

(2001) 11 J&K CK 0030

In the Jammu And Kashmir High Court

Case No : C.I.A. No. 38/1998 C.I.A. No. 103/1998

Union of India

APPELLANT

Vs

Freni Boga

RESPONDENT

Date of Decision : 26-11-2001

Acts Referred:

Land Acquisition Act, 1990 — Section 18

Citation : (2002) KashLJ 46 : (2002) SriLJ 56

Hon'ble Judges : Muzaffar Jan, J

Bench : Single Bench

Advocate : Z.A.Shah, S.Naik, Advocates appearing for the Parties

Judgement

1. By this common judgement propose to decide two appeals CIA No. 38/1999 and CIA 103/1998. Both appeals arise under the provisions of

Jammu and Kashmir Requisitioning and Acquisition of Immovable Property Act 1968 (hereinafter called the Act) and have been filed against the

award dated 05.03.1998 passed by Addl. District & Sessions Judge (Arbitrator) Srinagar.

2. The perusal of the record reveals that vide SRO No. 148 dated March, 15, 1979 the Government directed acquisition of the land under the

provisions of the Act, initially the Notification related to 1783 Kanals and 6 marlas of land situated in village Zawoora District Srinagar.

Subsequently the schedule of the land, enclosed to the notification, was substituted vide SRO 507 dated Sept 13, 1979. Under the substituted

schedule the land of the appellant measuring 313 kanals and 4 marlas falling in village Khormoh, was directed to be acquired. The Competent

Authority (Deputy Commissioner, Srinagar) initiated the acquisition proceedings under the J&K Land Acquisition Act (hereinafter called the Act).

The appellant claimed Rs. 20,000 per kanal as a just and fair amount of compensation. The Competent Authority vide his award dated

26.02.1981 permitted the amount of compensation payable to the appellant as follows:

(a). Orchard Land ... Rs. 6500/ per Kanal

(b). Maidani Land ... Rs. 6000/ per Kanal That the parties entered into an agreement under Rule 9(5) (iii) and the appellant accepted to have

received 'on account' payment of award in terms of Form 'L' on 16.08.1982, 07.05.1987 and 29.07.1987.

3. It appears that the appellant filed a formal application on 12th Aug 1987 before the Competent Authority seeking appointment of an arbitrator

for determining the amount of compensation, interest and solatium, payable to her. Although the request was made in the year 1987 the decision

for appointment and reference was made on July 11, 1985 vide SRO 156 by the State Government and Additional District and Sessions Judge,

Srinagar was appointed as exofficial arbitrator to make an award about the rate of compensation payable in respect of the land measuring 313

Kanals and 4 Marlas comprised in Survey Nos. 2880/2679/2584Min, 3183/2679, 2584Min, 3183/2679, 2584Min and 2727/2661/2582. The

arbitrator initiated proceedings and gave is award on 5th March, 1998 in the following terms:

i. that the client has received just and fair compensation at Rs. 6000/ in respect of the land measuring 291 kanals comprising in khasra No.

2880/2679/2584Min 3183, 2679/2584Min, 3183, 2679/2584Min, 3183/2679, 2584Min 2741/2679 min, 3183/2679/2584Min and 2484Min

situated in village Khonmoh;

ii. that the claimant shall be entitled to receive compensation the rate of Rs. 15.000/ in respect of land measuring 22 kanals and 4 marlas under

khasra No. 2727/2661/2582 situate in village, Khormoh and the amount already received by her shall be deducted;

iii. that the claimant shall also be entitled to solatium at the rate of 15 % on aggregate compensation amount as covered by item No. (i) and (ii).

iv. that the claimant shall also be entitled to interest at the rate of 6% on the enhanced unpaid amount shown at item No. (ii) from the date of this

award till its full realization.

v. that the claimant shall also be entitled to costs of the arbitration proceedings payable by the Union of India.

