

(1982) 01 GAU CK 0006
In the Gauhati High Court
Case No : F.A. No. 62 of 1973

Deputy Commissioner of Kamrup

APPELLANT

Vs

Arun Sankar Bhaduri

RESPONDENT

Date of Decision : 05-01-1982

Acts Referred:

Constitution of India, 1950 — Article 31(2)
General Clauses Act, 1897 — Section 3(26)
Registration Act, 1908 — Section 2(6)
Requisitioning and Acquisition of Immovable Property Act, 1952 — Section 25, 7, 7(2), 8

Citation : (1983) 1 GLR 172

Hon'ble Judges : T.C. Das, J; B.L. Hansaria, J

Bench : Division Bench

Advocate : M.A. Laskar, for the Appellant; J.P. Bhattacharjee, B.K. Goswami, K.R. Pathak and B. Buzarbaruah, for the Respondent

Final Decision : Allowed

Judgement

B.L. Hansaria, J.—The provisions relating to determination of compensation when any property is requisitioned under the provisions of the Requisitioning and Acquisition of Immovable Property Act, 1952, *brevi manu* the Act, require our interpretation in this appeal on these facts. An area of about 1617 bighas was first requisitioned under the Defence of India Act, 1962 by Notification dated 21.12.62 for construction of Digaru Explosive Storage Park and allied purposes. Possession was mostly taken on 8.3.63 and of some part on 25.3.63. Some portion was de-requisitioned, and the area which is still under requisition measures about 1435 bighas. At the (sic) of taking over possession a list of jirats (Trees and plants) as prepared. As there could be no agreement about the amount of compensation, the matter was referred to the learned District Judge, L.A.D., at Gauhati by appointing him as an arbitrator under the Act. The learned arbitrator has made the following award:

1. Initial compensation (for one time only)

Bhluka bamboo 1425 Nos. @ 2.50 per bamboo Rs. 3562.50
Jati bamboo 960 Nos. @ 1.50 per bamboo Rs. 1440.00
Kotah bamboo 6430 Nos. @ 1.00 per bamboo Rs. 6430.00
Bijull bamboo 949 Nos. @ (sic) per bamboo Rs. 424.50
Raldang cane 843 grove @ 35/ per grove Rs. 5005.00
Fuel tree 3288 Nos. @ 20/- per tree Rs. 5760.00
Total Rs. 82,622.00

2. Annual recurring compensation for Jirats and other fruit bearing trees.

Jam tree 21 Nos. @ Rs. 30.00 per tree Rs. 630.00
Kathal tree 206 Nos. @ Rs. 50.00 per tree Rs. 10,300.00
Amlakhi 32 Nos. @ Rs. 40.00 per tree Rs. 1,280.00
Totali 10 Nos. @ Rs. 20.00 per tree Rs. 200.00
Lemon 3 Nos. @ Rs. 30.00 per tree Rs. 90.00
Silikha 1 Nos. @ Rs. 20.00 per tree Rs. 20.00
Bel 178 Nos. @ Rs. 20.00 per tree Rs. 3,560.00
Mango 167 Nos. @ Rs. 20.00 per tree Rs. 10,020.00
Madhuriam 5 Nos. @ Rs. 20.00 per tree Rs. 100.00
Simalu 52 Nos. @ Rs. 30.00 per tree Rs. 1,560.00
Orange 701 Nos. @ Rs. 70.00 per tree Rs. 49,070.00
Total Rs. 76,339.00

From 8.3.1963 till 11.5.72 i.e. 9 years.

3. Annual recurring compensation for paddy lands measuring 153 bighas 1 Katha and 10 lechas at Rs. 350.00 per bigha of land. Rs. 53,644.00 annually.

From 8.3.1963 till 11.5.1972 i.e. 9 years.

4. Annual recurring compensation for lands having thatching grass over 124 bighas a kotha and 2 lechas (thatch bari) at Rs. 300.00 per bighas. Rs. 37,206.00 annually.

From 8.3.1963 till 11.5.1972 i.e. 9 years.

5. Annual recurring compensation for other lands measuring 1157 bighas 1 Katha and 10 lechas at Rs. 125.00 per bigha per year. Rs. 1,44,622.50 annually.

From 8.3.1963 till 11.5.1972 i.e. 9 years.

