

(1975) 01 CAL CK 0012
In the Calcutta High Court
Case No : A.F.O.D. No. 35 of 1954

State of West Bengal

APPELLANT

Vs

Nandalal Dey

RESPONDENT

Date of Decision : 29-01-1975

Acts Referred:

Arbitration Act, 1940 — Section 19, 47, 5
Defence of India Act, 1939 — Section 19(1)
Land Acquisition Act, 1894 — Section 23(1)

Citation : AIR 1975 Cal 130

Hon'ble Judges : R. Bhattacharya, J; K.J. Sen Gupta, J

Bench : Division Bench

Advocate : Sushil Kr. Biswas and Gouri Prosad Mukherjee, for the Appellant;
Deba Prosad Mukherje, for the Respondent

Final Decision : Partly Allowed

Judgement

Sen Gupta, J.—This appeal is directed against the judgment and decree passed by Sri M. L. Chakraborty, Arbitrator in L. A. Case No. 182 of 1949.

2. This proceeding was started before the learned Arbitrator in the following circumstances:--

3. Plots Nos. 156, 157 and 260 of Mouza Gouripore and Plot No. 820 of Mouza Birhati, which comprises a garden were requisitioned by Government under Defence of India Act on 24th June, 1944 and the same was de-requisitioned on the 21st February, 1948.

4. After de-requisition the respondent, owner of these plots asserted that during the period of requisition, extensive damages to the trees and to the soil of the garden were made by the military authority who occupied the same during that period. It was further asserted that a large number of trees were cut down and some area of the garden were rendered unfit for gardening purposes by making pavements with bricks and concrete for placing ante air craft guns. The Land

Acquisition Collector fixed Rs. 186/- as damages to be paid to the respondent who did not agree to accept the same and as there was no agreement between the Government and the claimant the matter was referred to the Arbitrator under the provisions of Section 19 of the Defence of India Act (Act XXXV of 1939).

5. The claimant filed an application for reference before L. A. Collector, 24-Parganas, There he challenged the assessment of compensation which was fixed by the L. A. Collector at a sum of Rs. 186/-. He, on the other hand, claimed more compensation on different heads to be mentioned hereafter. On the basis of that petition and as there was no agreement the matter was referred to the Arbitrator by Government Notification dated 19th September, 1949. The L. A. Collector dealt with the matter in L. A. Case No. VIII/62 of 1944-45.

6. The Arbitrator so appointed dealt with the matter in Case No. 182 of 1949 in the Court of Arbitration at Alipore. The State Government wanted to support the amount of compensation as fixed at a sum of Rs. 186/- by the Collector. A written statement to that effect was filed. The respondent claimant also filed a statement of claim before the Arbitrator. Different heads of claims as were made by him will be noted in the body of this judgment.

7. The Arbitrator fixed the compensation at a sum of Rs. 9475/- with interest thereon at 3 1/2 per cent, per annum payable from January 12, 1949 until realisation. The said decree has been challenged in the appeal by the State of West Bengal."

8. Mr. Biswas has raised the following objections against the finding of the Arbitrator. According to Mr. Biswas the Arbitrator has wrongly fixed the number of different trees, there was no sufficient evidence before him to come to the conclusion at which he had arrived; the price of the trees as fixed by the Arbitrator is also very high. He has also challenged the Arbitrator's granting interest at the rate of 3 1/2 per cent, per annum on the award. According to Mr. Biswas there was no provision in the Act itself for such grant of interest. Thirdly, it was contended that the Arbitrator has acted illegally by not taking recourse to the different provisions of Arbitration Act X of 1940 which came into force on the 1st day of July, 1940. Before we proceed further we may mention here the different heads of claim as laid by the claimant for getting compensation. These are the following items:

Rs. 5,000/- as the cost of bringing the land to its former condition;

Rs. 2,000/- as the cost of excavation of the well which the military have demolished.

This item includes the cost of pumping machine and other instruments as well;

Rs. 3,000/- as the value of a roller which belonged to the claimant and which has been, lost to him;

Rs. 500/- as cost of clearing the jungles, and

Rs. 500/- as the value of barbed fencing with iron posts;

Rs. 1,000/- as compensation for loss of standing crops of the garden at the time of requisition,

Rs. 500/- as compensation for damages to the trees, and

Rs. 1,500/- as the value of the fruit bearing trees cut down by the military;

6 per cent, per annum interest on the total amount of compensation. The Arbitrator, however, considering the materials on the record, allowed Rs. 250/- as the probable cost for clearing the jungles, Rs. 400/- as the value of barbed wire fencing with iron posts. Rs. 300/- as compensation for loss of standing crops and Rs. 8,525/- as the damage for the loss of trees. Other heads of the claim as made by the claimant were disallowed.

