

Constitutional Battles on Right to Property in India

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Abstract

The Land Acquisition, Rehabilitation and Resettlement Act, 2013 (earlier Bill, 2011) was passed in the Lok Sabha in September, 2013. It was passed in view of the various shortcomings of the Land Acquisition Act, 1984 and due to lack of resettlement and rehabilitation policies. The new Act tries to fill the lacunae in the previous Act. It tries to solve the dispute of forced acquisition and compensation which existed in the 1984 Act. This paper analyses the Act and the major concerns with respect to right to property in the light of the Constitutional history and development of the Right to property in India. The highlights includes whether the present Act actually redresses the resettlement and other grievances of the people. Whether the state now justified in acquiring the property with its new compensation, resettlement and rehabilitation policies? Are the justifications enough to be given to the people while acquiring their property in the name of public interest? Is the scope of "public purpose" now exhaustive? Would it be better to have right to property as a fundamental right? What led the Supreme Court to make right to property a constitutional right? Whether the new Act a consequence of making right to property a constitutional right or a consequence of its emerging importance as a fundamental right? All the questions have been dealt with respect to the development of right to property in the Constitutional law. The key questions would be dealt in this paper, starting with the present Land Acquisition Act, 2013.

Keywords: Land acquisition act; Resettlement; Rehabilitation; Right to property; Fundamental right

Introduction

The Land Acquisition, Rehabilitation and Resettlement Bill, 2011 was passed by the Parliament in September, 2013, with the effect of it becoming a law. The new law replaces the Land Acquisition Act, 1894 that suffers from various shortcomings, including silence on the issue of resettlement and rehabilitation of those displaced [1]. The Land Acquisition, Rehabilitation and Resettlement Bill, 2011 was introduced after the large scale protests by the farmers of the country. The protests were going on and off since the independence, due to inadequacy of compensation as a recompense for the loss of social and cultural value of land [2]. Since the Land Acquisition Act 1894 has been passed, many communities and farmers are displaced to make way for housing interests of the high income groups in the name of growth and development, protest is directed against the nexus between the State and the powerful private interests which deprives them of rights and autonomy on their own property [3]. The Land Acquisition, Rehabilitation and Resettlement Act, 2013 (earlier Bill, 2011) tries to solve the dispute of forced acquisition and compensation for the same. Now the question arises whether the present Act actually redresses the abovementioned grievances of the people. Whether the state is now justified in acquiring the property with its new compensation, resettlement and rehabilitation policies? Are the justifications enough to be given to the people while acquiring their property in the name of public interest? Is the scope of "public purpose" now exhaustive? Would it be better to have right to property as a fundamental right? What led the Supreme Court to make right to property a constitutional right? Whether the new Act a consequence of making right to property a constitutional right or a consequence of its emerging importance as a fundamental right? The key questions

would be dealt in this paper, starting with the detailed analysis and description of present Land Acquisition Act, 2013.

The Act, 2013 primarily encompasses the essential and salient feature of Social Impact Assessment i.e. the social impact, pros and cons, community assent has to be analysed before acquiring of land by the government or the concerned department be it for any purpose, public or for industries. This forms the basis for the government to decide whether to acquire the land either for public or other purpose is feasible and in public interest or not. The act clearly defines the scope of "public purpose" which includes-

- Strategic purposes relating to naval, military, air force, and armed forces, any work vital to national security or defense of India or State police, safety of the people;
- For infrastructure projects including agro-processing, warehousing etc. or mining activities, national investment and manufacturing zones, water harvesting and water conservation structures, sanitation, Government aided educational and research schemes or institutions,
- Project for project affected families; for housing;
- Project for planned development or the improvement of village sites or any site in the urban areas or provision of land for residential purposes for the weaker sections;
- Project for residential purposes to the poor or landless or of persons residing in areas affected by natural calamities [4].

Therefore, the Act places certain restrictions on the exercise of eminent domain and confines the definition of "public purpose" [5]. The emphasis on "public purpose" implicitly assumes that those who have to surrender property are called upon to make sacrifices for the greater common good. But the government is more often accused of acquiring land for private companies for their commercial interests, in the name of "public purpose". The Act introduces some procedural

safeguards i.e. in cases where Public Private Partnership projects are involved the Act requires consent of atleast 70% and where acquisition is taking place for private companies to work for public interest , the Act requires consent of not less than 80%. This includes consent to compensation. This is meant to ensure that no forcible acquisition takes place. However, the provision with respect to consent has been criticised on the ground that it is nowhere mentioned in the Act that any such consent is required in case of an entirely government owned project. For example, if a private company sets up a thermal plant, the consent of 80% farmers will be required, but for a power plant owned by the government such consent will not be needed [6]. This shows that even the new Act, does not deal with this issue properly. It is sometimes contended that the definition of “public purpose” is still kept vague enough to allow government Acquisition on behalf of industries [7].

