
(1944) 12 CAL CK 0007
In the Calcutta High Court

Bishnu Prosad Chunder

APPELLANT

Vs

Binoy Krishna Rahatgi and Another

RESPONDENT

Date of Decision : 22-12-1944

Acts Referred:

Land Acquisition Act, 1894 — Section 18, 20, 25, 3

Citation : AIR 1945 Cal 142

Judgement

1. Premises No. 12, Khangrapatti Street (hereafter called the acquired premises) was acquired under the Land Acquisition Act for the improvement of Calcutta. It was a narrow piece of land, 29 feet 3 inches long from east to west and 5 feet 4 inches broad from north to south. Its area was 3 chittaks and 21 square feet. At the time of the acquisition there was an one storied building upon it, about ten feet high from the ground level. Premises No. 5, Armenian Street (hereafter called the dominant tenement) on which there is a four storied building was to the immediate east of the acquired premises and of the adjoining premises No. 11, Khangrapatti Street. In its western wall it has a vent hole in the ground floor and a window on the fourth storey which overlooks the acquired premises. There are three other windows on the first, second and third floors, on that wall which overlooks premises NO. 11, Khangrapatti Street. The owners of premises No. 5, Armenian Street, who are the respondents in this appeal, claim that at the time of the compulsory acquisition they had easement to receive light and air through that vent hole and all those windows over the acquired premises. Whether they had the right to have the passage of light and air over the acquired premises through all the apertures is a question between the parties to this appeal, but in the view we are taking on the question of law, which we will hereafter discuss, it is not necessary for us to express any opinion on that point.

2. The Collector was of opinion that Rs. 9000 was the "full market value" of the land and structures of the acquired premises. By "full market value" we mean the market value of the acquired premises as if there was no easement or other incumbrance affecting it. As in his opinion that premises were under the burden of easements of light and air of the dominant tenement premises No. 5 Armenian

Street and of other dominant tenements he awarded the sum of Rs. 1100 odd to the owners of the dominant tenements and gave the balance, Rs. 7000 odd, to the owners of the acquired premises. Out of the sum awarded as compensation to the owners of the dominant tenements, the respondents were given Rs. 165 as owners of the dominant tenement, No. 5 Armenian Street. Against the said award of the Collector the owners of the acquired premises did not make a reference to Court u/s 18, Land Acquisition Act, but the respondents did. In their application for reference they did not name any person or persons as opposite parties. They only stated that they had easement of light and air over the acquired premises in respect of the several windows and openings and that the award made in their favour by the Collector was too low and should have been for Rs. 5000. On receipt of the reference the President of the Calcutta Improvement Tribunal gave notice of that application to the owners of the acquired premises but did not give notice to the Collector u/s 20, Land Acquisition Act. Accordingly the owners of the acquired premises only appeared and contested the reference. The reference was heard by the President of the Calcutta Improvement Tribunal without the assessors on the footing that it was a reference for apportionment only and was not a reference relating to valuation. The learned President pronounced his judgment on 30th July 1942. He held that the owners of the dominant tenement had the right to receive light over the acquired premises not only through the vent hole and the window that overlooked the same but also through the three other windows that overlooked premises No. 11, Khangrapatti Street, as those windows had been receiving rays of light over the roof of the low building on the acquired land in an oblique manner. He assessed the value of the easement right on certain calculations at the sum of Rs. 900 and directed that sum to be paid wholly out of the sum of Rs. 9000 which the Collector had assessed as the " full market value " of the acquired premises. In our judgment the learned President has committed an error. The proceeding in Court below was misconceived and defective from the beginning. The Collector ought to have been given notice u/s 20 of the Act and the case should have been tried as a valuation case, which under the provisions of the Calcutta Improvement Act, could be tried only by the Tribunal composed of the President and the two assessors.

