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Constitutional Right to Property-A Revisit

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Abstract

The most controversial provision perhaps among all the provisions of the Constitution has been the right to property. It was so even when it was being framed by the frames of the Constitution and it has been so after its coming into operation. The Constitution 44th Amendment Act, 1978 has eliminated Article 31 of the Constitution. Thus right to property is no more a fundamental right which was previously guaranteed under part III of the Constitution. But the right to property has been inserted as Article 300A under part XII of the Constitution. Prima Facie, it is the State which would be the judge to decide whether a purpose is a public purpose, although this is subject to judicial review. Public interest has always been considered to be an essential ingredient of public purpose. But every public purpose does not fall under Article 300A.

Keywords: Acquisition, constitutional validity, property, public interest, zamindari abolition

INTRODUCTION

Property means anything having a proprietor. It may be tangible or intangible. Among intangible category, movable and immovable properties are involved. The most controversial provision perhaps among all the provisions of the Constitution has been the right to immovable property. It was so even when it was being framed by the frames of the Constitution and it has been so after its coming into operation. The Constitution 44th Amendment Act, 1978 has eliminated Article 31 of the Constitution. Thus right to property is no more a fundamental right which was previously guaranteed under part III of the Constitution. But the right to property has been inserted as Article 300A under part XII of the Constitution.

Saving of Laws Providing for Acquisition of Estates etc.

Article 31A provide for the following:

1. The acquisition by the State of any such estate or any rights therein or the extinguishment or notification of any such rights. Estate here means the property included within that expression according to the land tenures applicable in the area where it is situated. And 'rights' in relation to an estate means proprietary and other intermediary rights. In short such laws are those which relates to agrarian reforms, or
2. The taking over of the management of any property by the state for a limited period either in the public interest, or in order to secure the proper management of the property, or
3. The amalgamation of two or more corporations either in public interest or in order to secure the proper management of any of the corporations, or
4. The extinguishment or modification of any rights of managing agent be secretaries and treasurers, managing directors or managers of corporations or of any voting right of shareholders thereof, or
5. The extinguishment or modification of any right accruing by virtue of any agreement, lease or licence for the purpose of searching for or mining any mineral or mineral oil or the premature termination or cancellation of any such agreement, lease or licence.

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Two limitations however have been imposed with respect to the claim relating to the acquisition of the estates. They are:

1. If such a law is made by a State Legislature then it cannot be protected by the provision of Articles 3lA discussed above unless after having been resorted for the consideration of the President and it has received his assent; and.
2. If the law provides for the acquisition of (i) any land within the ceiling limit applicable in that area (ii) any building or structure standing there on or apartment thereto, it (law) shall not be valid unless it provides for payment of compensation at a rate which shall not be less than the market value there of. This provision, however has been amended by the Constitution (29th amendment) Act.

This Article was inserted with retrospective effect by the Constitution (1st amendment) Act, 1951. It was inserted primarily to secured the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular. Articles 3l A and 3l B were introduced because the constitutional validity of several zamindari and land reforms legislation were challenged before various High Courts. Article 31A could not be challenged on the ground that a reasonable procedure, and contemplated by Article 21, was not provided for by the impugned statute.

Art.31A is an exception to the right to equality as guaranteed under Article 14 and to the six freedoms guaranteed under Article 19. If they come into conflict with any law mentioned in Article 31 A, the law made under Art.3l A will prevail.

Article 31 A thereof covers four categories:

i. Acquisition by state of any estate
ii. Acquisition of any rights therein
iii. Extinguishment of rights and
iv. Modification of rights.

The four categories are different. Acquisition will result in all the rights being transferred to the State. Similarly, in the case of an extinguishment, if the result is that all the rights stand transferred to the State it would fall within the expression "acquisition". At the same time, acquisition of any right in an estate may amount to modification since one of the right of the owner has been acquired. There is essential difference between "acquisition by the State" and "modification or extinguishment of rights". In the first case, the State is the beneficiary while in the other it is not a beneficiary.

