HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (M/S) No. 2364 of 2015

Heera Singh Pangtey and others ..…Petitioners

Versus

State of Uttarakhand and others …. Respondents

Present :-

Mr. T.A. Khan, Senior Advocate, assisted by Mr. Ravi Shankar Kandpal, Advocate, for the petitioners.
Mr. V.D. Bisen, Brief Holder, for the State of Uttarakhand.
Mr. Rakesh Thapliyal, Assistant Solicitor General, assisted by Mr. Pankaj Chaturvedi and Mr. Lalit Sharma, Standing Counsel, for the Union of India.

Date of Reserved : 05.10.2021

Date of Judgment : 04.03.2022

JUDGEMENT

Hon'ble Sharad Kumar Sharma, J.

Floreat Alma Mater, our Great Nation India.

2. The aforesaid reference has a relevance in the context of the issue involved, and the relevance of a Country for each and every citizen, who resides in it. The reference of the term "Alma Mater" in its literal and contextual meaning would mean a "generous Mother" and that is why our Country is the only country in the World, which is referred as to be the "Motherland". If the two references of the word "Alma Mater" is preceded with the word used as "floreat", that too has a reference denoting to the flourishment of the

country and to its long life, which would be of a contextual perennial importance, while dealing with the issue raised by the petitioners.

3. The issue involved in the present Writ Petition is of a grave national concern, pertaining to regulating the frontier borders of the country, adjoining to the **'Line of Actual Control'**, which adjoins and shares the boundary lines of our neighbouring country, China, which is approximately about 20 to 25 Kms. only away from the land, in dispute, which is proposed to be acquired for the purposes of meeting out the defence need of the ITBPF, i.e. Indo Tibetan Border Police Force (hereinafter to be referred as I.T.B.P.).

4. The issue would be, as to whether despite of there being certain limited statutory protection; having being granted to a specified class of reserved community, i.e. the Scheduled Tribes, whether their personal rights, if it is, at all prevailing under law, would prevail over the right and interest of the nation, i.e. our Motherland, particularly, when it calls for defending the critical and strategic border of our Nation, in order to have preparedness, to meet any unprecedented insurgencies or army aggression, by the neighbouring county China.

5. The petitioners to the present Writ Petition, contend and claim themselves to be the resident of Village "Milam", Tehsil Munsiyari, District Pithoragarh, which is located at a high altitude, in the higher laps of the Himalayas,

approximately about 12,000 to 13,000 feets, in height above sea level. The said village "Milam", where the land in dispute is situated and which is proposed to be acquired for defence purposes, is only approximately about 20 to 25 Kms. away from the bordering frontier, i.e. Line of Actual Control, between India and China, and strategically, it is of a grave military importance, for the defence of the country.

6. The petitioners have come up with the case, and they have raised a claim, that they are the residents of the said village, who yet again contend and claim to belong to a scheduled tribes, as it has been classified under Article 342 of the Constitution of India and are included as "Tribes", as it has been specified under U.P. Scheduled Tribes U.P. Order of 1967. The petitioners contend, that the land, in question, which lies in the aforesaid Village is located in Khasra Nos. 1417, 1416, 1419, 1397, 1409, 1410 and 1411. The petitioner No.3, has contended, that as far as the aforesaid land described above is concerned, it is allegedly shown to have been recorded in the revenue records in the name of petitioner No.3.

7. On the other hand, the late petitioner No.1, who was later on; substituted by the petitioners Nos. 1/1 to 1/5, have similarly claimed their ownership over Khasra No. 1370 and 1371 of Village Milam and they have claimed and contended, that they too stood recorded in the revenue records, from the time of their predecessors. Late Mr. Mahiman Singh, father of petitioner No.2, and they have also claimed, that they have their rights over part of the

unidentified land lying in khasra No. 1421 and 1417 of the same village.

8. Similarly, petitioner No. 4, had also claimed and contended, that he is the owner in possession of the land recorded in khasra Nos. 1470 and 1408, which has been placed on record by petitioner No.4, in order to substantiate his claim over the land, in question. The petitioners contended, that the aforesaid land since being located at a higher altitude of the Himalayas, for most of the period of the year approximately for about six months, it is covered by snow and hardly any agricultural activities are admittedly being carried by them over the land, in question, except for few chosen months of the year during the summer. The petitioners' admitted case is that the aforesaid land thus recorded is exclusively shown as to be an **"agricultural land"** and **"no abadi"** as such exits on any part of the land in question.

9. The petitioner in the Writ Petition, admittedly, had come up with the case that the land, which are the subject matter of acquisition, as contained in the Schedule of the Notification issued under Section 11 (1) of the Act of 2013, is an 'agricultural land', and admittedly, it is not being or was ever being utilised as an "Abadi", as defined under the Revenue Law. The term "agricultural land" has not been defined under the provisions of the U.P. Zamindari Abolition and Land Reforms Act, rather it defines the term 'land', which is inclusive of an activity of agriculture. Hence, the

land and its utility is exclusively limited for agricultural purposes, in the context of the Revenue Law, and even as per opinion of this Court, it would mean a continuous and a persistent agricultural activity to be carried in order to protect the right of tilling of soil by an occupant or an owner of the agricultural property.

10. The petitioners contended that since they belonged to a Scheduled Tribes i.e. "Bhotia", which in itself is a class of Tribes protected by the Constitution of India, **as well as, under the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013** (hereinafter to be called as **Act of 2013**), their land ought not to have been acquired, even for the purposes of meeting out the requirement of the defence personnel, as because of their self acclaimed immunity, which they have claimed to have vested in them, in the light of the provisions contained under Section 40 to be read with Section 41 of the Act of 2013.

11. Simultaneously, they have also sought a protection on the basis of the U.P. Scheduled Tribes Order, as it was then notified in 1967; because **"Bhotia Tribes"**, have been included in the said list of Scheduled Tribes, provided in the Schedule of 1967.

12. The petitioners have contended that apart from the fact, that they stand recorded in the revenue records and that they had been in possession of the land since 1880, and they have also claimed that in accordance with, and with the

enforcement of the provisions of the U.P. Zamindari and Land Reforms Act / KUJA Act, they have acquired the status of being a **“bhumidhar”** of the land, which is claimed to be belonging to them, since they claim that the respective parcels of land stood **“vested”** with them with the enforcement of U.P. Z.A. & L.R. Act.

13. It is known to all, that the **Line of Actual Control**, which regulates and lays down the demarcation line of the frontier borders of our Great motherland, with the neighbouring country China, is strategically of a very prime importance, from the perspective of the defence of the country, and particularly, in an eventuality of any unpredictable and unforeseen enemy military action, if it is required to be retaliated and taken by us, or if it is taken against our Country, to meet the defence need of the country and that too, where our armed forces have to defend the country in a higher altitude warfare, there are various statistical, strategical and technical issues, which are required to be technically considered by skilled defence personnels, from the perspective of the military requirement, while choosing an appropriate parcel of land, which could best suit the need; for the purposes of providing the adequate and effective military installations for Para Military Forces or for Military Forces; particularly, for construction of bunkers or installation of the ammunition and a long distance firing devices, which may be conveniently handled and made operational at higher altitude, and the said **technical assessment** of the military requirement, could and could only be falling for its assessment within the exclusive domain of

its assessment, to be made by the competent military officials, and because, since it is rather, based on the said perspective and the strategic location of the land, as already described and detailed above, the competent authorities, while exercising their powers under Chapter-II of the Act of 2013, i.e. the determination of the **"social impact assessment"** and the **"public purposes"**, after undertaking the said process and the assessment procedure, which were required under law, had resolved to acquire the land as aforesaid by issuance of a Notification, which is impugned in the Writ Petition, being **Notification No. 800/XVII-5/15-13 (5) Ardh Sanik/2015 dated 1st August, 2015**, whereby, the Chief Secretary, to the State of Uttarakhand, Department of Army Welfare, had with the prior consent of His Highness, the Governor of the State, had issued the notification under Section 11 (1) of Act of 2013, proposing to acquire the said land, lying in Malla Johar, Mauza Milam, District Pithoragarh, and on a simplicitor reading of the intention and the purpose of the notification for acquisition of land, it had been clearly and apparently spelt out therein, that the sole and solitary purposes of the acquiring of the land, was to meet the defence requirements of the country, looking to its strategic location, and particularly because of the consistent military insurgencies and across the border line firing, which this great country of ours, has been recently facing, the apparent threats of an army aggression by the adjoining neighbouring country China and that is why, the object for acquisition has been deciphered in the notification itself, the relevant part of which, is extracted hereunder :-

"राज्यपाल भूमि अर्जन, पुनर्वास और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता अधिकार अधिनियम, 2013 (अधिनियम संख्या 30 सन् 2013) की धारा 11 की उपधारा (1) द्वारा प्रदत्त शक्तियों का प्रयोग करके सर्व साधारण की सूचना के लिये अधिसूचित करते हैं कि उनका समाधान हो गया है कि निम्नलिखित अनुसूची में उल्लिखित भूमि की लोक प्रयोजन अर्थात जिला पिथौरागढ़ के ग्राम मिलम, परगना जौहार, तहसील मुनस्यारी में 14 वीं वाहिनी भा0ति0सी0पु0 बल, की अग्रिम चौकी मुख्यालय की स्थापना हेतु ग्राम मिलम की 2.4980 है, भूमि की आवश्यकता है।

चूंकि धारा 40 के अधीन आत्यायिकता उपबन्धों का अवलम्ब लेते हुए उक्त अधिनियम, 2013 की धारा 9 के अनुसार समुचित सरकार में सामाजिक समाघात निर्धारण अध्ययन कराने से छूट प्रदान करने की शक्ति दी गयी है। अतएव अब राज्यपाल की यह राय है कि यह मामला अत्यावश्यकता है, इसलिए उक्त अधिनियम की धारा 11 की उपधारा (1) के अधीन निर्देश देते हैं, कि यद्यपि धारा 40 के अधीन कोई अभिनिर्णय/आदेश नहीं दिया गया है तथापि राज्यपाल उक्त लोक प्रयोजन के लिए धारा 40 की उपधारा (1) में निर्दिष्ट घोषणा के साथ निम्नलिखित अनुसूची में उल्लिखित भूमि की उक्त अधिनियम की धारा 11 की उपधारा (1) के अनुसार विज्ञप्ति अधिसूचित की जाती हैः–"

14. What would be relevant to observe at this juncture only is that if the purpose of acquisition, which has been shown in the impugned Notification of 1st August, 2015, itself is taken into consideration, it is exclusively intended to meet the emergent need, for the purposes of establishment of the frontier chauki, i.e. Border Out Post (in short BOP), in Village Milam for the 14th Wing of ITBP. While taking an action for acquiring the land; under Section 11 of Act of 2013, it was specifically observed that the Government and its Social Welfare Department, had conducted a detailed survey as per Chapter II, Section 4 of Act of 2013, and also

for the purposes of the exemption, to be provided, for the land to be acquired to meet the urgent need of the defence forces of the country, for the defence of the country, in the light of the provisions or stipulation as it has been contained under Section 40 of the Act, which provide with ample of power to the Government, as it has been provided under Section 9 of the Act of 2013, for an exemption, from the implications of Section 40 of Act of 2013, in order to completely eradicate the necessity of "social impact assessment", in relation to the land, which is proposed to be acquired to meet the military or the defence requirement, when it comes to an issue of defence of the Country, which is supreme and above all the legal or personal rights, which are exempted under Section 9 of the Act, which relates to the exemption clauses contemplated under Section 2 (1) (a) and Section 9 of the Act of 2013, which are extracted hereunder:-

> "**Section 2. Application of Act.**–(1) The provisions of this Act relating to land acquisition, compensation, rehabilitation and resettlement, shall apply, when the appropriate Government acquires land for its own use, hold and control, including for Public Sector Undertakings and for public purpose, and shall include the following purposes, namely:—
>
> **(a) for strategic purposes relating to naval, military, air force, and armed forces of the Union, including central paramilitary forces or any work vital to national security or defence of India or State police, safety of the people; or**
>
> ……..

Section 9. Exemption from Social Impact Assessment.–Where land is proposed to be acquired invoking the urgency provisions under section 40, the appropriate Government may exempt undertaking of the Social Impact Assessment study."

15. Reverting back to the intention and object of the acquisition, if that is exclusively taken into consideration, in fact, the State Government, while issuing the notification on 01.08.2015, under sub-section (1) of Section 11 of the Act of 2013, had appropriately taken into consideration, the implications of Section 9 of the Act of 2013, to be read with Section 40, of the Act of 2013, for the purposes of issuing the notification of acquisition of land, under Section 11 (1) of the Act, proposing to acquire the land for the purposes of establishment of the frontier chaukies in the adjoining border area of the country, which is near to, the "Line of Actual Control" and which is of a very strategic military requirement for the purposes of **'National Security'**, and hence, it cannot be said, that the need of acquisition as stipulated by the impugned notification of 1st August, 2015, was at all or could have been at all, in non-compliance of the provisions contained under Section 40 (1) (2) of the Act, to be read with Section 9 of the Act of 2013, as it has been argued by the counsel for the petitioners.

16. The petitioners in the Writ Petition have primarily put a challenge to the aforesaid Notification of 1st August, 2015, on the principle ground, that it happens to be in

violation of Section 40 of the Act, as 30 days' notice provided therein, after the publication of notices under Section 21 of the Act, for taking possession of the land was mandatorily needed to be issued; even if it was to be acquired for the public purposes, that was not complied with.

17. In order to make a reference and to effectively answer to the aforesaid contention of the petitioners' Counsel, with regard to the implications of Section 21, to be read with Section 40 of the Act of 2013, in fact, their argument, itself has been answered in the object of the notification of acquisition, I am of the view, that once the State Government has exercised its powers, as it has been provided under the exemption clause provided under Section 9 of the Act of 2013, in that eventuality, the 'social impact assessment', which is otherwise protected by the provisions contained under Chapter-II of the Act of 2013, has had to be exempted, to be made applicable in relation to the stipulation and intention of acquisition provided under Section 40 of the Act of 2013, and for providing for a 30 days' notice by way of publication in compliance of the provisions contained under Section 21.

18. Apart from it, if sub-section (2) of Section 40 of the Act of 2013, if that is taken into consideration, that itself carves out an exemption from the strict compliance of the provisions of sub-section (1) of Section 40, of the Act of 2013, where the appropriate Government as defined under sub-section (e) of Section 3 of the Act of 2013, when it comes to conclusion, that the need of emergent acquisition is

for the purposes covered by sub-section (2) of Section 40 and also when its implication, has a direct impact and nexus with the purposes of the application of Act, as provided under sub-clause (a) of sub-section (1) of Section 2 of Act of 2013. **I am of the view that the defence purposes of the country acquires the drivers seat, and would be predominantly overriding all the restrictive intentions of the Act of 2013, since being contrary to the constitutional intention, for protection of individual rights or even for a right of a class of Society, because this Court is of the view that no individual rights or even for that matter even public rights, can be at any moment be taken to be the superior rights, than to the right of defence of the Country, because of which, we all citizens are thriving peacefully, because our frontiers areas of the Country, are in the safe hands of our gallant army and para military personnels. That is what has been even intended by the preamble of the Constitution of India.**

19. In that eventuality and context, the reference of Section 21 and Section 40 of the Act of 2013, becomes relevant to be extracted hereunder; because under the given set of circumstances, particularly when the notification is in the light of Section 9 of the Act of 2013, and particularly, when it dilutes the implications of Section 21 and Section 40 of the Act of 2013, and quite logically also too, when the land is proposed to be acquired is apparently and exclusively for the defence of the country and for the establishment of the frontier chaukies of the para military forces for defending our

Motherland from the adjoining enemies country. Section 21 and 40 of the Act of 2013, are extracted hereunder:-

> "**21. Notice to persons interested**.–(1) The Collector shall publish the public notice on his website and cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensations and rehabilitation and resettlement for all interests in such land may be made to him.
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> (2) The public notice referred to in sub-section (1) shall state the particulars of the land so needed, and require all persons interested in the land to appear personally or by agent or advocate before the Collector at a time and place mentioned in the public notice not being less than thirty days and not more than six months after the date of publication of the notice, and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, their claims to rehabilitation and resettlement along with their objections, if any, to the measurements made under section 20.
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> (3) The Collector may in any case require such statement referred to in sub-section (2) to be made in writing and signed by the party or his agent.
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> (4) The Collector shall also serve notice to the same effect on the occupier, if any, of such land and on all such persons known or believed to be interested

therein, be entitled to act for persons so interested, as reside or have agents authorised to receive service on their behalf, within the revenue district in which the land is situated.

(5) In case any person so interested resides elsewhere, and has no such agent, the Collector shall ensure that the notice shall be sent to him by post in letter addressed to him at his last known residence, address of place or business and also publish the same in at least two national daily newspapers and also on his website.

40. Special powers in case of urgency to acquire land in certain cases.–(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 thirty days from the publication of the notice mentioned in section 21, take possession of any land needed for a public purpose and such land shall thereupon vest absolutely in the Government, free from all encumbrances.

(2) The powers of the appropriate Government under sub-section (1) shall be restricted to the **minimum area required for the defence of India or national security** or for any emergencies arising out of natural calamities or any other emergency with the approval of Parliament:

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 to do so, 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) Before taking possession of any land under sub-section (1) or sub-section (2), the Collector shall tender payment of eighty per cent. of the compensation for such land as estimated by him to the person interested entitled thereto.

(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1), sub-section (2) or sub-section (3) are applicable, the appropriate Government may direct that any or all of the provisions of Chapter II to Chapter VI shall not apply, and, if it does so direct, a declaration may be made under section in respect of the land at any time after the date of the publication of the preliminary notification under sub-section (1) of section 11.

(5) An additional compensation of seventy-five per cent. of the total compensation as determined under section 27, shall be paid by the Collector in respect of land and property for acquisition of which proceedings have been initiated under sub-section (1) of this section:

Provided that no additional compensation will be required to be paid in case the project is one that affects the sovereignty and integrity of India, the security and strategic interests of the State or relations with foreign States."

20. The petitioners have submitted, that the Notification of 1st August, 2015, suffers from yet another discrepancy, that after the publication of the notification under Section 11 and after the lapse; of the stage of the proceedings of social impact assessment, it later involved the hearing of objections, as it has been provided under Section 15 of the Act of 2013, was not complied with was not provided to them, and hence, that itself would mitigate the entire acquisition proceedings. As far as the bearing of Section 15 is concerned to the acquisition process, it needs no reference, that in an exceptional exercise of power, which could be, and it had been left open for the State, to be exercised by the State Government, to acquire a land even without hearing the objections, it is to be exercised in circumspection, which gives a very limited power to the land owners to protect their personal rights and at the costs and risk of the public rights or the public interest, and that too when it relates to the nation, and particularly, the public interest, when it leads to an extent of augmentation of the defence of the nation. The hearing of objection, which had been that too when it is limited to the areas of objection, provided under sub-section (1) of Section 15 of the Act of 2013. The areas of objection which had been left open and limited for hearing under Section 15 of the Act of 2013, are as under :-

> "**15. Hearing of objections.**–(1) Any person interested in any land which has been notified under sub-section (1) of section 11, as being required or likely to be required for a public purpose, may within sixty

days from the date of the publication of the preliminary notification, object to -

(a) the area and suitability of land proposed to be acquired;

(b) justification offered for public purpose;

(c) the findings of the Social Impact Assessment report."

21. This Court is of the opinion, that the area of hearing of objections, under the different heads, which had been provided therein under Section 15 of the Act of 2013, will not be attracted or have its applicability, because the purpose herein as expressed in the notification of 08.08.2015, was for establishment of Border Out Post, adjoining to the Line of Actual Control, would not be an aspect, which at all could be left open for speculations and assessment by the executive or administrative authorities, because it could be best and with utmost perfection be only scrutinized by the defence forces authorities, to suit their need of deployment of armed personnel or establishment of their border out posts, which cannot be left open to be assessed by the executive, and as per opinion of this Court, the need of defence of the nation, nearing the frontier borders of adjoining country China, particularly looking to its topographical and climatic restrictions, it cannot be doubted that the proposed acquisition is not for the public purpose and for the purpose of the country. Coming to the impact of third clause (c) of Section 15 of the Act, it will have no application in the circumstances of the instant case, due to the implications of Section 2 (1) (a) to be read with Section 9 of the Act of 2013,

already dealt earlier, which had exempted the applicability of Section 40 of the Act of 2013.

22. While elaborating on the issue, which has been only and exclusively argued by the learned counsel for the petitioner, with regard to the impact of non-compliance of Section 15, of hearing of the objections and with regard to the issuance of notice under Section 21, to be given to the interested persons. In fact, if the necessity of compliance of Section 21, itself is taken into consideration, rather Section 21, it forms to be part and parcel of the provisions contained under Section 40 (1), which deals with the aspect of providing of a notice; by way of publication of the notices in the newspapers, which in the instant case, was resorted to by the respondents by issuing a publication in "Dainik Jagran" on 27th August 2015. But, the allegation of non compliance of Sections 15 and 21 of the Act of 2013 is concerned, this Court is of the view that it is not independent in its application, as per the provisions of the Act itself, particularly, because of the intention provided under the Statement of Reason (SOR) of the Act of 2013, if that is taken into consideration, particularly, when it deals with the aspect of the **"public purpose"**, it has been comprehensively defined, so that the Government intervention in acquiring the land may be limited to the defence need of the Country, to ensure the consent of at least of the affected families, but acquisition under an urgency clause had also been limited in its applicability for the purposes of National defence, security purposes, natural calamities, etc. which are the exceptions under the Act itself, and that is why, the definition of the

"public purposes", as given in the Act, though it is very wide enough in its application, where it entails infrastructural acquisition to meet the public purposes, but as per my view too, it would not be inclusive of the need of the defence of the country.