6. Ten bushes annual recurring compensation for 56548 Nos. of tea bushes at Rs. 4.00 per tea bush. Rs. 2,26,192.00 annually

From 8.3.1963 till 11.5.1972 i.e. 9 years.

7. Interest @6/- per cent per annum on the total amount of compensation from 11.5.1972 till the final payment.

2. The main dispute between the parties in this appeal by the Deputy Commissioner is about the principle adopted by the teamed arbitrator in fixing the compensation. As the Defence of India Act came to be repealed subsequently, it is an admitted position that the provisions finding place in the Act relating to the compensation shall govern the present matter also in view of the provisions in Section 25 of the Act.

3. We may note at the threshold relevant provisions of the Act:

Section 8. Principles and method of determining Compensation.

(1) ***

(2) The amount of compensation payable for the requisitioning of any property shall consist of-

(a) a recurring payment, in respect of the period of requisition, of a sum equal to the rent which would have been payable for the use and occupation of the property, if it had been taken on lease for that period; and

(b) such sum or sums, if any, as may be found necessary to compensate the person interested for all or any of the following matters namely:

(i) pecuniary loss due to requisitioning;

(ii) expenses on account of vacating the requisitioned premises;

(iii) expenses on account of reoccupying the premises upon release from requisition; and

(iv) damages (other than normal wear and tear) caused to the property during the period of requisition, including the expenses that may have to be incurred for restoring the property to the condition in which it was at the time of requisition.

(3) The compensation payable for the acquisition of any property u/s 7 shall be-

(a) the price which the requisitioned property would have fetched in the open market, if it had remained in the same condition as it was at the time of requisitioning and had been sold on the date of requisition.

4. A perusal of the Sub-section (2) shows that in case of requisition the land owner is entitled inter alia to: (1) a recurring payment which will be equal to the rent which would have been payable for the use and occupation of the property if it had been taken on lease; and (2) pecuniary loss due to requisitioning. These

are the two heads of compensation which are relevant for our purpose. The submission of Shri Laskar that Clause (a) of the Sub-section does not visualise compensation as he has spoken about "recurring payment", has no merit as the recurring payment itself is nothing but a part of compensation which would be absolutely clear from the opening part of Sub-section. This Conclusion does not follow from what has been observed para-15 of Union of India (UOI) Vs. Kamlabhai Harjiwandas Parekh and Others, Article 31(2) of the Constitution as existing at the time of passing of the Act had prohibited requisition also without payment or compensation. The passing reference in Sudhansu Kumar Mukherjee and Others Vs. Union of India (UOI), that in case of requisition "fair amount compensation" has to be paid does not lead as far, because that is required to be decided is how to determine this amount in case of requisitioning of a property. Nonetheless there is no (sic) that recurring payment has been visualised only by clause (Sic) and any compensation which may be payable under clause (Sic) is not visualised to be recurring that has to be lump sum in (sic). This much is not under dispute. Question is what is the width of Clause (a) and for what type of property recurring that can be and had to be made under that clause. A (sic) to the impugned award shows that the learned arbitrator has ordered for recurring compensation for (1) jirats and other fruit bearing trees, (2) all type of lands, and (3) tea bushes. Lumpsum compensation has been confined to the bamboos, canes and fuel trees only. According to Shri Laskar, the learned arbitrator erred in law in awarding recurring compensation for jirats, fruit bearing trees and tea bushes. Fixation of the recurring compensation for land on the basis of yield was another illegality committed by the learned arbitrator as per Shri Laskar. According to Shri Goswami, however, the award does not suffer from any illegality.

5. We may first deal with the recurring payment which could have been ordered for the land as such. There can be no denial that this compensation under Clause (a) has to be determined to the rent which would have been payable if the different types of land had been taken on lease. So, what has to be determined under this clause is the notional rent. But the learned arbitrator did not bear this in mind he went more by the yield. A reading of the award makes it abundantly clear. Shri Goswami argued that though this was done, cost of procuring the yield was also excluded. For instance, the annual yield per bigha of the paddy land was assessed at Rs. 650/-, from which cost of cultivation @ Rs. 300/- per bigha was excluded and the recurring compensation was fixed at Rs. 350/- per bigha. Now fixation of compensation on the basis of yield is more germane or relevant while fixing compensation for acquisition. The requisition compensation under Clause (a) requires attention to be paid to the rent which would have been payable if the property would have been taken on lease. It may as well be that the rent of the land is determined in the ultimate analysis by its yield, but there are theories and theories as to how rent is fixed in an economic world. Ricardo's theory of rent is one of these. Other classical economists Keynesians neo-Keynesians, and non-Keynesians have their own thinking. We may not enter into

