



Evolution of concept of right of land in changing times

Naveen Ahlawat

Research Scholar, Faculty of Law, M.D. University, Rohtak, Haryana, India

Abstract

Land is a free gift of the nature and it is an ample source of creation, sustenance and destruction for living and non-living things. It is the prime factor amongst the four factors of production namely land, labour, capital, and organization or entrepreneurship. The progress and prosperity of any country basically depends upon the geographical nature, yielding quality, intrinsic value and the extent of its territory. Further Land is a symbol of social status, greater extent of holding the land is higher will be the social status of the person who is holding it, this is a universal truth. However the present status of the land come after a long evolution of law i.e. from a police state to a welfare state.

Keywords: land, property right, constitution, amendment, development, acquisition, ownership, possession

Introduction

Land is a free gift of the nature and it is an ample source of creation, sustenance and destruction for living and non-living things. It is the prime factor amongst the four factors of production namely land, labour, capital, and organization or entrepreneurship. The progress and prosperity of any country basically depends upon the geographical nature, yielding quality, intrinsic value and the extent of its territory. Further Land is a symbol of social status, greater extent of holding the land is higher will be the social status of the person who is holding it, this is a universal truth. It is obvious also that land in its overall natural existence is limited by what it has been fixed by the nature while formulating the planet Earth. Its extent cannot be extended horizontally, except by way of artificial methods of filling up sub-soils by soil, or where it is so done naturally by the acts of god, like earthquakes, tsunami, etc. There cannot be any land without an owner it is accepted fact that the king or the sovereign authority (in the modern sense, the State or Government) is the real owner of all the lands existing under his or its regime.

During ancient period king was also considered to be the real representative of the God. One of the main characteristics of land is of its ownership that cannot be carried away physically in as much as it is an immovable property^[1]. Ownership is a concept and fiction. It cannot be seen but conceived from the enjoyment of property by the holder of it to the total exclusion of others. The definition of ownership differs from one legal system to other legal system. Jurist and academicians have defined it as per their respective legal systems. Ownership is sometimes regarded as a trinity of rights which in Latin tag means *iusutendi, fruend, abutendi* i.e., a right of using or profiting from land use means exclusive use. The owner of a thing may not only use it for himself, he may also prevent others from using it without his permission. "Profiting from" means enjoying the fruits or profits by the owner out of such use, depending upon the nature of the thing owned. "Of using up" means, the owner of a thing can abuse it, damaging or

destroying it. The most important aspect involved in establishing the ownership is the right of the owner to transfer his land to another person in any manner as he wants viz, by way of sale, gift or otherwise.

The primary owner of land was the king in ancient time or in the present scenario the elected government in power. As such the right of ownership will always remain with the king or with the elected government. Notwithstanding the fact that the land is transferred to individual for agricultural or their other purpose by the king or the government, ownership in the land vest always remains in the king or the government, therefore, when land is required for "public purpose" government can acquire it from individuals or the owners of the land. In time of war or insurrection the proper authorities may possess and hold any part of the territory for common safety; and in time of peace the legislature may authorize to utilise the same for public purpose. This is simply named as doctrine of eminent domain^[2]. Doctrine of "eminent domain", in its general connotation means ultimate power of the king or the government under which they can acquire or use private property for their own use without owner's consent. Government generally use the power of eminent domain when acquisition of land is necessary for completion of public projects such as making of railway, roads, hospitals, school-college, construing dams and irrigation canals, establishing manufacturing industry and for urban development even though owner of the required property is unwilling to negotiate the price for its sale^[3]. Using of domain power or sovereign power of the state for compulsory acquisition of land is only against private property and it cannot be invoked against crown land or government land^[4].

Evolution of Concept of Property in India

The concept of property in India goes back to the roots of humanity and has its origin in the every evolution of society. The instinct to have property is natural in human beings, though the term property was quite vague in the early phases

of human civilization. With the passage of time, it becomes well established and was realized that, property was keystone of the gigantic arch of social life. However the instinctive notion of property was gradually replaced by a legal approach, in a more civilized condition which made it necessary to frame the rules to govern the acquisition, preservation and disposal of property in its various forms. These rules underwent a continuous evolution and have now reached a stage of almost perfection in most of the civilized societies. With the rapid rise in the mode of transport and means of communication the societies living in different parts of the world have been brought nearer and the laws and concepts pertaining to the property have been greatly interchanged. Bernard Shaw endorsed this view and said that this was the only perfect truism that has ever been uttered. Edmund burke believed that private property perpetuated the society itself. Mackintosh regarded that private property as the sheet anchor of the society. As against this, Joan Pierre Brisset declared that private property is a theft against nature. Thus, the views regarding rights in respect to private property have been varied from time to time, from one legal system to another, from nation to nation country and from person to person within these two extreme views lie all notions of private property in our country today ^[5]. Locke went a step further when he remarked that the man uniting into common wealth and putting themselves under government for preservation of their property. He emphatically believes that state come into existence to safeguard the life, liberty and property of the people. This philosophy of Locke appears to be equally tenable in India. The main objective of the state in India was to safeguard the life, liberty and the property of the subject ^[6].

