
(1945) 04 CAL CK 0017
In the Calcutta High Court
Case No : Appeal No. 18 of 1945

H.C. Gupta

APPELLANT

Vs

Mackertich John

RESPONDENT

Date of Decision : 30-04-1945

Acts Referred:

Citation : (1945) 04 CAL CK 0017

Final Decision : Allowed

Judgement

Derbyshire, C.J.—This is an appeal from a judgment of Das J. whereby he declared that an order of the appellant requisitioning certain property was ultra vires of R. 75.A, Defence of India Rules, and made an order that the appellant should cancel the order complained of and forbear from enforcing it. The respondent Mr. Mackertich John for some thirty years past has carried on a business known as the Continental Hotel at 12 Chowringhee Road, Calcutta. The business is a considerable one employing some 300 persons. The hotel premises consisted of two floors, the ground floor and the first floor on which are six double bed rooms and seventeen single bed rooms; there are also kitchens and other offices. The respondent pays a rent of Rs. 4000 per month plus rates and taxes to his landlord under a lease for five years of which some two years have already run. The respondent has let the bed rooms to his customers and since the beginning of the War has catered very largely, but not exclusively, for military personnel. For that purpose he has doubled the number of beds in the various rooms.

2. In October 1943, the military authorities acting through the appellant, who is the Additional Land Acquisition Collector for Calcutta and invested with powers under the Defence of India Rules for the purpose of requisitioning land, buildings and other property, requisitioned a considerable portion, namely, ten thousand square feet of the ground floor of the hotel for the purpose of providing amenities in the way of food and drink for the military. The compensation for this area which was requisitioned in 1943 was not fixed immediately, but was

eventually fixed at the rate of Rs. 2,500 per month. The amount due was not paid until November 1944 and then only Rs. 27,000 was paid. This tardy payment undoubtedly inflicted hardship upon the respondent. In June 1944 the military asked the requisitioning board, an unofficial body connected with requisitioning in Calcutta, to requisition the rest of the premises and Mr. John was requested to state his objections to the requisitioning of the entire hotel with all its fittings, fixtures and appurtenances. On 20th June Mr. John made his representations pointing out that part of his hotel had already been taken and that with the rest he was catering for the requirements of the military and that if the requisition was made it would put him out of business and cause him considerable loss and hardship. However, the military authorities persisted in their intention to requisition the premises. On 18th November the appellant requested Mr. John to come to his office on 21st November and bring with him his lease and discuss the matter. The meeting on 21st November took place and at the meeting Mr. John protested against the requisition of the premises and complained of the withholding of the payment of the part already requisitioned. It is alleged that at this meeting the appellant got angry and said " I will teach you a lesson." It is also alleged that the complaint of the respondent about tardy payment was the cause of the order for requisitioning of the remainder of the premises. This allegation has not been persisted in. On 29th November, the appellant made an order as follows: [After quoting the order dated 29th November 1944 (see page 143 above) his Lordship proceeded.]

3. On 1st December Mr. John's attorneys wrote suggesting a working arrangement whereby Mr. John might continue in occupation of the premises. On 12th December a Mr. and Mrs. Lettington called at the hotel and saw Mr. John and told him that they would probably be asked to run the hotel on behalf of the military, Mr. John was of the opinion that this was an attempt to oust him from his business and on 8th December he moved this Court under S. 45, Specific Relief Act, for a rule prohibiting the appellant from enforcing or taking any steps in connexion with the requisition. On 28th February the rule was heard and Das J., made the order which is now appealed against. The contentions of Mr. John were (1) that the order was not in proper form in that it stated it was in Mr. Gupta's opinion necessary and expedient for the efficient prosecution of the War to requisition the buildings whereas it should have been in the opinion of the Government of India or the Bengal Government; and (2) that the effect of requisitioning the remainder of the premises under the order was to deprive Mr. John temporarily, if not permanently, of his business and its goodwill and that this could not be done under R. 75-A.