The consent includes that for compensation, so, the emphasis on “just compensation” upholds the notion that the economic interests of property owners cannot be compromised for any reason, however socially desirable. The Act also offers a method to determine the amount of compensation to be paid. However, the question of one time compensation only takes us to the further question of what after that, what about their livelihood, what about their other facilities which they were deriving out of their own lands before acquisition. Therefore, the Act not only puts forth the objective of “just compensation” but also provides a proper rehabilitation and resettlement scheme. Relief and rehabilitation, besides compensation up to four times the market value in rural areas and two times in urban areas promised. Other benefits include entitlement to a house, provided they have been residing there for five years and have been displaced. If they choose not to accept the house, they will be offered a one-time financial grant, training and skill development while being offered employment etc [8].

The government justifies such relief measures as a compensation for the acquisition of property of the land owners, in the name of public interest.

The Evolution of the Right to Property With Respect to the Land Acquisition Act 1894

The legal and constitutional framework of the right to property in India has often led to a debate between the government and the courts as to the “legality” or “illegality” of such acquisition. Legislature has made it a question of the manner of exercise of legal power. The original concept of acquisition of land emerged from the colonial legislation, Land Acquisition Act, 1894. It enabled the Government to expropriate huge tracts of land on behalf of private industries under the garb of greater common good. The act provided a caveat that those whose property would be acquired would have a right to receive compensation [9]. The Act worked on the principle that so long the “Public Purpose” subsists; the exercise of power of eminent domain could not be questioned. It was, thus, the key criteria in determining the legality of compulsory ‘taking’. But what constituted ‘public purpose’ or public interest was indeterminate. Therefore, every acquisition could be challenged on its legality as the meaning of public purpose was not clear. It was illustrated by heads such as provision of land for village sites, planned development, public offices, education, health and other schemes sponsored by the government, to name a few [10].

Further, the ambiguities and provision of discretionary power of the government led to the misuse of such power by the executive to serve private interests. For instance, The District Collector determined the value and compensation for the land to be acquired. The inadequacy of the amount of compensation awarded could be challenged in the civil court. However, on the other side, the Act curtailed the power of the judiciary in deciding on the matters of “just” compensation, by providing the Civil Court with clear direction in determining compensation, including matters to be ignored while computing compensation [11]. Since the Act provided with the acquisition of land by the government, with the authority of law, the misuse by itself especially in matters of compensation could not be helped by judiciary due to statutory restrictions. Post 1894, the question of compensation for expropriation was particularly contentious, especially in relation to land reform. The colonial system of revenue collection gave a class of zamindars considerable power over land. It was not clear as to how property would be guaranteed without making any promise on compensation which would benefit only the deserving owners. This implies there was as such no status of “right to property” as a fundamental right in India. The property was acquired by the government for the public purpose and compensation for the same was paid, whether just or not.

The Government of India Act, 1935 entailed the compensation formula, which, the Constituent Assembly decided to retain in the Constitution. It appealed to them as it withheld the powers from the judiciary. The continuous misuse by the government of its power to acquire lands led to the protests against acquiring agricultural land (right to property violated), internal displacement, loss of livelihood, inappropriate compensation. The battles between compulsory land acquisition, compensation and property rights continued until, Right to Property was made a fundamental right. Article 31 guaranteed that ‘no person shall be deprived of his property save by the authority of law’ and set the boundaries on the power of eminent domain of the State.

Post Constitution of India, 1950-to further developments till the 44th Amendment

It was in the Constitution that Right to Property was made a “fundamental right”. Since the Constitution came into force in 1951, Article 19 (1) (f) and Article 31, the two articles which guaranteed fundamental right to property, became the subject of constant and contentious judicial interpretations and parliamentary interference.

