed in Section 44-B of the Act and its being beyond the scope of Section 40(1)(a) of the Act must fall through as impermissible under the law."

15. Indisputably, the owner of the land, namely, Smt. Usha Bhalla and Smt. Sheela Kapoor did not raise any objection to the said acquisition. We are informed at the Bar that even the amount of compensation deposited by the appellant herein has been withdrawn by them in its entirety during the pendency of the first round of litigation.

16. Despite the same, the High Court on the writ petition filed by the contesting respondents quashed the notifications issued under Section 4(1) of the Act as also the declaration made under Section 6 thereof. The High Court had to do so as it could not uphold one part of the notification and quash another part. It is one thing to say that a notification being illegal is void ab initio but it is another thing to say that a party in view of his conduct would be found to be disentitled from grant of any relief. The order of this Court, therefore, should be constructed keeping in view the aforementioned backdrop.

17. Before this Court, three appeals were filed. One of them was filed by the Parents Association. In the said Special Leave Petition, the appellant herein were respondents. We have noticed hereinbefore that there exists a dispute as to whether the State of Uttar Pradesh took steps to issue the denotification at the instance of this Court or on its own. Ordinarily, the State is expected to consider the question of issuing denotification of an

acquisition proceed on its own. Denotification, however, was possible only in respect of the 6,000 sq. ft. of land as possession thereof had not been taken.

18. Submission of the learned counsel appearing on behalf of the appellant, however, is that the denotification in terms of Section 48 could be issued only when Section 4 and 6 were invalid. In law that is so. But then, the State on the same logic could not have been permitted to take recourse thereto unless and until the judgment and order passed by the High Court declaring the notification under Section 4(1) and the declaration under Section 6(1) invalid was set aside. It is in the aforementioned backdrop, the question was mooted to uphold the notification in respect of 17,000 sq. ft. of land upon denotifying 6,000 sq. ft. thereof. The decision must, therefore, have been taken keeping in view the aforementioned objective.

19. Legally, appellant is not a party to the said decision making process but the entire exercise taken by the State of Uttar Pradesh either on its own or on the basis of the observations made by this Court. It could not have been initiated and/or given effect to without consent of the appellants. Even if there was no explicit consent, implicit consent is evident. Even otherwise in a case of this nature, the doctrine of acceptance sub-silentio must apply. [see Ramji Dayawala & Sons (P) Ltd. v. Invest Imports (1981) 1 SCC 80].

20. The order dated 22.2.2005 passed by this Court must, therefore, stand or fall in its entirety. Concededly, appellant before filing of the aforementioned writ petition or even after the impugned judgment had been passed, has not filed any application for review thereof. We are informed at the Bar that merely an application for clarification was filed contending that the said judgment did not preclude the appellant from questioning the legality of the denotification. It is, therefore, evident that the appellant did not want that the said order be reviewed in its entirety. If the said order is to be reviewed, of course, that part of the High Court judgment whereby and whereunder even upon holding that the appellant is a person aggrieved and, thus, no relief could have been granted to it, may have to be set aside but then for the said purpose even accepting the submission of Mr. Shanti Bhushan that the notifications under Sections 4 and 6 must be deemed to have been valid, entire notification was also required to be set aside.

Order of this Court, thus, has to be reviewed in its entirety or not at all. It was not a case where a clarification would have served the purpose. We have noticed hereinbefore the submission of Mr. Shanti Bhushan that the denotification in terms of Section 48 would have been permissible only when the notification under Section 4 and declaration under Section 6 are held to be valid. The conclusion that the said notification under Section 4

(1) and declaration under Section 6(1) were valid could not have been arrived at by this Court without applying its mind as to whether the judgment of the High Court is correct or not.

21. Validity of notification under Section 4(1) and the declaration under Section 6 could have been declared by this Court only upon setting aside the findings of the High Court and not prior thereto. When a question arises as to whether a statutory authority has acted mala fide or otherwise or had not complied with the mandatory provisions of the statute rendering its decision void and a nullity, the same must be established by the party alleging the same. The court exercising the power of judicial review cannot do so only at the instance of parties who are colluding with each other. The State, the landladies, the appellant and the Parents Asociation, were all on one side. The landladies for one reason or the other did not intend to question the legality or validity of the acquisition notification. They had even accepted the amount of compensation deposited. Contesting respondents only, thus, were on the other side. If the High Court's judgment was to be set aside, it was to be set aside in its entirety and not a part of it. However, the contesting respondents could not have insisted that the entire notification should be set aside as their interest in the land was confined to 6,000 sq. ft.

only and upon issuance thereof, they ceased to have any locus to question the entire notification.

22. Indisputably, in view of the decision of this Court, the principles of natural justice had to be followed before issuance of the denotification under Section 48. It was so held in Larsen & Toubro Ltd. v. State of Gujarat [(1998) 4 SCC 387] in the following terms :

> "**31.** Principles of law are, therefore, well settled. A notification in the Official Gazette is required to be issued if the State Government decides to withdraw from the acquisition under Section 48 of the Act of any land of which possession has not been taken. An owner need not be given any notice of the intention of the State Government to withdraw from the acquisition and the State Government is at liberty to do so. Rights of the owner are well protected by sub-section (2) of Section 48 of the Act and if he suffered any damage in consequence of the acquisition proceedings, he is to be compensated and sub-section (3) of Section 48 provides as to how such compensation is to be determined. There is, therefore, no difficulty when it is the owner whose land is withdrawn from acquisition is concerned. However, in the case of a company, opportunity has to be given to it to show cause against any order which the State Government proposes to make withdrawing from the acquisition."