Property Right in Pre-independence Period

The concept of private property has played vital role in the development of an individual personality, though it has an evil tendency to enable exploitation of one individual by another resulting in mal-distribution of national wealth. Protection of private property in varying degrees has, therefore, been accorded by all modern Constitutions ^[7]. In every society property relationship and other elements of the social order are closely interlinked. Even if property relations are not regarded as the foundations on which the whole order resets as a superstructure, it is undeniable that the concept of property and the relationship it entails among members of the community have deep and wide implications for all aspects of social life ^[8]. In India there are laws pertaining to property in its different forms similar to those existing in other highly civilized countries. For historical reasons, the influence of the British Laws on our Laws has been considerable. There should be no hesitation in accepting the proposition that most of our concepts regarding owning, transferring and disposing of property are similar and at the times borrowed from the English notions on the subjects ^[9]. For an ideological picture of the scheme of property relations in India it is necessary to turn the Constitution of India which is not only a document reflecting existing social realities but, in many vital areas, it projects the wisdom and insight of the founding fathers. In a sense, almost all the provisions of the chapters on Fundamental Rights and Directive Principles could be said to contain direct or indirect ideas concerning the property

relations. Same has been found under the Government of India Act, 1935 except nomenclature like Fundamental Rights or Directive Principles. Provisions relating to finance, property, contract and, suits with some provisions like the federal railway authority, appeal in revenue matters, restriction on internal trade, provision relating to compulsory acquisition of land contained in the Government of India Act, 1935. The Fundamental Rights & Directive Principles are the chapters of the Constitution of 1950; therefore, these are definitely vision of our founding fathers. Property relations in India before Constitution came into force were regulated by ordinary law of the land. During the British rule in India there was no Constitutional guarantee for the right to acquire, hold and enjoy the property although, there was Land Acquisition Act of 1870. Later Land Acquisition Act of 1894 provides for acquisition of private property for public purposes and which laid down elaborate machinery for determining the market value of compensation. However, there was no Constitutional guarantee of property and hence such law could be altered at any time detrimental to the property owners. Therefore, during the struggle for independence, the right to protection of private property was given considerable importance and public opinion insisted upon by the leaders of freedom fighters ^[10]. It may be noted that the protection given to the private land was extended to commercial and industrial undertaking and this protection was available to “any person” in British India. Although there was no Constitutional guarantee of right to property, the provisions of Land Acquisition Act, 1894 has ensured adequate compensation on acquisition of private property for public purposes. There was enormous litigation and plethora of decisions of the courts on the subject. But there being no Constitutional guarantee, the law could be amended to make the provision for the amount of compensation which may be inadequate or even illusory. In *Babu Kailas chandra v. Secretary of State*¹¹ A the Privy Council held that only the present use of the land and not the potentialities of future development could be taken into consideration while arriving at the market value. There was also another point of view wherein it has argued that the compensation need not be full market value. Reliance was placed on the American case of *Chicago Railway v. Chicago II* B wherein the compensation awarded for the land acquired was one Dollar and the same was held to be just compensation. With this state of law regarding the property rights, in case of acquisition for public purpose, the feeling on either side, for and against of adequate compensation and there was considerable discussion and debate on whether the property right should be entrenched as fundamental right and whether compensation payable on acquisition should be the full market value ^[11].

Property Right in Post-Independence period

After independence, India has been making an effort to make certain crucial changes in its laws pertaining to right to property to suit the local conditions and to create a more just and progressive society. At the time of making Constitution there were considerable discussions at constituent assembly on property rights and many eminent persons opposed the property right being included as a fundamental right and the compensation payable for acquisition of property at market

