

The right to property under the Indian constitution

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Abstract

In India, no fundamental right has given rise to so much litigation between states and individuals than a property right. The Supreme Court of India protected the right to property of individuals under the ambit of fundamental rights but the government under the influence of socialistic philosophy curtailed the right to property as a fundamental right by several amendments. The present chapter tries to analyze the right to property before and after the 44th Amendment 1978. It also tries to find out the reason for the demise of the right to property as a fundamental right under the Indian Constitution.

Key Word: Property, Constitution, Fundamental, Right, Compensation etc.

Introduction

On 10 May 1951, the Constitution (First Amendment) Act was moved by the then Prime Minister of India, Jawaharlal Nehru, and enacted by parliament on 18 June 1951. Jawaharlal Nehru was an ardent supporter of agrarian reform and social reform. The First Amendment Act curtailed the fundamental right to property guaranteed by Article 31. The reason behind this was to achieve agrarian reform passed by the State Legislature. The First Amendment added two new Article 31A and Article 31B and also added Ninth Schedule in the Indian Constitution. The Ninth Schedule was a new technique by passing judiciary, in other words whenever parliament incorporated any Act into the Ninth Schedule judiciary cannot make a judicial review. It becomes fully protected against any challenge in a Court. Even an Act declared invalid by a Court becomes valid retrospectively after being incorporated in the Ninth Schedule.

Philosophy behind the inclusion of Right to Property in Article 19(1)(f) of the Constitution

On 9th December 1946, the Constituent Assembly was first convened and the drafting committee of the Constituent Assembly adopted Jawaharlal Nehru's resolution on 22 January

1947, which formed the basis of various provisions including the right to property of the Constitution.¹ The inclusion of the property right is a fundamental right under Article 19(1)(f) plays a vital role in the realization of the objectives of Jawaharlal Nehru's resolution.²

The Constituent Assembly has constituted several committees³ for the protection of the private individual right to property. Subsequently, The Constitutional Assembly has elected an advisory committee and its Chairman was Sardar Vallabhai Patel.⁴

K.T. Shah submitted a comprehensive note regarding the property as:

"Every citizen would be guaranteed the right to acquire, own, hold and dispose of property subject to the law in force; the right would be subject to the sovereign power of the State to acquire private property under the law; no proprietary rights would be allowed to, or recognized for, persons in industries concerning defense production, the soil of the country; mines, forests and other forms of natural wealth; industries declared by law as key, vital or parent industries; and public utilities, social services and so on; existing rights of ownership of any degree in agriculture land and properties under the preceding item would be acquired by the State subject to compensation, if any, as might be deemed proper and reasonable; existing rights in the property of religious institutions would continue but there would be no acquisition by them in the future. The State could acquire their properties and decide what compensation should be given, and if so, then how much."⁵

K.T. Shah conceded that State may acquire a property with or without compensation but in a certain case; State must pay compensation to the landowner as it would be reasonable.⁶ The

K.M. Munshi also submitted a comprehensive note on fundamental rights regarding the property as:

"All citizens would have right to acquire property subject to the restrictions imposed by laws; no person would be deprived of his property without due process of law; the property right would be guaranteed inter alia to religious bodies; Expropriation for public reasons only would be permitted on

¹ CAD, Vol. I, pp. 58-60

² *Ibid*

³ The Advisory Committee, the Sub-Committee on the Fundamental Rights, and the Drafting Committee.

⁴ CAD, Vol. I, p. 347

⁵ *Quoted by Naveen Sharma, Right to Property in India*, 48 (1st edn., 1990)

⁶ *Ibid*

conditions determined by the law and in return of just and adequate compensation determined according to the principles laid down by law."⁷

The view of K.M. Munshi was different from the K.T. Shah about the property right. Munshi's draft was wider support for the individual's right to property while K.T. Shah was more supportive in favor of the State for the acquisition of property in other words K.T. Shah's view was based on State ownership, not individual property rights. But both favored acquisition of property in the larger public interest. K.T. Shah was not in favor to pay compensation for the acquisition of property while K.M. Munshi was in a favour of adequate compensation in case of acquisition of property.

