Supreme Court of India
Ishwarlal Girdharlal Joshi Etc vs State Of Gujarat & Anr on 16 November, 1967
Equivalent citations: 1968 AIR 870, 1968 SCR (2) 267
Author: Hidayatullah
Bench: Hidayatullah, M.

PETITIONER:
ISHWARLAL GIRDHARLAL JOSHI ETC.

Vs.

RESPONDENT:
STATE OF GUJARAT & ANR.

DATE OF JUDGMENT:
16/11/1967

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
BHARGAVA, VISHISHTHA
VAIDYIALINGAM, C.A.

CITATION:
1968 AIR 870 1968 SCR (2) 267
CITATOR INFO :
R 1970 SC1102 (14)
RF 1977 SC 183 (35,36)
R 1980 SC 91 (17)

ACT:
Constitution of India, 1950, Art.166 and Rules of Business, rr.7, 10, 13 and 15-Notifications under Land Acquisition Act (1 of 1894) Whether could be signed by an Under Secretary-Formation of opinion regarding urgency and nature of land-Whether could be delegated to Secretary-Standing Orders, if necessary-Arable land, meaning

HEADNOTE:
By a notification under s. 4 of the Land Acquisition Act issued on March 10, 1965 the respondent State Government notified that certain lands were needed for a public purpose, namely, the construction of the State capital, that the Government was satisfied that they were 'arable lands' and further directed, under s. 17(4) of the Act, that as the acquisition of the lands was urgently necessary, the provisions of s. 5A would not apply. Thereafter, a notification was issued under s. 6 containing a direction under s. 17(1) of the Act enabling the Collector to take

possession of all the arable lands on the expiry of 15 days from the publication of the notice under s. 9(1) of the Act. Both Notifications were signed by an Under Secretary of the respondent-Government.

The petitioners challenged the notifications in writ petitions under Art. 226. In the original affidavits, the petitioners merely asserted that the Government had not made up its mind regarding the acquired lands as to urgency and that the lands were not arable. The parties filed a number of affidavits at various stages of the bearing, the Government in order to establish that everything was regularly done, while the petitioners alleged infractions. In one of the affidavits on behalf of the Government it was stated that file Minister-in-charge gave oral instructions to the Secretary that he or his under-secretaries may take action under s. 17(1) and (4) of the Act according to law, that the Secretary was satisfied regarding urgency and gave instructions to the Under Secretary to take the necessary action. The High Court after considering the affidavits, dismissed the petitions.

In appeal to this Court it was contended that: (i) only a Secretary could sign the notifications and that the Under Secretary who signed the notification under s. 6 was not duly authorised to do so; (ii) that there was no formation of opinion by the Government as regards urgency or that the lands were arable; (iii) that this function could not be delegated to the Secretary and even if it could be delegated, a general oral instruction given by the Minister was not according to the procedure prescribed by the Rules of Business; (iv) that since the lands in question were under cultivation, they were not waste or arable lands; and (v) that sub-ss. (1) and (4) of s. 17 of the Act were violative of Arts. 14 and 19(1)(f) of the Constitution.

HELD: Dismissing the petitions.

(1) The word 'Secretary' is not defined in the Land Acquisition Act or the General Clauses Act so as to exclude Additional, Joint, Deputy, Under or Assistant Secretaries. On the other hand r.13 of the Rules of Business framed under Art. 166 of the Constitution specifically places a
268
Secretary, Joint Secretary, Deputy Secretary, Under Secretary and Assistant Secretary on equality for authentication of orders and instruments of Government. The Under Secretary was, therefore, competent to sign the notifications. [273F; 274E]

Even if he did not possess the power as a Secretary he would have been competent as an officer 'duly authorised', within the meaning of s. 6 of the Act, by virtue of r. 13 of the Rules of Business. [274F]

(ii) Under Art. 166 of the Constitution the validity of the notification could not be called in question on the ground that it was not an order made by the Governor, because, as required by the Article the executive action of

the Government was expressed to be taken in the name of the Governor and the order was authenticated in the manner required by r. 13 of the Rules of Business. In addition, there is also the presumption of regularity of official acts. Therefore, the bare assertion that Government had not formed an opinion could not raise an issue. The Government was not called upon to answer the affidavit of the petitioners and the Government need not have undertaken the burden of showing the regularity of their action.[275 E--G; 278 D, F]

(iii) Rules 7, 10, 13 and 15 of the Rules of Business specifically allow conferral of powers on Secretaries and the determination of the Secretary becomes the determination of the Government. There is nothing in the Rules or instructions which prescribes that the authority must be in writing or by Standing Orders. Under Paragraph 3 of the instructions issued by the Governor under r. 15 of the Rules of Business, Standing Orders are necessary for the disposal of cases in the department, and a case is defined as 'the papers under consideration and all previous papers and notes put in connection therewith to enable the question raised to be disposed of'. Paragraph 4, on the other hand refers to "matters or classes of matters". Therefore, paragraph 3 only refers to the disposal of cases and not to matters arising In a case, regarding which under paragraph 4, the Minister may arrange with the Secretary whether they are to be brought to his personal notice or not.The matters in the present case were the application of s. 17(1) and (4), to the acquisition of waste and Arabic lands and the Minister could leave this matter to his Secretary as he did.For this purpose, Standing Orders were not necessary and oral instructions would be sufficient.The Secretaries concerned were given the jurisdiction to take action on behalf of Government and they satisfied themselves about the need for acquisition under s. 6, the urgency of the matter and the existence of waste and arable lands for the application of sub-ss. (1) and (4) of s. 17.Therefore, on a review of the affidavits, the provisions of the Act and the Business Rules and Instructions, the directions under sub-ss. (1) and (4) of s. 17 were not invalid. [280 D--G; 281 C--D; 282 E--G]

Shayamaghana Ray v. State, A.I.R. 1952 Orissa 200, referred to.