3. An easement comes within the definition of land as given in Section 3, Land Acquisition Act, because it is benefit arising out of land. If the servient tenement is acquired under that Act, on acquisition it would vest in the Government free from the easement of the owner of the dominant tenement. (Section 16). The owner of the dominant tenement would accordingly be entitled to compensation for the loss of his right. His right must be valued and he must be compensated by the sum of money which represents the value of his right. This is one fundamental proposition and should not be lost sight of. The second fundamental proposition, which must also be not overlooked, where the premises acquired is a servient tenement, is that the owner thereof would not be entitled to the "full market value" of his property. The easement depreciates its value to him. He can

only have the value of beneficial enjoyment thus restricted by the easement affecting it. This accords with principle. If there is a right of way over his land, he would be obliged to keep the space over which the pathway runs unbuilt, open and unobstructed. If an easement of light and air affects his property he is obliged to keep a sufficient portion of his land open. He cannot even build a high boundary wall or put up a high hoarding to protect his privacy. For those restrictive users a willing buyer would not give him the same price which he would have given, if the premises had not been burdened by the easement. It would follow from this second proposition that on the compulsory acquisition of the servient tenement a sum of money should be deducted from its "full market value" and the balance only should be awarded to its owner. But the sum so deducted would not necessarily be the value of the easement, the right of the owner of the dominant tenement, which had not been acquired, but which easement would be destroyed on the acquisition of the servient tenement. The amount representing the value of that right may be more, or may be less, than the sum that is to be deducted from the "full market value" of the acquired premises in making payment to owner thereof. The cases mentioned by Beaumont C.J. by way of illustration at page 426 of the judgment that he delivered in *Government of Bombay v. The Century Spinning and Manufacturing Co., Ltd.* ("42) 29 AIR 1942 Bom. 105 bring out the point. We entirely agree with the learned Chief Justice of the Bombay High Court, when referring to the argument of Sir Jamshedji Kanga noted at p. 424 of the report, he said that

the fallacy in the argument lies in the assumption that the value of an easement or restrictive covenant to the person entitled thereto is the same as the amount by which the existence of that easement or covenant depreciates the value of the land subject thereto.

From what we have said the third proposition follows. It is that where the value of the easement is more than the sum deducted from the "full market value" of the servient tenement, which is acquired, in making payment to the owner thereof, the excess must be paid by the Government to the owner of the dominant tenement. The view expressed by the Calcutta Improvement Tribunal in the case noted at p. 234 of the Commentary on the Land Acquisition Act by Rai Bahadur M.N. Gupta has our approval as it accords with sound principles. Whether in the circumstances of the case before us the respondents would be entitled to take out of the sum awarded by the Collector to the owners of the acquired premises any portion of the amount at which their easement is valued by the Court, if that value exceeds RS. 165 is however a different question. The case therefore has to go back. The Court below will issue notice upon the Collector u/s 20 and then the Tribunal, that is the President and the Assessors, will determine the questions involved in the case, namely: (i) whether the respondents had easement to light and air in respect of the all or some of the windows and apertures over premises No. 12 Khangrapatti Street, (ii) if so, what compensation ought to be paid to them in respect of their right, (iii) what ought to be the depreciation of the " full market value" (Rs. 9000) of premises No. 12

Khangrapatti Street on account of the burden of the easement of the respondents. If the Tribunal comes to the conclusion that the value of the easement to the respondents is more than Rs. 165, and if the depreciation by reason of the burden of that easement on the property acquired be assessed at more than that sum, a further question would arise, in view of the provisions of Section 25, Land Acquisition Act, or apart from it, namely, whether the whole of the amount in excess of Rs. 165 that will have to be awarded to the respondents for the value of their easement is to be borne by the Province of Bengal, or a part thereof is to be deducted from the amount which the Collector had awarded to the owners of the acquired premises and paid to the respondents, and the balance by the Province of Bengal. That question also is to be decided by the Tribunal. To prevent misconception we make it clear that the reference will have to be heard in the presence of the owners of the acquired premises and after notice to the Collector and in his presence, if he chooses to appear. The result is that the judgment and decree appealed against are set aside and the case remanded. The parties would bear their respective costs of the appeal. The costs of the further hearing is hereby directed to be in the discretion of the Court below.