

RIGHT TO PROPERTY AND COMPENSATION UNDER THE INDIAN CONSTITUTION

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At present the Right to Property viz. “No person shall be deprived of his property save by authority of law” is enshrined in Art. 300A, inserted by Constitution 44th Amendment.¹ The Constitution of India, as originally adopted safeguarded the Right to Property in a number of ways. **Firstly**, it guaranteed that “All citizens shall have the right to acquire, hold and dispose of the property.” The State, however, could impose reasonable restrictions (i) to serve the exigencies of public welfare and (ii) to protect the interest of any Scheduled Tribe [vide Art. 19 Clauses (1) (f) & (5)]. **Secondly**, in the phraseology of Art. 300A, the Constitution makers in Art. 31(1) guaranteed that “No person shall be deprived of his property save by the authority of law”. The provision indicated that a person can be deprived of his property only through an Act passed by the Parliament/State Legislature and not by executive order or fiat. The word ‘Law’ in Art. 300A means an Act of Parliament or a State Legislature, a rule or a statutory order, having the force of law, that is positive or State-made law.² **Thirdly**, as provided in Art. 31(2) (now deleted), the property of a person could be acquired or requisitioned only under two contingencies viz. (i) the acquisition or requisition could be for public purpose and (ii) the law must provide for payment of compensation to the owner of the property either by fixing the amount of the compensation or by specifying the principles upon which it could be determined or fixed. The obligation to pay compensation, however went on diluting continuously by the Constitution First, Fourth, Seventh, Twenty-fifth and Forty-second Amendment Acts.

The Supreme Court in *Bela Banerjee’s* case³ propounded that the word “Compensation” deployed in Art. 31(2) implied ‘full compensation’, that is the market value of the property at the time of the acquisition. The Legislature must “ensure that what is determined as payable must be compensation, that is, a just equivalent of what the owner has been deprived of”. The Government realized that due to paucity of resources, it was not feasible for it to pay the full market

* Elevated to Hon’ble High Court subsequent to publication of this Article

¹ W.e.f. 10.6.1979.

² *Jilubhai Nanabhai Khachar v. State of Gujarat*, AIR 1995 SC 142 at p. 158; *Bishambhar Dayal Chandra Mohan v. State of U.P.*, AIR 1982 SC 33.

³ AIR 1954 SC 170.

value of the property acquired and as such the National Planning and Development undertaken by the Government immediately after the independence of the country were bound to be hampered. Hence, the Parliament came forward with Constitution Fourth Amendment Act, 1955 which enacted that a law which provided for compensation for the property acquired or requisitioned and either fixed the amount of the compensation or specified the principles on which, and the manner in which the compensation was to be determined or given could not be called in question in any Court on the ground that the compensation provided by the law was not adequate.

But even after the Constitution 4th Amendment (1955) the Apex Court in famous R.C. Cooper's case⁴ popularly known as Bank Nationalization case, held that the compensation in Art. 31(2) implied full monetary equivalent of the property taken from the owner, that is its market value at the date of the acquisition. The Court observed: "Art 31(2) before and after it was amended guaranteed a right to compensation for compulsory acquisition of property and that by giving to the owner, for compulsory acquisition of his property, compensation which was illusory or determined by the application of principles which were irrelevant. the constitutional guarantee of compensation was not complied with". The result was the Constitution 25th Amendment (1971) which replaced the word 'amount' for the word 'compensation' appearing in repealed Art. 31(2). But even after this major amendment, the Apex Court in landmark judgment in Keshavananda Bharati's case⁵ held that the amount which was fixed by the Legislature could not be arbitrary or *illusory* but must be determined by a principle which is relevant to the acquisition of property.

