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In the Gauhati High Court

Case No : Writ Appeal Nos. 175 and 176/2015

Athena Demwe Power Limited APPELLANT

Vs

Laideo Tayan and Others RESPONDENT

Date of Decision : 05-01-2016

Acts Referred:

Land Acquisition Act, 1894 — Section 11, Section 24(1)(b), Section 4, Section 4(1), Section 6(1), Section 7, Section 8
Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 — Section 24, Sec

Citation : (2016) 159 AIC 685 : (2016) 4 GauLJ 40 : (2016) 3 GauLR 24 : (2016) 1 GauLT 602 : (2016) 1 GLD 207

Hon'ble Judges : Tinlianthang Vaiphei, Actg. C.J.

Bench : Single Bench

Advocate : N. Dutta, Sr. Adv., P. Mahanta and A. Gupta, Advocates, for the Appellant; A.M. Buzarbaruah, Sr. Adv., M. Barman, M. Bora and Sunil Mow, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Tinlianthang Vaiphei, Actg. C.J.

1. I have had the benefit of reading the erudite judgment of my brother. While I am in respectful agreement with the conclusions of my brother, I would also like to express my view separately. The facts of the cases in the two appeals have been sufficiently dealt with by my learned brother. As observed by his Lordship, though the facts pleaded by the parties are quite numerous, the facts crucial for disposal of the appeals lie on a narrow compass. The following facts are well-established:

"1. To facilitate execution of 1750 MW Demwe Power Hydro-Electric Project, the State Government decided to acquire a huge chunk of Kande land measuring 306.47 hectares belonging to the respondents in the year 2012.

2. The acquisition proceeding started with the issuance of the Notification dated

15-2-2010 under Section 4 of the Land Acquisition Act, 1894 ("the Act" for short) for acquiring the said lands, which was followed by the Notification dated 3-8-2010 under Section 6(1) of the Act and thence by the Notification dated 19-11-2010 under Section 7 of the Act followed by the Notification dated 157-2011 under Section 8 of the Act.

3. Finally, the Award under Section 11 of the Act was passed by the Deputy Commissioner, Tezu district and the Deputy Commissioner, Lohit district on 11-5-2012. The awarded amount of Rs. 31,27,16,819/- was deposited by the appellant in favour of the Deputy Commissioner by cheque dated 6-6-2012.

4. Possession of the land was taken by the appellant on 22-6-2012. There is, thus, no room for controversy that all the events narrated above took place prior to the coming into force of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ("the Act of 2013" for short)."

2. The grievance of the respondents in the writ petitions is basically directed against the non-payment of the compensation prior to the coming into force of the Act of 2013: the compensations were, as a matter of fact, not disbursed to them until 13-2-2014. As the compensation due to them was not deposited before the commencement of the Act of 2013, contend the respondents, all the beneficiaries specified in the Notification issued U/s 4(1) of the Act are entitled to assessment of their compensations in accordance with the proviso to sub-section (2) of Section 24 of the Act of 2013, and they should paid accordingly. The learned Single Judge accepted this contention of the respondents and passed the impugned judgment with the following observations and directions:

"Admittedly, the compensation in respect of the land value has not been determined in terms of the new Act of 2013. The award under Section 11 of the Old Act was also made in the year 2014.

Sub-clause 2 of Section 24 provides that where an award under Section 11 has been made five years or more prior to the commencement of this Act, but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act.

Here in this case, although the physical possession of the land has been taken up (sic), the compensation has not been paid in terms of the new Act of 2013 and therefore, the compensation in respect of Horti, Agricultural crops and medicinal plants, etc. has not been paid.

Therefore, the State respondents are directed to initiate a fresh proceeding of land acquisition in terms of the new Act of 2013 and to pay compensation in respect of land and standing crops like horticultural crops/orange/spices and medicinal plants, etc. which has also been assessed by the respondent

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authorities as per annexure-2 in WP(C) No. 114(AP) 2015 within a period of 3 (three) months from the date of receipt of a certified copy of this order.

In terms of the above directions, both the writ petitions are disposed of."