4. The learned Judge found against Mr. John on the first contention, but in his favour on the second. As regards the second contention he held that the effect of the order was to deprive the defendant of his business and its goodwill and that the business was an undertaking as defined by R. 81, Defence of India Rules, and that proceedings in respect of the acquisition of such an undertaking could only be under R. 81. He further was of the opinion that the acquisition of this

part of the undertaking would be contrary to the provisions of S. 299, sub-ss. (1) and (2), Government of India Act, which reads as follows:

(1) No person shall be deprived of his property in British India save by authority of law. (2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest, in or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.

5. The learned Judge has followed the decision of the Lahore High Court in 24 Lah. 617 Electric Supply Co., Ltd. v. Province of Punjab ('43) 30 A. I. R. 1943 Lah. 41 : I. L. R. (1943) 24 Lah. 617 : 205 I.C. 337 (F. B.). The matter has been argued very fully by the learned Advocate-General on behalf of the appellant and Mr. N. C. Chatterjee on behalf of the respondent. It will be convenient here to set out the relevant provisions of the Defence of India Act and Rules. Section 2 (1), Defence of India Act, provides:

The Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

6. Sub-s. (2) provides that the rules may empower any authority to make orders providing for inter alia,

(xxiv) the requisitioning of any property, movable or immovable, including the taking possession thereof and the issue of any orders in respect thereof.

7. Sub-s. (3) provides that:

The rules made under sub-s. (1) may further- (iv) confer power and impose duties-(a) upon the Central Government or officers and authorities of the Central Government as respects any matter, notwithstanding that that matter is one in respect of which the Provincial Legislature also has power to make laws; and (b) upon any Provincial Government or officers and authorities of any Provincial Government as respects any matter notwithstanding that that matter is one in respect of which the Provincial Legislature has no power to make laws.

8. Sub-s. (4) provides:

The Central Government may by order direct that any power or duty which by rule under sub-s. (1) is conferred or imposed upon the Central Government shall in such circumstances and under such conditions, if any, as may be specified in the direction be exercised or discharged- (b) whether or not the power or duty relates to a matter with respect to which a Provincial Legislature has power to

make laws, by any Provincial Government or by any officer or authority subordinate to such Government, or

(c) by any other authority.

9. Section 19 of the Act provides:

Where by or under any rule made under this Act any action is taken of the nature described in sub-s. (2) of S. 299, Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and in accordance with the principles, hereinafter set out.

10. Rule 75-A, Defence of India Rules, provides inter alia as follows:

(1) If in the opinion of the Central Government or the Provincial Government it is necessary or expedient so to do for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, that Government may by order in writing requisition any property, movable or immovable, and may make such further orders as appear to that Government to be necessary or expedient in connexion with the requisitioning : Provided that no property used for the purpose of religious worship and no such property as is referred to in R. 66 or in R. 72 shall be requisitioned under this rule.

(2) Where the Central Government or the Provincial Government has requisitioned any property under sub-r. (1), that Government may use or deal with the property in such manner as may appear to it to be expedient, and may acquire it by serving on the owner thereof, or where the owner is not readily traceable or the ownership is in dispute, by publishing in the Official Gazette, a notice stating that the Central or Provincial Government, as the case may be, has decided to acquire it in pursuance of this rule.

(3) Where a notice of acquisition is served on the owner of the property or published in the Official Gazette under sub-r. (2) then at the beginning of the day on which the notice is so served or published, the property shall vest in Government free from any mortgage, pledge, lien or other similar encumbrance, and the period of the requisition thereof shall end.

(4) Whenever in pursuance of sub-r. (1) or sub-r. (2) the Central Government or the Provincial Government requisitions or acquires any movable property, the owner thereof shall be paid such compensation as that Government may determine.

11. Rule 81 provides for the control and for regulation of industry and inter alia provides :

(1) In this rule any reference to article shall be construed as including a reference to electrical energy, and the expression "undertaking" means any undertaking by way of any trade or business and includes the occupation of

handling, loading or unloading goods in the course of transport. (2) The Central Government, or the Provincial Government so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide-

(bb) for regulating the letting and sub-letting of any accommodation or class of accommodation, whether residential or non-residential, whether furnished or unfurnished and whether with or without board.