9. Mr. Biswas challenges the finding of the Arbitrator on account of loss of trees on two grounds, namely, that number of trees as found by the Arbitrator was without any basis and that the price fixed for the trees was arbitrary. The Arbitrator has considered this aspect of the objection which was also raised before him. There was very slender evidence adduced on behalf of the State. Practically, there was no evidence whatsoever with regard to the number of trees and their price at the relevant time. In the fitness of things it is expected that when a property is requisitioned a list is to be prepared indicating trees and other materials standing on the land so requisitioned. In case of failure to do the same evidence of the claimant in this regard is to be considered and in the absence of any other materials, importance to such evidence is to be attached. On behalf of the claimant two witnesses have been examined -- one, is P. W. 1 Percy Lancaster who was the Secretary of the Royal Agri-Horticultural Society of India. Another witness, i.e., the claimant himself has also been examined in this case. On behalf of the State two witnesses have been examined. Opposite Party witness No. 1, Kanai Lal Mitra who is a surveyor of Collectorate stated that he inspected the garden. He produced the plan Ext. "B" which was prepared by the claimant. He stated that at the time of de-requisition a list was prepared, that is called dilapidation list which has been marked Ext. "A" in this case. This is a very important document on the basis of which the compensation has been calculated. That document gives an idea as to the number of trees cut and damaged. Opposite Party No. 2, Birendra Chandra Mitra another Surveyor attached to the Land Acquisition Collector's office stated that on enquiry they were satisfied as to the existence of those trees, roots of which were still in existence. Mr. Biswas submits that the Court should proceed on the basis of that evidence and hold that the trees, roots of which were still found, were in existence when the requisition was made. The said argument does not hold good for the reason that about four years back when the order of de-requisition was passed and the enquiry was made, roots of some of the trees must have been decomposed in due course of time. When the trunk of the trees are cut and removed the roots of some of the trees are liable to be decomposed. The said decomposition varies

from trees to trees. For the reasons stated the evidence of opposite party witness No. 2 is of little value. The Arbitrator has, therefore, very rightly based his finding on the dilapidation list which was prepared in the presence of the claimant. With regard to the value of the tree the evidence of Government Surveyor is not also acceptable as they have not given the correct valuation of the same. The value of the trees as given by the expert witness examined on behalf of the claimant was found to be reasonable by the Arbitrator. On the basis of that dilapidation list and the value of the trees as has been given by the said expert the compensation has been calculated by the Arbitrator, We do not find anything wrong in the said finding. Therefore, the assessment for damages for the loss of trees as fixed at Rupees 8,525/- by the Arbitrator is acceptable to us.

10. Mr. Biswas next drew our attention to the award of the Arbitrator in respect of Rs. 250/- as cost of clearing of the jungles. According to Mr. Biswas there is no evidence in support of the same. The claimant's claim in this regard was fixed at Rs. 500/-. The arbitrator, however, reduced the same to Rupees 250/-. The Arbitrator has himself noted that there was no evidence on the side of the claimant in support of the said claim. Therefore, the fixing of Rs. 250/- as cost of clearing of jungles has arbitrarily been made and not supported by evidence. We accept the said argument of Mr. Biswas and we disallow the sum of Rs. 250/- which has been awarded as cost of clearing of jungles to the claimant.

11. Similar is the argument advanced by Mr. Biswas in respect of the claim for damages to the barbed fencing with iron posts. Rs. 500/- was claimed on this head. But the Arbitrator has allowed Rs. 400/-. There is also no sufficient evidence in support of the said claim, neither there is any material to come to the conclusion that the claimant should be awarded Rs. 400/- on this score. The onus to prove this item is also on the claimant which he has hopelessly failed to discharge the same. Accordingly, we set aside this part of the award in respect of Rs. 400/- allowed by the Arbitrator to be paid to the claimant. Mr. Biswas next drew our attention to the claim regarding loss of standing crops as made by the claimant. The claim in this regard was laid at a sum of Rs. 1,000/- but the same was fixed by the Arbitrator at a sum of Rs. 300/-. It was contended on behalf of the State that there was no material to show that there was any loss on this score. We have searched in vain in the evidence of the claimant to find out any material in support of that claim. The arbitrator, however, allowed Rs. 300/- for this item without mentioning any reason or any basis for such award in this head. As there is no cogent evidence in support of that claim, the claimant cannot get benefit of the same and no award should be passed on that score. We also set aside this part of the Arbitrator's award and hold that the claimant is also not entitled to get Rs. 300/- fixed on account of compensation for loss of standing crops.