23. This aspect of the matter also stands affirmed and supported by the provisions contained under Section 2 (1) (a) of the Act of 2013, where an exception has already been carved out, with regard to meeting the requirement of military or paramilitary forces for any work; which is vital for the national security or the defence of India. In the light of the provisions contained under Section 2 (1) (a), if the legislative purpose of Section 9 is taken into consideration, which has already been dealt with above, the applicability of Section 40 itself has been exempted to be made applicable, which in itself eradicate the application of the social impact assessment, and once if Section 9 of the Act of 2013, is taken into consideration; the urgency provision under Section 40 of the Act of 2013, has exempted the assessment of social impact assessment, and if reference is made to sub-Section (1) of Section 40, it provides a 30 days' notice from the date of publication of notice under Section 21 and in that eventually, when Section 40, itself covers the impact of Section 21, which had been overridden by applying Section 9 of the Act of 2013, which has been exempted to be made applicable by the provisions contained under Section 9 of the Act of 2013, the argument of the learned counsel for the petitioners of non-compliance of the provisions contained under Section 21 or Section 40 of the Act, becomes

irrelevant for consideration in the circumstances of the present case.

24. The necessity of the defence of the country though has been indirectly considered in one of the recent judgement, which has been rendered by the Hon'ble Apex Court in **Civil Appeal No. 10930 of 2018, Citizens for Green Doons and others Vs. Union of India and others,** as decided by the Hon'ble Apex Court, while passing a judgement on 14th December 2021, in Miscellaneous Application No. 1925 of 2020, filed in the said Civil Appeal, though the text of the controversy in the said case was pertaining to the construction of "Char Dham Yatra", road in the State of Uttarakhand. The relevant part of the aforesaid judgement, with which we would be more concerned, would be pertaining to the aspect of the defence requirement and particularly, the area with which the present Notification is concerned i.e. District Pithoragarh, which shares the international boundary with China. Hence, while assessing its topographical and environmental impact and issues related to it, while dealing with and recording its finding in conclusion, as well as in the analysis made by the Hon'ble Apex Court, in the said judgement, it had been pointed out by His Lordships, that construction of the roads and particularly, the Char Dham Yatra road in the said matter, was all the more relevant for the purposes of meeting the defence requirement, because it adjoins the sensitive border areas of the country and in reference thereto, the Hon'ble Apex Court in its para 45, which is extracted hereunder has laid down and considered the importance, as to why the strategic points, adjoining to

the international borders, would be tactically and strategically relevant for the purposes of developing the infrastructural facilities for meeting the need of the Army, which also acts as a feeder road to the security of the nation. In fact, this issue which is involved in the present Writ Petition, too would also deal with the said genesis of the observations, which had been made by the Hon'ble Apex Court in the said judgement. **Para 45** of the same is extracted hereunder :-

> "The issue that arises for consideration is regarding the road-width to be adopted for the three strategic border roads, as indicated in MA No 2180 of 2020 filed by the MoD, namely: Rishikesh to Gangotri (NH-94 and NH-108), Rishikesh to Mana (NH-58), and **Tanakpur to Pithoragarh (NH-125)**. Broadly speaking, the appellants have argued that the present road infrastructure is sufficient to meet the needs of the Indian Army. Any further development, it has been urged, must be balanced keeping in mind the fragility of the Himalayas, the excessive damage caused to the environment and the need to ensure disaster-resilient roads. On the other hand, the UOI has stressed on the necessity of developing these feeder roads, for the security of the nation. Given the proximity of the roads to the Indo- China border, and the necessity of free movement for transport of trucks, machines, equipment and personnel of the Indian Army, double lane configuration must be allowed, according to the UOI. To analyse the issue, we shall first advert to the findings of the HPC."

25. The Hon'ble Apex Court in the said judgement has recorded that the choice of the land for the purposes of laying down of the roads, its widening though it deals with the different aspect pertaining to the terrain classification, geo metric design, design of the speed, sight distance or the visibility, are the various aspects, which was dealt with by Chapter-II of High Power Committee Report, which was dealing with the construction of the Char Dham Yatra Road. In para 52 by virtue of the majority view of the members of the High Power Committee, it had resolved in its Para 52 (iii) and (iv), about the vulnerability of the border roads and its necessity for the sensitive area, adjoining to the line of actual control, and hence, even as per the resolution of 2019 Indian Road Congress Guidelines, it had laid down an emphasis of providing and appropriate strategic border roads for military and paramilitary forces. The relevant part of para **52 (iii) and (iv)** of the aforesaid Apex Court judgment is extracted hereunder:-

> "52.
>
> …..
>
> (iii) Some of the highways of the Project are important feeder roads leading towards border areas. The BRO has highlighted that the terrain in border areas is in a snow bound region and feeder routes such as Helong-Mana and Barethi-Gangotri must be double-laned. Further, the roads beyond Joshimath and Uttarkashi are operationally sensitive and fall within 100 kms of the Line of Actual Control. Single-lane roads are closed during the winter season due to

accumulation of snow and hinder the movement of logistics and medical aid to the Indian Army;

(iv) The 2019 IRC Guidelines also suggest that strategic border roads for military and paramilitary forces be not less than two lanes with paved shoulders; and ”

26. The Hon’ble Apex Court in the said judgement in its para 60, while when it was dealing with regard to the aspect of nearness and proximity of the international border, as it was an issue dealt by the Ministry of Home Affairs and the Ministry of Defence, in its conclusion pertaining to the access of bordering areas from Pithoragarh to Lipu Lekh Pass, which also falls to be in the patch of the segment of the access to the Line of Actual Control, with which we are concerned, for which, the land to be acquired under the Notification, was also taken into consideration from the prospect of the defence of the country. Hence, while concluding the said necessity, the Hon’ble Apex Court in its judgment of 14.12.2021, had observed regarding its necessity in **para 63, 64 and 65**, which is also extracted hereunder:

“63. At the outset, therefore, we find that there are no mala fides in MA No 2180 of 2020 filed by the MoD. The allegation that the application filed by the MoD seeks to re-litigate the matter or subvert the previous order of this Court are unfounded inasmuch as MoD, as the specialized body of the Government of India, is entitled to decide on the operational

requirements of the Armed Forces. These requirements include infrastructural support needed for facilitating the movement of troops, equipment and machines. The bona fides of the MoD are also evident from the fact that the issue of security concerns was raised during the discussions of the HPC and finds mention in the HPC Report. Thus, the MoD has maintained the need for double-laned roads to meet border security concerns.

64 The appellants have referred to a statement made by the Chief of the Army Staff in 2019 in a media interview regarding the adequacy of infrastructure for troop movement. We do not find it necessary to place reliance on a statement made to the media, given the consistent stand of the MoD during the deliberations of the HPC and before this Court. The security concerns as assessed by the MoD may change over time. The recent past has thrown up serious challenges to national security. The Armed Forces cannot be held down to a statement made during a media interaction in 2019 as if it were a decree writ in stone. Similarly, the appellants have also raised a challenge to the 2020 MoRTH Circular and have sought a direction that this circular be revoked, on the ground that it recommends the DL-PS standard without application of mind.

65 This Court, in its exercise of judicial review, cannot second-guess the infrastructural needs of the Armed Forces. The appellants would have this Court hold that the need of the Army will be subserved better by disaster resistant roads of a smaller dimension. The

> submission of the appellants requires the Court to override the modalities decided upon by the Army and the MoD to safeguard the security of the nation's borders (it is important to remember that the MoRTH issued the 2020 MoRTH Circular based upon the recommendations received from the MoD). The submission of the appellants requires the Court to interrogate the policy choice of the establishment which is entrusted by law with the defence of the nation. This is impermissible."

27. That the requirement and importance of an accessible roads or accessible passage to the military personnel, would very well fall to be within an exclusive domain of consideration, which has to be effectively and conclusively made by the Ministry of Defence and the judicial review of the said military operational requirement of the Armed Forces, cannot be made as a subject matter of consideration by the Courts, as they are not equipped with the acumen to deal with the infrastructural support need for facilitating the movement of troops, equipment, ammunitions, and heavy machines, which are exclusively the concern of the Ministry of Defence and competent Army Authorities. That is why, the specific observation has been made in para 65 of the judgement, which has been extracted above, that it is exclusively the policy choice of the defence personnel and the Ministry of Defence to choose its requirement, and the manner it could be best met with, and particularly, while making reference to the decision of 2019,

taken by the Indian Road Congress Guidelines, particularly that as contained under Clause 6.2.2 (8), strategic and border road for military and paramilitary security forces, military operations and movements, should be more emphasized upon in order to secure the country's existence in itself and minor deviation, on the delicate balance of environmental issue has been diluted to be strictly construed and observed with the observation, that those issues would not impede the requirement of infrastructural development specifically in the area of strategic national importance, which are crucial to the security of the nation, adjoining the Line of Actual Control, shared between India and China.

28. So far as the area pertaining to the border areas being shared with the international borders, adjoining China, the matter was dealt with by the Hon'ble Apex Court, from the perspective of NH-125, which relates to District Pithoragarh, with which, we are concerned. In the present Writ Petition, where acquisition notification has been challenged, the Hon'ble Apex Court has observed in para 79 of the judgment, that the access of road from Tanakpur to Pithoragarh, would be of much more of military relevance and of importance for the defence of the country, and minor environmental issue, though certain checks and balance have to be strategically maintained, but not with the compromise to the issue of national security. **Para 79** of the aforesaid judgment of Hon'ble Apex Court, reads as under:

> "79. The order of this Court dated 8 September 2020 clarified that the 2018 MoRTH

> Circular will hold the field, regardless of whether works on a highway had been completed or were ongoing. By allowing the MA filed by the MoD for modification of this order, we have permitted the widening of the national highways from Rishikesh to Mana, Rishikesh to Gangotri, and Tanakpur to Pithoragarh, which are strategic feeder roads to border areas. To this extent, the order dated 8 September 2020 will stand modified. However, we grant liberty to the respondents to pursue appropriate legal proceedings and seek reliefs in the event that it is necessary to implement the DL-PS standard for the entire Project."

29. Hence, I am of the view that the basic intention of Section 15, for hearing of an objection, is exclusively confined on the effect of social impact assessment report, as envisaged under Chapter–II of Act of 2013, it does not absolutely protect the rights of an individual, as if an immunity has been given to the owner of the land particularly, when it clouds the real urgency and relates to the necessity of the defence of the country, which necessitates the immediate possession of the land sought to be acquired, for meeting the defence need of the army or para armed forces. This exemption of elimination of an inquiry or providing of an opportunity under Section 15 was an aspect, which was considered by the Hon'ble Apex Court in the case as reported in **(2013) 3 SCC 764, Laxman Lal Vs. State of Rajasthan,** which had laid down the parameters for elimination of an inquiry only in the deserving cases of real urgency and as per the guidelines framed by the said

judgment, the relevant paragraphs of which is extracted hereunder.

30. In the said case of **Laxman Lal (Supra),** the preliminary issue, which was given challenge in it was to the Notification of 1st September, 1980, which was then issued under the then Land Acquisition Act, under Section 4, where the subject land was needed for the public purposes for the construction of the Bus Stand. As a consequence thereto, a Notification under Section 6 was issued on 19th March, 1987, by which, the urgency clause under Section 17 was invoked, dispensing with the necessity of enquiry, which was contained and contemplated under Section 5 (A) of the said Act.

31. In the said judgement of **Laxman Lal (Supra)**, Hon'ble Apex Court while dealing with the right of the State to meet the public exigency from the context of the theory of **"eminent domain"** has held, that it is always the right and power, which is exclusively vested with the sovereign domain of the state to exercise its exclusive power within the ambit of its power of territorial sovereignty of acquiring the land to meet the public need and eminent domain has been held to be an attribute of the sovereignty and an essential element of the sovereign government for protecting the borders of the country, and hence, the theory of eminent domain, falls within the ambit of public interest, general welfare for the public and particularly in the context of the present case, wherein exigency relates to the unforeseen urgency or the land is required to be reserved for armed

personnels of Para Military Force, to dispel any probable future or present enemy threats, for which, a prior preparedness is also one of the important and vital aspects, which has to be taken into consideration for the purposes of taking over the land for the defence personnel. The relevant observations had been made by the Hon'ble Apex Court in the said authority with regard to the aforesaid theory of **"eminent domain"** in para 15, 16 and 21 of the said judgement, which is extracted hereunder:

> "15. The statutory provisions of compulsory acquisition contained in the 1953 Act are not materially different from the 1894 Act. This Court has explained the doctrine of eminent domain in series of cases. Eminent domain is the right or power of a sovereign state to appropriate the private property within the territorial sovereignty to public uses or purposes. It is an attribute of sovereignty and essential to the sovereign government. **The power of eminent domain, being inherent in the government, is exercisable in the public interest, general welfare and for public purpose.** The sovereign is entitled to reassert its dominion over any portion of the soil of the state, including private property without its owner's consent provided that such assertion is on account of public exigency and for public good.
>
> 16. Article 300-A of the Constitution mandates that:

> "300-A. Persons not to be deprived of property save by authority of law.—No person shall be deprived of his property save by authority of law."

Though the right to property is no longer a fundamental right but the constitutional protection continues inasmuch as without the authority of law, a person cannot be deprived of his property. Accordingly, if the State intends to appropriate the private property without the owners' consent by acting under the statutory provisions for compulsory acquisition, the procedure authorised by law has to be mandatorily and compulsorily followed. The power of urgency which takes away the right to file objections can only be exercised by the State Government for such public purpose of real urgency which cannot brook delay of few weeks or few months. This Court as early as in 1964 said that the right to file objections under Section 5-A is a substantial right when a person's property is being threatened with acquisition; such right cannot be taken away as if by a side wind (Nandeshwar Prasad v. State of U.P.)

21. Anand Singh has been referred to in later cases, one of such decisions is Radhy Shyam v. State of U.P. wherein this Court in paras 77(v) to (ix) of the Report stated as follows: (Radhy Shyam case, SCC p. 603)

> "77. (v) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even a few weeks or months. Therefore, before excluding the application of Section 5-A, the authority concerned must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry under Section 5-A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.
>
> (vi) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power

> is vitiated due to mala fides or that the authorities concerned did not apply their mind to the relevant factors and the records.
>
> (vii) The exercise of power by the Government under Section 17(1) does not necessarily result in exclusion of Section 5-A of the Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word 'may' in sub-section (4) of Section 17 makes it clear that it merely enables the Government to direct that the provisions of Section 5-A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of the exercise of power under Section 17(1).
>
> (viii) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Sections 17(1) and/or 17(4). The court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of audi alteram partem embodied in Sections 5-A(1) and (2) is not at all warranted in such matters.
>
> (ix) If land is acquired for the benefit of private persons, the court should view the invoking of Sections 17(1) and/or 17(4) with suspicion and carefully scrutinise the relevant record before adjudicating upon the legality of such acquisition.'"

32. The said judgement in its para 21 has dealt with the ratio propounded by the Hon'ble Apex Court in the judgement reported in **2011 (5) SCC 553, Radhy Shyam Vs. State of U.P.,** where it has been observed that the provisions of urgency clause under Section 17 of the Land Acquisition

Act, dispensing with the enquiry contemplated under Section 5 (A) will fall to be within the domain of an extra ordinary exercise of power with the State; to acquire a private property, where delay cannot be brooked into so as to frustrate a public purpose and particularly, when it is in the context of the defence of the Nation.

33. This Court is of the view, that the rights which are intended or aimed to be protected under Section 15 of the Act of 2013, as envisaged, which is to be protected of a private individual, is not an absolute right, which can be enforced in a writ jurisdiction, at the cost of the rights of the public or at the cost of the interest of the defence of the nation, and the said elimination of hearing under Section 15, could be very well resorted to under the given set of circumstances and for reasons already given above could only be treated to be only directive in nature and not mandatory, as it happens to be in the instant case, though here particularly under the facts involved in the instant case when, the notification itself, when it attracts Section 9 of Act of 2013, that itself mitigates the intensity and gravamen of the application of Section 15, for acquiring the land to meet the emergent defence need of the Country, which is supreme.

34. Another perspective, which, the petitioners have attracted to argue, in order to put a challenge to the Notification dated 01.08.2015, is from the view point of the implications of Article 342 of the Constitution of India; to be read with constitution Scheduled Tribes U.P. Order of 1967, wherein "*Bhotia*" tribes have been claimed to have been

notified, as to be a Scheduled Tribe, as covered by Article 342 of the Constitution of India and hence, they would be protected from acquiring of their land in view of the stipulations provided under Section 41 of the Act of 2013. Section 41 of the Act of 2013, is extracted hereunder:-

> "**41. Special provisions for Scheduled Castes and Scheduled Tribes.**–(1) **<u>As far as possible</u>**, no acquisition of land shall be made in the Scheduled Areas.
>
> (2) Where such acquisition does take place it shall be done only as a **<u>demonstrable last resort</u>**.
>
> (3) In case of acquisition or alienation of any land in the Scheduled Areas, the prior consent of the concerned Gram Sabha or the Panchayats or the autonomous District Councils, at the appropriate level in Scheduled Areas under the Fifth Schedule to the Constitution, as the case may be, shall be obtained, in all cases of land acquisition in such areas, including acquisition in case of urgency, before issue of a notification under this Act, or any other Central Act or a State Act for the time being in force:
>
> Provided that the consent of the Panchayats or the Autonomous Districts Councils shall be obtained in cases where the Gram Sabha does not exist or has not been constituted.
>
> (4) In case of a project involving land acquisition on behalf of a Requiring Body which involves involuntary displacement of the Scheduled Castes or the Scheduled Tribes families, a Development Plan

shall be prepared, in such form as may be prescribed, laying down the details of procedure for settling land rights due, but not settled and restoring titles of the Scheduled Tribes as well as the Scheduled Castes on the alienated land by undertaking a special drive together with land acquisition.

(5) The Development Plan shall also contain a programme for development of alternate fuel, fodder and non-timber forest produce resources on non-forest lands within a period of five years, sufficient to meet the requirements of tribal communities as well as the Scheduled Castes.

(6) In case of land being acquired from members of the Scheduled Castes or the Scheduled Tribes, at least one-third of the compensation amount due shall be paid to the affected families initially as first instalment and the rest shall be paid after taking over of the possession of the land.

(7) The affected families of the Scheduled Tribes shall be resettled preferably in the same Scheduled Area in a compact block so that they can retain their ethnic, linguistic and cultural identity.

(8) The resettlement areas predominantly inhabited by the Scheduled Castes and the Scheduled Tribes shall get land, to such extent as may be decided by the appropriate Government free of cost for community and social gatherings.

(9) Any alienation of tribal lands or lands belonging to members of the Scheduled Castes in disregard of the laws and regulations for the time being

in force shall be treated as null and void, and in the case of acquisition of such lands, the rehabilitation and resettlement benefits shall be made available to the original tribal land owners or land owners belonging to the Scheduled Castes.

(10) The affected Scheduled Tribes, other traditional forest dwellers and the Scheduled Castes having fishing rights in a river or pond or dam in the affected area shall be given fishing rights in the reservoir area of the irrigation or hydel projects.

(11) Where the affected families belonging to the Scheduled Castes and the Scheduled Tribes are relocated outside of the district, then, they shall be paid an additional twenty-five per cent. rehabilitation and resettlement benefits to which they are entitled in monetary terms along with a onetime entitlement of fifty thousand rupees."

35. On an overall reading of the aforesaid provisions and the legislative intent of Section 41 of the Act of 2013, if that is taken into consideration, it may not be ruled out that the legislature, in its all wisdom and consciousness, in its sub-section (1) where it intended to provide a certain shield of protection to the Scheduled Tribes and Scheduled Caste, had used the language **'as far as possible'**. The use of this term under sub-section (1) of Section 41, itself makes the provisions of Section 41 and the protection granted thereunder, as to be not an absolute right, which has been created or which could be granted irrespective of emergent circumstances to the prescribed caste or tribes, provided

therein particularly, when an acquisition is called for to be undertaken in the scheduled areas, which according to the petitioners' stand covered by the U.P. Order of 1967.

36. The learned counsel for the petitioners in the Writ Petition had proclaimed their rights of immunity from acquisition, since they had claimed to be belonging to a Scheduled Tribes, and hence the protection was sought to be attracted in the light of the provisions contained under Section 41 of the Act. The provisions of Section 41 of the Act, apart from the fact, that it is only directory in nature and not mandatory because it starts with the word "as far as possible" but then its applicability has been left open to be applied only over the "scheduled area". The term **"scheduled area"** has been defined itself under Section 3 (zd) which is extracted hereunder :

> "(zd) "**Scheduled Areas**" means the Scheduled Areas as defined in section 2 of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (40 of 1996)"

37. It means a scheduled area has had to be an area, which has been declared, as such and defined under Section 2 of the provisions of Panchayats (Extension to the Scheduled Areas) Act, 1996.