12. It has not been suggested either before Das J. or before this Bench that the powers sought to be exercised in this case have been exercised improperly or mala fide. It has been suggested, however, that it was not necessary under the circumstances for the Government to acquire the remainder of the hotel, and that Mr. John could have been directed to run what remains of this hotel in accordance with the directions of Government laid down in Rule 81 (2) (bb). The position generally with regard to orders made under Emergency Defence Regulations and the powers of the Courts there under is summed up in the judgment of Lord Greene, M. R. in the English case in (1943) 2 All. E.R. 560 *Carltona Ltd. v. Commissioners of Works* (1943) 2 All. E. R. 560 at p. 564 as follows :

It has been decided as clearly as anything can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the Courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so it would mean that the Courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament which authorises this regulation, commits to the executive the discretion to decide and with that discretion if bona fide exercised no Court can interfere. All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the Legislature and to see that those powers are exercised in good faith. Apart from that, the Courts have no power at all to inquire into the reasonableness, the policy, the sense or any other aspect of the transaction.

13. The above was a case where a factory was requisitioned by the Government under Regn. 51, Defence (General) Regulations. I will now deal with the first contention of the respondent (which Das J. decided in favour of the appellant) namely, that R. 75-A provides for two things (1) formation of opinion regarding specified matters by the Central or Provincial Government and (2) the making of the specified order, and that no order could be made unless and until the Government concerned formed the necessary opinion. It is said that in this case it is not the Government who formed the opinion that it was necessary to requisition the premises, but the appellant. In this connexion the appellant has produced his authority which is contained in a Government of India Notification

of 27th February 1943 published in the Gazette of India. It reads as follows: [After quoting the notification (see page 143 above) his Lordship proceeded.] The respondent contends, however, that that notification which is made under S. 2 (4), Defence of India Act, quoted above only refers to the power to requisition the property and that the appellant had not been entrusted with either the power or the duty of forming an opinion as to whether the requisition of premises is necessary and expedient. In my view the notification which unquestionably gives him the power to requisition the premises, gives him power and the duty of considering whether it is necessary and expedient to requisition them. The notification delegates to him the powers conferred on the Government of India by R. 75-A and those powers, in my opinion, include the power to consider whether the requisitioning is necessary and expedient and also the duty. Those powers were possessed by the Government of India which has conferred them upon him. I am, therefore, in agreement with the learned Judge on this point. On the second question, the argument ranged over a wider field. It was contended by Mr. Chatterjee that this hotel was an "undertaking" within the provisions of S. 299, Government of India Act, and R. 81, Defence of India Rules. An "undertaking" in the relevant sense according to the Concise Oxford Dictionary means "work &c. undertaken." I think, broadly speaking, it is synonymous with the word "business." I think the business of carrying on this hotel does come within the meaning of the word "undertaking."

14. Mr. Chatterjee then referred to 24 Lah. 617 *Medawar v. Grand Hotel Co.* (1891) 2 Q. B. 11 : 60 L. J. Q. B. 209 : 64 L. T. 851, mentioned above, where the Punjab Government who had powers to take over the Lahore Electric Supply Company under certain Acts, but found difficulties in its way of doing so, purported to act under R. 75-A, Defence of India Rules, and requisitioned the whole of the undertaking. The learned Chief Justice after dealing with the circumstances came to the conclusion that the Punjab Government was not acting bona fide under R. 75-A, but using it in order to acquire the undertaking which it found difficult in doing owing to its laches under the Acts which entitled the Government to acquire it. I can see no reason for doubting that part of the decision of the Lahore High Court. That was sufficient for the purpose of the Lahore case. The learned Chief Justice then went on to fortify the judgment by holding that R. 75-A was not applicable at all to the requisition of an undertaking such as the Lahore Electric Supply Company. I regret I do not see my way to follow the reasoning in that matter. Rule 75-A provides that for purposes of the defence of British India, public safety, the maintenance of public order, or the efficient prosecution of the war or for maintaining supplies essential to the life of the community, the Government may, by order in writing, requisition any property movable or immovable and may make such further orders as to the Government may have been necessary or expedient for requisitioning. The words "any property, movable or immovable" must necessarily include all kinds of property, land, buildings, machinery and chattels of any kind, and anything that can be described as property. This prima facie covers a business and its goodwill.