The fundamental 'right to property' had been modified by the Parliament by several other Constitution Amendments. Art. 31-A, inserted by the Constitution First Amendment Act, 1951 with retrospective effect, saved laws providing for acquisition of estates of the nature referred to in various clauses thereof, declaring that such laws shall not be deemed void on the ground that they are inconsistent with, or take away or abridge any of the rights conferred by Art. 14 or 19 of the Constitution. The object of taking out the acquisition of intermediate interests in land from the obligation to pay compensation was to make it possible for the Government to effect agrarian reform which was so urgently needed to protect the interests of the tenants as well as to improve the agricultural wealth of the country.⁶ New Art. 31-B added by Constitution 1st Amendment, like Art. 310A, saves Acts and Regulations mentioned in Ninth Schedule. Art. 31-C added by 25th Amendment Act, 1971 protects laws giving effect to the policy of the State securing all or any of the principles laid down in Part IV of the Constitution, apart from extending the same protection as

⁴ AIR 1970 SC 1461

⁵ AIR 1973 SC 1461

⁶ Dr. Basu's Introduction to the Constitution of India, 17th Ed. Page 118.

extended by Arts. 31-A and 31-B, and also declared that no such law shall be called in question in any court on the ground that it does not give effect to such policy.

The Constitution 44th Amendment Act, 1978, robbed the 'right to property' of its fundamental right-character, and adorned it with status of Constitutional/legal right. Arts. 19(1)(f) and 31 were deleted from the Part III- "Fundamental Rights" and only a fraction in the form of Art. 300 A which corresponds to Art. 31(1) only, has been inserted in Part XII under a separate Chapter V "Right to Property". What is important to note is that Art. 19(1) (f) which had guaranteed freedom to all citizens to acquire, hold and dispose of property and remaining clauses (2) to (6) of Art. 31, which hedged the right of the Legislature, to acquired property with limitations for public purposes and only on payment of adequate compensation, not illusionary one, as interpreted by the Apex Court, have been omitted altogether by the Legislature. The effect of this amendment of vast magnitude is that the 'right to property' is no more a fundamental right but is only a constitutional/legal right and in the event of breach thereof, the remedy available to an aggrieved person is to approach the High Court under Art. 226 of the Constitutional India and not the Supreme Court under Art. 32 of the Constitution, a speedy remedy available earlier.

However, two exceptions have been created by the 44th Amendment to the aforesaid general rule. First, where the property acquired belongs to an educational institution established and administered by a minority, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right of minorities "to establish and administer educational institutions of their choice" guaranteed by Art. 30(1)⁷ Secondly, where the State seeks to acquire any estate and where any land comprised therein is held by a person under this personal cultivation and such land is within the ceiling limit applicable to him under any law for the time being in force, or any building or structure therein or appurtenant thereto, the State must pay compensation at the market value for such land, building or structure acquired.⁸

It has been repeatedly canvassed that even though clauses (2) to (6) of Art. 31 which postulated provisions for payment of compensation when land was acquired/requisitioned, have been omitted from the Constitution Statute books, the obligation to pay adequate amount of compensation to the owner of the property still survives. In Basanti Bai's case⁹, a Division Bench of the Bombay High Court held that inspite of deletion of Art. 31(2), there is still obligation on the State to pay adequate amount to the expropriated owner. Further, the law providing for deprivation of property must be fair, just and

⁷ Vide Art. 30(1A), added by the 44th Amendment Act, 1978 w.e.f. 30.6.79.

⁸ Inserted by Constitution (Seventeenth Amendment) ACt, 1964.

⁹ AIR 1984 Bombay 366.