38. In fact, as per the writ records or pleadings raised in the Writ Petition, except for a bald assertion, that since the petitioners are Scheduled Tribes, they would be provided

with the shield under Section 41, which I have already observed above, that it is directory in nature and not mandatory when compared with nation's defence need. It was all the more necessary for the learned counsel for the petitioners; to have substantiated his arguments, which he has not done so; by placing any material or argument on record, as to how and in what manner, village Milam, where the land, which is proposed and is sought to be acquired falls to be within the ambit of the scheduled areas, as defined under the Act. Hence the argument as extended by the learned counsel for the petitioners, in the absence of the same being substantiated and there being any material on record cannot be accepted until and unless, the petitioner is able to establish the fact, by placing on records the documents that village Milam is or has been ever declared as a scheduled area, as per the Act of 2013, and also as per the 5th Schedule of Constitution of India, as framed under Article 244 (1), which relates to the administration and control of the scheduled areas, and the Scheduled Tribes. Part-C of the 5th Schedule of the Constitution of India, deals with the **"scheduled area"**, as to be an area as the President may by an order declared to be a "scheduled area", but this Court feels it to be extremely difficult to appreciate the arguments of the petitioners' Counsel in the absence of there being any credible material being placed on the records by the petitioners to substantiate their arguments, that the land falls to be in the scheduled area, as provided under Section 3 (zd) of the Act of 2013, to be read with **Part-C of the Fifth Schedule** of the Constitution of India, hence the argument extended by the

learned counsel for the petitioners that Milam is a scheduled area cannot be appreciated. The same is quoted hereunder :-

"PROVISIONS AS TO THE ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES.

....

6. **Scheduled Areas**.—(1) In this Constitution, the expression "Scheduled Areas" means such areas as the President may by order declare to be Scheduled Areas.

(2) The President may at any time by order —

(a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area;

[(aa) increase the area of any Scheduled Area in a State after consultation with the Governor of that State;]

(b) alter, but only by way of rectification of boundaries, any Scheduled Area;

(c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area;

[(d) rescind, in relation to any State or States, any order or orders made under this paragraph, and in consultation with the Governor of the State concerned, make fresh orders redefining the areas which are to be Scheduled Areas;]

and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the

order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order."

39. Thus the embargo of Section 41 of the Act of 2013, does not immune the Scheduled Tribes, with an absolute right and protection from acquiring their land; because under Sub-section (2) of Section 41, if it is read in accordance with the object of the acquisition, herein, in this case, the acquisition in the instant case will be deemed to be by way of a **'last resort'** which was available to the State for acquiring the land for meeting the defence need of the country due to topographical, climatic limitations, and strategic restrictions, because looking to the contour of the area and its topographical location, particularly, when it is situated at a height of approximately between 12,000 to 13,000 fts., which ultimately reaches to above 14000 fts. above sea level, near international border, and is located in the deep heights of the Himalayas and particularly when, the land in question, which is proposed to be acquired is not a motorable track, it becomes strategically of more importance for the Armed Forces and in the defence need of the nation, and since there is no other alternative, suitable and safe land available, in any adjoining area proposed to be acquired, it would be deemed, that it was only by way of a last resort, which was available to the State to acquire the land and in these circumstances, I am of a confirmed opinion, that irrespective of whatsoever the personal rights, the petitioners may or might claim to have (though not established as per law) vested in them by virtue of the implications of the provisions contained under the U.P.Z.A. & L.R. Act. But,

still too, the exemptions which had been provided under sub-section (1) and sub-Section (2) of Section 41, will have precedence over the personal rights and particularly over the rights and need of the defence of the country and no compromise or slackness of any nature could be extended or would be acceptable by this Court, when it comes to meet the need of defence of the nation, our Motherland, which is of a prime concern, because we the Indians or the citizens of this great country of ours, have their peaceful co-existence, only when the appropriate government, at its any level, is capable and able to provide a sufficient infrastructure, to the defence forces to protect our sensitive and vital strategical borders by installation of sufficient and appropriate military chowkies equipped with sufficient and suitable ammunition, for defending the country in the bordering areas, which in turn defends the citizens, and in the instant case, it could be reasonable inferred, that the said requirements would obviously have much more overlining precedence and an overriding effect over the personal need and hence this Court of the view, that it cannot be compromised at the cost of the public or private need and particularly to meet the need of the country, as envisaged by the preamble of the Constitution itself.

40. The preamble of the Constitution, which is the basic vertebra of our country and the foundation of our Constitution, reads as under:-

> "**WE, THE PEOPLE OF INDIA**, having solemnly resolved to **constitute India** into a

[SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation];

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

41. The very opening lines of the preamble of the Constitution of India, expresses a resolution, which has been extended and resolved by unanimity, by the people of India, which would obviously include Scheduled Tribes too, which had laid greater emphasis on solidarity of the Country to **"Constitute India"** into a sovereign, socialist, secular, democratic republic, which are the other basic essential structure and pillars of the Constitution. It is thereafter strong constitution of the country only, when under the strength of the other vital parameters, provided under it, it could be effectively attained, which had been laid down by the Constitution of India, its only possible, when all the citizens of country, we are able to **constitute and keep our country strongly integrated,** in order to meet the other objectives, which had been provided therein, under the preamble. Its

then only, that we would be able to achieve the wider interest of the country and for the purposes of **'constitution'** of a strong country itself, which is the prime object and motive of the Constitution of India, and its at this juncture, as per my opinion, that the defence of the country, becomes an issue of prime concern too and in fact to meet the said basic foundational requirement to constitute a safe and strong nation, this Court is of the confirmed opinion, that it would be the responsibility of each and every citizen, irrespective of castes or religion, it would be overriding the personal rights or even rights of any other statutory nature, which is provided under law or even if protected under law, particularly when and where existence of free and well defended country is endangered or could be endangered, even once it calls for laying down the parameters of the defending a country, because its then only, that we would be able to achieve the other object of the constitutional mandate prescribed by the preamble of the Constitution of India, and particularly, to constitute a sovereign republic of India, by providing it with enough strength to the defence forces, for protecting the sensitive and strategic borders of our country, its at this juncture that the personal and legal rights would be secondary rights, in these circumstances, and cannot have precedence even if marginally protected under law, over the defence requirement of the country, hence, personnel or for that matter even protected public right, would take back seat, than to the right and imminent need of the defence of the country.

42. Our Constitution derives its authority from the intention, which was expressed by the people of India, i.e. the citizens as contained under Article 5 of the Constitution of India. The word 'people' referred therein, in the Preamble, indicates that the Constitution is not created by the State or by the State Agencies, but rather, it has been created by the people of India in their concerted capacity to lay down the parameters, which would be governing the future India. That is why, in **Kesavananda Bharati's case**, it has been further elaborated and observed that the expression given in the Preamble, which starts with, we the people of India, which is highlighted its promise, which is made by the citizens of the country themselves, vesting of all the powers under the Indian Constitution, to derives its sovereignty for and by the people, which rests not even in the Parliament. Meaning thereby, it is exclusive supremacy of its "Constitution", to the Constitution of India, is by the intention expressed by the citizens itself. As already referred above, if the preamble is taken into consideration, if it was the intention of the citizens, as dealt hereinabove, it is rather reiterated by this Court, that the prime intention of the unanimity of the decision by the citizens of the country was to constitute a secure and safe India, and that is why, the preamble specifically uses the word "constitutes", which in its literal meaning would mean, to integrate the country into its strong formation, in order to meet up the other objectives, which are provided in the preamble of the Constitution. The only purpose of the preamble was to show the general purpose and objective, for which, the authors of the Constitution made the several provisions in the Constitution itself, but it could not be

regarded as an independent source of any substantive power or prohibitions, which could only be drawn from the express provisions in the body of the Constitution or by way of its rational implications in its applicability in the practical day to day life. The preamble and its contents are not the prohibition to the State and its Legislature from restricting a citizen from doing an act or to claim a right, which though might not have been expressively reserved to a person or a class of person under the law, and here when the preamble uses the word, 'citizens' in its wider sense, will not be in an exclusion of any class of citizens, which fall in the category of the reserved Castes or Scheduled Tribes.

43. The only use and intention could be made by the preamble is in interpreting the Constitution was that, where the terms which are used in the Constitution and the Articles as contained therein in the Constitution, where they are ambiguous or are capable of two interpretations and meanings, in that eventuality, a more realistic meaning has to be assigned to the ambiguous provisions or law framed under it, in order to widely meet the need of the country in order to integrate it into a strong democratic republic, free from being influenced or dominated by any outer powers. It is not unreal in case to speak of that the term the people enacting a Constitution through a constitutional assembly, it is seldom require, rather it is people who are asked even to approve the Constitution ostensibly enacted in their name, moreover, once Constitution is enacted even when, it is submitted to the people for its approval, it binds thereafter not only the institutions, if at all, which are covered under the

Constitution. But also, by the methods by which the Constitution in itself provide in order to regulate its internal and external affairs of the country. Meaning thereby, the flexibility in the preamble of the Constitution always widely aims and intends to achieve a strong country free from the influences of outer superior powers and thus from this aptitude of the constitutional mandate, if the impugned acquisition Notification is taken into consideration, it rather falls to meet out the very basic intention and objective of saving its frontier borders from the adjoining enemy country, with whom, this country has historically faced army aggressions and insurgencies.

44. Thus even for the aforesaid logic and reasonings, Section 41 of the Act of 2013, the implications of which has been harped upon by the Counsel for the petitioners, if Section 41 is read in its totality, it does not provide or even remotely intend to provide, under law, an absolute immunity to the Scheduled Tribes, from acquiring their land by making compromise with; for the need of the country so far it relates to the defence of its sensitive and strategical borders, adjoining Line of Actual Control, nearing international borders, which are being shared by India with China, which is posing consistent military threats to our 'Motherland India'.

45. There could be yet an another angle; from which the issue could be looked into also, that the petitioners have contended in the writ petition, that they stand recorded in the *khatauni,* after vesting of land with them, with the

enforcement of the provisions of the U.P. Z.A. and L.R. Act, the copy of respective khatauni, which they have appended with the records of the writ petition, based on which, they are showing themselves to be recorded over the land in question, but their nature of title over the land, or class of tenureship, in the light of the provisions contained under the **Land Record Manual**, has not been classified in the revenue records, as to what is the nature of their tenure-ship over the land claimed by them to be theirs, as per the provisions of **Para A124 of Chapter A VIII**, which classifies the tenure ship, over the ZA land, which is the subject matter of acquisition, coupled with the fact that there are no revenue entries, which had been made in column 7 to 12 of their respective *khatauni,* showing thereof, that as to in what manner and under which authority of law, the land in question, which is proposed to be acquired, had devolved upon the petitioners and under which authority of law and under which authority of an order having being passed as per law, which had been passed by the Competent Revenue Authority.

46. Though this Court, at this stage, is not required or is venturing into that controversy, for the reason being that, that would be absolutely altogether a different issue to be discussed, at yet on an another judicial and legal platform which may be available, under the relevant revenue laws, where the petitioners' individual right in relation to the land, which they claimed to have vested with them, since allegedly claimed to be possessed since 1880. Which they claim that they are performing their agricultural activities over it. Which

they claimed, that they have been recorded in the revenue records. All these aspects would be an issue to be decided independently by the competent revenue courts, as to whether at all, under the prevalent revenue law of vesting of rights, as a consequence of the enforcement of the provisions of U.P.Z.A. & L.R. Act, whether at all any specific right would, at all be vested with the petitioners ? Because of the mere un-established fact, that they had been in possession of the land as per law and had claimed to be performing agricultural activities for a limited period of few months, in a year.

47. As already observed in the above paragraphs, that the petitioners had utterly failed to substantiate their exclusive respective rights over the land, in question, and particularly merely because of the fact that the petitioners and their predecessors had been in possession of the land, hence the benefit of vesting would be extended to them in order to create their right of tilling the soil of the land, which is being sought to be acquired. In order to deal with the aforesaid argument, though yet again without any legal or documentary material being placed on record by the petitioner, but this Court feels it to be necessary to venture into that aspect. As already observed, when the provisions of U.P. Zamindari Abolition and Land Reforms Act, was introduced by the Gazette Notification of 24th January, 1951, and with the creation of the State of Uttarakhand, the Act was enforced in the territory of the State of Uttarakhand by virtue of an Amendment made by the Gazette Notification No. 2241/Revenue/2001 dated 16th July, 2001. Vesting the right by virtue of which the petitioners claim their right over the

land on the basis of having occupied the same, and the same is as a consequence of the implications of Section 6 of the Act. Section 6, if it is read in consonance with Section 4 of the Zamindari Abolition Act, the vesting of all the rights and title and interest over the land allegedly claimed to be in possession, with the enforcement of the Act, it is a right in continuation which is created with the State of Uttarakhand, with the enforcement of U.P. Z.A. & L.R. Act, as made effective with effect from 16th July, 2001, **the rights are vested with the State and not with an individual**. The vesting of right of an individual under Section 4 of the Act, in fact, it has been laid down in the judgement reported in [**2004 (97) RD 677, Vashisth Kumar Jaiswal Vs. State of U.P. and others.** The relevant para 3 and 4 are extracted hereunder :-

> "3. The respondents No. 5 and 6 were granted mining lease for three years which started from 28th April, 2000 and hence it came to an end on 27-4-2003. We are not going into the various points urged before us because we are of the opinion that this petition deserves to be allowed on the short point that once the period of the lease in favour of respondents No. 5 and 6 expired on 27-4-2003 there is no question of extension of the lease, and instead there should have been a fresh public auction/public tender after advertising the same in well known newspapers having wide circulation. This procedure is essential, as otherwise Article 14 of the Constitution will be violated. Transparency in public administration also requires that such a procedure should be followed whenever any public contract is granted. **It may be mentioned that the owner of the land is the State Government and a Bhumidhar under the U.P.Z.A. and L.R. Act is not the owner of the land, but he is only tenant, the owner is the State as the land is vested in it under Section 4 of the U.P.Z.A. and L.R. Act. Hence it is**

> **not correct to say that the land belongs to the Bhumidhar.**
>
> 4. Learned counsel for the respondents relied on a decision of the Supreme Court in Beg Raj Singh v. State of U.P., 2003 (1) CRC 362. In our opinion this decision is wholly distinguishable as Article 14 of the Constitution has not been considered therein at all."

48. That the effect of vesting under Section 4 to be read with Section 6, it is only the tilling right, which is vested, but the ownership of the land still continues to be vested with the State and the bhumidhar under the Act is not the owner, but rather he is only a tenant of the land. Hence, there is no sustainability of right and title over the land to override the effect of the State's right over the land, whose right are created by way of vesting under Section 4 to be read with Section 6 of the Act, and hence, the right of vesting as claimed by the petitioners, as to be personal right, is only a vesting of a right of tenant for tilling the soil, but rather under law, the ownership still continues to be vested with the State with the enforcement of the Act. The devolvement of right, by contending themselves to be the class of tenure holders to be the bhumidhars, is yet again a prospect, which is not acceptable by this Court for the reason being, that while dealing with the revenue entry relied by the petitioners, it has already been observed, that the class of tenure holdership of the petitioner, has not been defined or classified under the revenue documents relied by them, and hence they would not fall within any of the class of tenure holder, which had been provided under Chapter 8, Section 129 of the U.P. Zamindari Abolition Act, which is to be exclusively yet to be decided by the competent Revenue

Courts, as constituted under the provisions of the Zamindai Abolition Act. As the Act has its special constitutional existence, because of its inclusion in the IXth Schedule of the Constitution, vide its Entry 11 of it.

49. This Court is yet again unable to derive a confirmed opinion, with regard to the alleged claim of the petitioners or their predecessors having been in possession of the land ever since 1880, for the reason being, that the khatauni entries, which has been relied and placed on record by the petitioners themselves in its column '3', shows their possession to have commenced from **1374 *fasli,* that means, under revenue law would be w.e.f. 1967**. Even if it is presumed that, that as per the entries made in column '3', if the possessory rights, if any, were commencing from 1967, and in fact, that was in fact much after the enforcement of the provisions of the U.P.Z.A. & L.R. Act, which was notified to be enforced in the year 1951, after receiving its Presidential accent on 24.01.1951. If that be the situation, if the Act itself was enforced by the Presidential notification dated 24.01.1951 and their entries of possession in the revenue records, is said to have shown their possession to have commenced w.e.f. 1374 *fasli* i.e. 1967 A.D., in that eventuality, under the normal prevalent revenue laws, quite obviously, the source of recording of their names in the revenue records by the orders of competent revenue authorities, has had to be or it ought to have been reflected in the entries of column 7 to 12 of the *khatauni,* which could have been, possible only by an order of competent revenue authority, in order to provide a legal and statutory certainty of

their right and title of the land in question, in the absence of which and particularly in the absence of the *fasli years* entries also in relation to which the khatauni relates, which has been prepared, no comprehensive or any conclusive inference could have been drawn of creation of an absolute right and title of the petitioners over the land in question as a consequence of the effect of the alleged claim by vesting with the enforcement of the provisions of U.P.Z.A. & L.R. Act.

50. When the Writ Petition was initially argued, the Coordinate Bench of this Court, while directing the respondents to file their counter affidavit, had granted an interim protection vide its order dated 12.10.2015. During the intervening period, when the matter was taken up again before an another Coordinate Bench of this Court on 11th December, 2019, the Coordinate Bench of this Court had directed the District Magistrate, to conduct an inspection of the area, which was proposed to be acquired for the establishment of Border Outpost for I.T.B.P. and the place of establishment of frontier Chaukies vide its order dated 11.12.2019. The following orders were passed on the said date :-

> 3. The learned Senior Counsel for the petitioners would argue that the land of the petitioners is being acquired without there being any proper survey or inquiry into the matter, when the requirement of the Union of India can be equally met by acquisition of other land. Learned Senior Counsel for the petitioners has stated that there are other lands available which can

be easily acquired for the purposes of establishment of a "chowki" and the present acquisition is in fact not required.

4. Let the District Magistrate, Pithoragarh inspect the area and file an affidavit stating whether there is another land which can be suitably given to ITBP for the establishment of a "chowki" and in case it is not, he shall give reasons therein, for which four weeks' and no more time is granted.

51. Though this Court has already partly dealt with the stand of the Government of India, with regard to the requirement of defence need, in order to meet the argument of the learned counsel for the petitioners in the light of the provisions contained under Chapter-II of the Act of 2013, for the determination of social impact assessment and public purposes, though it is not made applicable over the impugned acquisition notification, in the light of the provisions contained under Section 9 of the Act of 2013, but still, on the basis of the document, which has been placed on record by the respondents by virtue of their counter affidavit, it has been contended, that the border outpost at village Milam, was for the first time created after the army aggression of 1962, i.e. Indo-China war, by posting a battalion of the "Special Protection Force", since 1968. Later on, after the military survey assessment, which has been made by the coordinated action of Ministry of Defence and Ministry of Home Affairs, a decision was taken by the competent superior army authorities, whereby they have taken a decision, that on account of consistent war threat perception and since being

the strategic and sensitive bordering areas, adjoining to the international borders, which are being shared with China, and which has been demarcated by the line of actual control, it was then decided by the Government of India, Ministry of Home Affairs vide its **GO No. II-27012/20/2006-PF dated 11th December 2007**, that in order to meet any unprecedented or sudden serious army insurgencies, the deployed Special Protection Force may not be viable and adequate enough to defend the strategic frontier of the country, and hence, it was decided to deploy the 14th Battalion of I.T.B.P., with a coy strength, to protect the border areas of the country, and hence, the Ministry of Home Affairs in coordination with the Ministry of Defence, jointly felt and took on stock a strategic decision, in the interest of the nation, that there was an emergent requirement for additional military operational forces for augmenting the defence sector in border outposts, adjoining the border of China. In fact, for the purposes of meeting out said purpose of the defence, the District Magistrate Pithoragarh, had requested the Commissioner/ Secretary, Board of Revenue vide his **Letter No. 49 dated 18th September, 2013**, for calling for the feasibility report and about the availability of any other alternative land. The Board of Revenue vide **Letter No. 5856 dated 30th September, 2013**, called for a report and the feasibility report, which was submitted by **Letter No. 24 dated 5th February, 2014**, wherein, as per the report submitted by SDM after actual spot inspection on 16th December, 2013, following observations was made :-

I. There was no other land available over the site, which could best and effectively suit the purpose of the armed forces.

II. Tactically, the land was suitable, owing to its nearness to the international border, and location of the already existing bunkers, at places which are so located to be made outside the firing range of the enemies.

III. Hence, the proposal was submitted for acquiring the land, and consequent thereto, a press proposal was submitted by the District Magistrate for acquisition vide his **Letter No. 3829-30 dated 28th April, 2014**, which was forwarded by the Board of Revenue vide **Letter No. 31 dated 6th April, 2015**, and as a consequence thereto, in compliance with it, the requisite deposit of amount, which was payable for compensation towards land acquired, under Section 41 has already been made available by the SHQ Bareilly on 3rd September, 2015.