this field of controversy here Suffice it to say, that Clause (a) requires payment of recurring compensation equal to the rent. Shri Goswami referred us to Assam (Temporarily Settled Areas) Tenancy Act, 1971 under which maximum rent, payable to landlord is 1/5th of the produce of the principal crop. This fraction was 1/4th under the repealed Act of 1935 and 1/3rd in Assam Adhikar Protection and Regulation Act 1948. Of course while determining rent those provisions, gross produce is taken into consideration and (sic) of production is not excluded. Be that it may, the learned arbitrator has apparently not fixed the recurring compensation of different types of land on the basis of rent payable for such lands. The award under items 3, 4 and 5 cannot therefore, be upheld.

6. We now enter into the real controversy. The same is whether recurring payment under Clause (a) is payable not only with respect to the use and occupation of land, but also for the jirat, tea bushes and fruit yielding trees. One way of deciding this controversy is perhaps to see if the aforesaid could be said to be "property" for which alone recurring compensation is payable under Clause (a). The word "property" has been upheld under the Act to mean immovable property of every kind and includes any right in or over such property. As the expression immovable property has not been defined under the Act. We may see to its definition in the General Clauses Act (sic) Section 3(26) states:

immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

Reference to Transfer of Property Act may also be apposite which has only stated that this expression does not include standing timber, growing crops or grass". Section 2(6) of the Registration Act has also excluded these from the definition of immovable property.

7. Thus, though trees are immovable properties being attached to earth, standing timber is not. The difference between tree and standing timber has been pointed out in *Shantabai Vs. State of Bombay and Others*, Further, every plant is not a "tree", vide *Mir Fakir v. State of West Bengal* AIR 1978 SC 1972 , wherein banana plant was not held to be a fruit tree as it lacked both the characteristics of a "tree", (1) it must be "perennial" and not seasonal; and (2) its main stem must be "woody" and not serebacious or pulpy. Reference to the Calcutta decision *State of West Bengal Vs. Mir Fakir Mohammad*, which was approved by the Supreme Court in the aforesaid case shows that bamboos are not trees, and shrubs are different from trees.

8. In this view of the legal position, we do not think if the controversy should be, really could be resolved by deciding which of the fruit trees would be immovable property and whether tea bushes would be covered by the expression "property" in Clause (a). It is doubtful if the legislature desired payment for trees under Clause (a), and of other plants under Clause (b). It cannot also be forgotten that the Act has conferred powers to deal with immovable property only. Another line of thinking reinforces this conclusion. When Clause (a) has desired payment of

notional rent as recurring sum, the underlying idea must have been that the property in question must be used and occupied as such by the authority for which the requisition has been made; and that without such use and occupation rent for it could not be asked to be paid. To illustrate, if a land is requisitioned on which there is a building, but the building is demolished after requisition, recurring compensation for the building would not be payable. But in case the building is also used and occupied as such, the matter would be different. In case of its demolitions too the owner would not go without compensation, as this would be taken care of by Clause (b)(i) which has mentioned about "pecuniary loss due to requisition".

9. One of the principles which thus emerges is that under Clause (a) recurring payment would be made only for that kind of property which is not destroyed, demolished or damaged (to make the requisitioned property usable for the purpose for which it was taken). Because in that case the destroyed or damaged property is not being used and occupied for which alone notional rent becomes payable under Clause (a). As requisition under the Act can be made for a public purpose only, it stands to reason to believe that in case there be fruit bearing trees or bushes over the land, the same would in normal course be uprooted to make the land fit for the public purpose. We do not, therefore, think fit recurring-payment for these types of things attached to the land could normally be claimed under Clause (a).