Emperor v.Shlbnath Banerji, L.R. 72 I.A. 241, distinguished.

(iv) Arable land under the Act is not only land capable of cultivation but also land actually under cultivation. The words 'compensation for the standing crops and trees (if any) on such land' in s. 17(3), show that the land may have crops or he fallow and the crops can only be on arable land. because. if crops could grow or were actually grown the land Would hardly he waste land [286 A--B, E]

Baldeo Singh & Ors. v. State of U.P. A.I.R. 1965 All Smt. Lakshmi Devi Ors. v. State of Bihar' & Ors. A.I.R. 1965 Pat, 400

269

and Guntur Ramalakshmamma v. Govt. of Andhra Pradesh, A.I.R. 1967 A.P. 280, approved.
Sadruddin Suleman v.J.H.Patwardhan, A.I.R.1965 Born.224. over-ruled.
(v) The High Court had rightly held that sub-as. (1) and (4) and 17 were not unconstitutional. [286 F-G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 883, 915 to 967 and 1042 to 1044 of 1967.

Appeals from the judgment and order dated December 2, 5, 12 and 13, 1966 of the Gujarat High Court in Special Civil Applications Nos 1003, 1177, 1178, 1183, 1186, 1195, 1197 to 1202, 1205 to 1210, 1220 to 1222, 1244, 1275, 1374, 1377, 1380, 1387, 1389 of 1965, 68 to 70, 72 to 74, 76, 77, 80, 83, 84, 166, 183, 393, 399, 547, 554, 790 of 1966, 1187, 1188, 1233 of 1965, 75, 154, 202, 402, 403 of 1966, and 1179, 1184 and 1185 of 1965.

B. Sen, S.K. Dholakia and Vineet Kumar, for the appellant (in C.A. No. 883/1967).

S, K. Dholakia and Vineet Kumar, for the appellants (in C. As. Nos. 915 to 967 and 1042 to 1044 of 1967). S.V. Gupte, A.K. Kazi, O.P. Malhotra and S.P. Nayar, for the respondents (in C. As. Nos. 883 and 915 to 967 of 1967). A.K. Kazi, O.P. Malhotra and S.P. Nayar, for the respondents (in C. As. Nos. 1042 to 1044 of 1967).

The Judgment of the Court was delivered by Hidayatullah, J.--On March 10, 1965, the Government of Gujarat notified under s. 4 of the Land Acquisition Act that certain lands were needed for a public purpose, namely, the construction of the capital of the State at Gandhinagar and that Government was satisfied that they were 'arable lands'. Government further directed under s. 17(4) of the Act that as the acquisition of the said lands was urgently necessary the provisions of s. 5A of the Act shall not apply in respect of the lands.A list of the lands was appended to the notification.This notification was followed by another on JuLy 31, 1965 under s. 6 of the' Land Acquisition Act and it contained a direction under s. 17 (1) of the Act, enabling the Collector, on the expiration of 15 days from the publication of the notice under s. 9 (1) of the Act, to take possession of all arable lands specified in the earlier notification. Both notifications were signed by L.P. Raval, Under Secretary to Government and were shown to be by order and in the name of the Governor of Gujarat.

Numerous petitions were filed in the High Court of Gujarat under Art. 226 of the Constitution by the owners of the lands Sup, C. I,/68-3 affected by the notifications to challenge the validity of the acquisition. One such petition was numbered Petition No. 1003 of 1965 and it was typical of all the others. The facts in all the petitions were the same, save the details of the lands, and as the contentions were also the same, the High Court pronounced a common judgment applicable to all, on December 2/5, 1966 and dismissed them. The High Court, however, granted a certificate under Art. 133(1)(c) of the Constitution and the present appeals have been brought. Civil Appeal No. 883 of 1967 arises from the Special Civil Application No. 1003/65 and the other appeals are in the other

petitions. This judgment will accordingly dispose of all the appeals.