4. In CIA No. 38/98 the award has been challenged on the following grounds:

i. that the findings of the arbitrator that the land in question is dissimilar to the land, which is subject matter of reference No. 3 of 1985, is not a

correct finding on facts;

ii. that the award in the matter of determination of compensation, proceeds on incorrect basis. The arbitrator was required to determine value of

the land as on 15.03.1979 and had to assume that the land in question was available for sale as on that date and was in the same condition when it

was requisitioned in the year 1950/51. It is further urged that when the land was requisitioned it was a fruit yielding orchard and the arbitrator had

to determine its price, as it would fetch in the open market, on 15.03.1979;

iii. that the land in question and subject matter of reference No. 3 of 1985 constituted on single integrated plot of land and the arbitrator erred in

law in looking for identical survey number in respect of the entire land;

iv. that the appellant became entitled to interest from 12.08.1987 when she requested the competent authority to refer the dispute, relating to rate

of compensation to an arbitrator and that she is entitled to interest at the rate of 20 % per annum;

v. that the finding of the arbitrator in respect of the issues is incorrect and unsustainable on the basis of the evidence available on record as also in

law.

vi. the appellant has also claimed solatium at the rate of 30 %.

5. However, the appellant has not challenged the findings of the arbitrator in respect of 22 kanals and 4 Marlas for which the arbitrator has allowed

the rate of Rs. 15,000 per Kanal.

6. In CIA 103/1988 the award has been assailed by Union of India with respect to

a. enhancing the compensation at Rs. 15,000/ per Kanal in respect of land measuring 22 Kanals and 4 marlas under Khasra No.

2727/2661/2582;

b. entitlement of solatium at 15 % on the aggregate compensation;

c. entitlement to interest at 6%.

d. entitlement to costs of the arbitration proceedings.

In other words the said appeal is directed against the directions contained in the award shown at (ii), (iii), (iv) and (v).

7. Heard learned counsel for the parties, the questions which have to be addressed are:

Whether the arbitrator has wrongly allowed compensation at the rate of Rs. 15,000/ per kanal in respect of land measuring 22 kanals and 4 marlas

under Khasra No. 2727/2661/2582 and whether, arbitrator wrongly refused compensation at the rate of Rs. 15,000/ per kanal In respect of entire

land of 313 Kanals and 4 marlas. The issues obviously are factual in nature and the answer to these issues have to be ascertained on the basis of

the evidence available on record. The subject matter of the said questions are covered by issues (1), (2), (3), (4) (6) and (7).

8. On behalf of the appellant following witnesses were examined by the arbitrator :

1. Ab Gani Khan, Record Keeper

2. Mohd. Ismail, Patwari

3. Abdul Ahad Baba

4. Sofi Mohammad Shafi

5. Shiv Ji Bhat, Attorney holder of appellant.

9. Besides examining these persons as witnesses, copies of Intikhab Jamabandi, Intakhabi Girdawari Aksshajra and a copy of the award dated

03.08.1989 alongwith the map of the ad joining land and certified copy of the judgement of the District Judge, Srinagar dated 29.06.1985,

delivered in reference No. 3 of 1985, have also been produced. On behalf of Union of India only Faiz Ahmed Buchh has been examined as a

witness. No evidence was produced on behalf of the State Government and reliance has been placed entirely on the record of the Competent

Authority. Scrutiny of the record of the Competent Authority cleared indicates that the competent authority acted on erroneous basis in determining

the amount of compensation at Rs. 6500/ per kanal for Orchard and Rs. 6000/ per kanal for Maidani and other kinds of land. The rate of

compensation so determined by the Competent Authority, appears to be founded primarily on the rate of compensation awarded for the adjacent

land acquired and in respect of which award was passed on 20.12.1978. The Competent Authority on page (2) of the minutes of proceedings

dated 26.02.1981 appeared on page 11 of the file has recorded as under: ""The army authorities (MEO) has asked for the estimated cost of the

said land acquisitioned to enable them to obtain sanction from the Central Government, Ministry of Defence. Accordingly this office intimated the

rate of Rs. 6500/ and Rs. 6000/ per kanal for Orchard and Maidani and other classes of land respectively, on the basis of uniform rate of Rs.