There are three exceptions to that, namely, no property used for the purpose of religious worship and no property such as is referred to in R. 66, namely, ships and their contents and property referred to in R. 72, namely, aeroplanes and their contents, shall be requisitioned. If it had been desired to exclude businesses and their component parts including goodwill the section could easily have provided for such exclusion. There are good reasons why businesses and parts of business and the goodwill are not excluded, since much property essential for the purposes of R. 75-A (1), may be part of some business. Indeed in most cases such essential property would only be likely to be found in such businesses.

15. It was then pointed out that under R. 75-A (4) when the Government requisitions any movable property the owner shall be paid such compensation as that Government may determine. It was further pointed out that under S. 299 (2), Government of India Act, the Government has no power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined. It was said that R. 75-A (4) authorises the Government to pay such compensation as the Government may determine, but does not fix the amount of compensation or specify the principles on which and the manner in which it is to be determined and that consequently the movable property referred to in R. 75-A (4) cannot be movable property which forms part of an undertaking. I am unable to agree with that contention. Section 19 (1), Defence of India Act, provides:

Where by or under any rule made under this Act any action is taken of the nature described in sub-s. (2) of S. 299, Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and in accordance with the principles, hereinafter set out.

16. The manner and the principles are set out in the following part of the section. In my view, therefore, the provisions of R. 75 A are not in conflict but are pursuant to the provisions of S. 299 (2), Government of India Act. It may be that there are cases where movable property is requisitioned which is not part of an undertaking and then compensation may be paid under R. 75-A (4). In this case, we are not concerned with movable property since in the operative part of the requisition order the movable property of the hotel is not requisitioned, but only the immovable property, namely, the land and buildings of the hotel. It seems to me that under the provisions of S. 19 (1) (e), Defence of India Act, where it is directed that

the arbitrator in making his award shall have regard to (i) the provisions of sub-s. (1) of S. 23, Land Acquisition Act, 1894, so far as the same can be made applicable

apply in this case. Section 23 (1), Land Acquisition Act, enacts:

In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration.... fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings.

17. I am, therefore, of opinion that the words in R. 75-A (1) "may requisition any property, movable or immovable" refer to all kinds of property except those referred to in the proviso. I think, therefore, that although the requisitioning of the remainder of Mr. John's hotel may for a time if not permanently, interrupt and damage his business that does not prevent the Government from requisitioning the land and buildings if it is necessary or expedient to do so for securing the defence of British India, public safety, the maintenance of public order, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community. The purpose for which the property was requisitioned is, we are told, to provide amenities for troops and comes within the purposes of R. 75-A, Defence of India Rules. Mr. John may find his business injuriously affected but he will be entitled from the Government to such compensation as is laid down in the Defence of India Act and Rules. In my view, the declaration and order of Das J., should be set aside and the appeal allowed with costs here and below. Certificate is granted under S. 205, Government of India Act, 1935.

Gentle, J.

18. The respondent, Mr. Mackertich John, is the lessee of No. 12, Chowringhee Road, Calcutta, known as the Continental Hotel, where he has conducted the business of a hotel and restaurant keeper for the past 30 years; the monthly rental is Rs. 4000 and in addition he pays the usual taxes. In October 1943, the major portion of the ground floor comprising the restaurant and lounge, was requisitioned by the authorities and thereafter ceased to be occupied by the respondent. The appellant, Mr. Harish Chandra Gupta, is the Additional Land Acquisition Collector for Calcutta. On 29th November 1944 he issued an order, in Case No. 574 of 1944, by which he purported to requisition the remaining portion of the hotel. Proceedings were taken by the respondent to question the validity of the order; Das J. held it was ultra vires R. 75-A, Defence of India Rules, and directed the appellant to withdraw or cancel the order and to forbear from enforcing it. Against this decision the present appeal is preferred.