Before we consider the arguments we may see the relevant provisions of the Land Acquisition Act. The scheme of the Act, which entered into force almost seventy-five years ago, is by now familiar to lawyers and courts and it is not necessary to refer in detail to it. The High Court has painstakingly analysed the provisions already. We shall refer in passing to what is material to the discussion, Acquisition of land under the Act originarily begins with a preliminary inquiry. Government notifies first under s. 4 that 'land in any locality is needed or is likely to be needed' for a public purpose. Public notices are also given. This enables the officers of Government to enter upon lands to survey them and also enables persons interested to object to the acquisition generally and also particularly in accordance with the provisions of s. 5A of the Act. After the objections have been considered and Government has satisfied itself on the report or reports of the Collector that a particular land is needed, a second notification is issued under s. 6 that a particular land is needed for the public purpose. This declaration is conclusive evidence that the land is so needed and Government then proceeds to acquire the land. The procedure is detailed in the sections that follow. Under s. 9 (1) the Collector causes public notices to be given that Government intends to take possession of the lands and that claim to compensation for all interests in lands shall be made to him. Then commence proceedings for the fixation of compensation with the details of which procedure we are not presently concerned. When these proceedings are completed the Collector makes his award about the true area, the compensation to be allowed and the apportionment of that compensation among persons known or believed to be interested. When the Collector has made his award (which is made conclusive for certain purposes) s. 16 enables him to take possession of the lands and the lands vest absolutely in Government free from all encumbrances. The is provided in s. 17. Under this procedure Government in cases award. There is a shorter procedure for cases of urgency and it is provided in s. 17. Under this procedure Government in cases of urgency, is enabled inter alia to omit the application of s. 5A and to notify the lands under s. 6 at any time after the publication of the notification under s. 4(1). Under sub-s. (1) of s. 17, Government can direct the Collector, though no award has been made, to take possession of any waste or arable lands needed for the public purpose, on the expiration of fifteen days from the publication of the notice under s. 9. Under Sub-s.(4) of the same section Government may direct that in the case of any land to which in its opinion the proviSiOns of the first sub-section are applicable, the provisions of s. 5A shall not apply and if it so directs a declaration may be made under s. 6 in respect of that land at any time after the notification under s. 4 (1) has been published. It will therefore, be noticed that the shorter procedure has been followed here. Before we refer to the grounds on which the action of Government is challenged we may read ss. 4(1) 6(1) omitting the proviso, and s.17. Although we are principally concerned with the first and fourth sub-section of the last section we shall be required to refer to the remaining sub-sections, and we shall read the section as a whole:

> "4(1) Whenever it appears to appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality. 6(1) Subject to the provisions of Part V/I of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under section 5A,

sub-section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorized to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4, sub-section' (1), irrespective of whether one report or different reports has or have been made (whenever required) under section 5A, sub-section (2).

17(1) In cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1), take possession of any waste Or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the Government, free from all encumbrances. (2) Whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or that station, or of providing convenient connection with or access to any such station, the Collector may, immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the appropriate Government, enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances:

Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty-eight hours' notice of his intention so to do or such longer notice as may be reasonably sufficient to enable such occupier to remove his movable property from such building without unnecessary inconvenience.

(3) In every case under either of the preceding sub-sections the Collector shall at the time of taking possession offer to the persons interested compensation for the standing crops and trees (if any) on such land and for any other damage sustained by them caused by such sudden dispossession and not excepted in section 24; and, in case s uch offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed for in awarding compensation for the land under the provisions herein contained.

(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1) In the High Court sub-ss. (1) and (4) of s. 17 of the Act were assailed under Arts. 14 and 19(1)(f) of the Constitution.This argument was placed at the forefront.In this Court this submission was relegated to the end. Apparently not much faith was reposed in its potency. The other arguments urged before the High Court and found against the appellants, were pressed with

vigour upon us.These arguments concern the issue of notifications invoking the shorter procedure and those notifications are questioned. These arguments involve the validity of the notifications as

(a) unauthorised by Government, (b) without formation of the necessary opinion on relevant matters, and (c) on erroneous assumption of facts.The first ground, when amplified, is that D.P. Raval, Under Secretary, who signed the notifications under s. 6 was not duly authorised to do so under the Act and the notifications were, therefore, invalid and of no effect. The second ground is based on the assertion that there was no formation of opinion by the Government as regards urgency or that the lands were arable, and on both the points the Act requires Government to reach a decision, which fact has not been established if not disproved. The third ground proceeds on the meaning of the expression 'arable land' which, it is claimed, denotes land capable of cultivation or village but not land already under the plough. We shall now proceed to consider each point in turn.

Raval's authority to issue the notification under s. 6 is questioned on the wording of the latter portion of that section where it is mentioned that "the declaration shah be made under the signature of a Secretary to such Government or some officer duly authorised to certify its orders." The argument is without substance The word 'Secretary' is not defined either in the Land Acquisition Act or the General Clauses Act so as to exclude Additional, Joint, Deputy, Under or Assistant Secretaries. If this were established, then it might be said that the word was intended to designate only the head of the secretarial department concerned with land acquisition. No such indication is available from any source. Nor was it necessary to invest any particular Secretary specially under the Act for no such requirement can be spelled out from the words relied upon. On the other hand, the business of Government is regulated by the Rules of Business made under Art. 166 of the Constitution. How those Rules operate will be more fully considered presently when we deal with the second point. For the present it is sufficient to point out a few provisions of the Rules, Rule 7 provides:

> "7. Each Department of the Secretariat shall consist of the Secretary to the Government, who shall be the official head of that Department and of such other officers and servants subordinate to him as the State Government may determine :-- Provided that-
>
> (a) more than one Department may be placed in charge of the same Secretary;
>
> (b) the work of a Department may be divided between two or more Secretaries."