12. Next point urged by Mr. Biswas is that the Arbitrator has awarded the interest at the rate of 3 1/2 per cent, per annum from 12th January, 1949. upto the date of payment, the said award is not tenable under the law. It is urged that under

the Defence of India Act (Act XXXV of 1939) there is no provision for the payment of interest on the amount of compensation to be awarded in favour of the claimant: that in the absence of any provision for interest as provided in Section 28 of the Land Acquisition Act, 1894, the Arbitrator could not grant the same. The said point came up for decision in the case of *The Province of Bengal Vs. Pawn Kissen Law and Co., . Das and Guha, JJ.*, held that Section 19 (1) (e) of the Defence of India Act by itself has not taken away the power of the arbitrator to fix fair amount of compensation to which owner was entitled and to allow the interest on the amount of compensation fixed. We are of the view that interest, if granted, becomes part and parcel of the compensation itself. The Arbitrator has the power to fix the compensation and in doing so he is permitted to fix the same with regard to the provisions of Sub-section (1) of Section 23 of the Land Acquisition Act 1894. so far as the same can be made applicable. It is noticed that the object of that provision is to fix proper compensation. Though in that section, there is no mention of interest, that by itself does not exclude his power to exercise his discretion while acting as an Arbitrator to allow interest to give the proper compensation to the party concerned. The said view as expressed in the above mentioned case has also been accepted by Amaresh Chandra Roy and Samarendra Narayan Bagchi, JJ. in the case of *Union of India v. N. K. Sen.* reported in (1971) 75 CWN 880. Considering all the facts, materials and the points of law raised and argued before us we are of the view that Arbitrator was justified in granting interest at the rate as has been granted in this case. As such the said contention of Mr. Biswas fails.

13. Lastly, it has been argued that the provisions of Arbitration Act (Act X of 1940) have not been applied in this case in the matter of appointment and change of the Arbitrator, and also for passing the decree based on that award.

14. Our attention has been drawn to Section 5 of the Arbitration Act which lays down that an authority of an appointed arbitrator or umpire shall not be revokable except with the leave of the court, unless a contrary intention is expressed in the arbitration agreement. It has been contended that the order sheet of the Arbitration case shows that originally Sri J. C. Majumder was appointed arbitrator and thereafter Sri M. L. Cha-kraborty succeeded him, the said change has not been made in accordance with the provision of Section 5 of that Act.

15. Similar point was raised and canvassed before Bose, J., in the case of *East India Film Studios Vs. P.K. Mukherjee and Others, .* In that case State Government wanted to change the Arbitrator. It was opposed by the other side on the following grounds:

That the appointment of an Arbitrator can only be revoked or cancelled in the manner prescribed by Section 5 of the Arbitration Act, though the arbitration was made u/s 19 of the Defence of India Act; it being a statutory Arbitration, Section 46 of that Act applied in that case.

16. Bose, J., while dealing with that matter referred to the provisions of Section 46 Arbitration Act. as well as to Section 5 of the said Act. Both the sections may be quoted here:--

Section 46 of the Arbitration Act runs as follows:--

"The provisions of this Act except Sub-section (11 of Section 6 and Sections 7, 12 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder."

Section 5 of this Act speaks like this:--

"The authority of an appointed arbitrator or umpire shall not be revokable except with the leave of the court unless a contrary intention is expressed in the arbitration agreement."

It was contended in that case that those sections were applicable to the fact of that case and as the procedure laid down in Section 5 was not followed the order revoking the power of the previous Arbitration was bad in law.

17. The said argument was sought to be repelled by reference to Section 19 of the Act. Section 19 (1) of the Defence of India Act provides in Clause (g) as follows:--

"19 (1)

(g) Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section."

That Sub-clause (g) quoted above suggests that arbitration proceedings started u/s 19 are not affected by any law for the time being in force. Bose, J., considered the meaning of the expression "for the time being in force". The question arose before his Lordship as to whether the Arbitration Act 10 of 1940 was an Act which came within the purview of the expression "for the time being in force" as used in Section 19 (1) (g) of the Act. His Lordship considering the relevant portions of the Defence of India Act as well as the Rules made thereunder held that the words "for the time being in force" as used in Section 19 (1) (g) of that Act had reference only to the rule which was actually in existence at the time Defence of India Act came into force. The reason ascribed for such decision was that the intention of the legislature was to keep the arbitration under the Defence of India Act unaffected by any other law having any bearing upon the subject. In other words, the object of the framer of the Defence of India Act was to make Section 19 of the Act as self-contained code so far as arbitration for assessment of compensation in respect of requisitioned land was concerned. His Lordship referred to certain rules which were framed u/s 19 of the Act. published on 30-3-1943. This Rule as framed would indicate that

Section 19 of the said Act was intended to be a complete code by itself. In this connection reference to Rule 20 may be made which showed that the award of the Arbitrator is enforceable in the same manner as a decree of the Civil Court and the Arbitrator should be deemed to be a court. In this connection reference to Rule 3 may also be made. The said Rule is as follows:--

"If the Arbitrator neglects or refuses to act or is incapable in acting or dies the Provincial Government shall appoint some other person in his place. Thus it is seen that this rule provides for substitution for another Arbitrator in place of the appointed Arbitrator only in certain circumstances as specified in the rule."