19. The hotel is a two storied building, the ground floor has a restaurant and lounge and on the upperfloor there are 6 double and 17 single bed rooms which normally accommodate 29 guests. Since the outbreak of the War large numbers of people, including members of the Allied Forces, have come to Calcutta; in order to meet the increased need for accommodation, the number of beds in each room was doubled and there is now provision for 58 visitors. There are 7

permanent residents, the remaining accommodation is mainly used by members of the Forces. In October 1943 the major portion of the ground floor (about 10 000 square feet) was requisitioned; no objection was raised by the respondent and it has since been utilised as a troops canteen. In May 1944 the amount of compensation payable to the respondent, in respect of the requisitioned portion, was agreed at Rs. 2,500 per month; no payment was made until 29th November 1944, when a sum of RS. 27,000 was paid on account. Meanwhile, the Secretary of the Requisitioning Board, by letter dated 14th June 1944, informed the respondent that a request had been made to requisition the remainder of the hotel, including its contents, such as fans, furniture and linen; the case would be considered by the Board on 20th June; any objection should be forwarded before that date; and he was invited to be present at the Board's meeting. The respondent wrote to the President of the Board setting out his objections and he attended the meeting. Nothing further transpired for several months. In November the respondent's solicitors, Messrs Fowler & Co., wrote to the appellant complaining of the delay in payment of compensation. Thereafter negotiation took place with the Bengal Government which eventuated in an agreement being signed on 21st November 1944 and on 29th November 1944 as already stated the respondent was paid Rs. 27,000 on account of the amount due; the ground floor had then been requisitioned for nearly 14 months. On the same day as payment was made, the appellant issued the order, the subject matter of the appeal, for requisitioning the remainder of the hotel, which was served upon the respondent on 1st December and required him to hand over the premises on 6th December. On 5th December the respondent took proceedings to question the validity of the order, a rule nisi was issued and also an injunction was granted restraining the operation of the order. On 12th December, a Mr. and Mrs. Lettington called at the hotel and informed the respondent they had come to take charge, and to conduct it, for the authorities, but, in view of the injunction, they left. On 12th February 1945, Das J. made the rule absolute holding that the order is ultra vires R. 75-A, Defence of India Rules, 1939. It is convenient, firstly, to set out the relevant provisions of the Defence of India Act 1939 (hereinafter called "the Act") and the rules made thereunder. They are as follows: (After setting out the relevant provisions of S. 2 (1), (2) and (4) his Lordship proceeded to quote the following provisions of the Defence of India Act.)

Section 15. Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India. Section 16 (2). Where any order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority.

Section 19 (1). Where by and under any rule made under this Act any action is taken of the nature described in sub-s. (2) of S. 299, Government of India Act, 1935, there shall be paid compensation, the amount of which shall be

determined in the manner, and in accordance with the principles, hereinafter set out, that is to say :-

(a) Where the Amount of the compensation can be fixed by agreement, it shall be paid in accordance with such agreement. (b) Where no such agreement can be reached, the Central Government shall appoint as arbitrator a person qualified....

(c) The arbitrator in making his award shall have regard to- (i) the provisions of sub-s. (1) of S. 23, Land Acquisition Act, 1894, so far as the same can be made applicable; and (ii) whether, the acquisition is of a permanent or temporary character.

20. [After setting out Rs. 75-A (1), (2), (5) (a); 81 (2) (b), Defence of India Rules, S. 299, (1) and (2), Government of India Act, 1935, and S. 28 (1), Land Acquisition Act, 1894, his Lordship proceeded.]

21. On 27th February 1943, the Government of India in pursuance of S. 2 (4) of the Act, made the following delegation of its powers to the appellant. (His Lordships then set out the Government of India Notification of 27th February 1943 (see page 143 above) and proceeded). It is to be noticed that the notification mentions "powers" and does not mention "duties" which S. 2 (4) enables the Central Government also to delegate. In exercise of the delegated powers, on 29th November 1944 the appellant made the order which is impugned, the relevant parts are: [After setting out the relevant parts of the order (see page 143 above) his Lordship proceeded.] The above order purports to have been made and signed by the proper authority in the exercise of powers conferred by and under the Act; it conforms with the provisions of R. 75-A, including the requirement for the respondent to furnish information with a view to determination of compensation; whilst in his petition, verified by affidavit on 5th December 1944 the respondent alleges the appellant's order was mala fide, for the reasons therein stated, these allegations were not pursued before Das J., nor during the hearing of the appeal. It is, therefore, to be presumed, pursuant to S. 16 (2) of the Act, that the order was made bona fide by the proper authority and that consideration was given to the matters set out in S. 15 of the Act. The validity of the impugned order is questioned by the respondent on the following grounds:

(1) Before the order could properly be made, it was the duty of the Central Government to form the opinion that it was necessary or expedient to requisition the hotel. Since this was done by the appellant and not by the Government, there has not been compliance with the requirements of the rule. (2) There is no power to requisition an undertaking; in the guise of requisitioning the building of the hotel, the order requisitions the respondent's undertaking established at the hotel and deprives him of his property of that undertaking.