Ambedkar's draft was different from K.M. Munshi's view of the property right. Ambedkar did not mention any personal right of an individual to acquire, hold, and disposition property rights. But they talked about the acquisition of private property and State ownership over certain properties. In his draft, he suggested that the industry should be control by the State and run by the State. Agriculture should be a State industry and the insurance company should be a monopoly of the Sate. The State should acquire agricultural land held by private individuals the State should provide compensation to them in the form of debenture equal to the value of their rights inland. K.T. Shah's views on the property right were similar to that of Dr. B.R. Ambedkar. There was the main distinction between Dr. Ambedkar and K.T. Shah that Ambedkar favored compensation while Shah left it to the discretion of the State to pay it or not. Dr. B.R. Ambedkar did not speak about cash payment but the payment in bonds. Finally, the drafts were discussed by the sub-committee and submitted to the Chairman of the Advisory Committee. Through intense debate, the Constituent Assembly ultimately adopted, Article 19(1)(f)⁸. This right was however subject to reasonable restrictions by the Union and State Legislatures in the public interest, stipulated in Article 19(5)⁹.

Article 19 merely referred to a citizen's capacity to own property. In other words, Article 19 forbade the State from denying particular individuals or classes the right to own property or to carry on the business but did not protect a citizen's interest in a particular piece of property

⁷ Quoted by B. Shiva Rao, V.K.N. Menon, (eds.), *The Framing of India's Constitution: Select Documents*, 74-75, Vol II (1st edn., 1966)

⁸ Art. 19(1)(f) of the Constitution of India, 1950: provides Indian citizens the right to acquire, hold and dispose of the property

⁹ Art. 19(5) of the Constitution of India, 1950: provides Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Schedule Tribes.

from State interference. Sastry C.J. in *the Commissioner, Hindu v. Sri Lakshmindra Thirtha Swamiar*¹⁰ noted that Article 19(1)(f) only protected the rights of citizens; any other interpretation would make Article 19(1)(f) redundant. But if Articles 19(1)(f) and Article (5) were understood as dealing only with the capacity to acquire, hold and dispose of the property in general, this distinction made sense. In that case, it would be justifiable to exclude aliens from such capacity, as had been done in several countries for the benefit of nationals, particularly concerning rights inland. This interpretation finds some support from the Constituent Assembly Debates, particularly the statement of T.T. Krishnamachari, later the Finance Minister. But even on Krishnamachari's statement, the right did not merely protect the capacity to acquire, hold and dispose of the property but some concrete though basic property entitlements.

Article 19(1)(f) has been repealed by the 44th Constitutional Amendments on 20th June 1979. This Article guaranteed the fundamental right of freedom to the citizens of India to acquire, hold, and dispose of property formed a part of a group of Articles under the heading of right to freedom parliament retains each sub-clause from (a) to (e) and (g), it is a clear indication of contrary view to Article 19(1)(f).

The term property is used in various contexts and senses. If one looks around the surrounding, everything can be categorized as property. Every object, whether tangible or intangible having some value to human beings, may be termed as property. The property consists of land, shares, buildings, and debts due to another person. The important characteristic of property is the value attached to it. Property is a source of wealth. The value of the property, therefore, may be either monetary or personal. However, the term when used in the legal sense has a definite connotation. It is the right to enjoy and to dispose of certain things in an absolute manner as one thinks fit.¹¹

In *Swami Motor Transports (P) Ltd. v. Sri Sankaraswamigal Mutt*¹², the Supreme Court ruled that Article 19(1)(f) applied equally to abstract rights of property as well as to concrete rights of property. The Supreme Court further suggested that abstract rights of property can be acquired by State, while the concrete right of property is to be deprived by the State in *Madan Mohan Pathak v. Union of India & Ors.*¹³, the Supreme Court held that "Property" under

¹⁰ AIR 1954 SC 282

¹¹ *Ibid*

¹² AIR 1963 SC 864

¹³ AIR 1978 SC 803; *See also, Jayantilal R. Shah v. R.B.I.*, AIR 1997 SC 370

Article 19(1)(f) and Article 31(2) comprised tangible property or intangible, in other words, it comprises every form of property.