If this Rule stood by itself, it might have been necessary to place on record evidence to establish that the work of this Department was divided among the Secretaries and how, but Rules 13 and 15 additionally provide:

> "13.Every order or instrument of the Government of the State shall be signed either by a Secretary, an Additional Secretary, a joint Secretary, a Deputy Secretary, an Under Secretary or an AssiStant Secretary or such other officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper

authentication of such order or instrument."

"15.These rules may to such extent as necessary be supplemented by instructions to be issued by the Governor on the advice of the Chief Minister,"

Rule 13 specifically places all Secretaries on equality for authentication of orders and instruments of Government and Rule 15 further authorises supplemental instructions which as we shall presently see were in fact issued.Thus Raval was competent to sign the declaration as a Secretary.It is not necessary to consider whether he can be treated as an officer 'duly authorised' because he already had authority by virtue of his office and rule 13 of the Rules of Business contemplates officers other than Secretaries. But if he did not possess the power as a Secretary he would undoubtedly have been competent as an officer duly authorised by virtue of rule 13 of the Rules of Business and that is all that s. 6 requires. No further special authorisation under the Act was necessary.

To overcome these rather obvious difficulties Mr. B. Sen raised the second point which was that the provisions of the Act require Government to form an opinion and this function cannot be delegated to the Secretaries and even if it could be delegated, strict compliance with Rules of Business and the instructions issued under Rule 15 was necessary. He submits that there was no formation of the necessary opinion in the case before action under s. 17(1) or (4) was taken. To understand this argument provision on the subject.To begin with Art.166 of the Constitution provides.

"166. Conduct of business of the Government of a State.

(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

It is obvious that the executive action of the Government was in fact expressed to be taken in the name of the Governor, and that the orders were authenticated in the manner required by rule 13 of the Rules of Business already quoted. The validity of the order could not, of course, be called in question that it was not an order made by the Governor. Had the Government sheltered itself behind the constitutional curtain, it is a little doubtful the appellants could have successfully pierced this barrier by merely stating that the Government had not passed the orders or made the necessary determination without alleging definite facts. In addition to the constitutional provision there is also

the presumption of regularity of official acts. Orders of Government, whether at ministerial or gubernatorial level, are all issued in the same form and the constitutional protection as well as the presumption both cover the case.

But, as it happens frequently, Government tried to establish that everything was regular. A batch of counter affidavits was filed on behalf of Government to show how the matter was dealt with from stage to stage and the appellant filed affidavits in rejoinder and were not slow to point out infractions or supposed infractions. As they sought to do this on facts furnished by the affidavits on behalf of Government we may say a word about those affidavits.

No less than eight affidavits were filed by Government and five affidavits including one supporting the petition were filed by the petitioner in Special Civil Application No. 1003 of 1965. Other affidavits on behalf of the other petitioners repeated the allegations. The affidavits filed with the petitions had averted only that Government had not 'made up its mind regarding acquired lands', that the satisfaction was 'mala fide' and 'colourable' and that the gap of time between the two notifications itself showed that there was no urgency. The affidavits also raised the issue that the lands were not 'arable lands'. Government apparently took up the challenge and flied affidavit after affidavit. The first affidavit was filed by L. P. Raval, Under Secretary (Oct. l, 1965) that the lands were arable lands' and Government had formed the opinion about urgency, and further that the determination of these two matters by Government was not justiciable. This was followed by an affidavit by the Executive Engineer (Oct. 8, 1965) who stated that the master plan was ready which involved 12 villages including Pethapur where these lands are situated. The lands were involved in the construction of main roads and the laying out of sectors. He explained the delay between the two notices on the ground that survey had to be done and that took time but reaffirmed that the matter was urgent. The appellants promptly questioned the formation of opinion by alleging 'that Government had not formed the opinion and that the affidavit of Raval did not establish this. In reply another Under Secretary (Nimbalkar) filed an affidavit (Nov. 8 1965) that Jayaraman, Deputy Secretary was 'subjectively satisfied' that the lands were 'arable lands' and that there was urgency and asserted that both matters were for the subjective determination of Government and thus not open to question in a court of law. This was followed by another affidavit in rejoinder from the appellants (November 24, 1965) 'that Jayaraman had not personally filed any affidavit and therefore it was not clear who had made the subjective determination regarding the matters disputed and the public purpose. Raval 'then swore another affidaVit (August, 1966) giving details of the urgency and stated that he had considered the need for issuing the notification under s. 4 and that 'it was decided' to apply s. 17(4). He also stated that the notification under s. 6 and the application of s. 17(1) was considered first by him and then by Jayaraman and they had agreed to issue the notification and apply s. 17(1). Another affidavit ill rejoinder was filed during the hearing (December 2, 1966) that neither Raval nor Jayaraman had stated that they had satisfied themselves about- s. 17(4) nor had Raval or Jayaraman stated that they were authorised by the State Government or by the Rules of Business or by any special order to form the said opinion. A number of affidavits were then fled. The Minister-in-Charge filed an affidavit in which he said:

> ".....for the purpose of urgently acquiring the lands for the Capital Project, I had given instructions initially to Shri S.M. Dudam and subsequently to Shri A.S. Gill after he

> became the Secretary of the Revenue Department, and had made arrangements with them, during their respective tenures as Secretaries of the Revenue Department, to take necessary action for urgent acquisition of lands for the Capital Project and had also instructed them that they or the concerned Deputy Secretaries or Under Secretaries in the Revenue Department may, without bringing the cases to my personal notice and without referring such cases to me, issue notifications under sections 4 and 6 o/the Land Acquisition Act and may apply urgency clause under section 17(1) and (4) of the said Act as the case may be wherever it was possible to invoke the urgency clause according to law."