The object of Article 31A was obviously to facilitate agrarian reforms and abolish zamindari holdings. The earlier decisions of the Supreme Court construed statutes by giving a strict interpretation to "agrarian reforms". Thus in *Kochunni K.K. v. State of Madra [1]*, it was held that a provision which deprived a *sthanee* of his property and vested the same in the *tarvad* would not be protected by Article 31 A has the rights of the proprietor of an estate and members of his family had no connection with agrarian reform. In *Deputy Commissioner v. Durga Nath Sharma [2]*, it was held that acquisition of land to ensure flood control or soil erosion has nothing to do with agrarian reform.

In *Vajravelu v. Special Deputy Collector [3]*, it was held that the Land Acquisition (Madras Amendment) Act 1961 was not a law for agrarian reform and therefore not protected under Art. 31-A. The Act was passed not only to clear slums but for housing schemes and creation of modern suburbs and therefore could not be regarded as agrarian reform. But in *State of Gujarat v. Kamalaben Jeevanbhai [4]*, it was said that the termination of annual grant with respect to certain forest rights was held to be part of agrarian reform.

The S.C struck down this provision as unconstitutional in 1973 on the ground that it was beyond the competence of the Constitution (25th Amendment) Act which introduced article 31C to take away the

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power of judicial review to question whether a particular law which professed to give effect to Directive principles was a reality [5].

The word "acquisition" must denote not only acquisition of ownership but also acquisition of some rights particularly an acquisition which leaves the person an owner in name only. This clause provide for take over of management of any property for a limited period. The take over must be in public interest or to secure the proper management of the property. The taking over must also be for a limited period.

If the Act is protected under Article 31A, it is immune from attack on grounds of being violative of Article 14, 19 and 31. But this does not stand in the way of the court examining the constitutional validity of any particular provision of the Act. In *Balmadies Plantations Ltd. v. State of Tamil Nadu [6],* the court held that section 3 of an impugned provision that provided for transfer of forest land in certain estates the Government was not protected by Article 31A. Also in *Kunjukutty Sahib v. State of Kerala [7],* provision for discharge of arrears of rent will not be protected under this Articles.

Thus in *Bhim Singhji v. Union of India [8],* it was held that the court can still consider whether particular law purporting to implement any directive principle can question its constitutionally if it finds that the nexus between that law and the directive principle relied on is illusory or colourable or whether it has direct and reasonable nexus with the directive principle in article 39(b) article 39(c).

Validation of Certain Acts and Regulations

Art 31B make a long sweep in protecting certain laws against attack on the grounds of violation of any fundamental rights. The law so protected are specified in the Ninth Schedule to the Constitution. These laws also relate mainly to land reforms. The effect of this Article is to confer immunity on statues which have been included in the Ninth Schedule form challenge on grounds of violation of the fundamental rights conferred by Part-III. When the appeal was pending before the Supreme Court, the impugned enactment was included in the Ninth Schedule. Its constitutional validity could no longer be challenged on the ground that it violated Article 19.

In *Kesavananada Bharati's* case, the majority view was that Parliament had no power to amend the Constitution so as to damage or destroy its basic or essential features or its basic structure. Therefore, the question arose as to whether Parliament could pass laws and insert them in the Ninth Schedule thereby rendering them immune from any attack on the ground that they violated fundamental rights.

The various Acts mentioned in the Ninth Schedule will be cured of any defect as regards violation of fundamental rights. The express words of Article 31B cured such defects with retrospective operation from the dates on which the Acts were put on the statute book. Even if these Acts were void or inoperative when they were enacted by reason of infringement of Article 13(2), they assume full force and vigour from the respective dates of their enactment after their inclusion in the Ninth Schedule. It is not necessary that the State Legislatures must re-enact the enactments which have been included in the Ninth Schedule.

The object and purpose of introducing Articles 31 A and 31 B was to protect agrarian reform from invalidation. The protection of Article 31B is available irrespective of whether the impugned enactments are pre or post Constitution laws. This is made clear by the emphatic language of Article 31B. The protection under Article 31B is only in the context of fundamental rights. It does not prohibit challenge on the ground that the particular enactment is beyond the legislative competence of the legislature which enacted it.