Early decisions of the Supreme Court showed that it adopted two basic conditions namely, public purpose and compensation in regulating the exercise of acquisition under the Constitution [13]. The Court was faced with two competing rights, the power of the state to acquire property, and the individual’s fundamental right to property. It adopted a restrictive view of on the state’s power of compulsory acquisition and inclined towards protecting the right to property and payment to adequate compensation. This led to a series of decisions of the Supreme Court wherein, it declared unconstitutional several laws and pursuant state actions, in view of the Articles 14, 19 and 31 of the Constitution [14]. On the other hand, the Parliament initiated a series of amendments to cancel the effect of the decisions taken by the Supreme Court against the discretionary powers of the State action.

The case which led to the First Amendment to the constitution was West Bengal vs. Bela Banerjee [15]. It raised the question of constitutionality of the law which provided acquisition of land for

public purposes but limited the value of compensation to the extent of the market value of the land as was on Dec. 31, 1945. The Supreme Court held that the ceiling of compensation value on to a particular date as opposed to the market value of the land at the time of acquisition was arbitrary and violated of the spirit of the constitution. As a result, the First Amendment Act inserted two new articles, Article 31A and 31B. The Article 31A broadly stated that, no law which provided acquisition for the state shall be deemed to be void on the ground, that it is inconsistent with or takes away any of the rights conferred by the part III of the Constitution. The validity of this amendment was challenged by zamindars in Shankari Prasad Deo vs. Union of India. But, the challenge failed and the Court upheld the validity of the Act. Later, the Fourth Amendment Act was enacted in 1954, which sought to bring clarity as to the interpretation of Article 31A and 31B by declaring that the courts should not deal with the question of adequacy of compensation and further, it laid down as to what is meant by “compulsory acquisition of property (referring to State acquisition only)” [16].

Even after this Amendment, it was held by the judiciary that a law depriving a person of his property could be judicially examined as to its reasonableness [17]. The Seventeenth Amendment Act, 1964 further made a special provision regarding compensation of land acquired from small farmers, which should not be less than market value of the land [18]. This was challenged in Sajjan Singh vs. State of Rajasthan [19], the court upheld the validity of the said amendment. Finally, the validity of first, fourth and seventeenth amendment acts, was challenged in Golaknath vs. State of Punjab [20]. The Supreme Court declared the above amendments as invalid; however, the laws made thereunder continue to be valid. It further held that the State could not take away fundamental rights by enacting laws, either in exercise of their constituent or legislative power.

In the Bank nationalisation case [21], the Supreme Court held that the adequacy of compensation and the principles laid down by the legislature to determine the amount of compensation are justiciable. This led to the 25th amendment act of 1971, through which the word “amount” was substituted in place of the word “compensation” and a new article, Article 31C was inserted. This provided that any law made in furtherance to give effect to Directive Principles of State policy in Clause (b) and (c) of Article 39, shall not be void on the ground that it takes away or abridges Fundamental Right(s).

The post 25th amendment period till the Act 2013

Lastly, the validity of 25th amendment including others was challenged in the Supreme Court in Keshavananda Bharti vs. Union of India. The Court upheld the validity of all property related amendments, and negated the status of property right as a “basic feature” of the Constitution. Nevertheless, the right to receive “amount” (compensation) was considered as fundamental right [22]. The Parliament, through 44th amendment Act gave the final blow to the private property and repealed Article 19(1) (f) from Part III, completing the demise of right to property as a fundamental right, and declared it merely as a constitutional right under Act. 300A of the Constitution [23].

Since then, right to receive “amount” was held as a fundamental right, there have been again debates between the parliament and the judiciary regarding the “just” amount whether justiciable or non-justiciable, especially in case of land acquisition by the government for public purpose in view of the Land Acquisition Act (Amendment) Act,

1985. Public Purpose has been another controversial term, in the name of which thousands of households are displaced from their land, with or without providing “just amount” and any resettlement facilities. Judiciary intervenes whenever the two fundamentals of “just compensation” and public purpose” are not followed. For instance, in the case of Greater Noida Industrial Development Authority vs. Devendra Kumar [24], land was said to be acquired for public purpose and the farmers were paid meagre compensation. However, the land was actually acquired to construct apartments for residential purposes. Supreme Court held that it was not a “public purpose” and therefore struck down this unreasonable use of power [25].