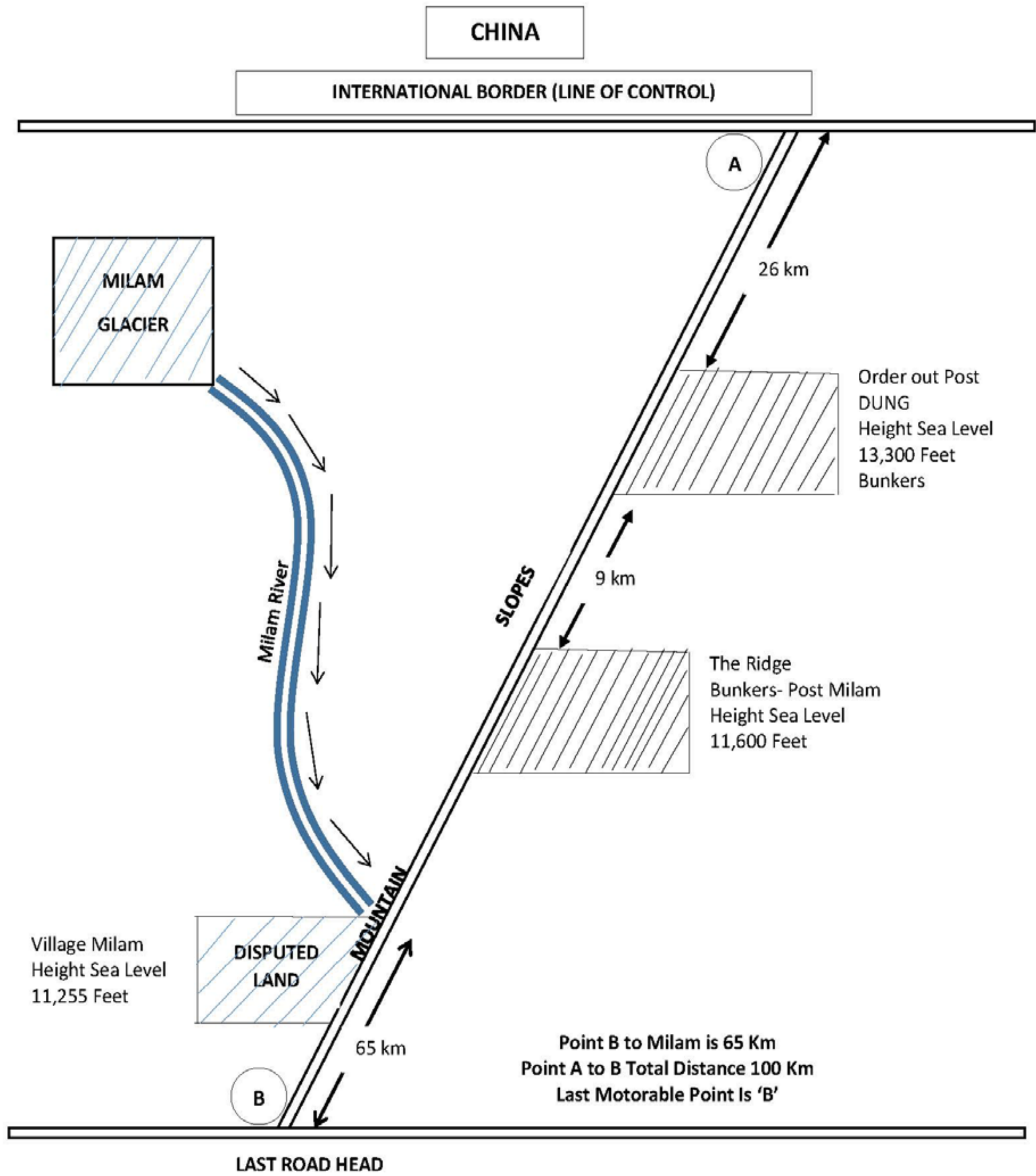
52. The respondents in the counter affidavit have specifically submitted, that if the reports of the Revenue Authorities are taken into consideration, in fact, the entire issue of the land being claimed to be an agricultural land, as taken by the petitioners is per se factually false, because as per report by the revenue authorities ever since 1990, no agricultural activities was ever carried, over the land sought to be acquired for Para Military Forces, rather the land was lying barren and according to the report, it was strategically and tactically of more importance and necessary, it was to be

more suitable for the establishment of border outpost and the development of infrastructure for the armed forces for augmenting the confidence of the defence personnel, military assistance for positioning of ammunitions, and for providing of second line of stand by forces, to meet any immediate military emergency, which may chance, and would be obviously be a part of war preparedness, which they are normally facing due to the threat perception. It has been further argued by the learned Senior Counsel for the Government of India, that the tactical site patch of the proposed land, to be acquired, in fact, is located in such geographical location, that it covers the two vital approaches to the Indian territory i.e **"Lasar Gad"** and the **"International Pass"**, which are passages of easy accessibility by the enemies and consistent vigil and control over the said accessible area could be conveniently maintained by the armed forces of our country from the land in question after the deployment of the border outpost, which only adjoins about 20 to 25 km. from the Line of Actual Control, hence, is of more importance and is near to the International Border, which is being shared with China.

53. Apart from it, the learned counsel for the Government of India, had submitted that the proposed land to be acquired, is so located that in fact just behind the land in question, there lies a range of mountains, which are the segment of the higher Himalayas, which would rather protect and act as a shield and take away the army outpost and its bunkers from being brought within the firing range of the enemy country, because any other adjoining land or open

land, if it falls within the firing range of **"Lasar Gad"** and the **"International Pass"**, it would not be suitable for the army need for defence purposes, and hence, later on, it was observed and as already extracted, that there is no other alternative strategic location, which could be made available in the higher Himalayas, which could be strategically viable to meet the need of defence personnel needs.

54. In compliance of the aforesaid interlocutory order, which was passed by the Coordinate Bench of this Court, during the pendency of the Writ Petition, the respondents had filed their counter affidavit on 22nd September, 2015. In the counter affidavit thus filed by the Commandant of I.T.B.P., they have contended; that the land proposed to be acquired was strategically of a national importance for the defence of the country, for the purposes of deployment of 14th Battalion of I.T.B.P., with a Coy strength, owing to its strategic location, since it was adjoining and easily accessible with the Line of Actual Control, i.e. the border line with the neighbouring country China, which is approximately only 20 to 25 kms. from the land proposed to be acquired. The learned Senior Counsel for the respondents, based on the instructions of the ITBP personnels, who were present in the Court proceedings, while hearing of the case, had explained the exact situation on the location in the presence of Counsel for the petitioner, which is prevailing on the spot at the moment, which this Court had to topographically analyse the situation, with the support of the following map, as it was explained to the Court by the respondents, which is as under:-


CHINA
INTERNATIONAL BORDER (LINE OF CONTROL)
A
MILAM
GLACIER
26 km
Order out Post
DUNG
Height Sea Level
13,300 Feet
Bunkers
Milam River
SLOPES
9 km
The Ridge
Bunkers- Post Milam
Height Sea Level
11,600 Feet
MOUNTAIN
Village Milam
Height Sea Level
11,255 Feet
DISPUTED
LAND
65 km
Point B to Milam is 65 Km
Point A to B Total Distance 100 Km
Last Motorable Point Is 'B'
B
LAST ROAD HEAD

55. They have contended, that because of the consistent threat perception which is commonly known to all and the sensitivity of the issue of protection of the international borders of our Nation, which was of greater importance, the matter had been consistently reviewed at the level of the Ministry of Home Affairs (MoHA), to the Government of India, in consultation with Ministry of Defence (MoD), and it was thereafter only, that on account of the tactical gaps report, which had been submitted by the competent Technical Authority of Ministry of Defence, it was felt that the land in question, was of eminent defence requirement for augmenting the defence structure of the border line post of the Para Military Forces of the country, and accordingly the report to the said effect was submitted by the **Correspondence General Memo No. III/40012/1/BOPs Augm1/2001/VOL-III-Ops dated 17.12.2012,** which reads as under :-

> "2. The recommendations received from all frontier and suggestions given by Army Eastern Command and 3rd Inf Div were evaluated in detail at Dte Gen the Bn-wise deployment of 32 Battalions which will be on border guarding duties (by the year 2015-16) have been finalized and enclosed as Annexure- I, II, & III. The concerned Ftrs are requested to disseminate the deployment to sector and Bn concerned and ensure its implementation within the time prescribed.
>
> 3. Before implementation, a copy of finalized deployment may be given to local Army formation for

their information. The induction plan of additional Battalions to border guarding duties and instructions already circulated vide Dte Gen memo no-3034 dated-13/06/2012 should be strictly adhered in to. Till the time the new Bns take over the BOPs the exiting Bn will continue to carry out assigned Ops task and initiate follow up actions for future requirements.

4. The locations where new BOPs are to be opened and the earmarked SHQ/ Bn are yet to be raised the concerned Ftr IsG may assign responsibility to suitable Bn within the Ftr to carry out recce, moving proposals for acquiring land for BOPs, develop infrastructures etc so that new Bn can get inducted immediately offer its operationalisation.

5. The provisioning, engineering and medical branches may take necessary follow up action for timely back up support for executing assigned operational tasks to Ftrs."

56. The respondents in the counter affidavit had further submitted, that this exercise and to assess the suitability and the purpose to meet the defence requirement, as reflected from the report of 17.12.2012 (as extracted above), as referred in para (II) of the counter affidavit, which had also been relied by respondent Nos. 3, 4 and 5, they have also submitted, that a proposal for acquiring 2,4980 hectares of land, i.e. equivalent to 6.007 acres of land, to meet the defence requirement, was a proposal, which was initially, submitted by the then District Magistrate, Pithoragarh vide his **Office Letter No. 4077-78 dated**

11.05.2009, and accordingly, in lieu of the proposed acquisition of the land, the respondents/Government of India, through its Ministry of Defence, had already deposited the assessed amount, which would have been payable towards the compensation amounting to the tune of Rs.17,02,068/- before the District Magistrate, Dehradun vide their letter No. 1054 dated 11.12.2013, which would be in fact in the light of provisions for compliance of the provisions of sub-section (6) of Section 41 of the Act of 2013.

57. In order to eradicate the aspect of delay, which was being caused and the time period, which was probably being involved to be engaged for acquiring the land, the attempts and efforts were also made to take over the land of the private landowners (as claimed by them) by the State, through private negotiations, but that could not be materialised and hence, accordingly as per the Correspondence No.21, made on 17.04.2013, from the office of Deputy Land Acquisition Officer, the proposal for acquiring the land, was sent by the Deputy Land Acquisition Officer, District Pithoragarh, and if the reference made in the said letter (CA III page 69) is taken into consideration, it refers to the Letter No. 2760-61, as it was submitted by the I.T.B.P. on 15.04.2013, expressing their opinion about the emergent requirement of acquiring the land for establishment of the border outpost of the armed forces, which was vital and which was an emergent defence need of the Country.

58. The learned Senior Counsel appearing for the respondent Nos. 3, 4 and 5, in fact, have also drawn the

attention of this Court, to the correspondence which was made by the Commandant of I.T.B.P. to the District Magistrate on 11.05.2009 (CA 1 page 66), which was based upon the determined emergent necessity, which was expressed by the Ministry of Home Affairs, to the Government of India and its Ministry of Defence too, vide their communication No. **MHA UO NO.II-27012/20/2006-PF dated 11th December, 2007**, wherein, the Commandant had expressed the emergent requirement of the need of land in Village Milam in the following manner:-

> "चूँकि यह स्थान अन्तराष्ट्रीय सीमा के निकट है जहॉ पर बल की समुचित तैनाती राष्ट्र हित में हर समय अपेक्षित है, जिस कारण इस भूमि का शीघ्रातिशीघ्र हस्तान्तरण कर वहॉ पर रहने वाले जवानों के लिए बैरेक आदि बुनियादी सुविधायें उपलब्ध कराये जाने हेतु शीघ्र निर्माण कार्य प्रारम्भ किया जाना है। प्रस्तावित भूमि को विभाग द्वारा संबन्धित भू–स्वामियों से आपसी समझौते से क्रय किया जाना सम्भव नहीं है।"

59. Hence, the contention of the petitioners, that the acquisition suffers from the vices of non-compliance of Section 15, to be read with Section 40 of the Act, though had already been dealt with and answered above, it is also quite apparent too from the stand taken by the respondents in their counter affidavit, in their pleadings and by the various communications, which has been placed on record, that when all efforts for private negotiation to takeover the land, in order to meet the emergent defence need of the country failed, the acquisition by issuance of the impugned notification under Section 11 (1) of Act of 2013,became inevitable and accordingly, the Office of the District

Magistrate, Pithoragarh, vide its **Letter No. 49/भू0अ0/आईटीबीपी–मिलम/2012-13 dated 18.09.2013**, had forwarded the acquisition proposal to the Commissioner/Secretary, Board of Revenue to the Government of Uttarakhand, for acquiring the land for the I.T.B.P border out post adjoining the border of China.

60. In response to the aforesaid communication, which was made by the Office of the District Magistrate on 18.09.2013, to the office of Commissioner/Secretary Board of Revenue, the Commissioner, in order to meet up the emergent military requirement as per the legislative spirit of sub-section (2) of Section 41, to be read with Section 40, had issued an **Office Order No. 5856 dated 30.09.2013**, wherein, the Secretary, Board of Revenue, to the State of Uttarakhand, had called for the comments from the Government of India, its Ministry of Defence and its Ministry of Home Affairs, about the feasibility of the land for the purposes of acquisition and whether any other land could be made available, or could be worked out to be made available to be acquired for the Para Military Forces. The said communication of 30.09.2013, was followed by the order issued by the office of the District Magistrate, who alleges and has contended that he undertook the exercises and had submitted its report vide letter No. 24 dated 25th February, 2014, wherein, in the aforesaid communication, the District Magistrate had observed, that after procuring the reports from various quarters and officials; the proposed land to be acquired, he had got conducted an enquiry through the

Sub Divisional Magistrate, and as per the report, which has been made available, the following report was submitted, the relevant part of which is extracted hereunder:-

> "प्रकरण के सम्बन्ध में सेनानी, 14 वीं वाहिनी, भा0ति0सी0पु0 बल के पत्र संख्या–अभि0/2011–567–69 दिनांक 27.012014 (छायाप्रति संलग्नक–2) के द्वारा अवगत कराया गया है कि सीमा चौकी की स्थापना हेतु 3.410 हे0 का मानक निर्धारित है। वर्तमान समय में भा0ति0सी0पु0 के कब्जे में केवल एस0पी0एफ0 के नाम दर्ज 0.903 हे0 भूमि है। भूमि की कमी के कारण सीमा चौकी में कार्यरत जवानों के निवास आदि के लिए काफी कठिनाई का सामना करना पड रहा है जिसका जवानों के मनोबल पर विपरीत असर पड रहा है। तथा पूर्व में चौकी की स्थापना हेतु प्रषित ग्राम मिलम की 2.4980 है0 भूमि को भा0ति0सी0पु0 के नाम अधिग्रहण करने का अनुरोध किया गया है।
>
> **इस प्रकार सीमान्त क्षेत्र में भा0ति0सी0पु0 की मिम चौकी की स्थापना हेतु सार्वजनिक भूमि, राज्य सरकार के स्वामित्व की भूमि, सिविल सोयम एवं विभाग की भूमि उपलब्ध न हो पाने के कारण राष्ट्रीय सुरक्षा के हित को दृष्टिगत रखते हुए भूमिधरों की नाप भूमि को ही अधिग्रहण किया जाना आवश्यक है।**
>
> अतः अनुरोध है कि राष्ट्रीय सुरक्षा के हत को दृष्टिगत रखते हुए पूर्व में अधिग्रहण हेतु प्रेषित ग्राम मिलम की 2.4980 है0 भूमिधरों की नाप भूमि को भू–अर्जन अधिनियम के अन्तर्गत भा0ति0सी0पु0 के नाम अधिग्रहण के प्रस्ताव में परिषद स्तर पर विचार करने उपरान्त धारा–4 (1)/17 के अन्तर्गत शासकीय विज्ञप्ति निर्गत करने हेतु शासन के प्रशासकीय विभाग को प्रस्ताव प्रेषित करने का कष्ट करें।"

61. Its' not even that, even as per the correspondence of the office of the Deputy Land Acquisition Officer, which was made vide its communication, through **Letter No. 29 dated 12.03.2014**, it was intimated by way of a corrigendum, that for the proposed land to be acquired, the fresh estimate

of enhanced compensation was assessed as Rs. 45,29,224/- and as a consequence, in compliance of the said correspondence, and on the basis of the latest rate of land which was assessed by the competent revenue authorities, the additional amount of Rs. 93,32,021/- was proposed to be sent by the SHQ, Bareilly, vide letter No. 8732 dated 03.09.2015, to meet up the requirement of the escalated estimated value of the land, towards compensation of the land, proposed to be acquired, as per the intention of sub-section (6) of Section 41 of the Act of 2013.

62. When the interlocutory order passed by the Coordinate Bench of this Court on 11.12.2019, calling for a report from the District Magistrate, was not complied with, this Court, vide its order dated 18.08.2021, had directed the District Magistrate to conduct an enquiry and submit a supplementary counter affidavit with the report, about the actual requirement for the establishment of the border outpost (BOP) of the I.T.B.P., and in compliance thereto, the District Magistrate had placed on record a Government Order No. **1279/XVIII (II)/03(35)/2021 dated 25.09.2021**, wherein, the proposal thus given by the State Government for offering the alternative land to I.T.B.P. was objected by the Assistant Solicitor General, on the ground of its strategic location of the proposed border outpost, which was to be constructed for the I.T.B.P., and hence, the Deputy Advocate General was granted time to file their objection to the proposed Government Order dated 25.09.2021.

63. The learned counsel for the Government of India has filed a supplementary counter affidavit on 04.10.2021 in compliance of the previous order, passed by this Court, and in compliance thereto, in the supplementary counter affidavit thus filed by respondent Nos. 3, 4 and 5 on 04.10.2021, they had produced number of documents, contending thereof that the proposal, which had been extended by the State Government, do not suit the defence requirement of the Armed Forces, which was determined since 2009, (as explained by map extracted above), and in support thereto, they have placed on record the google map too of the Milam Post of the I.T.B.P. in order to substantiate their stand, and that the land proposed to be acquired is strategically of a greater importance for the defence personnel and for defence of the country itself, for high altitude warfare at the height about 14,000 ft. above seal level, in the higher region of the Himalayas, adjoining Line of Actual Control, shared between India and China.

64. On the basis of the aforesaid scrutiny of the factual aspect, as it has been argued by the respective counsel for the parties, on overall controversy, which has been argued by the learned counsel for the petitioners was limited from the perspective of (i) the effect of vesting; (ii) the effect of Sections 15, 21, 40 and 41 of the Act of 2013, and (iii) from the perspective of Section 41 of the Act. These aspects and arguments, which has been widely and wildly, extended by the learned counsel for the petitioners was only oral in nature, without there being any credible material or any document being placed on record supporting their

contentions on the basis of which, the petitioners could have foundationed their argument to substantiate, as to in what manner their personal right was claimed, they can put a challenge to the Notification issued under Section 11 (1) of the Act of 2013, and that too when it exclusively intended to meet the defence need of the Country, which is supreme and would be above all personal or public purposes, of an individual or even a community or a segment of community, cannot have precedence of choice, over the defence need of the country.

65. By way of a reiteration, though the answer has already been extended by this Court in the above paras of this judgment, with regard to the effect of vesting, because as per opinion of this Court, vesting exclusively under Section 4 and 6 of the Zamindari Abolition Act, would not be a vesting of a right or ownership over a land, and in the absence of there being any judicial order passed by the competent Courts, in favour of the petitioners, which had been created under the Revenue Law because vesting cannot be by way of any personal inferences. The vesting contemplated under Sections 4 and 6, is a vesting of ownership with the enforcement of U.P. Z.A. & L.R. Act, is with the State, which exercises its, "**eminent domain**" over the land and it is only a right of tilling of the soil, which could be treated to be given to the legally established occupants of the land, which too has not been substantiated by the petitioners even on the basis of revenue entries, as the petitioners' possession has been shown to be w.e.f. 1374 fasli, i.e. 1976 A.D. and that is not prior to the enforcement of the U.P. Z.A. & L.R.

Act, which was in 1951, and furthermore, and more because since it does not classify, as about the nature of title of tenure ship of the petitioners, in the light of the provisions contained under Section 129 of the Zamindari Abolition Act, to be read with provisions of Chapter-A, VIII of the Land Record Manual, it cannot be said that the petitioners ever had any exclusive bhoomidhari rights over the land in question, or were the occupants, because it had been the specific unrebutted case of respondents that ever since 1990, the land was lying barren, which is a fact not specifically denied by petitioners by pleading or by way of placing on record any authenticated documents.