3. The appellant-company, on whose behalf, the lands were acquired, is now questioning the legality of the impugned common judgment/order in these two appeals. The submissions of Mr. N. Dutta, the learned senior counsel for the appellants, and Mr. A.M. Buzarbaruah, the learned senior counsel, appearing for the respondents/writ petitioners have already been recorded in detail by my Brother in his judgment. I refrain from reproducing them here for the sake of brevity. The bone of contention is about the interpretation of the proviso to sub-section (2) of Section 24 of the Act of 2013. I, therefore, straightaway reproduce these provisions below:

"24. Land acquisition process under Act No. 1 of 1894 shall be deemed to have lapsed in certain cases.-(1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894),-

(a) where no award under Section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said Section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where an award under the said Section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under Section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

4. The provision extracted above has become the subject of much litigation in a short span, and the same has already reached the Apex Court a couple of times. In the oft-quoted judgment of Radiance Fincap (P) Ltd. v. UOI, , (2015) 8 SCC 544, it was held:

"All of these appeals were admitted before the commencement of the Right to

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Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. After commencement thereof, the appellants changed the tack of their challenge-originally framed under the Land Acquisition Act, 1894- and impugned the acquisition proceedings in toto, by evoking the deemed lapse of proceedings under Section 24(2) of the 2013 Act. Any determination under this provision must proceed sequentially. First, the factum of an award under Section 11 of the Land Acquisition Act, 1894, must be clearly established. The said award must predate the commencement of the Act i.e. 1-1-2014, by at least five years (or more) i.e. the award must have been passed on or before 1-1-2009. This having been established, if possession is found to not have been taken, or compensation not paid, then the proceedings shall be deemed to have lapsed. Thereafter, the appropriate Government, if it so chooses, may reinitiate acquisition proceedings in respect of the same land, but under the 2013 Act''s regime.

"12. Each and every deeming operation under Section 24(2) requires unambiguously and unvaryingly that a factual conclusion be drawn about the passing of the award under Section 11 of the 1894 Act, on or before 1-1-2009; further, the absence of compensation having been paid or the absence of possession having been taken by the acquirer, either of these, must be a proven point of fact, as a threshold requirement attracting the lapse.

13. From the record, these appeals do not unambiguously answer these indispensable queries, which inarguably must precede any declaration of lapse of acquisition under Section 24(2). Each of these appeals must factually satisfy this Court on the ingredients of Section 24(2), before this Court may pass a declaration in recognition of the statutory lapse of acquisition."

5. The construction placed by the Apex Court in the foregoing paragraphs has been reiterated by the Apex Court in Ratan Singh v. UOI and others in its judgment dated 8-12-2015 in IA No. 4 in Civil Appeal No. 2851 of 2009. In the instant case, the indisputable facts on record are that the award was passed by the Deputy Commissioner U/s 11 of the Act as late as 11-5-2012 i.e. within five years from, but not five years or more prior to, the commencement of the Act of 2013, i.e. 1-1-2014. At the outset, it may be noted that Section 24(2) deals with a situation where an award has been made by the land acquisition authority five years or more prior to the coming into force of the Act of 2013, but neither possession of the lands has been taken nor was compensation paid and in such eventualities the very land acquisition proceeding is deemed to have been lapsed. In other words, following conditions shall have to be satisfied:-- (a) the award must have been passed 5 years prior to 1-1-2014 when the Act of 2013 came into force; (b) physical possession of the lands has not been taken even after the award was made or (c) compensation for such lands has not been paid. Thus, this section cannot obviously deal with a situation if the award is passed within five years of the commencement of the Act of 2013. There is no dispute at the bar that the award in question was passed on 11-5-2012, while possession

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was taken on 22-6-2012. Had the award been passed prior to 2009 i.e. five years or more before 1-1-2014, and had no possession of the land been taken or no compensation paid to the landowners, then it could be safely said that the land acquisition proceedings are deemed to have lapsed. Now, if the acquisition proceedings got lapsed by the operation of the deeming provision of Section 24(2), then, it is the prerogative of the State Government to choose as to whether it shall initiate proceedings of such land acquisition afresh in accordance with the provisions of the Act of 2013; it is, therefore, not within the province of this Court to order fresh land acquisition proceeding. With due respect, the learned Single Judge has acted without jurisdiction in directing the State-respondents to initiate proceedings of such land acquisition afresh in accordance with the Act of 2013 even if we assume that the land acquisition proceeding has lapsed by the operation of Section 24(2) of the Act of 2013. This is the first reason for our interference in the impugned judgment.