10. But then the land owners do suffer pecuniary loss on this count. If, however, the land was being used by them only or even mainly, for growing trees, tea bushes etc. can they claim once for the use and occupation of the land and then, for trees and tea bushes separately? We may usefully refer in this connection to *Jute and Gunny Brokers Private Ltd. and Another Vs. The State of Bihar*, wherein a Bench of that Court was seized with the question of determining market value of an orchard. It was held where the orchard in question was almost wholly covered of trees. Its market value should be determined for the land building the trees as a whole and not by valuing the trees separately from the land for the simple reason that the land wholly (sic) with trees cannot yield any usufruct independent of the (sic) of the trees, and without the trees such lands have very (sic) value.

11. Before proceeding to indicate how compensation for fruit trees etc. on land has to be determined in case of requisition under the Act, we may dispose of the submissions of Shri Goswami that if the requisitioned land was being used for paddy cultivation, a land owner would be entitled not only to rent for the use and occupation of the land, but also to compensation for the loss on account paddy which he would have otherwise grown on the land subsequent to requisition. According to us this submission is misconceived. This would be a clear case of asking for double payment, once on account of use of the land by the requisitioner and then for the use to which it could have been put by the requisitioner. Really the rent takes care of or determined keeping in view the loss

to be sustained by the land owner. Of course, if there be Standing paddy when the land was requisitioned, the land owner shall be entitled to be (sic)bitried for the loss of the crop, and this would be taken any of by Clause (b)(i).

12. This takes us back to the question as, to how compensation or tea bushes, fruit yielding trees, etc. should be determined in case of requisitioning of the land over which these had stood. As these types of plants yield permanent or semi-permanent income recurring loss to the landowner is apparent. Still then, as alluded, recurring, compensation under Clause (a) is perhaps not visualised for these types of plants inasmuch as the requisitioner is neither deriving any benefit from them, nor he putting to any use such trees and bushes. One way to have the tangle lies in determining the rent which would have (sic) payable, if the land with the type of trees and bushes that (sic)on it had been taken on lease. Leasing out of an orchard a tea garden is not known. In such a case nothing separately would be paid for the trees. This method will be singularly appropriate where large tract of land, as in the instant case is requisitioned. But, if the growth on the land has been destroyed or uprooted, the proper method of determining compensation will be to pay a recurring sum for the use and occupation of the land alone under Clause (a), and to pay a lump sum amount for the damage to the trees etc. under Sub-clause (i) of Clause (b). The lump-sum compensation may be determined as per the principle mentioned in Kerala State Electricity Board Vs. Marthoma Rubber Company Ltd., the same being determination of the present value of an annuity yielding the return in question. How should it be determined has been indicated in para 6 of the judgment with which was respectfully agree. For arriving at this figure determination of reasonable interest rate is necessary, so also the fixation of the figure of return, for which omnibus evidence regarding yield may not be sufficient, as trees and bushes may be of varying age and of different qualities. Still another way of recompense in case of very short requisitioning exercise may be even to pay a recurring sum for the tree (and tea bushes) also as per their yield if this aspect has been taken care of while fixing rent, and to sort out the question of payment on account of damage to the plants under Sub-clause (iv) of Clause (b) at the time of handing over of the property back.

13. In this case the above principles were not followed while fixing the compensation for jirats, fruits trees and tea bushes and so we have to set aside the order relating to them also which is covered by items 2 and 6 in the award. As we have no materials before us to fix compensation on the basis of above principles either for the use and occupation of the land or for yield from trees and bushes growing thereon, we have no alternative but to remand the case back to the learned arbitrator. It would, however, be only proper if opportunity is given to both the sides to lead evidence in the above light because while leading evidence earlier they were not aware of the above mentioned legal principle.

14. Accordingly the appeal is allowed and the impugned award is set aside except for what was ordered under item No. I for different varieties of bamboos,

cane and fuel trees which was not questioned by any side before us, as only lump sum award has been made for them. The matter is remitted back for determination of compensation for rest of the items as indicated above. As the requisition, was in 1962 and a long time has since passed it would be apposite if the matter is disposed the learned arbitrator expeditiously. Before parting we may (sic) that we have noted with surprise that the property has been requisition ever since 1962 i.e. for about two decades by now. We have no doubt, in our mind that the requisitioning provisions of the Act are meant to take care of a temporary need. If, however, the public purposes for which the property is requisitioned is likely to last long, there can be no denial that financial wisdom and any functionary responsible to treasury would like to go in for acquisition which in the long run turns out to be cheaper than requisition.