66. The argument of the learned counsel for the petitioners though it has already been answered above, which related to the allegation of non compliance of Sections 15 and 21, and the effect of the protection claimed under Sections 40 and 41, I am of the view, that in the light of the purpose of the Act and the exemption, which had been legislatively contemplated under Section 2 (1) (a) of the Act, to be read with Section 9, particularly when Section 9 itself excludes the applicability of Section 40; to be applied when the acquisition is contemplated to be made for the defence purposes provided under Section 2 (1) (a) of Act of 2013, and particularly when it is exclusively for the security of the nation, the application of Section 9, which itself is reflected to have been applied from the impugned notification that itself will make the argument of the learned counsel for the petitioners not sustainable. Because, this Court is of the view that once the exemption has been

attracted under Section 9 of the Act of 2013, and Section 40 has been excluded to be made applicable and since Section 40, itself protects the purpose and intention of Section 21, the argument of the learned counsel for the petitioners in the light of the aforesaid provisions and alleging that the notification violates those provisions would not be sustainable, and is not acceptable by this Court, hence, it is turned down.

67. The petitioners have claimed their rights from the perspective, that they are **"Scheduled Tribes"** and residents of **"scheduled area"**, which has been defined in the Fifth Schedule of the Constitution of India, as framed under Article 244. Its only an argument. But, there is no material as such on record as argued or relied by the petitioners in order to enable them to show that ever the village Milam was declared, as to be a scheduled area, as per Part-C of the Fifth Schedule of the Constitution of India, hence in the absence of the aforesaid material being placed on record or even the U.P. scheduled tribes order of 1967, which had been heavily referred to by the petitioners' Counsel, the reference of which has been made by the petitioners, the protection, if any, could have only been extended or could have been judicially considered, if the petitioners would have been able to succeed by placing on record the evidentiary documents to show that the land is a scheduled area, which is falling under the Scheduled Area, as defined under Section 3 (zd) to be read with Part-C of the Fifth Schedule of the Constitution of India. In the absence of the same, no benefit could be extended to the petitioners. Section 3 (zd) defining the

Scheduled Area under the Act of 2013 is extracted hereunder:-

> "(zd) "Scheduled Areas" means the Scheduled Areas as defined in section 2 of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (40 of 1996);"

68. But, here in the instant case, this Court is of the opinion that and as already dealt with in the body of the judgement, that once the basic vertebra of the Constitution i.e. its preamble intends to **"create a nation"**, I am of the view that the creation of a nation could only be by way of its effective protection of its frontier borders, with the adjoining enemy countries, which makes the need of defence even more eminent and superior to any other private and public rights, where there exist a consistent threat perception of any army aggression. This Court is of the view that irrespective of the fact that the Scheduled Tribes, and Scheduled Castes persons though they might have some personal rights, which are or which may have been protected by the Constitution or by the laws framed under it, but the said statutory protection of an individual or a class of society cannot be treated to be an absolute right, even to have a far fetching effect to override the basic intention of the Constitution, to constitute an integrated and strong country as it was and has been resolved by all Indians, to provide with the country which is well protected from its foes. Hence, the definition of citizens provided under Article 5, will not exclude the protection of a personal right (which is yet to be established), of a particular

class of Society even when it call upon to defend the country and to meet the need of the defence personnel, because personal interest will under and no set of circumstances will override the public interest or interest of the defence of the nation, when it comes and directly relates to the defence of the country, it will keep all the secondary and personnel protected rights diluted and kept at bay.

69. The perception of **public interest or a public purpose**, which has often been a bone of contention in the various proceedings, which were held before different High Courts of the Country and the Hon'ble Apex Court, where the acquisition proceedings is put to challenge, it had provided various facets for its challenge. Those facets of public purpose have been primarily dealt with by the various Courts in the following authorities dealt hereunder, by this Court, as to how and in what manner the public purpose has to be dealt with, under the given set of circumstances and facts of the each case. However, in none of the authorities, the sovereignty or the defence need of the nation, has been dealt, while dealing with the personnel or public purposes, in relation of land acquisition.

70. In a judgement, as reported in **AIR 1996 SC 1051, Chameli Singh and others Vs. State of U.P. and others,** it was a case, which was arising out of the acquisition proceedings, which was made as a compulsory acquisition by the State of U.P. in order to meet up the public purpose as involved consideration in the said case for enforcement of a Public Housing Scheme for the Dalits. The

Hon'ble Apex Court under the aforesaid backdrop of the need for public purpose to meet the housing requirement of the Schedule Castes of society, have brought the same within the ambit of public requirement and had upheld the concept of exercise of the powers of **'eminent domain'** for the public purpose of acquisition for laying down the housing scheme for the oppressed class of the society, but however, the limit of exercise of powers, as it has been observed in para 16 and 17 of the said judgement, which is extracted hereunder, could only be justified and would be outside the ambit of a judicial review, so long the exercise of the powers for the public purpose, the individual rights of the owners is protected by providing the land losers with an award of adequate compensation as per the parameters, which had been laid down under the Act, and the acquisition could be proceeded with in accordance with law of acquisition, because once there is a deprivation of the land, which deprives the owners of his right of livelihood, the same should be suitably remunerated by payment of adequate compensation. Para 16 and 17 are quoted hereunder :-

> "16. It is true that there was pre-notification and post-notification delay on the part of the officers to finalise and publish the notification. But those facts were present before the Government when it invoked urgency clause and dispensed with inquiry under Section 5-A. As held by this Court, the delay by itself accelerates the urgency: Larger the delay, greater be the urgency. So long as the unhygienic conditions and deplorable housing needs of Dalits, Tribes and the poor are not solved or fulfilled, the urgency continues to subsist. When the Government on the basis of the material, constitutional and international obligation, formed its opinion of urgency, the court, not being an appellate forum, would not disturb the

finding unless the court conclusively finds the exercise of the power mala fide. Providing house sites to the Dalits, Tribes and the poor itself is a national problem and a constitutional obligation. So long as the problem is not solved and the need is not fulfilled, the urgency continues to subsist. The State is expending money to relieve the deplorable housing condition in which they live by providing decent housing accommodation with better sanitary conditions. The lethargy on the part of the officers for pre and post-notification delay would not render the exercise of the power to invoke urgency clause invalid on that account.

17. In every acquisition by its very compulsory nature for public purpose, the owner may be deprived of the land, the means of his livelihood. The State exercises its power of eminent domain for public purpose and acquires the land. So long as the exercise of the power is for public purpose, the individual's right of an owner must yield place to the larger public purpose. For compulsory nature of acquisition, sub-section (2) of Section 23 provides payment of solatium to the owner who declines to voluntarily part with the possession of land. Acquisition in accordance with the procedure is a valid exercise of the power. It would not, therefore, amount to deprivation of right to livelihood. Section 23(1) provides compensation for the acquired land at the prices prevailing as on the date of publishing Section 4(1) notification, to be quantified at later stages of proceedings. For dispensation or dislocation, interest is payable under Section 23(1-A) as additional amount and interest under Sections 31 and 28 of the Act to recompensate the loss of right to enjoyment of the property from the date of notification under Section 23(1-A) and from the date of possession till compensation is deposited. It would thus be clear that the plea of deprivation of right to livelihood under Article 21 is unsustainable."

71. Having scrutinised the aforesaid principle laid down in the said judgement, this Court is of the view that when the Hon'ble Apex Court has laid down that the need of Housing requirement of the Dalits, to be within the ambit of

public purpose, there cannot be any iota of doubt, that the need in the present case for which, the land is supposed to be acquired in the instant case, i.e. for defence of the country, which is supreme to all needs, would definitely be to meet the wider public interest of every citizen of the country and the exercise of powers by issuing a Notification, would also definitely fall to be within a rightful exercise of powers under the theory of 'eminent domain' and that too, when it is backed with a concrete and concerted decision-making process by Ministry of Home Affairs and Ministry of Defence, based on its tactical reports, prior to making the recommendation for acquiring the land for construction of the Military Outpost at the places, which falls to be outside the firing range of the enemy country, China, in the higher range of Himalayas, which are not easily and consistently assessable, and which engages about 65 kms. of track, from the last motorable point, its where prior preparedness is of much national importance and concern.

72. For the purposes of answering the elements required to be satisfied and considered for justifying an acquisition for public purpose, a reference to yet another judgement of the Hon'ble Apex Court as reported in **(1995) 5 SCC 587**, **State of U.P. and another Vs. Keshav Prasad Singh** becomes relevant, it was a case where the State of U.P. by issuing a Notification under Section 4 / 6 of the Land Acquisition Act of 1894, as it was then applicable, intended to acquire a property for construction of a wall on the land of the private owners, who were respondents in the said case and the issue was emanating from a Civil Suit for the grant of

decree of permanent injunction. Para 4 of the said judgement is extracted hereunder :-

> "4. Having considered the respective contentions, we are of the considered view that the conclusion of the High Court was clearly illegal. It is seen that the land acquired was for a public purpose. Admittedly, the same land was acquired in the year 1963 for building a PWD office and after construction a compound wall was also constructed to protect the building. As found by the civil court, on adducing evidence in a suit that the Department had encroached upon the respondent's land which was directed to be demolished and delivery of possession to be given. It is seen that when that land was needed for a public purpose, i.e., as part of public office, the State is entitled to exercise its power of eminent domain and would be justified to acquire the land according to law. Section 4(1) was, therefore, correctly invoked to acquire the land in dispute. It is true that the State had not admitted that its officers had encroached upon the respondent's land and had carried the matter in appeal. The finding of the civil court was that the property belongs to the respondent. The factum of the action under the Act implies admission of the title of the respondent to the extent of land found by the civil court to be an encroachment. Though the State chose to file the appeal which was pending, better judgment appears to have prevailed on the State to resort to the power of eminent domain instead of taking a decision on merits from a Court of Law. In view of

> the fact that the PWD office building was already constructed and a compound wall was needed to make the building safe and secure and construction was already made, which is a public purpose, the exercise of power of eminent domain is perfectly warranted under law. It can neither be said to be colourable exercise of power nor an arbitrary exercise of power."

73. It has been rather in those circumstances too when it was held by the Hon'ble Apex Court, that if the land is needed for the public purpose, to be made as a part of the public office of the State, if that has been brought to be within the ambit of public purpose, as per the ratio laid down therein, there cannot be any scope of doubt with regard to the public need, as expressed in the present acquisition proceedings, being undertaken by the impugned Notification, for acquiring the land for the purposes of defence requirements. Here, in the present circumstances, according to my opinion, or the parameters which had been laid down in the aforesaid judgement dealt with above, were with regard to the aspect of the need for public purpose, which is to be first satisfied before State exercises its power under the theory of 'eminent domain', that when the Government of India was satisfied, under the circumstances of the present case to meet the defence need of country.

74. Hence, I am of a considered view that nothing can be more superior subject for compulsory acquisition under the concept of public purpose, than to the need of the defence of the country, where irrespective of the class to which, the

land owner belongs, it will have no right of precedence over the property, merely because it belongs to class of a society, which falls within the ambit of definition of citizens under Article 5 of the Constitution, and in that eventuality too, the acquisition even of a land belonging to the Scheduled Tribes, lying in a Scheduled Area (which is not established in the instant case at the hands of the petitioner), the acquisition resorted to by the respondents/State satisfies both the elements and the same cannot be put to a judicial scrutiny, which needed a Technical Expertise for its opinion, and which, as per the records is quite apparent, that the various reports, which has been submitted by the competent superior Military Officials and the State Revenue Department, as well as the Ministry of Home Affairs to the Government of India, they have just held that looking to the topographical constraints, the land was so strategic and of crucial importance for the defence personnel, because it was so strategically located, that it would have conveniently enabled the paramilitary or the military forces to keep a vigil on the **"International Passes"** and **"Lasar Gad"**, adjoining to the Line of Actual Control, which could be an easy access of the military forces of the adjoining country, China into the Indian territory, and hence, if the land, in question, is strategically so located to keep a consistent check and vigil on the bordering activities, it definitely becomes a public purpose of a much greater importance for the Nation as a whole, and where an individual right or for that purpose even a right of a community, even if it is protected under law, cannot have a predominant effect, over the need of the Nation, to meet any

probable military crisis, which is intended by the constitution of the country.

75. In yet another judgement of the Hon'ble Apex Court as reported in **1995 Supp. (1) SCC 596, Jilubhai Nanbhai Khachar and others Vs. State of Gujrat and another,** in the said judgement, the Hon'ble Apex Court was dealing with the tenancy law, as applicable in the State of Maharashtra and its co-related implications of deprivation of a property of an individual by the acquisition of a land for public purposes, as provided therein, under the law enacted by the State Legislature or the Parliament or under any other alternative or substituted legislation, to meet the requirement of a public purpose. The said judgement in its para 30 to 36 has yet again dealt with, the wider parameters, as to how, the percept of a right of a State to take over the property under the exercise of its power of theory of 'eminent domain' to meet the public requirement could be conjointly and harmoniously read with the rights which are preserved under Article 300A of the Constitution of India. **The theory of 'eminent domain' is the highest and the most benevolent idea of property vested with the State, in the exercise of its power of dominion over the land falling within its territorial jurisdiction and while taking it over in the exercise of its sovereign power, because it gives a right to the State to resume a possession of the property to meet the public requirement in the manner directed by the Constitution and the laws framed thereunder.** Whenever the powers is to be exercised for meeting the public requirement. But, it was not under the pretext of defence

need of the country. Para 30 to 36 of the said judgement is extracted hereunder :-

> “**30.** Thus it is clear that right to property under Article 300-A is not a basic feature or structure of the Constitution. It is only a constitutional right. The Amendment Act having had the protective umbrella of Ninth Schedule habitat under Article 31-B, its invalidity is immuned from attack by operation of Article 31-A. Even otherwise it would fall under Articles 39(*b*) and (*c*) as contended by the appellants. It is saved by Article 31-C. Though in the *first Minerva Mills case*, per majority, Article 14 was held to be a basic structure, the afore-referred and other preceding and subsequent to the *first Minerva Mills case* consistently held that Article 14 is not a basic structure. Article 14 of the Constitution in the context of right to property is not a basic feature or basic structure. The Constitution 66th Amendment Act, 1990 bringing the Amendment Act 8 of 1982 under Ninth Schedule to the Constitution does not destroy the basic structure of the Constitution.
>
> **31.** Even agreeing with the contention that after the Constitution Forty-fourth Amendment Act, 1978, which had come into force from 19-6-1979, the right to property engrafted in Chapter IV, Part 17, namely Article 300-A that the appellants are entitled to its protection, whether Section 69-A is unconstitutional? The heading “Right to Property” with marginal note reads thus:
>
> > “300-A. *Persons not to be deprived of property, save by authority of law.*— No person shall be deprived of his property save by authority of law.”
>
> which is restoration of Article 31(1) of the Constitution.
>
> **32.** In *Subodh Gopal case* Patanjali Sastri, C.J., held that the word ‘deprived’ in clause (1) of Article 31 cannot be narrowly construed. No cut and dry test can be formulated as to whether in a given case the owner is deprived of his property within the meaning of Article 31; each case must be decided as it arises on its own facts. Broadly speaking it may be said that an abridgement would be so substantial as to amount to a deprivation within the meaning of Article 31, if, in effect, it withheld the property from the possession and enjoyment by him or

materially reduced its value. S.R. Das, J., as he then was, held that clauses (1) and (2) of Article 31 dealt with the topic of "eminent domain", the expressions "taken possession of" or 'acquired' according to clause (2) have the same meaning which the word 'deprived' used in clause (1). In other words, both the clauses are concerned with the deprivation of the property; taking possession of or acquired, used in clause (2) is referable to deprivation of the property in clause (1). Taking possession or acquisition should be in the connotation of the acquisition or requisition of the property for public purpose. Deprivation specifically referable to acquisition or requisition and not for any and every kind of deprivation. In *Dwarkadas Shrinivas of Bombay* v. *Sholapur Spinning and Weaving Co. Ltd.* Mahajan, J., as he then was, similarly held that the word 'deprived' in clause (1) of Article 31 and acquisition and taking possession in clause (2) have the same meaning delimiting the field of eminent domain, namely, compulsory acquisition of the property and given protection to private owners against the State action. S.R. Das, J. reiterated his view laid in *Subodh Gopal case*. Vivian Bose, J. held that the words "taken possession of " or 'acquired' in Article 31(2) have to be read along with the word 'deprived' in clause (1). Taking possession or acquisition amounts to deprivation within the meaning of clause (1). No hard and fast rule can be laid down. Each case must depend on its own facts. The word 'law' used in Article 300-A must be an Act of Parliament or of State legislature, a rule or statutory order having force of law. The deprivation of the property shall be only by authority of law, be it an Act of Parliament or State legislature, but not by executive fiat or an order. Deprivation of property is by acquisition or requisition or taking possession of for a public purpose.

33. It is true as contended by Shri Jhaveri that clause (2) of Article 31 was not suitably incorporated in Article 300-A but the obligation to pay compensation to the deprived owner of his property was enjoined as an inherent incident of acquisition under law is equally untenable for the following reasons. Ramanatha Aiyar's ***The Law Lexicon*** **Reprint Edn. 1987, p. 385, defined "eminent domain" thus:**

> **"The right of the State or the sovereign to its or his own property is absolute while that of the subject or citizen to his property is only paramount. The citizen holds his property subject always to the right of the sovereign to take it for a public purpose. This right is called 'eminent domain'."**

> At p. 386 it was further stated that:

> "The sovereign power vested in the State to take private property for the public use, providing first a just compensation therefor. A superior right to apply private property to public use. A superior right inherent in society, and exercised by the sovereign power, or upon delegation from it, whereby the subject-matter of rights of property may be taken from the owner and appropriated for the general welfare. The right belonging to the society or to the sovereign, of disposing in cases of necessity, and for the public safety, of all the wealth contained in the State is called eminent domain. The right of every Government to appropriate, otherwise than by taxation and its police authority, private property for public use. The ultimate right of sovereign power to appropriate not only the public property but the private property of all citizens within the territorial sovereignty, to public purposes. Eminent domain is in the nature of a compulsory purchase of the property of the citizen for the purpose of applying to the public use."

In *Black's Law Dictionary*, 6th Edn., at p. 523 "eminent domain" is defined as:

"The power to take private property for public use by the State, municipalities, and private persons or corporations authorised to exercise functions of public character…. In the United States, the power of eminent domain is founded in both the Federal (Fifth Amendment) and State Constitutions. The Constitution limits the power to taking for a public purpose and prohibits the exercise of the power of eminent domain without just compensation to the owners of the property which is taken. The process of exercising the power of eminent domain is commonly referred to as 'condemnation' or 'expropriation'."

34. The right of eminent domain is the right of the sovereign State, through its regular agencies, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the State including private property without its owner's consent on account of public exigency and for the public good. Eminent domain is the highest and most exact idea of property remaining in the Government, or in the aggregate body of the people in their sovereign capacity. It gives the right to resume possession of the property in the manner directed by the Constitution and the laws of the State, whenever the public interest requires it. The term 'expropriation' is practically synonymous with the term "eminent domain".

35. This Court in *Chiranjit Lal Chowdhuri* v. *Union of India* held that eminent domain is a right inherent in every sovereign to take and appropriate private property belonging to individual citizens for public use. The limitation imposed upon acquisition or taking possession of private property which is implied in clause (2) of Article 31 is that such taking must be for public purpose. The other condition is that no property can be taken, unless the law which authorises such appropriation contains a provision for payment of compensation in the manner as laid down in the clause. **In *State of Bihar* v. *Kameshwar Singh*, the "eminent domain" was held to be a right inherent in every sovereign to take and appropriate private property belonging to individual citizens for public use without owner's consent.** The limitation imposed upon acquisition or taking possession of private property which is implied in clause (2) of Article 31 is that such taking must be for public purpose. The other condition is that no property can be taken, unless the law which authorises such appropriation contains a provision for payment of compensation in the manner laid down in the clause. Mahajan, J., as he then was, quoting from *Thayer's Cases on Constitutional Law* stated that: (SCR p. 929)

"Shorn of all its incidents, the simple definition of the power to acquire compulsorily or of the term 'eminent domain' is the power of the sovereign to take property for public use without the owner's consent. The meaning of the power in its irreducible terms is, (*a*) power to take, (*b*) without the owner's consent, (*c*) for the public use. The

concept of the public use has been inextricably related to an appropriate exercise of the power and is considered essential in any statement of its meaning. Payment of compensation, though not an essential ingredient of the connotation of the term, is an essential element of the valid exercise of such power."

36. In *Bishambhar Dayal Chandra Mohan* v. *State of U.P.*, this Court had held that the State Govt. cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. It is, therefore, necessarily subject to Article 300-A. Eminent domain, therefore, is a right inherent in every sovereign State to expropriate private property for public purpose without its owner's consent which inheres in Article 300-A and it would be exercised by the authority of law and not by executive fiat or order."

76. In order to answer the arguments extended by the learned counsel for the petitioners in the light of the tenancy laws, in the instant case, where the **'right of vesting'** has been claimed by the petitioners over the property, in question, though without any authority of law, the principle in the said context has been dealt with in para 42 of the said judgement which is extracted hereunder :-

"42. Property in legal sense means an aggregate of rights which are guaranteed and protected by law. It extends to every species of valuable right and interest, more particularly, ownership and exclusive right to a thing, the right to dispose of the thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. The dominion or indefinite right of use or disposition which one may lawfully

> exercise over particular things or subjects is called property. The exclusive right of possessing, enjoying, and disposing of a thing is property in legal parameters. Therefore, the word 'property' connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate or status. Property, therefore, within the constitutional protection, denotes group of rights inhering citizen's relation to physical thing, as right to possess, use and dispose of it in accordance with law. In Ramanatha Aiyar's The Law Lexicon, Reprint Edn., 1987, at p. 1031, it is stated that the property is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have. The term property has a most extensive signification, and, according to its legal definition, consists in free use, enjoyment, and disposition by a person of all his acquisitions, without any control or diminution, save only by the laws of the land. In Dwarkadas Shrinivas case this Court gave extended meaning to the word property. Mines, minerals and quarries are property attracting Article 300-A."