Article 19(5) impose reasonable restriction to acquire, hold and dispose of the property in the interests of the general public or for the protection of interests of Scheduled Tribe in another word individual private property right has been respected unless a clear case of imposing restriction made out in the name of general public interests but the condition must be harmony in the eye of the law, it must be harmony between Article 19(1)(f) and 19(5) and object must be reasonable which is to be achieved.¹⁴

The Supreme Court in the various decisions¹⁵ upheld the validity of land acquisition by the State in the name of general public interest, it includes public order, public health, and morality, *etc.* Various State Governments enacted the Rent Control Act and Eviction Act on the ground of general public interest to restrict the property right to the landlord. Sometimes acquisition arises, whether a restriction is in the interest of the public or not. It has been held in *Ram Krishna v. Radhamal*¹⁶, that whether the land acquisition is in the general public interest or not is a justifiable issue and such types of a question must be made available for argument in Court. A law limiting the size of holding of land in a single individual hand and other laws promoting the consolidation of land to a private individual consider as a reasonable restriction.¹⁷

The Supreme Court in *Manchegowda Etc. v. State of Karnataka*¹⁸, upheld the provision of the Karnataka Scheduled Castes and Scheduled Tribes Act, 1979. This prohibits the transfer of land by SC and ST members to whom such land is transferred by the State Government as ownership, with this condition that he cannot transfer government allotted land to anyone. The Supreme Court decided that such types of restrictions are reasonable under Article 19(5). The restriction to eviction from land must be reasonable, it should not be unreasonable and arbitrary. Section 112 of the Ajmer Tenancy and Land Records Act, 1950 provides that if landlords knowingly and habitually infringe the right of the tenant, they would be disqualified by the property in this situation owner of land becomes a sufferer. This Act was challenged

¹⁴ *K.K. Kochuni v. State of Madras*, AIR 1960 SC 1080

¹⁵ *Ram Krishna v. Radhamal*, AIR 1952 All 697; *See also, Ishwari Prasad v. N.R. Sen*, AIR 1952 Cal 273

¹⁶ *Ibid*

¹⁷ *Bhagirath Ram Chand v. State of Punjab*, AIR 1954 Punj 167

¹⁸ (1984) 3 SCC 301

by the petitioner because his estate was taken by the State in *Thakur Raghubir Singh v. Court of Wards*.¹⁹

The Supreme Court held that section 112 of the Ajmer Tenancy and Land Records Act, 1950 is *void ab initio* because of restriction of use and enjoyment of property solely dependent on the discretion of the executive authority. The Court further said that when a law deprives a person of possession of his property for an indefinite period, merely on the subjective determination of an executive officer, such law cannot construct the word 'reasonable' be described as coming within that expression, because it is completely negative for the fundamental rights. Because use and enjoyment of property of section 112 of the Ajmer Tenancy and Land Records Act, 1950 solely depend on the discretion of the executive authority. The affected person having no right to have a resource for establishing the contrary in a civil court.

Constitutional Amendments and Right to Property

*In State of West Bengal v. Mrs. Bela Banerjee*²⁰, the issue was whether the compensation provided for under the *West Bengal Land Development and Planning Act, 1948*, complied with the provision in Article 31(2). The law was held to be unconstitutional on the ground that the 'compensation' bore no relation to the market value of the land on the date of acquisition. The Court emphasized that 'compensation' meant 'just equivalent' of the property acquired and that it was a justiciable matter which the courts could adjudicate upon.

After the decision of *Bela Banerjee*, the Central Government thought that it would place an onerous burden on the country's resources to pay just compensation. To get over this hurdle, the Constitution (Fourth Amendment) Act, 1955, was undertaken. The Fourth Amendment amended Article 31(2) with a view to make the question of adequacy of compensation as non-justiciable. The Courts were now debarred from going into the question whether the quantum of compensation provided by a law for property being acquired or requisitioned by the State was adequate or not.²¹

In *Vajravelu v. Special Deputy Collector*²², the Supreme Court held that the amended Article 31(2) still retain the word compensation as given to it in *Bela Banerjee*. Therefore, a law for acquisition or requisition should still provide for a just compensation for what the owner was

¹⁹ AIR 1953 SC 373

²⁰ AIR 1954 SC 170

²¹ *Supra* note 37 at 1312,1313

²² AIR 1965 SC 1017

being deprived of. Thus, the Supreme Court had taken the position that a statute was liable to be struck down as infringing Article 31(2) on the ground that compensation provided by it was inadequate and that compensation ought to be the just equivalent of the property of which a person was deprived and that adequacy of compensation was a justiciable matter.