22. It was contended by Mr. N. C. Chatterjee, on behalf of the respondent, that by virtue of (1) the order has not been properly made and is ineffective, and, by

virtue of (2) the order is ultra vires R. 75-A and is invalid.

23. As to (1) - Mr. Chatterjee argued that the rule enables property to be requisitioned provided two requirements are fulfilled, namely, (1) the discharge of a duty by the Central Government to form an opinion that it is necessary or expedient to do so including consideration being given to the provisions of S. 15 of the Act and, not until this has been done, (2) the exercise of the power by the Government to issue an order to requisition. Unless and until the Government delegates both the duty and the power, each can only be performed and exercised by the Government. By the notification the power alone has been delegated to the appellant and the duty has not been delegated to him. Before the appellant can exercise the power to issue an effective order, the Government must previously discharge the duty to form the opinion. The appellant has purported to discharge this duty-the order recites, "whereas I am of opinion..." - which should have been performed by the Government. Since there has been no delegation of the duty to the appellant, he cannot perform it, and since it has not been performed by the Government, therefore, it is contended, the impugned order is not an effective order to requisition the hotel. In my view a duty of the Central Government, which S. 2 (4) contemplates being delegated, is a substantial or an express duty, such as, a duty, which pursuant to S. 2 (3) (iv), can be imposed upon it and its duty to appoint an arbitrator under S. 19 (1) (b). Such duty is not the formation of opinion indicated in R. 75-A. The exercise of the power in that rule is subject to and dependent upon the formation of the opinion; the power is not absolute but is conditional upon the opinion being previously formed; the formation of the opinion and the making of the order are not separate and distinct and independent attributes but the former is a component or an integral part of the latter; the need for the formation of the opinion before the power can be exercised is a limitation of the power, it qualifies its extent and is a part of the power; and the formation of the opinion and the issue of the order constitute the exercise of the power. The delegation of the power includes authority to form the opinion conditioned upon which the power can be exercised. When the power has been delegated it is the responsibility of the person, in whose favour the delegation is made, to form the opinion before he can exercise the power. The validity of the delegation of the power to the appellant is not questioned; after the delegation he was the person by whom the opinion had to be formed. This is in accordance with the decision in *Kewalram Vs. Collector of Madras*, . I agree with Das J., that the impugned order is not ineffective by reason that the appellant formed the opinion that it was necessary and expedient to requisition the hotel.

24. As to (2)- It is not disputed that the object of requisitioning the hotel building is to utilise it solely for the accommodation of personnel of the allied Forces; except for a few permanent civilian residents, the majority of the hotel guests are members of the Forces, at the present time. It is also not in dispute that the respondent's business of a hotel keeper, which he has conducted for 30 years, is a commercial undertaking and is movable property. It was contended on his

behalf that Rule 75-A does not enable an undertaking to be requisitioned; an undertaking can only be controlled by the machinery of R. 81; and, by the requisition of the building the undertaking is thereby requisitioned and the respondent is wrongly deprived of the property of the undertaking.

25. Whilst the majority of the visitors at the hotel are military they go there in the same way as all guests. If and when the building is used by the authorities, it will provide solely for personnel of the Forces, but they will be sent there by the authorities and they will not go to, or use it, as a hotel but as a place which caters for them alone. Sleeping accommodation, meals and refreshment will be provided, as at the present time, but the business and the goodwill of the hotel undertaking will have no bearing upon the use of the premises by the military and a hotel, as such, which provides for all wayfarers, will not be conducted. The existing conditions in Calcutta may make it difficult for the respondent to conduct his business elsewhere, with its name "Continental Hotel," but he will be perfectly at liberty to do so. When the requisition period terminates, the respondent will also be at liberty to resume his business at the premises. By requisitioning the building the authorities do not requisition the business, although there will be an interruption and an interference in the conducting of it and, in that respect it will be injuriously affected e. g. loss of custom and profit both during the time the requisitioning is in operation and at least for some period after the business is resumed at the hotel.