77. The Division Bench of Allahabad High Court has also dealt with the aspect of co-related study between the aspect of acquisition and its implication on the public purpose. The relevant observations has been made by the Division Bench of the Allahabad High Court in a judgement

reported in **2008 (1) UPLBEC 211, Manju Lata Agrawal (Smt.) Vs. State of U.P. and others,** and particularly, for its reference, the public purpose in the said case has been widely discussed in para 11 to 14 of the said judgement, which is extracted hereunder:-

> "11. In Daulat Singh Surana and Ors. v. First Land Acquisition Collector and Ors. (2007) 1 SCC 641, the Hon'ble Supreme Court while considering the meaning and scope of the expression "public purpose" considered large number of its earlier judgments, particularly, State of Bombay v. Bhanji Munji and Anr. ; State of Bombay v. Ali Gulshan ; State of Bombay v. R.S. Nanji ; Babu Barkya Thakur v. State of Bombay and Ors. ; Somawanti v. State of Punjab and Ors. ; and Arnold Rodricks and Anr. v. State of Maharashtra and Ors. , and came to the conclusion that it is not possible to precisely define the expression "public purpose" as it would depend upon the facts and circumstances of each case. However, the Government is the best judge to decide as to whether the public purpose is served by issuing the Notification for acquisition of land. The public purpose must include an object in which the general interest of the community as opposed to the particular interest of individual, is directly and vitally concerned. Public purpose is bound to change with time and the prevailing conditions in the given area. Therefore, it cannot be defined within a particular framework. The declaration made by the Government in this regard is final. The Court has a limited scope of judicial review to interfere only if it is satisfied that it was a colourable exercise of power, on being challenged by the aggrieved party. The Court further held as under:
>
> > **"Public purpose" is not static. It also changes with the passage of time, needs and requirements of the community. Broadly speaking, public purpose means the general interest of the community as opposed to the interest of an individual.**

The power of compulsory acquisition is described by the term "eminent domain" can be exercised only in the interest and for the welfare of the people. The concept of public purpose should include the matters, such as safety, security, health, welfare and prosperity of the community or public at large.

The concept of "eminent domain" is an essential attribute of every State. This concept is based on the fundamental principle that the interest and claim of the whole community is always superior to the interest of an individual.

12. It is also settled by now that once the original acquisition is valid and title has vested in the State/Authority then how it uses the excess land is not of any concern of the original owner and cannot be made a ground for invalidating the acquisition. A valid acquisition cannot be voided because long after, the Authority diverts its public purpose other than shown at the time of initial acquisition. The excess land can also be sold by public auction, the erstwhile owner cannot claim restitution of the part of the land as it vests in the State free from all encumbrances. Vide Gulam Mustafa and Ors. v. The State of Maharashtra and Ors. ; Chandragauda Ramgonda Patil and Anr. v. State of Maharashtra and Ors. ; C. Padma and Ors. v. Dy. Secretary to the Govt. of Tamil Nadu and Ors. ; Slate of Kerala and Ors. v. M. Bhaskaran Pillai and Anr. ; Tulsi Cooperative Housing Society, Hyderabad etc., etc. v. State of Andhra Pradesh and Ors. and Govt., of A.P. and Anr. v. Syed Akbar .

13. Thus, in view of the above, the Court has to examine, as in the specific case on hand, whether the land is sought to be acquired for a public purpose.

14. In State of U.P. v. Smt. Pista Devi and Ors. AIR 198f SC 2025, the Hon'ble Supreme Court considered its earlier judgment in Narayan Govind Gavate etc. v. State of Maharashtra and Ors. , wherein it was held that the scheme relating to development of residential area in urban centres was not so urgent that it was necessary for eliminating the inquiry

> under Section 5A of the Act and came to the conclusion that because of the subsequent fast development of urbanisation, the situation has completely changed and the problem of housing accommodation has become a matter of national urgency. Taking judicial note of this kind of development, the Court held that the acquisition of land for providing housing sites can warrant dispensation of the inquiry under Section 5A of the Act. The Court further held that where a large area of land is sought to be acquired, the scheme of planned development should not be frustrated by judicial interference at the behest of few persons. On the issue that there was an omission in the notification issued under Section 17(1-A) of the Act regarding the agricultural land the Court held that it was not fatal for the reason that the Government had the power to acquire the land other than waste and arable land also by invoking urgency clause."

78. Though, factually in the said case, the land, which was sought to be acquired was for the purposes of Plan Development at Mathura area, but taking into account the population growth, the religious importance of the place and that has been brought within the ambit of the public purpose on the pretext that since the concept of the public purpose cannot literally be defined precisely in a strict jacketed formula, it has to be ascertained on the basis of the facts and circumstances of each and every case of acquisition for meeting the public requirement and in that eventuality, the judgment of Division Bench of Allahabad High Court, becomes relevant in the present context and subject of acquisition, in the aforesaid judgement, it has been observed, that for the purposes of determination of the aspect of public purpose, the Government is the best judge to assess the requirement of the public purpose, and particularly, in the

instant case, when it relates to the defence of the country for protecting its Bordering Frontier, then obviously, it would be the Government of India, through its Ministry of Defence and Ministry of Home Affairs, who could in joint collaboration best assess the public requirement, and which has been adhered to in the instant case by observing the aforesaid principles, as would be apparent from the various documents relied and referred to by the learned counsel for the Government of India.

79. In that eventuality, the Division Bench of the Allahabad High Court has held, that where under the facts of a particular case, it has been made out that it satisfies the public purpose, in that eventuality, the acquisition cannot be made as a subject matter of judicial review by the Courts, on the question of public purpose, particularly when its determination has already been made by competent technical authorities, who had expressed their concerted opinion on the requirement of a particular land to be acquired to meet the public purpose of defence need of the country of its borders. The legal preposition, which has been derived at could also be extracted from the observation, which had been made in para 39 and 40 of the said judgement, which is extracted hereunder :-

> "39. It is a settled legal proposition that the scope of judicial review is limited to the decision making procedure and not against the decision of the authority The Court could review to correct errors of law or fundamental procedural requirements, which may lead to manifest injustice and can interfere with the impugned order in exceptional circumstances. In

judicial review, the Court cannot trench on the jurisdiction to appreciate the evidence and arrive at its own conclusion as it is not an appeal from a decision. Review of the decision is not permissible where the findings are recorded by an authority on the basis of legal evidence and the said findings are not based either on ipsi dixit or conjectures or surmises. The Court cannot interfere on the ground that the matter requires appraisal of evidence. "Between appraisal of evidence and total lack of evidence, there is an appreciable difference which could never be lost sight of".

40. The power of judicial review of the writ court is limited, but it has competence to examine as to whether there was material to form such an opinion as required by law or the findings recorded by the authority concerned are perverse. It is settled law that non-consideration of relevant material renders an order perverse. A finding is said to be perverse when the same is not supported by evidence brought on record or they are against the law or where they suffer from the vice of procedural irregularities Vide Purushottam Chandra v. State of U.P. and Ors. ; Mohar Singh v. President Notified Area Committee, Colonelganj and Ors. 1956 ALJ 759; Gaya Din v. Hanuman Prasad AIR 2001 SC 386; and In the matter of Special Reference No. 1 of 2002 Gujrat Assembly Election Matter."

80. The aforesaid judgment deals with as to what would be the expanse of exercise of powers of 'judicial review' for acquiring the land for meeting the public purpose and if no malice is attributed to the acquisition, and there is an emergency for acquiring the land and the same is in the interest of the nation, the same cannot be put to challenge by way of a judicial scrutiny before the Courts, and that too particularly when, the circumstances has already been determined by the competent authorities, and ultimately, the conclusion which has been derived at by the Division Bench

of the Allahabad High Court, as contained in para 71 of the said judgement, which is extracted hereunder, as to under what circumstances, the concept of public purpose could be best determined for the purposes of invocation of emergency clause to meet a public requirement. Para 71 of the said judgement is extracted hereunder :-

> *"71. In view of the aforesaid settled legal propositions, it emerges that the land can be acquired for public purpose; the expression 'public purpose' cannot be defined by giving a specific definition as the same cannot be fitted in a straitjacket formula. The facts and circumstances of each case have to be examined to find out whether acquisition is for a public purpose. Right to property is a constitutional/statutory/human right of an individual person. A person interested has a right to file objections under Section 5-A of the Act though such a right is limited for pointing out that the purpose for which the land is acquired is not a public purpose or the land of she said person is not suitable for that purpose or the area of the land sought to be acquired would be excessive for serving the said purpose as the land cannot be acquired for some other collateral purpose. Such objections form the basis of an enquiry under Section 5-A of the Act. In exceptional circumstances whore there is a grave urgency or unforeseen emergency, the Government is competent to invoke the urgency powers contained under Sections 17 of the Act and take possession before making the*

Award. In a case of urgency or emergency Government is also competent to take a decision that in order to avoid further delay, the enquiry envisaged under Section 5-A of the Act be dispensed with, but for taking such a decision, there must be existing and relevant material before the Government and it must apply its mind as to whether he urgency is such that persons interested are to be deprived of their right to file objections under Section 5-A of the Act. Invoking the provisions under Sections 17(1) or 17(2) of the Act would not automatically dispenses with the enquiry under Section 5-A. There has to be an independent decision by the State Government for such dispensation. Section 17(4) itself indicates that the "Government may direct that the provisions of Section 5-A shall not apply." The recital of such an opinion in the order or in notification is not necessary. Not reasons have to be recorded in this regard in the official records. It is a case of subjective satisfaction of the Government and once the Government forms the opinion and dispenses with the enquiry under Section 5-A of the Act, the Court, in its limited jurisdiction of judicial review, cannot declare tie acquisition proceedings bad. Pre or post notification delay or lethargy on the part of the officials of the State Government is not fatal to acquisition proceedings. Very often persons interested in the land proposed to be acquired make various representations to the concerned authorities against the proposed acquisition This is bound to result in a multiplicity of enquiries,

communications and discussions leading invariably to delay in the execution of even urgent projects Very often the delay makes the problem more and more acute and increases the urgency of the necessity for acquisition. There is no prohibition in law for acquiring the land for a public purpose, which is not in conformity with the land use shown in the Master Plan, as the Master Plan can be amended/modified by the Government. Acquisition of the land for a use other than the se for which it had been earmarked in the Master Plan can be initiated in anticipation of approval to the proposed amendment/modification of the Master Plan by the State Government. Planned development proposed should not b installed at the behest of a few aggrieved persons, where a huge chunk of land belongs to a very large persons is involved."

81. In yet another Constitution Bench judgement, as reported in **2011 (8) SCC 708, Rajiv Sarin and another Vs. State of Uttarakhand and others,** in para 68, 70, 71, 77 and 78, which is extracted hereunder :

"68. The incident of deprivation of property within the meaning of Article 300-A of the Constitution normally occurred mostly in the context of public purpose. Clearly, any law, which deprives a person of his private property for private interest, will be amenable to judicial review. In the last sixty years, though the concept of public purpose has been given quite wide interpretation, nevertheless, the "public purpose" remains the most important condition in order to invoke Article 300-A of the Constitution.

70. Under the Indian Constitution, the field of legislation covering claim for compensation on

deprivation of one's property can be traced to Schedule VII List III Entry 42 of the Constitution. The Constitution (Seventh Amendment) Act, 1956 deleted Schedule VII List I Entry 33, List II Entry 36 and reworded List III Entry 42 relating to "acquisition and requisitioning of property". The right to property being no more a fundamental right, a legislation enacted under the authority of law as provided in Article 300-A of the Constitution is not amenable to judicial review merely for alleged violation of Part III of the Constitution.

71. Article 31-A was inserted by the Constitution (First Amendment) Act, 1951 to protect the zamindari abolition laws. The right to challenge laws enacted in respect of the subject-matter enumerated under Articles 31-A(1)(a) to (g) of the Constitution on the ground of violation of Article 14 was also constitutionally excluded. Further, Article 31-B read with the Ninth Schedule to the Constitution protects all laws even if they are violative of Part III of the Constitution. However, it is to be noted that in the Constitutional Bench decision in I.R. Coelho v. State of T.N.15 this Court has held that the laws added to the Ninth Schedule to the Constitution, by violating the constitutional amendments after 24-12-1973, would be amenable to judicial review on the ground like basic structure doctrine.

77. Article 31(2) of the Constitution has since been repealed by the Constitution (Forty-fourth Amendment) Act, 1978. It is to be noted that Article 300-A was inserted by the Constitution (Forty-fourth Amendment) Act, 1978 by practically re-inserting Article 31(1) of the Constitution. Therefore, right to property is no longer a fundamental right but a right envisaged and conferred by the Constitution and that also by retaining only Article 31(1) of the Constitution and specifically deleting Article 31(2), as it stood. In view of the aforesaid position the entire concept of right to property has to be viewed with a different mindset than the mindset which was prevalent during the period when the concept of eminent domain was the embodied provision of fundamental rights. But even now as provided under Article 300-A of the Constitution the State can proceed to acquire land for

> specified use but by enacting a law through State Legislature or by Parliament and in the manner having force of law."

82. This was a case, which was arising out of the acquisition proceedings, and its co-related implications from the tenancy laws, as applicable in the State of Uttarakhand, particularly, from the percept of Kumaon Zamindari Abolition and Land Reforms Act 1960. A major part of the argument, which was based on vesting of the tenancy rights, which has been pleaded by the learned counsel for the petitioners has already been dealt with by this Court in the earlier part of this judgement, but the said case was dealing with the aspect pertaining to the effect of Sections 12, 4 and 19 of the Kumaon Zamindari Abolition and Land Reform Act 1960, though which is not the case here, which was even pleaded or argued by the learned counsel for the petitioners, based on valid documentary rights because here the argument has been confined, by the petitioners claim of rights of vesting under Sections 4 and 6 of the U.P. Z.A. & L.R. Act, since they have claimed their possession and possessory rights over the land in question since 1880, and the said question and the effect of vesting has already been answered by this Court in the light of the judgement of the Division Bench in **Laxman Lal (Supra),** as to what would be the effect of vesting of right over land, in question, in the light of the constitutional mandate contained under Article 300A of the Constitution of India.

83. The Constitution Bench in the aforesaid judgement had observed, that the definition of a property, which is only the

scope the judicial exercise is to be undertaken in the light of the fact, that the rights to property is no longer a Fundamental Rights, the Hon'ble Apex Court has in its para 68 had laid down that in an incident of deprivation of a property to meet the public purpose would still remains as to be one of the most important facets for invocation of the right of acquisition of private property and upto what extent, it would be made amenable to a judicial review, in the light of the field of legislation, which has been covered by the Seventh Schedule, List-III, Entry-42 of the Constitution, is made limited only for the purposes of determination of the adequacy of compensation, on the deprivation of the property, as a consequence of an acquisition, and hence, it has been held in para 70, that when the acquisition is for a public purpose and the public purpose is a facets, which is satisfied, then the acquisition, it cannot be put to a judicial review merely because of the violation of Part-III of the Constitution of India.

84. The Constitution Bench judgement in its para 77, which has already been extracted above, while considering the implications of the Article 31, and its effect of repealment made by virtue of the Constitution 44th Amendment Act 1978, and the effect of insertion of Article 300-A of the Constitution of India, it had observed that the entire concept of right of property though it has been diluted but still it has to be viewed from a different percept and the circumstances, which is prevalent during the situation at the time of acquisition of the property, particularly, when the State under its concept of authorities provided by the theory of 'eminent

domain' exercises its power for taking over the property, but it is with the only rider, which has been attached as per the observations made in para 77, that Article 300A of the Constitution of India, has had to be protected and the State can proceed to acquire the land for the specific public use by enacting a law or by enforcing a law of acquisition to meet the public requirement, and this Court is of the view, that looking to the circumstances of the instant case, and the backdrop of the instant case, necessitating acquisition, the said aspect has quite elaborately been dealt with by this Court in the above paragraphs, and no compromise of any nature under whatsoever percept for the purposes of judicial review, of an acquisition sought to be made for meeting the defence requirement could be made subject to a judicial review, because under the given set of circumstances, it cannot be even thought of that the requirement of deployment of the bordering outpost, adjoining to the Line of Actual Control could ever be remotely placed under a concept, to be outside the domain of public purpose, rather it is more widely applicable, because it is not only exclusively confined to the public purpose, but it is rather confined to the purpose of the nation and its defence, which is of an exclusive predominant requirement.

85. The Constitution Bench of the Hon'ble Apex Court in yet another judgement as reported in **(2011) 9 SCC 1, K. T. Plantation Private Limited and another Vs. State of Karnataka**, had dealt with the concept, as to how a co-related study could be made or is required to be made with regard to the aspects of deprivation of the property of a

private individual and how and under which context, the theory of ‘eminent domain’ could be made extendable and to be made applicable for the purposes of facilitating a judicial review of a Notification issued for acquiring the land to meet a public purpose. The question, which was dealt with in the said judgement, had laid down that though the right has been vested with the State for taking over the property, to meet the public purpose under the exercise of its inherent power of ‘eminent domain’, but then further the right, which has been envisaged therein do not camouflage or cloud the rights of the private persons, whose land is taken to get adequate compensation as per law, as the same stands protected under Article 300A of the Constitution of India to be read with Article 14 of the Constitution of India, where a right of compensation has had to be determined as per the nature of the land acquired, its title, and the entitlement of the person to receive the compensation as per law, whose land has been said to be taken over to meet the public purpose.

86. In the said judgement of the Constitution Bench of the Hon’ble Apex Court, factually, the Legislative Assembly of State of Karnataka, had issued a Notification by virtue of which, they have enforced the Acquisition and Transfer Act of 1996, for the purposes of acquisition of land and movable assets for the plantation of a private limited organization and had bought a portion of the land, which was held by the State, under the registered sale deed in the year 1991. In the said case, the Hon’ble Constitution Bench, in its observation made and recorded in para 119, which is extracted hereunder, had observed that while determining a

right of an individual under Article 300A of the Constitution of India, the Courts cannot venture into a judicial review of the validity of an acquisition on the touchstone of Article 300A of the Constitution of India, because the acquisition is a concept, which is available to the State, i.e. the dominion with which, the property is vested to exercise its power of 'eminent domain' which has to be harmoniously read with regard to the rights reserved under Article 300A of the Constitution of India, whenever there is a deprivation of a property of a private persons. Para 119 of the said judgement is extracted hereunder :-

> "119. We will now examine the validity of the Acquisition Act on the touchstone of Article 300-A of the Constitution and examine whether the concept of eminent domain be read into Article 300-A and in the statute enacted to deprive a person of his property."

87. The Hon'ble Apex Court in the said judgement of the Constitution Bench in its para 132 too, while dealing with the concept of states exercise of powers under the theory of 'eminent domain' has extracted its theory, which is held to be a natural and an absolute right, which is rather a convention now in the society, but the exercise of natural and conventional rights by the State for taking over the rights of an individual, it had observed that the philosophy, as per the thinkers, who had laid down the principles and the circumstances, under which, the land could be taken over, it had observed that the right to property on its owners are absolute. But, it simultaneously definitely involves a definite social responsibility too, if at all, it is required to be met and

had held, that a private property can be taken over to establish the need of a public or to meet an urgent need of the Country and then in that eventuality, the public interest would always prevail over the civil or individual rights, but it will not preclude a natural right of a private individual to receive the compensation, if the ownership of the property is divested from them (provided they have it) due to the consequences of the acquisition. Para 132 of the said judgement is extracted hereunder :-

> "132. Eminent thinkers like Hugo Grotius, Pufendorf, John Locke, Rousseau and William Blackstone had expressed their own views on the right to property. Lockean rhetoric of property as a natural and absolute right but conventional in civil society has, its roots in Aristotle and Aquinas, for Grotius and Pufendorf property was both natural and conventional. Pufendrof, like Grotius, never recognised that the rights to property on its owners are absolute but involve definite social responsibilities, and also held the view that the private property was not established merely for the purpose of "allowing a man to avoid using it in the service of others, and to brood in solitude over his hoard of riches." Like Grotius, Pufendorf recognised that those in extreme need may have a right to the property of others. For Rousseau, property was a conventional civil right and not a natural right and private property right was subordinate to the public interest, but Rousseau insisted that it would never be in the public interest to violate them."