reasonable as propounded by Hon'ble Supreme Court in the famous Maneka Gandhi's case.¹⁰ In special appeal before Supreme Court, against the judgment of the Bombay High Court titled "State of Maharashtra v. Basanti Bai"¹¹ it was urged that the provisions of sub-sections (3) and (4) of Sec. 44 of Maharashtra Housing and Development Act, 1977, which contained the basis for the determination of compensation in respect of the land were violative of Arts. 14, 19 and 31 of the Constitution and as such were liable to be declared as void. It was further contended that the compensation payable was illusory in its quantum and the procedure prescribed for the acquisition was not fair and reasonable, though the dictum laid down in Maneka Gandhi's case ordained so. The Supreme Court reversed the judgment of the Bombay High Court without finally deciding the mooted points. The Court held that even if it was assumed that the law should be fair and reasonable and not arbitrary and the law should also satisfy the principle of fairness in order to be effective, all those conditions were satisfied by the impugned law in the case under appeal. All the requirements of a valid exercise of the power of eminent domain even in the sense in which it was understood in the United States of America where property rights are given greater protection than what is required to be done in our country were fulfilled by the impugned Act. As to the contention that the impugned Act violated the provisions of Art. 21 of the Constitution, their Lordships of the Supreme Court observed.

"Then in the end we have to consider the argument based on Article 21 of the Constitution which is urged on behalf of the respondents. Article 21 essentially deals with personal liberty. It has little to do with the right to own property as such. Here we are not concerned with a case where the deprivation of property would lead to deprivation of life or liberty or livelihood. On the other hand, land is being acquired to improve the living conditions of a large number of people. To rely upon Art. 21 of the Constitution for striking down the provisions of the Act amounts to a clear misapplication of the great doctrine enshrined in Art. 21. We have no hesitation in rejecting the argument. Land ceiling laws, laws providing for acquisition of land for providing housing accommodation, laws imposing ceiling on urban property etc. cannot be struck down by invoking Art. 21 of the Constitution."

Thus the Supreme Court jettisoned the argument that the law relating to acquisition of property must also satisfy Art. 21.

The fundamental 'right to property' has been abolished because of its incompatibility with the goals of justice, social, economic and political and equality of status and of 'opportunity' and with the establishment of a social democratic republic, as contemplated by the Constitution.¹² The 'right to

¹⁰ AIR 1978 SC 597.

¹¹ AIR 1986 SC 1466.

¹² State of Maharashtra v. Shandrabhai, AIR 1983 SC 803.

property' under Art. 300A is not a basic feature or structure of the Constitution. It is only a Constitutional right.¹³

The Hon'ble Supreme Court in *Tinsukhia Electric Supply Co. Ltd. v. State of Assam*, AIR 1990 SC 123 at p. 138 has observed that even though Article 31 had not been deleted (at the time of the 42nd amendment) "Its content had been cut-down so much, so that even under a law providing for acquisition of property which did not have the protection of 31-C the adequacy of the "Amount" determined was non-justiciable and all that was necessary was that it should not be unreal or illusory. By then the Constitution had done away with the idea of a just equivalent or full indemnification principle and substituted thereof the idea of an "Amount" and rendered the question of the adequacy or the inadequacy of the amount non-justiciable".

A Full Bench of the Kerala High Court in *Elizebath Samuel Aaron's case*¹⁴ observed-

"The legislative history behind the deletion of Article 31 and the introduction of Article 300-A eloquently shows that Parliament intended to do away with the concept of a just equivalent or adequate compensation in the matter of deprivation of property, and to provide only a limited right, namely that no person shall be deprived of his property save by authority of law. In other words, the limited constitutional protection intended to be continued (not as a fundamental right) was only that there should be a law authorising and sustaining any deprivation of property, and that none shall be so deprived by mere executive fiat. Article 300A does not provide for anything more. it does not go further and provide that the law should provide for compensation and either fix the amount, or at least specify the principles on which the compensation is to be fixed and given. Evidently, Parliament intended to shield all such legislation for acquisition or requisitioning of property from challenge on any of the grounds on which they could be challenged as per the various decisions of the Supreme Court on the ground that the compensation was inadequate or illusory or that the principles laid down for fixing the compensation were irrelevant or irrational. If this were not the intent of the series of Constitutional amendments, and if this were not achieved thereby, one wonders why Parliament should have under taken all the exercise and effaced Article 31(2) altogether from the Constitution."

In a very recent case of *Jilubhai Nambhai Khachar v. State of Gujarat*¹⁵ the Apex Court held that after the Constitution Forty Fourth Amendment Act

¹³ *Jilu Bhai Nam Bhai Khachar v. State of Gujarat*, AIR 1995 SC 142.