rate. But the Sardar Patel Committee on Fundamental Rights was not prepared to accept this view point at the end of which, it was thought necessary that property rights should be considered as sacrosanct and hence they were included as a Fundamental Right and embodied in Articles 19(1)(f) and 31. In this way property right had got maximum protection from being eroded, abridged or abolished. Some members of Sardar Patel Committee on Fundamental Rights expressed their unhappiness against inclusion of right to property as a fundamental right^[12]. Property right is one of the fundamental rights amongst the famous seven freedoms and it provides that all citizens shall have the right to acquire, hold and dispose of property. This provision elevating the property right to fundamental right however, it gave rise enormous litigations and courts were called upon to decide, where private property was sought to be acquired for common good of the community as a whole. Hence courts always insisted two basic requirements to be fulfilled in the matter of acquisition. They are: (a) Acquisition must be for a public purpose; and (b) Compensation must be adequate for the property acquired^[13]. Right to property had been a fundamental right given double barreled protection. Under Article 19 (1) (f) every citizen guaranteed right to acquire, hold and dispose of property, subject to reasonable restrictions. Under Article 19(5) reasonable restrictions are imposed by law in the interest of general public or for tribe. On the other hand under Article 31 property right guaranteed to every person irrespective of citizenship and it provides that right against deprivation of property right unless it acquired by the state for public purpose. Article 31(1) provides that a person cannot be deprived of his property right merely by executive fiat but it can be deprived by legislative enactment. However, Article 31(2) guaranteed the compensation to the individual when his property acquired for public purpose^[14]. The principle embedded in Article 31(2) derived from doctrine of eminent domain i.e., the sovereign power of the state to appropriate for purpose of public utility the land within the limits of its jurisdiction. The principle underlying appropriation of private property by the State rests upon two famous maxims i.e., *salus populi est suprema lex* which means that welfare of the people or the public, is the paramount law, another maxim *necessitas publico major est quam private* which means, 'public necessity is greater than private'. "The law imposed these principles on every subject that he prefers the urgent service of his prince to the country before the safety of his life^[15]". The sovereign power of the state, which was originally vested in the ancient kings, came to be delegated to public bodies and corporations, with the advance of civilization and with all the complex organization of the machinery of state. With the growing importance and interest in view of the progressive industrialization of the country and promotion of enormous irrigation projects, schemes of town planning and town improvement and other utilitarian activities, the subject of land acquisition has gained momentous importance. The breaking down of the old feudal system of land tenures and the ushering in of co-operative farms and making the tiller very near owner of the soil, all these invite state intervention to acquire private land for public purpose^[16].

Property Right after 44th Amendment

The Preamble of the Constitution of India envisages that constituting India, inter alia, into a "Socialist" country. Though the Preamble does not add to or subtract from the provisions of the Constitution, the Supreme Court has been reading the enacting provisions of it in the light of the Preamble. The word "socialist", when read with Article 14, was interpreted to strike down a statute which failed to achieve the socialist goal to the fullest extent,^[17] or which adopts a classification which is not in tune with the establishment of a welfare society^[18]. The word socialist when read with Article 39(d) would enable the court to uphold constitutionality of laws of nationalization of private property^[19]. The preamble also envisages the expression of "Social and Economic justice". This expression involves "distributive justice" what connotes as, the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between unequal in society. It comprehends more than lessening of inequalities of differential taxation, giving debt relief or regulation of contractual relations; it also means the restoration of properties to those who have been deprived thereof by unconscionable bargains; it may also take the form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of the society. As a result of social and economic justice Articles 19(1)(f) and 31 were repealed by the constitutional forty fourth amendment, now property right is only a legal right^[20]. Thus, the only effect of deletion of Articles 19(1)(f) and 31 is that the right to property is no more a fundamental right and such deletion does not abolish the right of property as they exist under the ordinary law, as for example, the right of a landlord to evict a tenant under the Rent Control Act^[21]. Article 31(1) and 31(2) and followed interdependent clauses 3, 4, 5 & 6 were repealed and Article 31(1) was redrafted as Article 300A. Now compulsory acquisition of land for public purpose is implied in the Article 300A. State Government may require land for various public purposes, especially to uplift the down trodden people where economic disparities are prevalent. For meeting this contingency almost all the countries of the world reserve the right to acquire or require land for public purpose. This power of the state government is known as the power of "eminent domain."

References

1. Dr. Maheshwaraswamy's N. 'Land Law', Asia Law House, Hyderabad, 1st ed., 2009, P1
2. Supra note 1, at 3 & 4.
3. Supra note 1, at 5.
4. Ramachandra's VG, 'Law of Land Acquisition and Compensation', (Eastern Book Company, Lucknow, 7th ed., vol. No. 1, 1960), pp 1&2.
5. Supra note 5 at 320.
6. Sunil Deshta & Kiran Deshta's, 'Jurisprudential Aspect of Right to Property under the Constitution of India', 18 Review Law 53 (1996).
7. Pande's GS. 'Constitutional Law of India' (University Book House Pt. Ltd., Jaipur, 10th ed. 2007), p596.

9. Indra Deva. 'Property Relations in India and the Social Order: The Perspective of Social Change', (G.S. Sharm ed. 'Property of Relations Independent India: Constitutional and Legal Implication' Tripati Publication, New Delhi, 1985), p 36.
10. M. Hidayatulla's. 'Constitutional Law of India', (The Bar Council of India Trust in Association with Arnold-Heinemann, New Delhi, 1986), p 359.
11. Sanjiva Roa's. 'Land Acquisition and Compensation', (J.P. Singhal, rev'd., Law Book Company, Allahabad, 4th ed., 1958) p 85.11 A ILR (1946) ALL738 11 B 166 US 226 (1897).
12. Supra note 10, at 360 & 61
13. Supra note 10, at 361-62.
14. Supra note 10, at 363.
15. Supra note 8, at 597
16. Supra note 4, at 1 & 2.
17. Supra note 4, at 2 & 3.
18. Nakara DS v. Union of India, AIR 1983 SC 130
19. Atam Prakash v. State of Haryana, AIR 1986 SC 85.
20. Excel Wear v. Union of India, AIR 1979 SC 25.
21. Waman Rao v. Union of India, AIR 1981 SC 271.
22. AIR 1981 SC 234.