While making the Fourth Constitutional Amendment on 11th April 1955, Jawaharlal Nehru clarified that the purpose of amending Article 31 is that the quantum of compensation for the acquisition of property should be decided by the legislature. He further added that the makers of the Constitution failed to give their view accurately and precisely and due to this judiciary interpreted it differently. Prime Minister Nehru and others thought in the Constituent Assembly that the original Article 31(2) made the legislature supreme to fix the quantum of compensation. Judiciary can not challenge the decision of legislature except where there is the fraudulent exercise of power so given.

After the First and Fourth Constitutional Amendment Parliament again by Seventeenth Constitutional Amendment modified Article 31. The Seventeenth Constitutional Amendment expanded the scope of the word 'estate' to protect all legislation. The Supreme Court in *Karimbil Kunhikoman v. State of Kerala*²³, struck down the Kerala Agrarian Relation Act, 1961. Because ryotwari land was in question and ryotwari land was not included in an 'estate'. So that by the Seventeenth Amendment change the definition of the word 'estate' and bring ryotwari land and another land within the meaning of 'estate'.

In *I.C. Golaknath and Others v. State of Punjab*²⁴, the Seventeenth Amendment came into question as a challenge whether parliament had the power to abridge or abrogate fundamental rights. The Supreme Court rejected the idea of amendment of a fundamental right and reversed the previous judgment of *Shankari Prasad*²⁵ and *Sajjan Singh*²⁶. However, the decision of *Golaknath* was not retrospectively applied, the only prospective applied so that it did not affect the First, Fourth, and Seventeenth Amendments.

The decision of the *Bank Nationalization*²⁷, wherein it was held that the expropriated Bank had not been given a true compensation for the loss of undertaking, led to the passing of the

²³ AIR 1962 SC 723

²⁴ AIR 1967 SC 1643

²⁵ *Sankari Prasad v. Union of India*, AIR 1951 SC 458, wherein it was held that the word 'law' in Article 13(2) did not include law made by parliament under Article 368. The word 'law' in Article 13 must be taken to mean rules or regulations made in exercise of legislative power and, therefore Article 13(2) did not affect amendment made under Article 368

²⁶ *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845, wherein the Supreme Court followed the decision in *Sankari Prasad*

²⁷ *Rustom Cavasjee Cooper v. Union of India*, AIR 1970 SC 1318

Twenty-Fifth Amendment which amended clause (2) of Article 31. This Twenty-fifth amendment drops the word compensation from 31(2) and added the word "amount" for avoiding judicial review. Further, the amendment also exempted any law giving effect to Articles 39(b) and (c) of Directive Principles of State Policy from judicial review, even if it violated the fundamental rights.

Judicial Response to Constitutional Amendments

In *Kameshwar Prasad v. State of Bihar*²⁸, the Bihar Land Reform Act, 1950 was struck down by the Patna High Court on the ground that it acts contrary to Articles 14, 19(1)(f), and 31(2) of the Constitution. Due to this parliament brought First Amendment to the Constitution and added Articles 31A and 31B to the Indian Constitution to secure the validity of land reform laws. Article 31A saved laws for the acquisition of estates even if they were inconsistent with the fundamental right of Article 14 or 19. Article 31B and Ninth Schedule added to the Constitution and saved the laws specified in part III of the Constitution if any law declared inconstancy to the fundamental right. The concern of the framers of the Constitution about compensation to be paid for acquisition of land, which came to be considered by the Supreme Court in the light of the provisions of the Constitution in *Bela Banerjee* a question arises whether compensation guaranteed by West Bengal Land Development and Planning Act, 1948 complied with the provision of Article 31(2) of the Indian Constitution. Originally, the West Bengal Government enacted a law for settling the issue of Pakistani refugees, who came to West Bengal from East Pakistan. The West Bengal Government acquires land many years later from the date of enactment of the Act, 1948 but they decided to pay compensation on market value that prevailed on 31 December 1946 not fixed compensation rate at the time of acquisition of land and the prevailing market rate for paying compensation. The Court held that the West Bengal Land Development and Planning Act, 1948 invalid, there was no relation to fixing the market value of the land at the time of the acquisition, which was envisaged in Article 31(2). Thus, the Supreme Court struck down this impugned Act which is not according to the provision of clause (2) of Article 31. Compensation must be adequate at the time of acquisition of land, and compensation should be fixed according to the existing rate.