It has been found in *Waman Rao v. Union of India [9],* that the amendment made to an Act subsequent to the inclusion of the Act in the 9th schedule are not entitled to the protection of Art 31-B and therein validity can be changed.

In a recent decision the Supreme Court has referred to the apparent inconsistencies in the case of *Waman Rao.* The court pointed out that when certain Acts had been held to be unconstitutional, they were included in the Ninth Schedule. Therefore, the Supreme Court has now referred the following two questions for the decision of nine Judges bench:

1. Whether an Act or Regulation which, or a part of which is or has been found by this Court to be violative of one or more of the fundamental rights conferred by Articles 14,19, 31 can be included in the Ninth Schedule?
2. Whether it is only a constitutional amendment amending the Ninth Schedule that damages or destroys the basic structure of the Constitution that can be struck down?

The Supreme Court has also directed reconsideration of the *Bhim Singhji's* case. It is submitted that the scope of Parliament's power to include provisions in the Ninth Schedule also requires reconsideration. While there can be no doubt that provisions relating to agrarian reform can be included, there are various enactments like the Essential Commodities Act, COFEPOSA, Urban Land Ceiling Act and so on whose inclusion cannot be justified under the Ninth Schedule. Wherever the enactment is covered by clauses (a) to (e) of Article 31 A, it gets the protection of Articles 14 and 19. There is no justification for including any enactment arbitrarily under Article 31B.

In *Srinivasa Raghavachar H.S. v. State of Karnataka [10]*, the Supreme Court refused to reconsider the *Waman Rao* cases. In *Munjushree Plantations Ltd. v. State of Tamil Nadu [11]*, the question whether an Act which affected the basic structure could be given effects to when it had been placed in the Ninth Schedule and questions of law pertaining to Article 31A, 3lB and 31 C were referred to five-member Bench.

Although an enactment which is included in the Ninth Schedule gets the protection of Article 31B, the amendments made to such an Act will not automatically receive such protection if it is made after the parent Act was included in the Ninth Schedule. However, where the amendment were already made to the enactment and the Amended act was included in the Ninth Schedule, the protection of Article 3lB would be available.

The provision of Article 31B and the Ninth Schedule proceed on the assumption that laws passed before the commencement of the Constitution did not contravene the provisions of Section 299 of the Government of India Act, 1935. The Constitution (29th Amendment) Act 1972 added Kerala Land Reforms Act 1969 & The Kerala Land Reforms Act 1971 to the 9th schedule. At present the Constitution (78th Amendment) Act, 1995 amended the Ninth Schedule of the Constitution and the total number of Acts included in the schedule has risen to 284.

Saving of Laws Giving Effect of Certain Directive Principles

The New Art.31C added by 25th amendment of the Constitution lifts the constitutional limitations on the powers of the State imposed by Art. 14 (equality before law) Art.l9. (Freedom) as regards law giving effects to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39. These Principles are:

1. That the ownership and control of the material resources of the community are so distributed as best to subserve the common good and
2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The object of this amendment as state in its preamble, was to get over the difficulties placed in the way of giving effect to the directive principles of State policy. It further provided that any which contained a declaration that it was put on the Statute book for giving effect to such policy could not be called into question in any Court on the ground that the new law did not give effect to such policy. The declaration clause of Art. 31-C thus barred the judicial review of such laws completely.

Fortunately, in *Kesavanand Bharti v. State of Kerala [12]* the majority struck down the declaration clause of Art. 31-C as unconstitutional on the ground that it was destructive of the basic feature of the Constitution, that is, the judicial review. The first part of the Clause was however held to be valid. The majority judgment clearly held that any law enacted by Parliament for giving effect to the directive principles contained in clauses (b) and (c) of Art. 39 cannot be declared void on the ground that it violates or abridges any of the rights conferred by Articles 14, 19 or 31.

