PUBLIC PURPOSE AND COMPULSORY ACQUISITION OF PROPERTY

P. R. Ramachandra Rao

Justice Mukherjea said *in Charanjit Lal Chowdhury* v. *The Union of* India.[1]

> It is a right inherent in every sovereign to take and appropriate property belonging to individual citizens for public use. This right, which is describe das *eminent domain* in American law, is like the power of taxation, an offspring of political necessity, and it is supposed to be based upon an implied reservation by Government that private property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner.

The power of eminent domain is essential to a sovereign government. The provisions of the fifth amendment to the Constitution of the United States are that private property cannot be taken for public use without just compensation.[2] The power to appropriate lands or other property is essential to the independent existence and perpetuity of the government.[3] There is an absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or of any other authority.[4]

The principle of compulsory acquisition of property is founded on superior claims of the whole community over an individual citizen, but is applicable only in those cases where private property is wanted for public use or demanded for the public welfare.[5] Accordingly, the right of eminent domain does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation where the public interest will be in no way promoted by such transfer.[6]

There is no power in the sovereign to acquire private property in order to give it to private persons. As Wiloughby[7] forcibly puts it:—

---

1. A.I.R. 1951 S.C. 41, 53-54.
2. *U.S.* v. *Carmack*, (1947) 329 U.S. 230.
3. Kohl v. U.S., (1875) 91. U.S. 367.
4. 1 Colley, *Constitutional Limitations* 526 ,1927).
5. 2 Cooley, *Constitutional Limitations* 113 (1927).
6. *Id.* at 1124.
7. 2 Willoughby, *The Constitutional Law of the United States* 795 (1929).

> As between individuals, no necessity, however great, no exgncy however imminent, no improvement, however valuable, no refusal, however unneighbourly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate.

The limitation on the power of eminent domain that the acquisition or taking possession of property must be for a public purpose has been expressly engrafted in clause (2) of article 31 of the Constitution of India by its fourth amendment Act of 1955: "No property shall be compulsorily acquired or requisitioned *save for a public purpose. . . .*" The Supreme Court pointed out in *State of Bihar* v. *Kameshwar Singh*[8] that article 31(2), as it stood before the amendment, did not expressly make the existence of a 'public purpose' a condition precedent to the power of acquisition, but it was an essential ingredient of eminent domain, and the clause proceeded on the assumption that the acquisition can be for a public purpose only.

All private property is held subject to the demands of a public use. Whenever public uses demand the Government may appropriate any private property on the payment of just compensation.[9] Every character of right, title or interest in private property which a citizen may possess is subject to the power of eminent domain.[10] Property denotes not only the physical thing itself, but also the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.[11] In *State of West Bengal* v. *Subodh Gopal Bose*[12], the Supreme Court enunciated that property in Article 31

> must be understood both in a corporeal sense as having reference to all those specific things that are susceptible of private appropriation and enjoyment as well as insists judicial or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the exclusion of all others.

After a scrutiny of the authorities, Das J, in *State of Bihar* v. *Kameshwar Singh* [13], reached the conclusion that no hard and fast definition of 'public purpose' can be laid down, for its concept has been rapidly changing in all countries; he formulated, as a working definition, that whatever furthers the general interests of the community, as opposed to the particular interest of the individual, must be regarded as a public purpose. However,

---

8. A.I.R. 1952 S.C. 252, 273.
9. *Long Island Water Supply Co.* v. *Brooklyn,* (1897) 166 U.S. 685.
10. *Chappell* v. *U.S.* (1895) 160 U.S. 499.
11. *U.S.* v. *General Motors,* (1943) 825. U.S. 373.
12. A.I.R. 1954 S.C. 92, 107.
13. *Supra* note 8.