S.M. Dudani who was Secretary 'till April 2, 1965 and A.S. Gill who followed him swore two affidavits. Their purport was almost the same A.S. Gill said:

> ".....Shri Utsavbhai S. Parikh, the Hon'ble Minister for the Revenue Department for the purpose acquiring lands urgently for the Capital Project had given instructions to me and had made arrangements with me to take necessary action for urgent acquisition of lands for the Capital Project and had also instructed me that myself or the concerned Deputy Secretaries or the Under-Secretaries in the Revenue Department may, without bringing the cases to his personal notice and without referring such cases to him, issue notifications under sections 4 and 6 of the said Act and may apply urgency clause under sections 17(1) and (4) of the said Act, as the case may be, wherever it was possible to invoke the urgency clause according to law. I had given instruction to the concerned Deputy secretaries and the under Secretaries of the Revenue Department to take necessary actions under sections 4 and 6 of the said Act and to apply the urgency clause wherever it was possible according to law."

The appellants then filed a last affidavit in rejoinder denying the power of the Minister to delegate by oral instructions his own power to the Secretary and questioned the sub-delegation to the Deputy and Under Secretaries.

It would thus appear that the controversy got enlarged as time passed and Government undertook more and more burden although there was hardly any attempt by the appellants to support their assertions by mentioning any facts. The High Court noticed in its judgment that there was really nothing in the original affidavit supporting the petition which Government need have answered and yet it allowed affidavits to be filed during the hearing and even in the midst of the pronouncement of the judgment. Each affidavit on the side of Government itself enabled the appellants to enlarge their allegations and to take up new stands. This unusual course appears to have been permitted from a desire to be just and fair but was hardly proper and the High Court ought really to have stemmed the flow of affidavits, keeping the appellants to their burden and the Government to its burden, if any. The Government also did not leave the appellants to their burden which would have been heavy in view of the presumption and the provisions of Art. 166(2) already mentioned.

The High Court having before it allegations, counter allegations and denials dealt first with the legal side of the matter. Then it readily accepted the affidavits on the side of Government. If it had

reversed its approach it need not have embarked upon (what was perhaps unnecessary) an analysis of the many principles on which onus is distributed between rival parties and the tests on which subjective opinion as distinguished from an opinion aS to the existence of a fact, is held open to review in a court of law. As stated already there is a strong presumption of regularity of official acts and added thereto is the prohibition contained in Art. 166(2). Government was not called upon to answer the kind of affidavit which was filed with the petition because bare denial that Government had not formed an opinion could not raise an issue. Even if Government under advice offered to disclose how the matter was dealt with, the issue did not change and it was only this. Whether any one at all formed an opinion and if he did whether he had the necessary authority to do so.The High Court having accepted the affidavits that Raval and Jayaraman had formed the necessary opinion was only required to see if they had the competence.The High Court after dealing with many matters held that they had. Mr. B. Sen has, therefore, very rightly confined himself to this aspect of the case. and has questioned the competence of Raval and Jayaraman to act for the Government. His contention is that the procedure followed by the Minister-in-Charge offended the Rules of Business and therefore the necessary satis-

faction or the opinion of Government was wanting in the case. In support he has relied upon Emperor v. Shibnath Banerji(1). Mr. Sen's argument proceeds like this:

Under the Rules of Business (Rule 4) the business of Government is to be transacted in the Department specified in the First Schedule and item No. 15 covers the topic of acquisition of property and the principles on which compensation is to be determined and it is assigned to the Revenue Department. Each Department of the Secretariat consists of a Secretary to the Government (Rule 7) but the work may be divided between two or more Secretaries. The Minister-in-Charge is primarily responsible for the disposal of the business appertaining to the Department (Rule 10). Therefore only 'the Minister for Revenue could decide questions. Referring to the oral instructions said to have been given by the Minister, Mr. Sen refers to the instructions issued by the Governor under Rule 15 and draws attention to paragraph 3 of the instructions which reads:

> "3. Except as otherwise provided in these Instructions, cases shall ordinarily be disposed of by, or under the authority of the Minister-in-Charge, who may by means of standing orders, give such directions as he thinks fit for the disposal of cases in the Department. Copies of such standin g orders shall be sent to the Governor and the Chief Minister."

He contends that a general instruction of the type mentioned by the Minister in his affidavit could only be given as a standing order of which a copy had to be sent to the Governor and the Chief Minister and, therefore, the oral instructions had no validity in law. He submits in the alternative that at least an order in writing ought to have been passed.