²⁸ *Supra* note 22

The same principle was retained in the *State of Madras v. D. Namasivaya Mudaliar*²⁹, Tamil Nadu Government made a law for the acquisition of igniting land and paid compensation to the owner based on April 28, 1947. The State Government did not calculate compensation on the existing date of acquisition. The Court held that there is a difference between the date of acquisition and the date of the freezing of land. There are huge gaps and delays in land acquisition since the issue of notification for land acquisition and compensation given by the State Government unable to fulfill the provision of clause (2) of Article 31. Thus, compensation paid to the landowner was inadequate not according to the proper manner.

Effect of Amendment in Clause (2) and (2-A) of Article 31 after change introduced by Fourth Amendment Act, 1955:

(a) There are two forms of compensation for the acquisition of private property namely acquisition and requisition of property. If any person is deprived of their property by the process of acquisition or requisition and not by the State, then there is no liability on State Government to pay compensation to the deprived person.

(b) No Court can challenge the issue of adequacy of compensation it ultimately depended on the legislature, how much compensation should be paid to the deprived person for acquisition or requisition of property.

(c) It has been explained in clause (2-A) of Article 31 that acquisition only takes place where the ownership and entire title of the expropriated owner are by operation of law as referred to in clause (2) of Article 31. While as to the requisition, there must be transfer to the right of possession either to the State or State nominee. This is the view of the Central Government to pay compensation in all forms of acquisition or requisition of property.

The Supreme Court in *Union of India v. Metal Corporation of India Ltd.*³⁰, followed the decision of the *Vajravelu*³¹ case and reiterated that providing payment of compensation must be just equivalent at or about the time of acquisition of private property. If the legislation fixed the compensation and principle laid down for compensation are not arbitrary then such matter cannot be questioned in a Court of law.

In *State of Gujarat v. Shantilal Mangaldas*³², the Supreme Court affirmed the practice of compensation for the acquisition of land by the State. The Bombay Town planning Act, 1955 was in question. Under this Act, compensation would be payable to the owner not on the date

²⁹ AIR 1965 SC 190

³⁰ *Union of Indian v. Metal Corpn. of India Ltd.*, AIR 1967 SC 637

³¹ *Ibid*

³² AIR 1969 SC 634

of acquisition of land. This Act says that compensation shall be paid on the date when the authority made the scheme for the acquisition of land and not when the land was acquired by the State. A notification expressing the intention of the government to acquire a plot of land was issued in 1942. But the actual acquisition took place in 1957 and State decided to pay compensation according to market value in 1942. This was challenged on the ground that the value of land was determined not on the date of acquisition in 1957, they had determined since 1942 for the intention to acquire land. The Supreme Court upheld the validity of this Act and says that the principle of determining compensation for land was not irrelevant and not illusory. Further, the Court said that we cannot go into the question of the adequacy of compensation unless the legislature abuses the principle of determination of compensation by this the *Metal Corporation* case was overruled with the remark that the principle for determining compensation was irrelevant.

Conclusion

Since the enforcement of the Indian Constitution Article 31 has been modified by Parliament six times by Amendment. In First Amendment added two additional Articles added in Article 31, namely Article 31A and Article 31B, and by Fourth Amendment added clause 2A in Article 31 and Amended clause (2). Article 31, enlarged the provision of the Ninth Schedule and a Proviso has been added in article 31A in the Seventeenth Amendment extended the meaning of "estate" in Article 31A. The Ninth Schedule has been further modified by Twenty-Ninth, Thirty-Fourth, Thirty-Ninth, Fortieth, and Forty-Fourth Constitutional Amendments. Thus, the fundamental right of property is the most debatable Article of property due to which, the relationship between the Supreme Court and Parliament is unpleasant. Since independence, the trajectory of the right to property in the Constitution as seen from the drafting of the original Constitutional property clause and its evolution through judicial interpretation, legislation, and Constitutional amendment, demonstrates the Indian State's continual attempts to reshape property relations in society to achieve its goals of economic development and social redistribution.