> with the onward march of civilization our notions as to the scope of the general interest of the community are fast changing and widening, with the result that our old and narrower notions as to the sanctity of the private interest of the individual can no longer stem the forward flowing tide of time and must necessarily give way to the broader notions of the general interest of the community.[14]

In that case, the Supreme Court adverted to the meaning and implication of the expression 'public use' in American law, holding it to be of more limited import than 'public purpose,' as used in the Indian Constitution. Cooley[15] says that no satisfactory definition of 'public use' has ever been achieved by the American courts. Two different theories are presented by judicial attempts to describe the subjects to which the expression would apply. One theory of 'public use' limits the application to 'employment', 'occupation', while a more liberal and more flexible meaning makes it synonymous with 'public advantage', 'public benefit'. The more limited application of the principle appears in the earlier cases, and the more liberal application has been rendered necessary by complex conditions due to recent developments of civilization and the increasing density of population. In the very nature of the case, modern conditions and the increasing interdependence of the different human factors in the progressive complexity of a community make it necessary for the government to touch upon and limit individual activities at more points than formerly. Likewise, the Corpus Juris[16] observes that no general definition of what degrees of public good will meet the constitutional requirements for a 'public use' can be framed, as it is in every case a question of public policy. The meaning of the term is flexible and is not confined to what may constitute a public use at any given time, but in general it may be said to cover a use affecting the public generally, or member thereof, as distinguished from particular individuals. Some courts have gone so far in the direction of a liberal construction as to hold that 'public use' is synonymous with 'public benefit', 'public utility' or 'public advantage', and to authorise the exercise of the power of eminent domain to promote such public benefit etc., especially where the interests involved are of considerable magnitude.

In *Hamabai Framjee* v. *Secretary of State*[17], the meaning of the words 'public purposes' fell to be considered by the Judicial Committee; it did not think it fit to attempt a precise definition of the expression but was content to quote with approval the opinion of Bachelor J, in

---

14. *Id.* at 275.
15. *Supra* note 5 at 1139-1140.
16. *Corpus Juris Secundum* Vol. XX, Article 39, 552-553.
17. 42. I.A. 44, U.C.

the judgment appealed against, that the phrase 'public purpose', whatever else it may mean, must include a purpose, that is, an object or aim in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned. It is this opinion that the Supreme Court in *State of Bihar* v. *Kameshwar Singh*[18] affirmed as being of the essence of the concept of 'public purpose'.

It has been held that not only the present demands of the public but also their future demands, as may fairly be anticipated, should be taken into consideration.[19] In discussing what constitutes a public use, the Supreme Court of the United States recognized the inadequacy of, use by the general public, as a universal test. A purpose, which is for the benefit of individuals, may still be a public purpose, provided that such persons are benefitted not as individuals but in furtherance of a scheme of public utility.[20] Overriding public interest is assumed from the unique legal status of the public utility despite the presence of direct benefit to a private industry.[21] If the use for which land is taken by eminent domain is public, the taking is not invalid merely because an incidental benefit will ensure to private individuals.[22] Professor Willis[23] has pointed out that, according to the newer viewpoint there is a public use if the thing taken is useful to the public. This makes public use for eminent domain practically synonymous with public purpose for taxation and somewhat like social interest for police power. It is not necessary for the benefit to be for the whole community, but it must be for a considerable number. If the purpose for which the acquisition is made results in benefit or advantage to the public, it is a public purpose, though the acquisition may be in favour of a private corporation or of individuals. So it was held in *Rindge Co.* v. *Los Angeles*[24] that it is not essential that the entire community or even any considerable portion of it should directly enjoy or participate in any improvement in order to constitute a public use. And, it is not necessary, in order that the use should be public, that every resident in the district should have the right to the use.[25]

---

18. *Supra* note 8.
19. *Rindge Co.* v. *Los Angeles*, (1923) 262 U.S. 700.
20. *Clark* v. *Nash* (1905) 190, U.S. 361.
    Strickly v. *Highland Mining Co.* (1906) 200 U.S. 527.
21. *Union Lime Co.* v. *Chicago N.W.R. Co.* (1914) 233 U.S. 211.
22. 2 Nichols, *Eminent Domain* 447 (1963).
23. Wills, *Constitutional Law of the United States* 817 (1936).
24. *Supra* note 19.
25. *Fallbrook Irrigation District* v. *Bradley*, (1896). 164 U.S. 112, 162.
    Strickly v. *Highland Roy Mining Co.*, (1906) 200 527, 531.