6. The next question to be considered is whether compensations can be paid to the appellants in terms of the proviso to Section 24(2) of the Act of 2013. The submission of Mr. A.M. Buzarbaruah, the learned senior counsel for the respondents is that inasmuch as the compensation amounts were not disbursed to the respondents even after the commencement of the Act of 2013, all the landowners are entitled to compensations in accordance with the proviso to Section 24(2) of the Act of 2013. In my opinion, the learned senior counsel appears to have overlooked the fact that a proviso cannot be read in isolation, and must be read in the context of the main enactment. Before proceeding further, let us first ascertain the meaning of the term "proviso". The text of the proviso to Section 24(2) of the Act of 2013 has already been extracted earlier. The language of a proviso, even if general, is normally to be construed in relation to the subject-matter covered by the section to which the proviso is appended. In other words, normally, a proviso does not travel beyond the provision to which it is a proviso. "It is a cardinal rule of interpretation", observed BHAGWATI, J., "that a proviso to a particular provision of a statute embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other." The application of a proviso is succinctly explained by the Apex Court in Ali M.K. v. The State of Kerala, , (2003) 11 SCC 632 in the following manner:

"10. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Surrey (1880) 5 QBD 170: 42 LT 128 (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha , AIR 1961 SC 1596 and Calcutta Tramways Co. Ltd. v. Corpn. of Calcutta , AIR 1965 SC 1728), when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main

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enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso. ..." said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. 1897 AC 647: 66 LJ Ch 726: 77 LT 284 (HL) Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. [See A.N. Sehgal v. Raje Ram Sheoran , 1993 Supp (1) SCC 304, Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal , (1991) 3 SCC 442 and Kerala State Housing Board v. Ramapriya Hotels (P) Ltd. , (1994) 5 SCC 67]

"This word (proviso) hath diverse operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant." (Coke upon Littleton 18th Edn., p. 146.)

"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails.... But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole." (Per Lord Wrenbury in Forbes v. Git (1922) 1 AC 256.)

11. A statutory proviso "is something engrafted on a preceding enactment" (R. v. Taunton, St. James (1829) 9 B & C 831).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances."

(Per Lord Esher in Barker, Re (1890) 25 QBD 285.)

12. A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (see Jennings v. Kelly 1940 AC 206)."

7. In my opinion, the proviso in question will come into play once it is established that an award has been made under Section 11 of the Act five years or more before the commencement of the Act and possession of the lands of the landowners was taken but compensation was not paid to majority of such landowners. In other words, this is a case where the acquisition proceedings of the land cannot be deemed to have lapsed under Section 24(2) of the Act of 2013 but Section 24(1)(b) will apply. As already noticed, once the criteria for deemed lapsed of the land acquisition proceedings U/s 24(2) of the Act of 2013 are fulfilled, then the question of payment of compensation in terms of the award

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already made U/s 11 of the old Act will not and cannot arise since the land acquisition proceeding itself will have died a natural death. In such eventualities, the legislature has left it to the discretion of the State Government whether or not to initiate a fresh proceeding for acquisition of the same land in accordance with the Act of 2013. However, as already noticed, there could be a situation where the land acquisition proceedings cannot be deemed to have lapsed under Section 24(2) since the conditions for the deemed lapsed thereunder are not satisfied such as when possession of land has already been taken but compensation has not been paid even after making of the award five years or more prior to the commencement of the Act of 2013. In the meantime, the market value of the lands of such landowners could have increased by leaps and bounds but, to the misfortune of these landowners, an award was already made under the old Act on the basis of the market value obtaining on the date of the notification U/s 4 of the old Act i.e. five years or more before the commencement of the Act of 2013. This is most likely to cause heavy loses to the landowners without their fault. In my judgment, it is for these landowners that the proviso has been inserted by the legislature to give protection to such landowners. Thus, where an award has been made five years or more prior to the coming into force of the Act of 2013 but the lands of the landowners were already taken possession of, but compensations for majority of the land holdings have not been deposited in the account of these landowners, such landowners shall be entitled to compensation in accordance with the provisions of the Act of 2013. However, the landowners such as the private respondents herein, for whom an award was made within five years of the coming into force of the Act of 2013, cannot obviously take advantage of the proviso to Section 24(2) of the Act of 2013 as there was no delay in making the award for them; to hold otherwise will amount to conferring upon them unjust enrichment at the expense of the appellants. Consequently, neither Section 24(2) nor the proviso to Section 24(2) of the Act of 2013 can be held applicable to the facts of these appeals. Thus, to sum up, the proviso will operate in a field not covered by Section 24(2) and will operate only when an award has been made U/s 11 of the old Act and possession of the land was taken but majority of the landowners are not paid their compensations five years or more before the coming into force of the Act of 2013. Consequently, in the instant case, the land acquisition proceedings shall be allowed to continue, and compensations to the appellant paid in accordance with the award made under the provisions of the Land Acquisition Act, 1894 as if this Act has not been repealed.

8. Resultantly, both the appeals are allowed. The common judgment and order dated 29-4-2015 is, therefore, set aside. The respondents shall now proceed with the payment of compensation as assessed by them under the provisions of the Land Acquisition Act, 1894 without any loss of time. The parties are, however, directed to bear their respective costs.

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