The effect of declaring the second para as void is that the Court will have jurisdiction to examine whether there is a direct and reasonable nexus between the laws passed to implement the directive principles contained in Art.13 (b) and (c).

The absence of a declaration in the Act that it was intended to give effect to Art. 39(b) would not render Art. 3l-C inapplicable. The question whether an Act is intended to secure the objects contained in Art. 39(b) or not depend upon the declaration by the legislature but depends on its contents. In order to ascertain this, the Court has to examine the legislation as a whole.

The confusion created *Sanjeev Coke Manufacturing Co.* case was clarified by the recent judgment of the Supreme Court on *State of Tamil Nadu v. L. Abu Kavur Bai [13]* wherein a five Judge Bench held that although the directive principles are not enforceable, yet the court should make a real attempt at harmonising and reconciling the directive principles and the fundamental rights and any collision between the two should be avoided as far as possible.

In *Minerva Mills* case, it was urged that the amendments to Articles 31 C destroyed the harmony between Part III and IV of the Constitution by making fundamental rights subservient to the Directive Principles of State Policy. The Supreme Court pointed out that Indian Constitution is founded on the bedrock of the balance between Part III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. The goals set out in Part IV should be achieved without the abrogation of the means provided by Part III. The startling consequence of the amendment to Article 31C was that even if a law was in total defiance of Article 14 and 19, its validity will not be open to question as long as its object is to secure a directive principle of state policy._The amendment to Article 31 C was_unquestionably made with a view to empowering the legislatures to pass laws of a particular description even if they violated the discipline of Articles 14 and 19. The amendment to Article 31 C was held to be unconstitutional.

In *Minerva Mills* case has an unfortunate sequel in the *Sanjee Coke* case. In this case, the Coking Coal Mines (Nationalisation) Act, 1972 was challenged. The Act was passed to nationalise all coking coal mines and coke oven plants situated in or about the coal mines. In an earlier case, it was held that the word "mine" in Section 3(j) of the Act would not include coke oven plants. This view was overruled thereby enabling nationalisation of coke oven plants as well. The impugned Act was also held as not violative of Article 14. The judgment could have stopped here but for inexplicable reasons, it proceeded to hold that the view taken by the majority in the *Minerva Mills* case was not correct, although not expressly saying so. It was observed that the *Kesavananda Bharati* case had upheld the first part of Article 3lC which protected laws giving effect to the policy of Article 39(b) or (c). The 42nd amendment only extended the protection to laws giving effect to all Directive Principles laid down in Part-IV of the Constitution.

The mere absence of a declaration that it was enacted to give effect to Article 39(b) would not render Article 31 C inapplicable. There is no requirement of such declaration and the court is entitled to satisfy itself about the character of its legislation by examining all parts of it. In *Rashtriya Mill Mazdoor Sangh v. State of Maharashtra [14]*, the court is not excluded from examining whether there is a nexus between the impugned enactment and the directive principles in Articles 39(b) or (c).

In *Maharashtra State Electricity Supply Co. v. Thane Electric Supply Co. [15]*, Nationalisation is the acquisition and control of privately owned business. An amendment providing for payment of an amount equivalent to the book-value (after depreciation) instead of the market value as compensation has a nexus with the object under Article 39(b). The amendment is to make the cost of economic reform affordable.

Article 300A: "No person shall be deprived of his property save by authority of Law".

Article 300A falls within Chapter IV of Part-XII. This Chapter contains only Articles 300A which now deals with the right to property. This article states that no person shall be deprived of his property save by authority of law. This Article was introduced from 20th June 1979, when Articles 19(1) (f) and 31 were deleted by the Forty Fourth Amendment to the Constitution. Thus, the right to property was removed from Part-III relating to Fundamental rights and was reintroduced as Article 300A as a Constitutional right. Right to hold a property is no more a fundamental right. Instead, in *Jilubhai v. State of Gujarat [16],* this was considered as a Constitutional right.