88. In continuation thereto, the theory of 'eminent domain' in the said judgement of the Constitution Bench was dealt with, on the basis of the philosophy laid down by the renowned philosopher **Hugo Grotius**, wherein, he has observed that the principles of 'eminent domain' though it does applies to the works, which are required for, or which are to be done in order to meet up the public rights, which may have an overlapping effect and precedence over the private rights, but for the purposes of exercise of the powers of theory of 'eminent domain' few basic pre requisites, which are essentially required to be satisfied are :-

a) That the exercise of the powers of 'eminent domain' is for meeting the public requirement;

b) The compensation from the public fund is required to be ensured to be made payable to the land loser, who loses his rights.

c) It has laid down that the theory of 'eminent domain' is solely a matter of Statute and that would always be a situation depending upon the Constitutional mandate of the particular country, over which, the said principle is being applied for acquiring the property to meet the public purpose.

89. It goes without saying, that in the instant case, the land, in question, is being taken for the defence need and under the normal human prudence and sensitivity of perception towards nation, of the citizen of our nation, the requirement of defence personnel, will always fall to be within the ambit of the public purpose and its the public right, which is to be protected too and hence, the acquisition

to meet up the aforesaid purpose would obviously overlap the personal rights, as in the instant case.

90. In the said judgement, the Hon'ble Apex Court while interpreting the effect of the application of the theory of 'eminent domain' under the backdrop of the observations, which had been made in the above paragraphs, which has been extracted, had also dealt with the theoretical aspect of the doctrine, that the principle of 'eminent domain' which will still continue to apply, under the deleted Article 31of the Constitution of India, and under the present Article 30 (1A) of the Constitution of India, as inserted by the Constitution (44th Amendment Act 1978) w.e.f. 20.06.1979, and under the second proviso to Article 31A, as would be apparent, which is in an exclusion from the implications of Article 300A of the Constitution of India.

91. In the present case, since there is an imminent threat nor the case has been projected by the petitioners that they would be deprived of an adequate compensation to be made payable to them as per the provisions of the said Act, the aforesaid principles and the safeguards taken by the Hon'ble Apex Court in the said judgement will come to the rescue to the State to apply the theory of 'eminent domain' when there is a deprivation of the property, which has been saved by Article 300A of the Constitution of India.

92. In the said judgement, in its para 166, the implications of the rights protected under Article 300A of the Constitution of India, has been dealt with in the parameters,

which has been laid down in para 166, which is extracted hereunder:-

> "166. Article 300-A, when examined in the light of the circumstances under which it was inserted, would reveal the following changes:
>
> 1. Right to acquire, hold and dispose of property has ceased to be a fundamental right under the Constitution of India.
> 2. Legislature can deprive a person of his property only by authority of law.
> 3. Right to acquire, hold and dispose of property is not a basic feature of the Constitution, but only a constitutional right.
> 4. Right to property, since no more a fundamental right, the jurisdiction of the Supreme Court under Article 32 cannot be generally invoked, aggrieved person has to approach the High Court under Article 226 of the Constitution."

93. Because the cessation of the Fundamental Right of an individual to hold a property under the Constitution, it has been protected as observed, that the Legislature cannot deprive a person to hold the property except with the due process of law and a right of acquisition and disposal of the property for meeting the basic constitutional requirement of the defence of the country, as it is in the instant case, the strict principle of Article 300A of the Constitution of India, since it protects the individual right over the property, and to receive compensation on acquisition, but still, it has to be ensured to be commensurated with the payment of adequate compensation, which has always been a fact already pleaded above and, as well as by the pleadings raised by the respondents, that the appropriate compensation payable on acquisition by the Government of India, had already been deposited with the District Magistrate Pithoragarh, for

meeting up the requirement of acquisition for the defence of the country. The Hon'ble Apex Court, in its para 180 of the said judgement, while dealing with the aspect of public purpose, where there is a deprivation of the property, it must take place only for public purpose or public interest. It has also laid down that the theory of 'eminent domain', which applies only when a person is deprived of his property, when it is specifically postulated to meet a public requirement and the public need and in the public interest. It further provides that merely an incidental benefit cannot be a reason for deprivation of a property by acquiring the same, the deprivation therein, has had to be lawful, fair and in the interest of the country, or a public interest and once, it satisfies the aforesaid parameters, it cannot be put to subject to a judicial review, because it is rather the Legislature, which has to determine the aforesaid aspects, and particularly in the instant case, as per the correspondence referred to above, based on the decision taken by the Ministry of Defence and Ministry of Home Affairs, the steps, for which, was taken ever since 2009, looking to the persistent threat perception of an enemy aggression, the acquisition in the instant case, will definitely would fall to be to meet a specific public purpose and the defence requirement of the country, which is in the larger interest of the country and its each citizen and its defence. If the concept of public purpose, as it has been observed in the aforesaid judgement, though it has been most extensively utilised, whenever an acquisition is made to meet a public purpose as deciphered in the acquisition Notification, but the condition precedent for invoking Article 300A of the Constitution of India, has not

been ruled out to be made applicable and, which in the instant case too, has been specifically protected.

94. Similar view, while answering the aforesaid two concepts of "public purpose" and theory of 'eminent domain' in the aforesaid judgment of the Constitution Bench, the references which has been drawn thereunder has been envisaged under its sub-para (e) of para 221 of the said judgement, which provides that the existence of the public purpose is a precondition for deprivation of a person from the property, which is protected under Article 300A of the Constitution of India, and the right to claim the compensation for the deprivation has had to be legislatively an inbuilt mechanism under the Act itself under which the acquisition is to be made for depriving an individual of his property to satisfy the need of the State and that would exclusively depend upon the scheme of the Statute, the legislative policy, object and purpose and various other related factors, which has to be taken into consideration in the decision making process, as it has been provided under the Act of 2013, that for acquiring a land, the social impact assessment has to be made; though the strict principle would not apply in the present case, because of the exemption extracted by Section 9 of the Act itself, which eradicates the applicability of Section 40 of Act of 2013. Sub-para (e) of para 221 is extracted hereunder :-

> "221. We, therefore, answer the reference as follows:
>
> (a) ....
>
> (e) Public purpose is a precondition for deprivation of a person from his property under Article 300-A and

> the right to claim compensation is also inbuilt in that article and when a person is deprived of his property the State has to justify both the grounds which may depend on scheme of the statute, legislative policy, object and purpose of the legislature and other related factors.”

95. Another aspect, which would be also of prime importance for dealing with the controversy, while the petitioners gave challenge to the Notification under Section 11 (2) of Act of 2013, would be from the point of view of theory of **“eminent domain”**. The theory of “**eminent domain”** grants an exclusive and inherent dominant power with the Government, which is the supreme owner of any land falling within the territory of the Nation, to take over the land and property, though under the terms and conditions of the given set of law, in order to meet out the emergent country requirement, due to any army aggression, army preparedness to face any sudden enemy insurgency, National calamity or other areas of such emergent need of the country and for the country, where time always plays an important pivotal role and where it is exclusively only the need of the country at large, which is to be considered. The aspect of eminent domain has been considered by the Hon’ble Courts in various judgements, which are being detailed and dealt hereunder.

96. Though, this Court has already dealt with as to what are the basic elements, which are required to satisfy the exercise of powers by the State under the theory of ‘eminent domain’ but the basic elements, which were required to be satisfied for applying the wider principle of theory of

‘eminent domain’ has been considered as back as in a judgement which has been reported in **AIR 1953 Assam 84, Mahindra Mohan Lahiri and others Vs. The State of Assam,** wherein, the constitutional validity of an Estate Act was put to challenge for transfer of the land for the public purpose and for the management of the State Government. In the said judgement, it had dealt the aspect in its para 13 and 15, which is extracted hereunder :-

> “13. The answer to Mr. 'Ghose's contention based upon Article 19(1)(f) read with Clause (5) of Article 19 is this. When an Act of the State Legislature is covered by item 9 in the 1935 Act, it is an Act passed by the State in the exercise of its power of eminent domain, and is, therefore, not subject to the provisions of Article 19(1)(f), Constitution of India, in precisely the same way as when an Act passed by the State Lagislature in the exercise of its police power depriving a person of his property by reason of his personal incapacity or disability or in the interests of public order, is not subject to the provisions of Article 19(1)(f). This aspect of the case has been considered by their Lordships of the Supreme Court in two cases involving interpretation of Article 21, Constitution of India. Article 21 is in these terms :
>
> > "21. No person shall be deprived of his life or personal liberty except according to procedure established by law."
>
> > Article 31 (1), Constitution of India says :
>
> "31. (1) No person shall be deprived of his property save by authority of law".
>
> Referring to Article 21 and its effect on Article 19, Kama C. J., observed :
>
> > "Deprivation (total loss) of personal liberty, which is sought to be protected by the expression 'personal liberty' in Article 21, is quite different

> from restriction (which is only a partial control) of the right to move freely (whick is relatively a minor right of a citizen) as safeguarded by Article 19. Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India. Therefore, Article 19(5) cannot apply to* a substantive law depriving a citizen of personal liberty. The contention that the word 'deprivation' includes within its scope 'restriction' when interpreting Article 21, is not acceptable."
>
> These observations apply with equal force to the interpretation of Article 31. Where, therefore, a person is deprived of his property by authority of law, the question of the infringement of fundamental right of property guaranteed by Article 19(1)(f) does not arise and equally, the question of restrictions upon that right does not arise, for the person having (sic) been deprived of his property either in the exercise of the State's police power or in the exercise of its power of eminent domain.
>
> 15. Our conclusion then is that the impugned Act is a valid Act and 'intra vires' the Assam (Legislature; that the question of the infringement of fundamental right of property guaranteed by Article 19(1)(f) does not arise, the Act having been passed in the exercise of the State's power of eminent domain; that the presence of public purpose is demonstrable. "

97. There is the aforesaid authority of 1953. It has been observed, that when a person is deprived to his property by an authority of law, as it happens to be in the instant case, the question of infringement of a right over a property, even though, it no more exists under existing law to be a constitutional right, it does not arise for consideration because the person has been deprived of his right over the property by the exercise of powers of the State under the

theory of ‘eminent domain’ in accordance with law, and hence, it meets the very purpose, and hence, as per the opinion of this Court, it meets the very purpose, which has been provided and protected of the land owner under Article 300A of the Constitution.

98. The Hon’ble Apex Court in a judgement as reported in **(2006) 2 SCC, 545, State of Bihar and others Vs. Project Uchcha Vidya, Sikshak Sangh and others,** while reiterating to the concept of the doctrine of ‘eminent domain’, and the principles, which are required to be adhered to has been laid down in its para 65 and 66, which is extracted hereunder, as to under what circumstances, the taking over of the land for the requirement of the Government could be embodied to be brought within the doctrine of theory of ‘eminent domain’. Para 65 and 66 of the said judgement is quoted hereunder :-

> “**65.** The word “takeover” would mean that the Government had thought of taking over of the properties and assets of the schools together with the teaching and non-teaching staff. Takeover of schools in the context of the policy decision of the State does not appear to be an expression of an intendment for complete takeover of the management of the school. In the former sense takeover of such schools would be violative of Article 300-A of the Constitution. Article 300-A embodies the “doctrine of eminent domain” which comprises two parts, (*i*) acquisition of property in public interest; and (*ii*) payment of reasonable compensation therefor.
>
> **66.** In *Jilubhai Nanbhai Khachar* this Court held: (SCC p. 622, para 34)
>
> > “*34*. The right of eminent domain is the right of the sovereign State, through its regular agencies, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the State

> including private property without its owner's consent on account of public exigency and for the public good. Eminent domain is the highest and most exact idea of property remaining in the Government, or in the aggregate body of the people in their sovereign capacity. It gives the right to resume possession of the property in the manner directed by the Constitution and the laws of the State, whenever the public interest requires it. The term 'expropriation' is practically synonymous with the term 'eminent domain'."'

99. In a judgement, which is reported in **AIR 2007 SC 471, Daulat Singh Surana and others Vs. First Land Acquisition Collector and others,** it was dealing with the circumstances of a case of acquisition, which was being undertaken by the State of West Bengal, where the fundamental underlying principle was the interest and claim of the community as a whole, whose interest has been held to be superior to the interest of the individual, because in the said case, the land was proposed to be acquired for the safety and the security of the people. Hence, it was observed in the said case, that the power of compulsory acquisition as prescribed under the terms of 'eminent domain' therein in the said case can be exercised in the interest and for the welfare of the people and particularly, the welfare of the people, which in the instant case, is in league with the preamble of the Constitution to constitute a strong integrated country, where safety, security, health and welfare of the person residing in it, i.e. its citizen and the prosperity of the country as a whole would be falling within the zone of public purpose, where the exercise of power of 'eminent domain' could be said to have been rightly exercised by the State, as it has been held by the said judgement in para 39, 40, 41, while

dealing with the wider concept of public purpose and in para 73, 74, 75 and 76, where the harmonious construction to meet out the "public purpose" and 'eminent domain' has been laid down by the Hon'ble Apex Court. Para 39, 40, 41, 73, 74, 75 and 76 are extracted hereunder :-

> "**39.** Public purpose has been defined in the Land Acquisition Act as under:
>
> "3. (*f*) the expression 'public purpose' includes—
>
> (*i*) the provision of village sites, or the extension, planned development or improvement of existing village sites;
>
> (*ii*) the provision of land for town or rural planning;
>
> (*iii*) the provision of land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned;
>
> (*iv*) the provision of land for a corporation owned or controlled by the State;
>
> (*v*) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, any local authority or a corporation owned or controlled by the State;
>
> (*vi*) the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out any such scheme, or, with the prior approval of the appropriate Government, by a local authority or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a State, or a cooperative society within the meaning of any law relating to cooperative societies for the time being in force in any State;

(*vii*) the provision of land for any other scheme of development sponsored by Government or, with the prior approval of the appropriate Government, by a local authority;

(*viii*) the provision of any premises or building for locating a public office,but does not include acquisition of land for companies."

40. Public purpose will include a purpose in which the general interest of community as opposed to the interest of an individual is directly or indirectly involved. Individual interest must give way to public interest as far as public purpose in respect of acquisition of land is concerned.

41. In the Constitution of India, some guidelines can be traced as far as public purpose is concerned in Article 37 of the Constitution. The provisions contained in this Part (directive principles of the State policy) shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country. It shall be the duty of the State to apply these principles in making laws.

73. Public purpose cannot and should not be precisely defined and its scope and ambit be limited as far as acquisition of land for the public purpose is concerned. Public purpose is not static. It also changes with the passage of time, needs and requirements of the community. Broadly speaking, public purpose means the general interest of the community as opposed to the interest of an individual.

74. The power of compulsory acquisition as described by the term "eminent domain" can be exercised only in the interest and for the welfare of the people. The concept of public purpose should include the matters, such as, safety, security, health, welfare and prosperity of the community or public at large.

75. The concept of "eminent domain" is an essential attribute of every State. This concept is based on the fundamental principle that the interest and claim of the whole community is always superior to the interest of an individual.

> **76.** Public purpose for which the premises was required in the instant case was not questioned seriously. As a matter of fact, the State of West Bengal has been using the premises in question for more than six decades for the safety and security of the people by having an office of the Deputy Commissioner of Police (Security Control). Therefore, by no stretch of imagination, it can be said that the premises was not required by the State Government for the interest and welfare of the people or there was no public purpose involved in acquiring the premises in question."

100. In a case, which was arising out of the judgement of the Kerala High Court, as reported in **(2009) 8 SCC 46, State of Kerala and another Vs. Peoples Union for Civil Liberties, Kerala State Unit and others,** it was dealing with the case, where Kerala Government has enacted a legislation for the purposes of restriction of transfer of land and restoration of alienated land of the Scheduled Tribes of the State and for the recovery of the Tribal land from non tribal occupants. Initially, the matter was decided by the learned Single Judge of the Kerala High Court, and later on, it travelled before the Full Bench of the Kerala High Court, and ultimately, the right of reservation given to the Scheduled Tribes therein, for the purposes of restoration of the land belonging to them under Sections 5 (1) and 5 (2) and Section 6 and Section 22 of the Act of 1999, which was put to challenge before the Kerala High Court, and it was held that a person acquires an indefeasible rights over the land, but then, still the owner of land, he can be deprived therefrom it only by taking recourse to the prevalent law and the exercise of its power under the theory of 'eminent domain", and that is what has been laid down in para 87, 88 and 89 of the said

judgement as to in what and under what circumstances, the concept or the exercise of power under the theory of 'eminent domain' could be exercised by the State even in relation to taking over of the land of the Tribal Community. Para 87, 88 and 89 is extracted hereunder:

> "**87.** The statutory provisions, therefore, must be interpreted in the light of the constitutional provisions. The decisions of this Court, therefore, are clear and unambiguous. In a case involving members of the Scheduled Tribes living in Scheduled Area the period of limitation can be extended, **but it is not permissible in respect of an area which has not been declared to be a Scheduled Area.**
>
> **88. When a person acquires an indefeasible right, he can be deprived therefrom only by taking recourse to the doctrine of eminent domain.** If a person is sought to be deprived of an indefeasible right acquired by him, he should be paid an amount of compensation. In a case of this nature, therefore, where an amount of compensation has not actually been tendered, the vendees of the land could not be deprived of their right to be dispossessed. In that view of the matter, a distinction must be made between a case where an amount of compensation has been paid and in a case where it has not been.
>
> **89.** If a vested right has not been taken away, the question of applicability of Article 14 of the Constitution of India would not arise. The High Court, however, proceeded to apply Article 14 of the Constitution of India on the premise that the provisions of the 1999 Act clearly seek to destroy the right conferred on Scheduled Area by Act 31 of 1975. The approach of the High Court being not correct, the same cannot be sustained."

101. The Hon'ble Apex Court in yet another judgement as reported in **(2010) 10 SCC 43, Amarjit Singh and others Vs. State of Punjab and other,** while dealing with the concept and holding thereof that the rights envisaged under

Article 300A of the Constitution of India, rests upon the doctrine of theory of 'eminent domain' to be exercised by the State. **It provides that the exercise of power for theory of 'eminent domain' for the public need, the individual rights of ownership over the land must be replaced to the larger public need** and where the acquisition is made for the public purpose and in accordance with the procedure established by law, after payment of the reasonable and fair compensation under the parameters laid down by the Legislature, then no fault could be found in acquiring the land for public need. Relevant para 31, 36, 47 and 48 are extracted hereunder :-

> " **31.** The term "expedient" appearing in Section 178 of the Act has not been defined. *Black's Law Dictionary*, however, assigns the expression "expedient" the following meaning:
>
> > "Appropriate and suitable to the end in view - Whatever is suitable and appropriate in reasons for the accomplishment of a specified object."
>
> **36.** Power of exemption reserved in favour of the Government under Section 178 of the Punjab Regional and Town Planning and Development Act, 1995 is also intended to relieve hardship arising from the operation of the Act. It is intended to enable the Government to deal with situations in which circumstances independent of the question of hardship render it expedient to do so by granting exemption. A liberal construction has, therefore, to be placed upon the provisions of Section 178(2) so that exercise of power for good and bona fide reasons is not defeated.
>
> **47.** Article 300-A of the Constitution rests on the doctrine of eminent domain and guarantees a constitutional right against deprivation of property save by authority of law. It mandates that to be valid the

deprivation of property must be by authority of law. That such deprivation in the present case is by the authority of law was not disputed, for it is common ground that the property owned by the appellants has been acquired in terms of the provisions of the Land Acquisition Act, 1894 which is a validly enacted piece of legislation.

48. It is also not in dispute that the provisions of the Land Acquisition Act invoked by the State for the acquisition under challenge provide for payment of compensation equivalent to the market value of the property as on the date of the preliminary notification apart from other benefits like solatium for the compulsory nature of the acquisition, additional compensation and interest, etc. The sum total of all these amounts undoubtedly constitutes a reasonable compensation for the land acquired from the expropriated owners. Neither Article 300-A of the Constitution nor the Land Acquisition Act make any measures for rehabilitation of the expropriated owners a condition precedent for compulsory acquisition of land. In the absence of any such obligation arising either under Article 300-A or under any other statutory provision, rehabilitation of the owners cannot be treated as an essential requirement for a valid acquisition of property."

102. In a judgement as reported in **(2011) 5 SCC 553, Radhy Shyam and others Vs. State of Uttar Pradesh and others,** was yet again a case, where a Notification for acquisition under Section 4 (1) was put to challenge, where the land was sought to be acquired for the purposes of a Planned Industrial Development in District by the Development Authority of Greater Noida. The Hon'ble Apex Court, where the challenge was given to the notification of acquisition, in its para 16, 17 and 77, which is extracted hereunder, has widely dealt with as to the circumstances under which, the powers of inherent exercise of the theory of 'eminent domain' which is vested with the sovereign State

could be exercised to take a property belonging to a private individual to be utilised for the public purposes. The said judgement lays down that the concept of public purpose or public interest which cannot be or rather should not be apparently used as a shield to take the land belonging to the private owner. The competent authority before acquiring the property and invoking an urgency clause cannot erroneously for no valid reason could avoid to exercise its power to acquire the property without complying with the provisions contained under, the then Section 5 of the Land Acquisition Act, by invoking the urgency clause.