26. If it were necessary to decide the question, in my opinion, a commercial undertaking can be requisitioned by R. 75-A. The power to requisition, in the rule, expressly applies to movable property, and a commercial undertaking is property of that description. There is nothing in the Act or the rules which prevents this being done. Rule 81 provides for Government controlling and regulating undertakings, including those which supply furnished residential accommodation and meals, which remain under the administration and direction of the proprietors but it does not provide that this is the only method by which Government can compulsorily be concerned with undertakings. Mr. Chatterjee relied upon the observation of Sir Douglas Young C. J. in 24 Lah. 617 *Medawar v. Grand Hotel Co.* (1891) 2 Q. B. 11 : 60 L. J. Q. B. 209 : 64 L. T. 851 to support his contention that an undertaking cannot be requisitioned by R. 75-A. At p. 639 the learned Chief Justice said

a careful examination of the provisions of R. 75-A shows conclusively that this rule is not applicable at all to the requisition or acquisition of an "undertaking".

In that case the requisition order by the Provincial Government was not made bona fide; they had failed to give the required notice of their intention to exercise statutory powers and compulsorily to acquire an electricity undertaking; in consequence the undertakers were entitled to keep it for a further 20 years and the Government lost its opportunity to purchase it until the expiration of that period; in order to overcome their failure and to obtain the undertaking for themselves they utilised R. 75-A. That was a clear case of mala fide conduct in

the use of the rule and the exercise of the requisitioning power contained in it. There is no question of mala fide conduct in the present case and the above observations must be considered applicable only to the special circumstances of the case in which they were made and, in my view, do not have general application.

27. Mr. Chatterjee referred to S 299, Government of India Act, and argued that the requisitioning of the building and as he contended, which involved requisitioning or acquiring the hotel business, is in violation of the section. The section prohibits a person being deprived of property save by authority of law and denies power to a Legislature to make law authorising the compulsory acquisition for public purposes of any land or any commercial undertaking unless the law provides for payment of compensation and either fixes the amount or specifies how it is to be determined. I have previously indicated that the respondent's undertaking has not been requisitioned but only his building, i. e. his land. The requisition has been effected by authority of law contained in R. 75-A.

28. The requisitioning of the hotel is compulsory acquisition of it within sub-s. (2) of S. 299, Constitution Act, and the provisions of sub-s. (1) of S. 19, Defence of India Act, apply. The acquisition is intended to be temporary but S. 299 (2) does not limit compensation to permanent acquisition. Section 19 (1) provides that where, by or under any rule made under the Act action is taken of the nature described in sub-s. (2) of S. 299 there shall be paid compensation, the amount of which shall be determined by agreement (cl. (a)) or by arbitration (cl. (b)) and the arbitrator, in making his award, shall have regard to the provisions of sub-s. (1) of S. 23, Land Acquisition Act, and whether the acquisition is of a permanent or temporary character (cl. 1 (e) (i) and (ii)). Those provisions require that in determining the amount of compensation for the acquisition of land, the damage sustained by reason of the acquisition injuriously affecting other property, movable or immovable, of the person interested, shall be taken into consideration. The impugned order does not infringe the provisions of S. 299, Constitution Act, the deprivation of the respondent's building has been accomplished by authority of law contained in R. 75-A, its compulsory acquisition is subject to compensation being paid and being determined under S. 19 (1) of the Act, the provisions of which conform with the requirements in sub-s. (2) of S. 299. The amount of compensation which the respondent will be entitled to receive will, failing agreement, be ascertained as directed by the several clauses of subs. (1) of S. 19 of the Act, and the injurious effect to his undertaking namely, his movable property, by interruption or interference in its being carried on whilst his building is requisitioned and also the period of the requisition, will have to be considered by the arbitrator when making his award as to the amount of compensation. The impugned order is effective and valid and is in conformity with the requirements of law. In my opinion the appeal should be allowed.