Mr. S.V. Gupta in reply contends that this overlooks the opening words of Rule 10 which are "without prejudice to the provisions of rule 7," indicating that the business of land acquisition is to be transacted in the Revenue Department (Rule 4) by the Secretary to the Department (Rule 7 read with Rule 10) although the Minister is primarily responsible for the disposal of the business. He

then draws attention to the provisions of Rule 13 where a Secretary is equated to Additional, Joint, Deputy, Under and Assistant Secretaries for certain purposes and the definition of Secretary in paragraph (1)(vii) which includes these other functionaries for 'the purpose of the Instructions. Mr. Gupte next reads with paragraph 3 the provisions of paragraphs 4 and 5 which provide:

(1) L.R. 72 I.A. 241.

> "4. Each Minister shall arrange with the Secretary of the Department what matters or classes of matters are to be brought to his personal notice."
>
> "5.Except as otherwise provided in these Instructions cases shall be submitted by the Secretary in the Department to which the case belongs to the Minister-in-charge."

Mr. Gupta contends that there is nothing in the Rules or Instructions that oral instructions, if clearly issued, cannot confer on the Secretaries the power to make determinations and submits that Standing Orders refer to all cases generally and oral instructions ,can be issued in certain particular contingencies and this was done as stated in the affidavits of the Minister, A.S. Gill and S.M. Dudani which have been accepted. He contends that there is no sub- delegation because Rule 7(b) covers this case.

In our judgment the argument of Mr. Gupte is valid.There is nothing in the Rules or Instructions which prescribes that the authority must be in writing or by Standing Orders. Standing 'Orders are necessary for the disposal of cases in the Department (paragraph 3) and this applies to cases generally. Paragraph 4, on the other hand, refers to "matters or classes of matters" and that is not a "case" but a "matter" in a case. The definition of case in the Instructions is:

> "Case includes the papers under consideration and all previous papers and notes put in connection therewith to enable the question raised to be disposed of", but this definition is excluded by the context.Although the case belongs to a Department [paragraph 2(i)],the word case in paragraph 3 obviously refers to the disposal of cases and not to matters arising in a case regarding which the Minister may arrange with the Secretary whether they are to be brought to his personal notice or not. The matters here were application of s. 17(1) and (4) to the acquisition of waste and arable lands and the Minister could leave this matter to his Secretaries as he did. For this purpose Standing Orders were not only not necessary but would be inappropriate.

Reliance was placed upon the decision of the Orissa High Court in Shayamaghana Ray v. State(1) that Rules 15 must prevail over the instructions. But 'that Rule itself provides that the Rule may be supplemented by instructions and the power so conferred was available in paragraph 4 to provide that the 'Minister may arrange with the Secretary of his Department what ,(1) A.I.R. 1952 Orissa 230.

matters or classes of matters are to be brought to Iris personal notice. This dispenses with the taking of orders of the Minister each time.

Mr.Sen then refers to the words of ss.4, 6 and 17(1) and (4) which are different.In s.4 the words are whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed' while in s.6 the words are 'when the appropriate Government is satisfied' and in s. 17(4) the words are 'in the opinion of the appropriate Government'. He contends that some difference must be made between them and when sub-ss. (1) and (4) of s.17 require, a direction from the appropriate Government the determination must be by the Minister himself.If the sections stood by themselves this argument would be unanswerable but we have the Rules of Business which specifically allow conferral of powers on Secretaries and the determination of the Secretary becomes the determination of Government.Mr.Sen's reference to Emperor v.Shibnath Banerji's case(1) is not apposite because the circumstances there were different.That case arose from petitions under s. 491 of the Code of Criminal Procedure seeking directions in the nature of habeas corpus on behalf of certain pensons detained in pursuance of orders made under Rule 26 of the Defence of India Rules 1939. It appears that detentions were dealt with in Bengal in the Home Department and the Home Minister Bengal, in the Bengal Legislative Assembly in answer to interpellations, slated that he had directed that on receipt of the report of arrest under Rule 129 (Defence of India Rules 1939) together with a recommendation by the police for detention under Rule 26, orders of detention under Rule 26(1) (b) should at once be issued as a matter of course subject to review by Government on receipt of further details. As Lord Thankerton pointed out tthat clearly meant the substitution of the recommendation by the police in place of the recommendation of the Governor prescribed by Rule 26 and equally rendered any order under r. 26 in conformity with the Home Minister direction, to which their Lordships referred as the routine order, ab initio void and invalid as not being in conformity with the requirements of r. 26. Further Mr. Porter, the Additional Home Secretary, in an affidavit regarding Shibnath Banerji stated:

> "10. Shibnath Banerji: He was arrested by the Police under r. 129, Defence of India Rules on 20th October 1942. On 27th October 1942, I considered the materials before me and in accordance with the general order of Government directed the issue of an order of detention under r.26(1)(b) Defence of India Rules.On receipt of fuller materials the case was later submitted for consideration of the Honourable Home Minister, Bengal, from whom no order directing withdrawal or modification of the order of detention was received." "Their Lordships are unable to read Mr. Porter's state- ment that he had considered the materials before him as involving anything more than he has considered the report of the arrest and the recommendation of the police to see if there was material sufficient to justify the issue of an rder under the routine order. It cannot mean that, in spite of the direction of the Home Minister in the routine order, he considered the materials before so as to satisfy himself, independently of the police recommendation that an order under r.26 should be issued. That would not be in accordance with the requirement of the routine order that-the police having recommended it--the order of detention should be issued as a matter of course.