> "**16.** At the outset, we record our disapproval of the casual manner in which the High Court disposed of the writ petition without even calling upon the respondents to file counter-affidavit and produce the relevant records. A reading of the averments contained in Paras 11 and 16 and Grounds *A* and *F* of the writ petition, which have been extracted hereinabove coupled with the appellants' assertion that the acquisition of their land was vitiated due to discrimination inasmuch as land belonging to influential persons had been left out from acquisition, but their land was acquired in total disregard of the policy of the State Government to leave out land on which dwelling units had already been constructed, show that they had succeeded in making out a strong case for deeper examination of the issues raised in the writ petition and the High Court committed serious error by summarily non-suiting them.
>
> **17.** The history of land acquisition legislations shows that in 19th Century, Bengal Regulation 1 of 1824, Act 1 of 1850, Act 6 of 1857, Act 21 of 1863, Act 10 of 1870, Bombay Act 28 of 1839, Bombay Act 17 of 1850, Madras Act 20 of 1852 and Madras Act 1 of 1854 were enacted to facilitate the acquisition of land and other immovable properties for roads, canals, and other public purposes by paying the amount to be determined by the arbitrators. In 1870, the Land Acquisition Act was enacted to provide for proper valuation of the acquired land. That Act envisaged

that if the person having interest in land is not agreeable to part with possession by accepting the amount offered to him, then the Collector may make a reference to the civil court. The 1870 Act also envisaged appointment of assessors to assist the civil court. If the court and the assessor did not agree on the amount then an appeal could be filed in the High Court. This mechanism proved ineffective because a lot of time was consumed in litigation. With a view to overcome this problem, the legislature enacted the Act on the line of the English Lands Clauses Consolidation Act, 1845. However, the landowners or persons having interest in land did not have any say in the acquisition process either under pre-1894 legislations or under the 1894 Act (unamended). They could raise objection only qua the amount of compensation and matters connected therewith. The absence of opportunity to raise objection against the acquisition of land was resented by those who were deprived of their land. To redress this grievance, Section 5-A was inserted in the Act by amending Act 38 of 1923.

77. From the analysis of the relevant statutory provisions and interpretation thereof by this Court in different cases, the following principles can be culled out:

(*i*) Eminent domain is a right inherent in every sovereign to take and appropriate property belonging to citizens for public use. To put it differently, the sovereign is entitled to reassert its dominion over any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good - *Dwarkadas Shrinivas* v. *Sholapur Spg. and Wvg. Co. Ltd.*, *Charanjit Lal Chowdhury* v. *Union of India* and *Jilubhai Nanbhai Khachar* v. *State of Gujarat*.

(*ii*) The legislations which provide for compulsory acquisition of private property by the State fall in the category of expropriatory legislation and such legislation must be construed strictly — *DLF Qutab Enclave Complex Educational Charitable Trust* v. *State of Haryana*; *State of Maharashtra* v. *B.E. Billimoria* and *Dev Sharan* v. *State of U.P.*

(*iii*) Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, it must be remembered that compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the society or people suffering from other handicaps, then the court is not only entitled but is duty-bound to scrutinise the action/decision of the State with greater vigilance, care and circumspection keeping in view the fact that the landowner is likely to become landless and deprived of the only source of his livelihood and/or shelter.

(*iv*) The property of a citizen cannot be acquired by the State and/or its agencies/instrumentalities without complying with the mandate of Sections 4, 5-A and 6 of the Act. A public purpose, however laudable it may be does not entitle the State to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, can the State invoke the urgency provisions and dispense with the requirement of hearing the landowner or other interested persons.

(*v*) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even a few weeks or months. Therefore, before excluding the application of Section 5-A, the authority concerned must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry under Section 5-A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.

(*vi*) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the authorities concerned did not apply their mind to the relevant factors and the records.

> (*vii*) The exercise of power by the Government under Section 17(1) does not necessarily result in exclusion of Section 5-A of the Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-section (4) of Section 17 makes it clear that it merely enables the Government to direct that the provisions of Section 5-A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of the exercise of power under Section 17(1).
>
> (*viii*) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Sections 17(1) and/or 17(4). The court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of audi alteram partem embodied in Sections 5-A(1) and (2) is not at all warranted in such matters.
>
> (*ix*) If land is acquired for the benefit of private persons, the court should view the invoking of Sections 17(1) and/or 17(4) with suspicion and carefully scrutinise the relevant record before adjudicating upon the legality of such acquisition."

103. The said judgement has provided, that it is always to be satisfied by the competent authorities acquiring the land, when the urgency clause is being invoked that it is the real emergent need of the State to take over the land and it deals with the aspect of real emergent necessity, that the exercise of powers of theory of 'eminent domain' could only

be actually exercised, when the delay would brook the very purpose of acquisition for public need.

104. If the said principle is made applicable under the circumstances of the present case, apparently the Notification has attracted the exemption clause under Section 9 of the Act of 2013, where the invocation of Section 9 of the Act of 2013, has eradicated the application of Sections 40 and 21 of the Act of 2013. The emergent requirement or the emergent need, as per the opinion of this Court, has always to be considered as to what is the need and purpose of immediate requirement, which has been expressed for acquiring a land. Few months delay in acquiring the land for meeting the need of the road or for providing the residential accommodation to the particular oppressed community for building of an official accommodations, they can be postponed or deferred and under the particular circumstances of the case be treated as to be not an emergent need. But, if that is read and correlated in the circumstances of the present case, I am of the view that the intention of the acquisition under the impugned notification does not mean an actual enemy army action, before the land is acquired, because once it is dealing with the aspect of defence of the country, it goes without saying that the acquisition proceedings cannot be delayed to wait for an actual insurgency to chance, because looking to the topography of the land sought to be acquired and the purpose of deployment of well equipped armed forces with heavy mechanical devices of long-range firing, it requires consideration of an important aspect of war preparedness and element of preparedness particularly from the concept of

defence of a country itself would constitute to be an urgent requirement, which cannot be delayed in any manner and that too, in the present case, when it was assessed after 1962 Indo-China war, when for the first time, the border outpost was deployed in 1968, and later on, it was substituted by the decision taken by the Government of India, for the deployment of 14th Battalion of ITBP to defend the two passes, which were the easy accessible zone of entry by the enemy army of the neighbouring country, China in the Indian territory, and as per the correspondences made by the Ministry of Defence in league with decision with the Ministry of Home Affairs, it was and it had an element of preparedness, which cannot await an actual army action, hence it was an emergent military requirement, which could not have been delayed, for any whatsoever valid reason, when it effects the defence of the Country.

105. Thus, the nature of acquisition in the present case, it satisfies all the elements, the public purpose; the public need; the need of the defence of the country; the preparedness of the military personnel to face any sudden military insurgency; to meet the requirement of the defence personnel at a higher altitude war fare at 14,000 feet above sea level, in the higher Himalaya; and above and overall, the defence of the country is to be ensured to be sufficient enough to over track and sideline the personal requirement, even if it is at all to be given some protection under the law, because the law has to be rationally made applicable and liberally construed considering the requirement of the country, when it comes to its defence.

106. In a recent judgement of the Hon'ble Apex Court as reported in **(2020) 9 SCC 356**, **Hari Krishna Mandir Trust Vs. State of Maharashtra and others,** this was a case, where it related to a controversy pertaining to a private road in Pune, which was being declared as a road owned by the Pune Municipal Corporation, though as per the records, it was recorded in the name of the private person and as a private road. The Hon'ble Apex Court in para 96 and 97 of the said judgement, while analysing the effect of Article 300A of the Constitution of India, under the doctrine of 'eminent domain' had laid down that the theory of 'eminent domain' widely comprises of a prior satisfaction of two elements (i) that the possession of the property has been taken over for exclusively for public purpose and in public interest and (ii) taking over of the possession under the concept of public purpose or public interest, has had to be followed with a payment of reasonable compensation. The said judgement has held that the right of property, though it may not be said to be a Fundamental Right, any more after the Constitution Amendment, but still, it is a constitutional right, which is protected under Article 300A of the Constitution of India, which has a basic structure of protection of the human rights and the executive or administrative decision cannot be arbitrarily be exercised dehors the spirit of Article 300A of the Constitution of India, for depriving of a person of his private right under the concept of public requirement for public need, though which could be done in the exercise of theory of 'eminent domain', when the second parameters of awarding reasonable

compensation as per the law is met out. Para 96 and 97 is extracted hereunder :-

> “96. The right to property may not be a fundamental right any longer, but it is still a constitutional right under Article 300-A and a human right as observed by this Court in *Vimlaben Ajitbhai Patel* v. *Vatslaben Ashokbhai Patel*. In view of the mandate of Article 300-A of the Constitution of India, no person is to be deprived of his property save by the authority of law. The appellant Trust cannot be deprived of its property save in accordance with law.
>
> 97. Article 300-A of the Constitution of India embodies the doctrine of eminent domain which comprises two parts, (*i*) possession of property in the public interest; and (*ii*) payment of reasonable compensation. As held by this Court in a plethora of decisions, including *State of Bihar* v. *Project Uchcha Vidya, Sikshak Sangh*; *Jilubhai Nanbhai Khachar* v. *State of Gujarat*; *Bishambhar Dayal Chandra Mohan* v. *State of U.P.*, the State possesses the power to take or control the property of the owner for the benefit of public. When, however, a State so acts it is obliged to compensate the injury by making just compensation as held by this Court in *Girnar Traders* v. *State of Maharashtra*”

107. In view of the aforesaid authorities refer to, this Court has also to look into the controversy from the concept that the concept of public purpose has also been dealt with in a book titled as the **Concept of “Public Purpose”** authored by **Mr. J. Narain**. In the said book, yet again, it has provided, that the power of taking over of the land by the State should always be in a textual context of social and economic reforms and its practical larger social consequences having bearing on the peaceful and safe living of the citizen of the country.

108. In the said book, it had referred that no doubt technically speaking, the judiciary still has a final power to determine, whether the public purpose has been served in the given set of circumstances of the acquisition case, or not, but the nature and its complexity, which may be attributed to be assessed in future of a modern State, in general, and in the wider interest of the nation, particularly to immensely eradicate the social and economical problems, which may occur, such reforms, which are the basic need of the country, it gives a greater discretion to the Government in choosing the need to meet up the social welfare and the social public objective to develop and to secure the country from its any future practical complexities, it could as per opinion of this Court would include too the need of defence of country and need of armed forces of the country.

109. In yet another book, authored by **Schwartz**, which was **"The Commentary on the Constitution of the United States"**, while referring to, two of the leading judgements of the **Rindge Company Vs. Los Angeles and Bragg Vs. Weaver,** it has provided that the "the necessity for appropriating a private property for public use, is not a judicial question. This power inherently resides in the Legislature and may either be exercised by the Legislature or under the power delegated to the public officer". It further at its page number 259 provides "whether it is necessary, and eminent that the given property be taken, are legislative questions and no matter, who may be charged with and by the decision and hearing thereon is not essential, if due process is being followed with as per law". "The

constitutional requirements are satisfied as soon as the property owner is assured of a judicial forum, in which, he could demonstrate, if he can take over the issue that the land is taken over for legitimate public purpose and establish the value of his property and the damages, which he or she would be entitled to".

110. Meaning thereby, in view of the aforesaid principle also, the enquiry over an object of acquisition for the public purpose has got a very limited implication to the context of determining the element and the factors required for public purpose by the Courts, even the constitutional courts. However, the conclusion drawn for necessitating for taking over of private property for public purpose is a exclusive legislative determination, and it has to be left to the domain of the Legislative mandate itself or the law, which governs such subjects and cannot be made to be a subject matter of judicial review.

111. The constitutional requirements are satisfied, as long as the property owners are assured and provided with the judicial forum, in which, one can demonstrate, if he could sustain the rights that the taking over of the land is not for the purposes to the legitimate public purpose or if he is able to establish the value of his property and the damages, to which, he will be entitled to. The only safeguard under law for acquiring the private property for public need, and particularly, the need of the nation and its defence, the protection under Article 300A of the Constitution is to be safeguarded for securing a legitimate compensation of the

damages or the value of the property, which has been thus taken over.

112. The enquiry into that aspect is limited only to the extent of determining the existence of a public purpose and one the aspect, which is quite conclusive however, that the necessity of taking private property for public purpose is a Legislature determination, and it will be exclusively for the Legislature or the law, such as framed under the Constitution and the Ministerial Law of Administration, for taking over the property for the public need, and that is why, if the said intention of acquisition for the public purpose is read in context with the constitutional mandate of other countries, it had rather consistently laid down, that there is no immunity for the State in acquisition of a private property, that could not be mitigated by the powers of in-appropriation for public purpose, but by virtue of the rationale application of the theory of eminent domain, where the Courts imposed upon to determine, it in the context of natural justice, as to whether, the exercise of powers of eminent domain are sustainable to the object and public purpose, which has been taken as to be the foundation for acquiring the land.

113. This Court for all the logics and reasonings already assigned above is of the view, that apart from the constitutional mandate and sprit of the applicable law about the relevance of the country, the integration of the country, assuring a peaceful living to the citizens of the country, this Court is of the view that it could only be assumed to a citizen when they are secured when the country's defence structure

and its strength and its preparedness to meet any sudden, military crisis is augmented by providing, its defence personnel or any other such agencies with sufficient infrastructural facilities, and particularly, at the strategic point, like the one, in question, where India is sharing an international border, which is hardly 20 to 25 km. away from the land in question, adjoining to the Line of Actual Control. It is at this juncture, that the relevance of defence of the country has been mythologically considered too in various Vedas, and particularly, certain excerpts of the Atharva Vedas are required to be considered at this stage of the judgment, in order to determine the importance and necessity of the Notification from the perspective of the need of the defence of the country.

114. Lastly, the concept of the importance of a country and its defence is not an isolated or a new theory, which has been developed or discussed by the modern law, as it has been now being legislated by the different countries, but rather, it is an aged old theory, which was considered by the mythological Vedas and ancient scriptures of our country, for example **Atharva Vedas** in its Clause 5/19/4 has dealt with the requirement and the necessity of the defence of the country. The following extracts from the **Atharva Vedas** also supports the acquisition intended to be made by the impugned notification. The relevant part is extracted hereunder :-

> "ब्रह्मगवी पच्यमाना यावत् साभिविजंग्डहे।
> तेजो राष्ट्रस्य निहन्ति न वीरो जायते वृषा ।।
> अथर्ववेद 5/19/4"

115. Literally, the basic intention of the ancient scriptures of our country, in view of the above excerpts from the Atharva Vedas, it had been rather prophesized by the ancient scriptures and sermons given by the priest and the emperors, it rather casts a duty that the basic inherent right and duty to be performed by an emperor of the Country is to ensure the safety of its frontier, as to be its prime objective to safeguard it from any army aggressions, and hence, the acquisition herein, also forms and falls to be within the intention of the aforesaid **Sloak** of the Atharva Vedas, where national importance has been emphasized as to be one of the predominant duty of the emperor to save the country, and which would be the intention of the present Notification too for acquiring the land for defence purposes.

116. In **Atharva Vedas Samhita**, Part-II, in its Chapter-24, had dealt with the importance of the country in its para 4750, wherein, it had provided that the human community, as a whole of particular country, has had to make all efforts for the prosperity and the defence of the country. The relevant part is extracted hereunder :-

"अथर्ववेद संहिता भाग–२

[२४ राष्ट्रसूक्त]

[ऋषि–अथर्वा। देवता–मन्त्रोक अथवा ब्रह्मणस्पति। छन्द–अनुष्टुप्, ४–६,८ त्रिष्टुप्, ७ त्रिपादार्षी गायत्री]

४७५0. येन देवं सवितारं परि देवा अधारयन्। तेनेमं ब्रह्मणस्पते परि राष्ट्राय धत्तन ।।

हे ब्रह्मणस्पते ! देवों ने जिस प्रकार सवितादेव को चारों ओर से धारण किया, उसी विधि से इस महान् शान्ति के अनुष्ठाता यजमान को राष्ट्र की सुरक्षा के लिए सन्नद्ध (तत्पर) करें ।।१ ।।"

117. In fact, if the principles laid down in the above excerpts of Atharva Vedas is taken into consideration, it had rather provided that the security of the nation has to be made in a manner, in which, when Sita was abducted by Ravana and she was kept in Ashok Vatika, in fact, she was safeguarded by the Gods from all four corners in order to protect her from any harm to be caused to her and, in fact, it is the derivation of the said intention that Clause 4750 of the Atharva Vedas, has provided that the country has to be similarly guarded in the manner, in which, Sita was guarded by the Gods, when she was confined under the Ravana's domain in the Lanka, and hence, it has provided that all types of penance, conviction and commitment has had to be made in the interest and for the security of the State, in order to make it a progressive country, and if the said intention of the Atharva Vedas is extracted to be made applicable, it cannot be ruled out that the Notification herein, acquiring the land adjoining the Line of Actual Control to provide a suitable place to the Armed Forces, was well within the ambit of spirit of ancient scripture also.

118. Thus, in view of the aforesaid reasonings and rationale, this Court is of the view that :

1. To meet the object of the defence of the country in the light of the spirit of the preamble, which intends to constitute a country, as intended by its citizens, it will be inclusive of maintaining an integrity and sovereignty of the country, free from any foreign insurgencies over the territory of India.

2. This Court is of the view, that owing to the ancient scriptures and the public purpose as expressed in the Notification issued for acquiring the land, adjoining to the International borders to provide the defence with sufficient infrastructure would be well within the ambit of public purpose and the issuance of the Notification would be within the exercise of powers of eminent domain vested with the country.

3. This Court is of the view that for the reasons assigned, when the preamble itself was framed on behalf of the citizens of the country, it aimed to provide an integrated India, the said objective cannot be diversified by enforcing a right of a particular community at the cost of the safety of the nation, because the use of the word 'citizens' in the preamble would be inclusive of any sub-castes or reserve caste or tribes, as included in the Constitution and their rights, which may be individual in nature will not have precedence or supremacy over the rights of the country.

4. This Court is of the view, that when it is the defence requirement and that too, particularly in a remote areas, where higher altitude warfare is one of the important aspects due to inaccessibility of the area, which is not motorable, the individual rights would not prevail.

5. No prejudice is caused to the petitioners, herein, particularly when, in view of the ratio already dealt with in the body of the judgement, their rights are being

protected to be suitably remunerated by payment of an adequate compensation as a consequence of taking over of the land to meet the public purpose, while exercising the rights under the eminent domain, and in that eventuality, it cannot be said that the petitioners would be prejudiced or the act taken by State in is in violation of Article 14 and 300A of the Constitution of India.

6. Even the rights, which are claimed by the petitioners over the land, in question, in fact, owing to the records, which has been brought by the petitioner before this Court or as argued by the learned Senior Counsel, it does not substantiate an establishment of an indefeasible rights by any orders, which are to be passed by the competent authority, because the claim of vesting, as a consequence of the enforcement of the Z.A. & L.R. Act, could be a vesting of land with the State and not with the individual and vesting herein, as per the decision of the Division Bench of Allahabad High Court, would be confined to a right vested for tilling of soil and not the ownership which vests with the State.

7. The petitioners' contention that they have been in possession since 1880, is not established by documentary evidence, because their evidence which has been placed on record shows that they are in possession since 1967,though which was a fact denied by the respondents, which remained un-rebutted that the

petitioners ever since 1990 had not taken any agricultural activities over the land in question.

8. In order to contend that the petitioners were carrying an agricultural activities over the land, it was the burden which was to be discharged by the petitioners by placing requisite documents on record of performing an agricultural activities, which was not established owing to the fact, that even their own revenue records, on which, they have relied, do not establish their nature possession or their tenureship over the land, as to under which, category or classification of land, they would fall to within the provisions of Section 129 of the Z.A. & L.R. Act, to be read with Para-A, 124 of the Land Record Manual.

9. Since the land is being acquired for the defence needs, this Court is of the view, that irrespective of whatsoever protection has been marginally granted by the Statute, it cannot be compromised under any set of circumstances to mitigate the defence need of the country, and particularly, when as per the ratios dealt with above, the petitioners right as envisaged by Article 300A are still protected.

10. In view of the consistent decisions being taken by the Ministry of Home Affairs and Ministry of Home Affairs, Government of India, as would be apparent from the various communications on record, and the tactical report, which was placed on record to show the

strategic location of the land, which was more importantly required to keep an eye on the two easily accesses to the Indian territory across the Line of Actual Control, i.e. “Lasar Gad” and “International Pass”, the land was of more of a military importance, rather than an importance of an individual.

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11. The tactical report and the surveys, which has been made by the competent Revenue and Military Authorities, it has been observed that the location of the land since it is hardly 20 to 25 km. from International Border, it is so located just below a mountain range, as would be apparent from the map, that it would be falling outside the firing range of the enemy country and would be located near the already existing Army Installations and Bunkers.

12. It has been further found that the land was so located that heavy army equipment and long range firing devices could be easily deployed from the land, which was proposed to be acquired to meet the defence need of the Paramilitary and Military Forces.

13. Hence, owing to the aforesaid reasons, this Court is of the view that irrespective of the personal rights of a person or a community, it can under no set of circumstances, override the rights or need of the defence of the country, hence the acquisition does not suffer from any apparent error, which could leave open for the petitioners to scrutinize the propriety of the

acquisition in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India.

119. In the light of the aforesaid reasons, this Court is of the view that for all rationale and the logic assigned above, the impugned Notification does not suffer from any legal and apparent defect, hence, the Writ Petition lacks merit and the same is accordingly dismissed.

(Sharad Kumar Sharma, J.)
04.03.2022

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