6000/ per Kanai award for the adjacent land acquired in the same village issued on 20.12.1978 in that case,

10. It is thus self evident that the competent authority awarded the compensation on the basis of the earlier award delivered in respect of the

adjacent land. Subsequently the award delivered in respect of the land, adjacent to the land in question, was challenged and in reference No. 3 of

1985 the District Judge, Srinagar enhanced the compensation to Rs. 15000/per kanal in respect of all kinds of land. The decision of the District

Judge was not further challenged before any court and as such, became final. In law, therefore, the rate of compensation, Judicially determined by

the District Judge in reference No. 3 of 1985, is the right rate. The rate earlier determined had undergone a change and it is the changed rate which

would determine the rate of compensation for the adjacent land. The rate of compensation, therefore, allowed by the competent authority cannot

be accepted.

11. The arbitrator while accepting the rate of Rs. 15.000/ per kanal restricted its application only to 22 kanals and 4 Marlas.

12. The next question to be considered is whether the arbitrator was justified in restricting the application of the said rate only to a portion of the

land acquired. Mr. Naik appearing for Union of India, however, submitted that arbitrator was not even justified in applying the rate of Rs. 15000/

per kanal even for 22 kanals and 4 marlas of land. The argument cannot be accepted for multiple reasons. Under law both the competent authority

as well as arbitrator were required to determine the rate of compensation in accordance with the provisions of the Act and in doing so the rate of

compensation judicially determined in respect of the adjacent land could not have been ignored. It constituted safe basis and one of the important

considerations. There are no sale deed available on record which could have assisted the competent authority and the arbitrator in assessing the rate of compensation. Other available relevant material, therefore, had to be considered and in the process of consideration, previously determined compensation judicially ascertained for the adjoining land could not be ignored. Mr. Naik further submitted that the arbitrator has not recorded any finding that the land in question is having similar potentiality and the commercial value as the adjacent land, acquired by the SIDCO. It is further urged that the adjacent land acquired by State Industrial Dev. Corporation (SIDCO) is abutting the general main road and that 22 kanals of and 4 marlas of land are situated behind the SIDCO land and that the said land is approximately 300 meters from main road and, therefore has less potentiality and commercial value and the two lands cannot be equated. Mr. Z.A. Shah on the contrary submitted that the arbitrator should have applied the rate of Rs. 15,000/ per kanal to the entire land of 313 kanals and 4 marlas. It was further urged by him that the said 313 Kanals and 4 marlas of land was a part of 1809 kanals and 16 marks of land was acquired for different purposes. Land measuring 313 kanals and 4 marlas have been acquired for defence purposes under the Act and part of the remaining land of the appellant has been acquired for industrialization by SIDCO. It is therefore, urged that the compensation in respect of one single integrated portion of land cannot be differently determined. The legal aspect of this submission will be taken up later.

13. The arbitrator while restricting the rate of Rs. 15,000/ per kanal to only 22 kanal and 4 marlas of land has proceeded to do so on the basis that the appellant has not, with precision, spelt out the exact market value; that only 22 kanals and 4 marlas of land comprised in survey No. 2582 is common with the land acquired in reference No. 3 of 1985, that the balance land of 291 kanals carries different survey number; that the land comprised in survey No. 2584 is located on the back side of the land comprised in survey No. 2582 and that the land under survey No. 2582 is nearer to the developed area. On this basis the arbitrator has concluded that there is dissimilarity between 291 kanals of land with that of the land involved in reference No. 3 of 1985 and that only 22 kanals and 4 marlas of land carry the same survey number of land involved in the reference.