¹⁴ AIR 1991 Ker. 162 (FB).

¹⁵ AIR 1995 SC 142.

has come into force, the right to property in Arts. 19(1)(f) and 31 had its obliteration from Part III, Fundamental Rights. Its abridgment and curtailment does not get retrieved its lost position, nor gets restituted with renewed vigour claiming compensation under the garb 'deprivation of property' in Art. 300-A. The court further held that the principle of unfairness of the procedure attracting Art. 21 does not apply to the acquisition or deprivation of property under Article 300A giving effect to the Directive Principles.

Now, if the property of a person has been acquisitioned/requisitioned even not for a public purpose, and without payment of compensation though under the authority of law, the owner cannot grouse or grumble against the same, the Legislature is no more under a Constitutional obligation to pay the compensation what to say of adequate compensation. Such a person cannot ventilate grievance before the Court that the compensation granted is illusory one. Only where a person is deprived of his property by the executive without the authority of law, in that event he would be entitled to legal relief on the ground that such executive action abridges the provisions of Art. 300A of the Constitution.

The Constitution makers bestowed right on every citizen of the country to acquire, hold and dispose of property and also provided ample safeguards against deprivation of the property by Legislature by confining such deprivation for public purpose only and only on payment of compensation to the expropriated owner either by fixing the amount of compensation or by specifying the principles upon which it could be determined or fixed. Even in pre-Independence era, under the Government of India Act, 1935, similar safeguards were provided in as much it was envisaged therein that no person could be deprived of his property in British India save by the authority of law and that neither the Federal nor Provincial Legislature had power to make any law authorizing the compulsory acquisition of land etc., unless the law provided for the payment of the compensation for the property acquired and either fixed the amount of the compensation or specified the principles on which, and the manner in which, it is to be determined¹⁶. All such injunctions and safeguards have been done away with by the Constitution 44th Amendment, and even the prime condition 'public purpose' which appeared in Art. 31(2) of the Constitution has been eliminated. Dr. Durga Das Basu has observed that "the Author (he) would be happy if the Supreme Court could devise some means to nullify any Legislative attempt to deprive the expropriated owner of any compensation at all".

Other provisions which voice concern are that the property owned by Minority Educational Institutions and the property under personal cultivation of an agriculturist as seen above, have been placed in envious position. Dr. Durga

¹⁶ Vide Government of India Act, 1935 Sec. 299(2).

Das Basu has observed- “The net result is that if a poor man’s hut is taken away without compensation, by a law which provides for accommodation to the office of the political party in power, the former shall have no legal remedy under the sky. This is contrary to Art. 13 of the 1977 Constitution of the U.S.S.R. which says that “the personal property of citizen and the right to inherit it are protected by the States”, and this personal property includes “articles of very day use, personal consumption and convenience, a house and earned savings”. Article 9 of the 1978 Constitution of China similarly protects the right of a citizen to own private property which includes his “lawfully earned income, saving, houses and other means of subsistence.”¹⁷

As regards the concession in favour of Minority Institutions given by Constitution 44th Amendment, Dr. Durga Das Basu has remarked- “It is somewhat inexplicable why no such guarantee should be made in favour of educational institutions managed by members of a majority community. Is not a education as pure and adorable whether it comes through the Ganges or the Jordan? In their over-zealousness for the addition of a special guarantee in favour of the minority which the fathers of the original Constitution did not envisage, the fathers of the 44th Amendment took no time to ponder that by eliminating Art. 31(2), they were taking away a right which had been guaranteed to all persons in India. Legally speaking, the new provision in Art. 30(1A) is a tail which has lost its head by the repeal of Art. 31(2)”¹⁸.

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¹⁷ Dr. D.D. Basu’s Shorter Constitution of India 11th Ed. Pae 932.

¹⁸ Introduction to the Constitution of India 17th Ed. Page 120.