A person whose property is deprived cannot invoke Article 32 which is available only for violation of fundamental rights. He has to invoke Article 226 or file a suit or adhere to any other statutory remedy if available. The fundamental right to property has been abolished because of its incompatibility with the goals of "justice, social, economic and political", "equality of status and of opportunity" and "establishment of social, democratic republic" as contemplated by the Constitution. This was held in *State of Maharashtra v. Chandrabhan [17]:* It is submitted that these observations are utterly meaningless. In Article 31, it has been explained as to why deletion of right to property was not necessary for the attainment of any constitutional goal. Thirty years after the deletion of the right property, the only result is that it has ceased to be a fundamental right. There is no evidence that the deletion of this right has promoted social or economic justice or has facilitated equality of status and opportunity.

Right to property did not pertain to the basic structure of the Constitution and it was subordinate to the common good. This view was subsequently reiterated in a few cases which have been set out in *Jilubhas's* case.

The word 'law' used in Article 300A must be an act of Parliament or of state legislature, a rule or statutory order having force of law. The State Government cannot, while taking recourse to the executive power of the state under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by mere executive fiat or order. It is, therefore, necessarily subject to Article 300A.

In MS Delhi Airtech Services Pvt Ltd v State of Uttarpradesh &Anr [18] the court observed that in a welfare state statutory authorities are bound not only to pay adequate compensation, but there is also a legal obligation upon them to rehabilitate such persons. It is not permissible for any welfare State to uproot a person and deprive him of his fundamental constitutional human rights, under the grab of development. The court remarked that depriving the person of their immovable properties was a clear violation of Article 21 of the Constitution. Any law depriving the rights should be just, fair and reasonable.

Whenever acquisition is carried out under State's order, it can only be for 'public purposes' which is however, subject to judicial review. It was observed that every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority which has been reiterated in the under-mentioned cases. In *K.T. Plantation Private Ltd* v *State of Karnataka [19]* the court observed that the requirement of public purpose is the rule when a person is deprived of his property and the principal requirement of compensation is not incorporated under Article 300 A.

When the right to property was deleted as a fundamental right by the 44th Amendment, provisions were made to protect the interest of minority educational institutions. It was provided that the amount of compensation payable for acquisition of their property should not restrict or abrogate the right guaranteed by Article 30(1). Similarly, the Seventh Amendment, provided that compensation to small farmers should not be less than the market value of the land acquired.

The law relating to compensation has been discussed in Article 31 and need not be repeated here. The case law on the subject has been considered in Jilubhai's case. The court held that where property is acquired to implement the Directive Principles of State Policy, the compensation need not be a just equivalent. The amount determined must not be illusory and the adequacy of the resultant amount cannot be questioned in a court of law. But compensation based on irrelevant principles will be subject to judicial review.

Interestingly, the Supreme Court had held in *Bhim Singhji v. Union of India [20],* that payment of an amount of Rs. 2lakhs as the maximum limit for property worth Rs. 2 Crores would not be illusory. It is submitted that payment of 1 % of the value would be totally illusory. Such absurd provisions are substantially responsible for the cancer of corruption that has wrecked this country.

CONCLUSION

Prima Facie, it is the State which would be the judge to decide whether a purpose is a public purpose, although this is subject to judicial review. Public interest has always been considered to be an essential ingredient of public purpose. But every public purpose does not fall under Article 300A.

In *Bishamber Dayal Chandra Mohan v. State of U.P. [21],* the Supreme Court has very clearly stated that the executive cannot deprive a person of his property without the authority of law and 'law' in this context means "an act of Parliament or of a State Legislature, a rule, or a statutory order, having the force of law, that is positive or State-made law". In view of the interpretation given to the word 'law' in Article 21 in *Maneka Gandhi v. Union of India [22],* and some subsequent cases that 'law' must be fair, reasonable and just law, the Bombay High Court in *Basantibai v. State [23],* invalidated some provisions of the Maharashtra Housing and Area Development Act, 1976 under Article 300-A because according to it the law was not just and fair insofar as it provided less compensation for the acquisition of property than provided under the Land Acquisition Act, 1894.

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