14. The arbitrator does not seem to have addressed and appreciated the controversy in accordance with law, and considered whether the land in question i.e. 313 kanal and 4 marlas is similar to the adjacent land for which compensation has been judicially determined and paid at Rs. 15000/ per kanal. There are only two survey numbers involved i.e. survey No. 2582 and 2584. In so far as survey No. 2582 is concerned the arbitrator has already awarded Rs. 15,000/ per kanal since the said survey number was also involved in reference No. 3 of 1985. The issue to be examined is, whether the land, comprised in survey No. 2582 is similar to the land in its essentials to the land comprised in survey No. 2584. There is no controversy that the two lands comprised in two survey numbers are adjacent to each other. This position is corroborated by the Khonmoh village Map (EXOW/5). According to the statement of Mohd. Ismail Bhat, Patwari of village Khonmoh, the land acquired by SIDCOI (partly comprised in survey No. 2582) is adjacent to the land in question and has common boundaries. According to him SIDCO acquired 342 kanals and 19 marlas and that the nature of the land acquired by SIDCO and the land in question is identical. He has further stated that the SIDCO land is abutting on the main general road and the land in question is on the back side of the said land. The said witness has also proved various revenue extracts placed on record as EXPW3, EXPW4, and EXPW6. It has also been stated by him that the land in question was partly orchard and partly BanjereQadeem and that when it was requisitioned (in 1950/51) it was a fruit yielding orchard. The attorney of the appellant, Shiv Ji Bhat, has corroborated the statement of Patwari. He has stated that the appellant (Mrs. Frani Boga) had 780 Kanals of land in village Khormoh which was in the shape of an orchard bearing apple, apricot, walnut and almond trees. He has stated that the land has frontage running parallel to the general road and gradually ascended and is in the shape of slope with terraces on it. On the Eastern side of the land is the SIDCO Industrial Complex and on the Western side was the orchard of Aziz Mir and other which was also acquired and had become subject matter of reference No. 3 of 1985 in which the compensation was judicially determined at Rs. 15,000/ per kanal. He has further stated that the market value of the land was Rs. 20,000/ per kanal. He has admitted that the land in question is on the back side of the Industrial Estate which has frontage towards the general

road. The statement of witnesses and the records produced lead to the following conclusion of facts:

1. that the land in question is comprised in two survey Nos. 2582 and 2584.
2. that the appellant in all owned 780 kanals, part of which was acquired by SIDCO and part by Union of India;
3. that the land in question was in the nature of an orchard and Banjereqadeem;
4. that the land owned by the appellant started from the main general road and gradually ascends and is in the form of slope with terraces on it;
5. that the land in question is behind the land acquired by SIDCO.
6. that for the adjoining land comprised in survey No. 2582 compensation had been determined at Rs. 15000/per kanal.

15. On these undisputed facts it clearly emerges and it is established that when the land was requisitioned, before 1959, somewhere in the year

1950/51, it was an orchard abutting Kharmoh, Srinagar Road. The arbitrator has held that the front side of the land acquired by SIDCO abuts the

main road and the land in question is situated adjacent to the said land but the back side, meaning, perhaps towards the upper side of the slope.

The arbitrator has also inspected the side of prepared the plan which shows a separate road, taking off from the main general road leading to the

land in question. It is also established on evidence that the land is next to the developed industrial area of SHDCO. The evidence produced by the

appellant is un rebutted to the fact that there are commercial activities nearby the land in question. Establishment of Industries adjacent to the land in

question clearly demonstrates 'building potentiality of the acquired land. The neighbourhood land admittedly is full of commercial activities and this

advantageous feature of the adjoining land neither be ignored nor denied to the land in question. The arbitrator has determined similarity on the

basis of the common survey number, which alone cannot be made as the basis of similarity. It is the accessibility, nearness to the developed area,

nature of the land which are a few factors to determine similarities. The land being an orchard and that too a fruit yielding orchard at the time of

requisition would show that it was capable of generating income. If proper agricultural operations are adopted substantial income can accrue to a

person from an orchard in particular by the kind of fruits available from it. This would be a special feature of the land in question and cannot be

overlooked. In these circumstances the findings of the arbitrator that the land comprised in survey No. 2584 is dissimilar radically to the land

comprised in survey No. 2582 cannot be upheld. It is established by evidence and the material existing on record that the land comprised in survey

No. 2582 and 2584 constituted one single compact integrated piece of land. The entire land was in the form of an orchard and partly

Banjareqadeem (rocky). The land was accessible from the main road. The entire land is in the form of aslope. Part of the land is acquired by

SIDCO for Industrial Purposes and the part is acquired by the Union of India for defence purposes. Therefore, having regard to the fact that a

single compact piece of land without any distinction in its nature or quality and partly being used for commercial purpose and containing fruit

yielding trees, the arbitrator was not justified in making hairsplitting distinction between the two survey numbers when the similarities far out weigh

the dissimilarities identified by the arbitrator. The entire land carried same benefit and burden. The entire land carried same potentiality and

commercial value. The entire land would fetch, in open market, identical value when sold as a compact piece of single integrated land.