The position in the present case is different. If Mr. Porter had sworn the affidavit that he had considered the need for detention, quite apart from the routine order, the result might have been different because of the orders being in the name of the Governor and by his order. In any case Mr.

Porter admitted that he had not considered the matter. In our case the Secretaries concerned were given the jurisdiction to take action on behalf of Government and satisfied themselves about the need for acquisition under s. 6, the urgency of the matter and the existence of waste and arable lands for the application of sub-ss. (1) and (4) of s. 17. In view of the Rules of Business and the Instructions their determination became the determination of Government and no exception could be taken. Of course, if Government had relied upon the provisions of Art. 166(2) and the presumption of regularity of official acts, all this enquiry would have become unnecessary since the appellants had not originally pleaded any fact.s leading to any enquiry. However, on a review of the affidavits the provisions of the Act and the Business Rules and instructions we are satisfied that the directions under sub-ss. (1) and (4) of s. 17 were not invalid.

This brings us to the contention that since the lands in question were under cultivation, they did not constitute 'waste or arable lands' because by arable land is meant land capable of being ploughed or fit for village and not land actually Cultivated. The High Court has rejected this contention disagreeing with a decision of the Bombay High Court reported in Sadruddin Sideman v.

J.H. Patwardhan(1). Mr. Sen has adopted the judgment of the Bombay High. Court as part of his argument. Mr. Gupte in his reply has ruled upon Guntur Ramalakhsmana and Others v. Government of Andhra. Pradesh and another(2), Baldeo Singh and others v. State of Uttar Pradesh and others(3) and Smt. Lakshmi Devi & others v. The State of Bihar and others(4) and the reasons given in the judgment under appeal. We shall first deal with the three rulings from Andhra Pradesh, Allahabad and Patna High Courts. The first contains no discussion and may not be referred to here. In the case from Allahabad reference is made to s. 17 (3) of the Act (already quoted) in which there is a provision that standing crops must be compensated for and it is inferred that by 'arable lands' must be meant not only land fit for cultivation but also land actually under cultivation. In the case from Patna reference is made to Halsbury's Laws of England (II Edn.) Vol. 14 p. 633 paragraph 1187, where arable land is shown as including untilled land.

In the case from Bombay relied upon by Mr. Sen three different reasons were given. First several dictionaries were referred to and reliance was placed upon the Oxford Dictionary in preference to Webster's particularly because the Oxford Dictionary did not mention land under actual cultivation as one of the meanings although Webster's Dictionary did. The learned Judges next referred to the etymology of the word 'arable' and finally to the dicta of Judges in Palmer v. McCormick(5) and 'Simmons v. Norton(6). Support was then found for the view in s. 17(3) of the Act, the mention of compensation for standing crops notwithstanding.

There is no definition of the word 'arable' in the original Land Acquisition Act.A local amendment includes garden lands in the expression. Now lands are of different kinds: there is waste-land desert-land, pasture-land, meadow land, grass-land wood-land, marshy-land, hilly land, etc. and arable land. The Oxford Dictionary gives the meaning of 'arable' as. capable of being ploughed; fit for village; opposed to pasture-land or wood land and gives the root as arablis in Latin. The learned Judges have unfortunately not given sufficient attention to the kinds of land and the contrast mentioned with the meaning. Waste-land comes from the Latin vastitas or vastus (empty, desolate, without trees or grass or buildings). It was always usual to contrast vastus with incultus

(uncultivated) as in the phrase 'to lay waste' (agrivastate)..A meadow or pasture-land is pratum and arable is arvum and Cicero spoke 'of prata et arva (meadow and arable (1) A.I.R. 1965 Bom. 224. (2) A.I.R. 1967 A.P. 280. (3) A.I.R. 1965 All. 433. (4) A.I.R. 1965 Pat. 400. (5) [1890] 25 Ir.Rep.110. (6)[1831] 7 Bing 640=131 E.R. 249.

lands). Grass-land is not meadow or pasture-land and in Latin is known as campus as for example the well-known Campus Marflus at Rome, where the comitia (assembly of the Roman people) used to meet. Woodlands is silvae, nemora or saltus.