His Lordship was considering the matter as to whether the change of the Arbitrator on the facts of that case was justified. His Lordship was approached under Article 226 of the Constitution to exercise his jurisdiction to remove the defects, if any, Bose, J., on the materials on record was satisfied that the provision of Rule 3 indicated above, was not complied with. Accordingly, the order of the appointment of the second arbitrator in place of the original one was quashed.

18. Mr. Biswas has tried to assail the appointment of the second arbitrator in this case. Mr. Biswas challenges the action of the State Government. Be that as it may, when that point has been raised we have got no other alternative but to see the legality of such appointment.

19. At the very outset I like to mention that I have got much hesitation to agree with the decision of Bose, J., in the case already noted. Rather I respectfully differ with the said decision for the reasons stated hereafter. The Defence of India Act and the Rules made thereunder would indicate that object of the framer of the said Act was to make Section 19 of the Act as self-contained Code so far as the arbitration for assessment of compensation in respect of requisitioned land was concerned. In Rule 3 specific provision has been made for changing the Arbitrator. No such objection was raised before the Arbitrator as is sought to be raised by Mr. Biswas. It is for the first time in appeal this point has been raised. Even in the grounds of appeal such a ground has not been taken. We, therefore, do not know under what circumstances of the case the change had to be made. That is one aspect of the case. Entering into the broader question, we entirely agree with the finding of Bose, J., that Section 19 of the Defence of India Act is a self-contained Code. The provisions of the section and the rules made thereunder indicate that all possible situation which might arise in the consideration of the compensation payable under the Act was considered. Bose, J., however, wanted to interpret the words "for the time being in force" by holding that it excluded other Acts touching arbitration which were in vogue at the time when the Defence of India Act came into operation. Such finding itself contradicts the earlier finding of Bose, J., that the said Act was a complete code by itself. Reference may be made to Clause (g) of Section 19 (1) of the Defence of India Act, 1939. It excludes the application of any law relating to arbitration under that section. Clause (g) of that section provides for that. I am, however, of the view

that the expression "any law for the time being in force" as appears in that Clause (g) refers not only to any law bearing upon the subject of the arbitration which is in force at the time when Section 19 of the Defence of India Act came into force but also covers any such law which came into force even after the passing of the aforesaid Act. Mr. Biswas has drawn our attention to the provision of Section 46 of the Arbitration Act wherein amongst others it has been laid down that the provisions of the said Act shall apply to every arbitration under any other enactment for the time being in force. From the above it has been argued that the provision of arbitration as indicated in Section 19 of the Defence of India Act is also contemplated under the provision of Section 46 or in other words it has been argued that Section 19 of the Defence of India Act is restricted in its operation by the provisions of Section 46 of the Arbitration Act. In this connection I may refer to the provisions of Section 47. Leaving the portions which are not relevant for the purposes of this case I may refer only to the following portions of Section 47:

"Subject to the provision of Section 46 and save in so far as is otherwise provided by any law for the time being in force the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder."

So the words "save in so far as is otherwise provided by any law for the time being in force" are very significant. It excludes the applicability of Section 19 of the Defence of India Act under the Arbitration Act. For the reasons stated I hold that the provision of Section 19 of the Defence of India Act is a self-contained one; that it is not restricted by any other provisions under any other Act. I am further of the opinion that the provisions of the Arbitration Act have got no application in the matter of compensation to be awarded under the Defence of India Act.

20. The said finding gets support from the Bench decision in the case of Union of India (UOI) Vs. Ramdas Oil Mills, wherein it has been held that the provisions of Arbitration Act do not apply to Arbitrations u/s 19 of the Defence of India Act 1939 since the provisions of the former Act, are inconsistent with that of the later Act. It has further been held that the words "for the time being in force" referred to any law bearing upon the subject of arbitration which is in force at the time when the question of applicability of that law to arbitration u/s 19 of the Defence of India Act arises and covers any such law which came into force even after the passing of the aforesaid Act.

21. For the reasons stated the last point urged by Mr. Biswas also fails.

22. It may, however, be noted that we did not get any assistance from any of the learned Advocates on behalf of the respondent as the respondent has not appeared in this appeal.

23. For the reasons stated the appeal is partly allowed and that the decree is modified in the following terms. That the claimant respondent would get a decree for damages for the loss of trees at a sum of Rs. 8,525/- with interest at the rate

of 3 1/2 per cent, per annum from the 12th January, 1949, till realisation with proportionate costs of the lower court to be paid by the State Government to the claimant. As this appeal is not being contested by the respondent no order as to costs is passed in this appeal. The State Government will pay the dues within three months from the date of signing of this decree, failing which the respondent will be at liberty to execute the decree.

R. Bhattacharya. J.

I agree.