Where the acquisition of land by a company was intended for the construction of certain works, and the consent of the Government had to be given on its satisfaction that the works were likely to prove useful to the public under section 40(1)(b) of the Land Acquisition Act, 1894, as it then stood, the Supreme Court held that it was works like a hospital, a public reading room or a library or an educational institution open to the public or such other work as the public might directly use, that were contemplated and it was only such works which were useful to the public in that way and could be directly used by it that land could be acquired for a company under the Act. The fact that the product of the company would be useful to the public was not sufficient.[26]. Sarkar J in a dissenting judgment, said that it would be unduly restricting the meaning of th eword 'useful' to say that a work is useful to the public only when it can directly be used by the public. The work contemplated in a work from the construction of which the public can in any way derive benefit, whether by direct use of the work or by the enjoyment of the fruits of the activities carried on there or otherwise.

The Supreme Court has pointed out, in *State of Bombay v. Ali* Gulshan[27] that the Constitution of India contemplates three categories of 'purpose' in items 33, 36 and 42 of the lists I, II and III respectively —Union purpose, State purpose and any other public purpose. There may be cases where the purpose of the acquisition or requisition is neither the one nor the other but a public purpose. Cases where the State acquires or requisitions property to facilitate the coming into existence of utilitarian institutions, or schemes having the public welfare at heart, fall within the third category of other public purpose. And, an undertaking may have three facets or aspects and may serve the purpose

The question what is a public use is a judicial one[28] but, as stated by Weaver[29]. What constitutes a public use is largely a question for the legislature and the courts will not interfere except to enquire whether the legislature could reasonably have considered the use a public one. Generally, the phrase is not limited to business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. It may include not only the present demands of the public, but also those which may be fairly anticipated. The courts, however, require that the use shall be fixed and definite. It must be one in which

---

26. *R. L. Arora* v. *State of U.P.*, A.I.R. 1962. S.C. 764, 774.
27. A.I.R. 1955 S.C. 810, 811.
28. *Kohl* v. *U.S., Supra* note 3.
29. Weaver *Constitutional Law and its Administration,* 546 (1946).
30. (1952) 348 U.S. 26.

the public actually has an interest, and the terms and manners of enjoyment. It may include not only the present demands of the public, but also those which may be fairly anticipated. The courts, however, require that the use shall be fixed and definite. It must be one in which the public actually has an interest, and the terms and manners of enjoyment must be within the control of the State. In *Berman v. Parker*[31] the Supreme Court of the United States pointed out that the concept of public welfare is broad and inconclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. The State's power to eminent domain may be exercised if the taking "be essential or material for the prosperity of the community"[31]. The rule is, when the legislature has declared a purpose to be public, its judgment will be upheld by the court unless it is palpably without foundation[32]. In deciding whether expropriation of private property is for a public use, the court has appropriate regard to the diversity of local conditions and considers with great respect declarations as to the uses considered to be public in the light or local exgencies. However a legislative declaration as to what constitutes a public use is not binding upon the court when called upon to determine whether the taking is without due process as being for a non-public use.[33] A legislative declaration of facts that are material only as the ground for enacting a rule of law that a certain use is a public one may not be held conclusive by the courts, but a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect[34]. The decision of the legislature is entitled to deference until it is shown to involve an impossibility.

The courts are not concerned with the wisdom, expediency or even directly with the necessity of the uses for which the land is proposed to be taken. These are legislative questions with which, it is clearly estab-

---

31. *Fallbrook Irrigation District* v. *Bradley*, (1896) U.S. 112.
32. *U.S.* v. *Gettysburg Electric R. Co.*, (1896) 160, U.S. 668.
33. *Cincinnati* v. *Vester*, *Supra* note 28.
34. *Block* v. *Hirsch*, (1921) 256 U.S. 185.
35. *Cincinnati* v. *Vester*, *Supra* note 28.
Old Dominion Co. v. *U.S.* (1925) 269, U.S. 55.
Tennessee Valley Authority v. *Welch.*, (1946) 328, U.S. 772.
36. *Puerto Rico* v. *Eastern Sugar Associates*, (1946) 328 U.S. 772.

lished, the courts have nothing whatever to do[36]. Any departure from this judicial restraint would result in courts deciding on what is and what is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision.[37]

37. *Tennessee Valley Authority* v. *Welch, Supra* note 35.