We have given these roots became a great deal depends on the distinctions thus visible in understanding the judicial decisions of English and Irish Courts. Lands described in different combinations of words such as waste and arable or arable and pasture or pasture and woodland emphasise different aspects of land. In many cases the change from one kind of use to another was held to be waste. It is in this sense that Coke on Littleton 53b (quoted in Oxford Dictionary) said that the conversion of meadow into arable or arable into wood is waste but 2 Roll. Ab. 815 said that 'if meadows be sometimes arable, and sometimes meadow, and sometimes pasture, then the ploughing of them is not waste.' In Lord Darey v. Askwith (Heb. 234) it is laid down as "generally true that the lessee hath no power to change the nature of the thing demised: he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor decay the pale of a park "It was thus in Simons v. Norton(1) which was an action of waste for ploughing ancient meadow that Tindal C.J. made the observations which are relied upon in the Bombay case. He observed:

> "It is clearly established by several authorities, that ploughing meadow land is waste.....In grants,land often passes specifically, as meadow, pasture, arable, or by other descriptions. Ploughing meadowland is also esteemed waste on another account; namely, that in ancient meadow, years, perhaps ages, must elapse before the sod can be restored to the state in which it was before ploughing. The law, therefore, considers the conversion of pasture into arable as prima facie injurious to the landlord on those two grounds at least."

Similarly, the observations of Chatterton V.C. in Palmer v. McCormick(2) and of Fitzgibbon J. in the same case cannot lead to any conclusion that 'arable land' means only land capable of cultivation and not land actually cultivated. Tiffs was also a case of' alleged waste. Chatterton V.C. observed:

> "arable' does not mean land actually ploughed up or in tillage but land capable or fit to be so: for ought I know this land, though properly designated arable in 1821, may even then have been in process of acquiring (1) 131 E.R. 249. (2) 1890 25 Ir. Rep, 110.
>
> the character of ancient pasture, which process have commenced, and been going on for sometime."

Mr. Justice Fitzgibbon observed that because the laud was not .in grass for 20 years the defendant could treat it as arable. 'that is. cultivable by him. The contrast between grass-land and arable is thus

established but it does not rule out that arable land does not include land actually cultivated. As a matter of fact the passage from Chatterton V.C. is correctly understood in Stroude's not only land actually ploughed upon in tillage but also I and capable or fit to be so. In tiffs connects it is useful to see that in the Agricultural Holdings Act, 1923 (13 and 14 Geo. 5 c.9) 'arable land' is defined as not including land in grass, and in the second schedule to the Agriculture Act, 1947 (10 and 11 Geo. 6 c. 48) special direction may be given by the Minister requiring the ploughing up of any land consisting of permanent pasture, and the land is deemed 'to be arable land and to have been arable land at all material times. It is thus clear that by arable land is meant not only laud capable of cultivation but also actually cultivated. It is not arable not because it is cultivated demonstrates its nature as arable land.

All this discussion by us was necessary to dispel the inferences drawn from dictionaries and repons of cases from England and Ireland, but 'the safest guide, as always, is the statute itself which is being considered. In this connection we may first turn to the Land Acquisition Act of stood:

"17. Power to take possession in cases of urgency. In cases of urgency, whenever the Local Government so directs. the Collector (though no such reference has been directed or award made) may, on the expiration of fifteen days from the publication of the notice mentioned in the first paragraph of section nine, take possession of any waste or arable land needed for public purposes or for a Company.

Such land shall thereupon vest absolutely in the Government free from all encumbrances.

The Collector shall offer to the persons interested compensation for the standing crops and trees (if any) on such land; and in case such offer is not accepted, the, value of such crops and trees shall be allowed for in awarding compensation for the land under the provisions herein contained."

LISup.CI./68 4 It will be noticed that compensation was then payable for standing crops and trees (if any). There can be no question of crops on waste land for the crops can only be on arable lands became if crops could grow or were actually grown the land would hardly be waste.The words in parenthesis obviously indicate that land may have crops or be fallow and compensation was payable crops if there were crops.

Turning now to the section as it is today it will be noticed that the first sub-section corresponds to the first and second paragraphs of s. 17 of the Act of 1870 taken together. The third paragraph of the former Act corresponds to the third sub-section of 'the present. Act. The difference in language in the third sub-section necessary because the provisions of sub-section (3) are now intended to apply also to the second sub-section of the present Act 'which is new. Hence the opening words 'in every case under either of the preceding sub-sections' which means all cases arising either under sub-s. (1) or sub-s. (2). The words in parenthes is (if any) in relation to the first sub-section continue to have the same force and no other, as they had previously. The learned Judges of the High Court of Bombay did not give sufficient consideration to the fact that the opening words "in every case under either of the preceding sub-sections" do not play and more part than to indicate that what follows applies equally to cases under sub-s.(1) and sub-s. (2). They ought to have read the words that follow

the opening words in relation to sub-s. (1) and if they had so read them, there would have been no difficulty in seeing the force of the words in parenthesis (if any) or why crops are mentioned when the words of the sub-section are waste and arable.The quotation from Roger's Agriculture and Prices quoted in the Oxford Dictionary-"half the arable estate, as a rule, lay in fallow",gives a clue to the meaning of the words 'if any'. In our judgment, therefore, the conclusion of the Bombay High Court was erroneous and the judgment under appeal is right on this point. Finally there remains the question of the constitutionality of sub-ss. (1) and (4) of s. 17. On this point very little was said and it is sufficient to say that the High Court judgment under appeal adequately answers all objections.

In the result the appeals fail and are dismissed.We, however,think that this is a proper case in which there should be no order about costs and direct accordingly.

V.P.S. Appeals dismissed.