Still, the problem of displacement of people, meagre compensation and no provision of resettlement has been a reason of protests since long. People are displaced in the name of development with the loss of livelihood and shelter. The leading case in this regard has been Narmada Bachao Andolan vs. Union of India [26], with respect to construction of dam by displacement of thousands and thousands of people without any resettlement and rehabilitation policies. The amendment gave the legislature more leeway to pass laws to restrict a person’s right to property. As the right to property was no longer a fundamental right but only a legal right, a person did not have a right to file a writ in the Supreme Court under Article 32 for infringement of such right. He could either file a suit against the Government or file a writ under Article 226 to the High Court. This dilutes a person’s remedies on deprivation of his right to property. This finally led to the enactment of the Land Acquisition, Resettlement and Rehabilitation Act, 2013 [27].

Jurisprudence Evolved

The jurisprudence with respect to the right to property which has evolved over the years is that right to property remains fundamental to a human, however, constitutionally it has been made only a statutory right. If it is acquired under any law of the state for any public purpose, the person should be compensated with a just amount and provided rehabilitation and resettlement facilities. Pre-1978 when the right to property was fundamental right Supreme Court stated that

a. The constitution guarantees right to compensation which is equivalent to the value of property.

b. The constitution guarantees the owner must be given the value of his property [28].

Post-1978 when the right to property became a constitutional right the Supreme Court held that the distribution of material resources and the restriction on the concentration of wealth is to better serve the common good [29].

Now, in the present scenario, when there is so much displacement and land acquisition in the name of development Supreme Court has realised the absence of this fundamental right and recourse to right to equality is taken to invalidate land ceiling legislation. Need is felt to restore right to property as a fundamental right to protect the elementary and propriety rights of the poor, against compulsory land acquisition [30]. Such need was raised in a PIL filed before the Supreme Court in Sanjeev Agarwal vs. Union of India, which sought to invalidate the Forty-fourth Amendment and reinstate the fundamental right to property. The petitioner cited large-scale displacement caused by the creation of Special Economic Zones and projects like the Narmada Dam as reasons for his demand [31]. However, the Supreme Court dismissed its petition not on merits but

for a better case to be made in for that. Therefore, to avoid any change in the law stated and declared by the Keshavananda Bharti judgment.

References

1. <http://www.indianexpress.com/news/land-acquisition-bill-gets-a-green-signal-from-rajya-sabha/1164783/2>.
2. Nihal J, Srinidhi Rao (2012) The Land Acquisition Bill 2011: One step forward and two steps back. 5 NUJS L. Revs. 219.
3. Walter F (2004) Rehabilitation Policy for the Displaced.
4. Land Acquisition Act 2013, Section 2(1)
5. Maitreesh G, parikshit G (2011) The Land Acquisition Bill: A Critique And A Proposal. Economic And Political Weekly.
6. <http://www.tribuneindia.com/2013/20130908/pers.htm>
7. Michael Livein (2011) Rationalising Dispossession: The land Acquisition and Resettlement Bills.
8. Ibid
9. Rajesha Babu (2012) Constitutional Right To Property In Changing Times. Vienna Journal on International Constitutional Law 6: 213-247.
10. Jaivir Singh (2004) Unconstituting Property: The Destruction of Right to Property in India.
11. Allen Tom (2007) Property as a Fundamental Right in India, Europe and South Africa. Asia-Pacific Law Review 15: 193-218.
12. Usha Ramanathan (2011) Land Acquisition, Eminent Domain and the 2011 Bill.
13. State of Bihar vs. Maharajadhiraja Sir Kameshwar, 1952 SCR 889
14. Sir Kameshwar Singh (Darbhanga) v The Province of Bihar AIR 1950 Patna 392
15. AIR 1954 SC 170
16. AIR 1951 SC 458
17. Gae RS (1973) Land Law in India: with Special Reference to Constitution.
18. Kochuni vs. State of Madras
19. 17th Amendment Act,1964
20. AIR 1965 SC 845
21. AIR 1967 SC 1643
22. 1970 3 SCR 530
23. 1973 4 SCC 225
24. Fali SN (2006) The Silences In Our Constitution. 2 SCC (Jour) 15
25. (2011) 12 SCC 375
26. (2000) 10 SCC 664
27. The Bank Nationalisation Case (Rustom Cavasjee Cooper vs. Union of India), (1970)1 SCC 248
28. State of T.N vs. L. Abu Kavur Bai, (1984) 1 SCC 515
29. Vaibhavi (2008) Fundamental Right to Property. Times of India
30. <http://www.thehindu.com/news/national/court-rejects-plea-to-make-property-a-fundamental-right/article836599.ece>