Larsen & Toubro was followed in State Govt. Houseless Harijan Employees' Association v. State of Karnataka [(2001) 1 SCC 610], wherein this Court held:

> "33**.** The section does not in terms exclude the principles of natural justice. However, the section has been construed to exclude the owner's right to be heard before the acquisition is withdrawn. This is because the owner's grievances are redressable under Section 48(2). No irreparable prejudice is caused to the owner of the land and, if at all the owner has suffered any damage in consequence of the acquisition proceedings or incurred costs in relation thereto, he will be paid compensation thereof under Section 48(2) of the Act. (See *Amarnath Ashram Trust Society* v. *Governor of U.P.;* also *Special Land Acquisition Officer* v. *Godrej & Boyce*1.) But as far as the beneficiary of the acquisition is concerned there is no similar statutory provision. In contrast with the owner's position the beneficiary of the acquisition may by withdrawal from the acquisition suffer substantial loss without redress particularly when it may have deposited compensation money towards the cost of the acquisition and the steps for acquisition under the Act have substantially been proceeded with. An opportunity of being heard may allow the beneficiary not only to counter the basis for withdrawal, but also, if the circumstances permitted, to cure any defect or shortcoming and fill any lacuna."

23. The question which, however, falls for consideration is as to whether in a situation of this nature, principles of natural justice were required to be complied with. It is now a well settled principle of law that it cannot be put in a straight jacket formula. The Court, despite opining that principle of natural justice was required to be followed, may, however, decline grant of a relief, inter alia, on the premise that the same would lead to a useless formality or that the person concerned, in fact, did not suffer any prejudice.

It is trite that a party may waive his right of hearing by his conduct.

It is furthermore well settled that a fact admitted need not be proved. Indisputably, the appellant was a party to the decision. The decision was based on the consent of the respondents which, in the facts and circumstances of this case, must be held to have included the appellants herein also.

24. A judgment rendered by a court of law and in particular a consent order, it is trite, must not only be construed in its entirety but also having regard to the pleadings and conduct of the parties.

{See N.K. Rajgarhia v. Mahavir Plantation Ltd. [(2006) 1 SCC 502 paragraph 19]}

25. Judgment on consent in this case was passed only in view of Section 48(1) of the Act and not on any other premise. Appellant is the only beneficiary of the said order as by reason thereof, the judgment of the High Court in respect of 17,000 sq. ft. of land was set aside. By reason thereof, the possession of the appellant was protected as otherwise it was bound to hand over the vacant possession to the landladies pursuant to the order of eviction.

For the aforementioned purpose, thus, the proceedings before this Court assume significance. We have noticed hereinbefore that the question as to whether such a notification can be issued was debated. The State of Uttar Pradesh has been given opportunity after opportunity therefor. The Chief Secretary was also asked to remain personally present.

26. Only thereafter, the noficiation under Section 48 of the Act was issued. Appellants do not say nor does it appear from the record that at any point of time it raised any protest. In fact, it must be held to have accepted the suggestion whether emanating from this Court or from the State of Uttar Pradesh without any demur whatsoever. It is in the aforementioned situation, the doctrine that a person cannot be permitted to approbate or reprobate at the same time must be invoked.

In Nagubai Ammal & Ors. v. B. Shama Rao & Ors. [1956 SCR 451], this Court held :

> "But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in OS No. 92 of 1938-39 are relied on as barring the plea that the decree and sale in OS No. 100 of 1919-20 are not collusive, not on the ground of res judicata or estoppel but on the principle that a person cannot both approbate and reprobate, it is immaterial that the present appellants were not parties thereto, and the decision in *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Company Ltd.* and in particular, the observations of Scrutton, L.J., at page 611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree. Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief.".

Referring to some English decisions, it was observed :

> "It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same

> transaction and to the persons who are parties thereto."

In C. Beepathumma & Ors. v. V.S. Kadambolithaya & Ors. [(1964) 5 SCR 836], this Court held :

> "In view of the fact that in this way, Kunhi Pakki obtained the enjoyment of the mortgage in respect of his 1/4 share for a period of 40 years certain, he must be taken to have elected to apply to his own 1/4 share the terms of Ex. P-2. Having in this way accepted benefit and thus approbated that document, neither he nor his successors could be heard to say that the mortgage in Ex. P-1 was independent of Ex. P-2 and that the limitation ran out on the lapse of 60 years from 1842. In our opinion, the doctrine of election was properly applied in respect of Kunhi Pakki's 1/4 share now in the possession of the present appellants through Defendant 8."

In Ambu Nair since Deceased v. Kelu Nair, since Deceased [(1932-33) 60 Indian Appeals 266], it was held :

> "Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other mortgage debt the appellant, their Lordships think, cannot now turn round and say that redemption under the usufructuary mortgage had been barred nearly seventeen years before he so obtained payment. It is a well accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of Honeyman J. in *Smith* v. *Baker* (1),

> "at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage." See also per Lord Kenyon C.J. in *Smith* v. *Hodson* (1) where the same expression is used."

27. A party consenting to an order cannot be permitted to resile therefrom while retaining the benefit obtained therefrom.

{See Union of India v. Krishan Lal Arneja [(2004) 8 SCC 453]}.

28. For the reasons aforementioned, there is no infirmity in the impugned judgment. The appeal is dismissed. In the facts and circumstances of the case, however, there shall be no order as to costs.

IA NO. 6 IN CIVIL APPEAL NO.6747 OF 1999

29. In view of the order passed above, no separate orders are required on this I.A.

...……J.
[S.B. Sinha]

...……J.
[Cyriac Joseph]

New Delhi;

FEBRUARY 18, 2009