16. In the acquisition of 'Orchards' the Apex Court has ruled in *Koya Patnodi vs. State of Kerala* (1991 4SCC 8) that where land, with fruit

bearing trees standing thereon, is acquired, the market value of the land should be determined by including value of the trees treating them as timber

or annual net income of the fruit bearing trees multiplied by capitalization of 15 years, whichever is higher should be adopted.

17. In matters arising under Requisitioning and Acquisition Act, the condition of the property has to be assumed as on the date of acquisition to be

the same as it was at the time of requisition. In the instant case the property has been directed to be acquired on 15.03.1979 when it was

requisitioned in the year 1950⁵¹. During these 30 years it has remained in the possession of the Army Authorities. As per the evidence of Patwari,

Mohd. Ismail, the land in question was an orchard in early fifties. If the land in question was an orchard in early fifties. If the land had remained in

the same condition till the year 1979 and proper agricultural operations, and use of various inputs in the maintenance of fruit yielding trees, had

been made, 313 kanals and 4 marlas of land by the method of capitalization of 15 years would have fetched much more amount of compensation

than to which appellant is found entitled to. The appellant has not proceeded on that basis and as such, she cannot claim any relief on this account.

18. It was also argued that a small portion of 22 kanals and 4 marlas of land, comprised in survey No. 2582Min, should not be made the basis for

determining compensation of the balance 291 Kanals. In the facts and circumstances of the case the submission is misplaced. It has already been

stated that the appellant owned compact single integrated piece of land which was in the form of an orchard. The total land she owned was

approximately 780 kanals. In the present proceedings the total land involved is 313 kanals and 4 marlas. Out of this the arbitrator has for 22 kanals

and 4 marlas allowed the rate of Rs. 15000/ per kanal. The question to be considered is whether 22 kanals and 4 marlas of land constitute a small

portion of the total land of 780 kanals or that smallness of size has to be judged in the context of only 291 kanals. 22 kanals and 4 marlas of land

means 1/13th portion of 291 kanals and the same 22 kanals and 4 marlas of land means 1/35th of the total land of 780 kanals. In the present

proceedings we are concerned with 313 kanals and 4 marlas and the validity of the argument has to be adjudged in the context of the said land.

The question to be considered is whether is it a small portion and what would be just and fair compensation of balance land ?

19. There are several decisions of the Supreme Court of India dealing with this question. Some of them are:

1976 (iv) SCC 687

1995(ii) SCC 424

1991 (iv) SCC 506

1995 (v) SCC 426

20. In Tarlochan Singh & another vs. State of Punjab and others the Apex Court observed as under:

It is seen that a land of magnitude of 881 Acres when was acquired for plan development of the town, a willing purchaser would offer the same

rates at which small plots each measuring to 120 to 250 sq.ft were offered and sold. It is impossible to accept that the lands would fetch that price

when a large tract of land was offered for sale in open market to willing buyer. Under those circumstances, sale transactions are absolutely and

totally irrelevant and cannot form the basis to determine the compensation.

21. It is thus evident that for determining the value of 881 acres of land on the basis of the rates of small plots of land measuring 120 to 250 sq.ft is totally irrelevant. 250 Sq.ft constitutes 1/15336 4th of 881 Acres. It is in this context that small transaction of small plots cannot form the basis for determining compensation.

22. In Bhagwathula Samanna & others vs Special Tehsildar and Land Acquisition Officer, the Apex Court has observed as under:

The proposition that large area of land cannot possibly fetch a price at the same rate at which small plots are sold is not absolute proposition and

in given circumstances it would be permissible to take into account the price fetched by the small plots of land.

23. In K. Vasundrara Devi vs. Revenue Divisional Officer (LAO) the land acquired was 46 Acres 6 Gunthas in Nalgonda District of Andhra

Pradesh and the same deeds of small extent of one Guntha were considered. The Apex Court allowed 50 % of deduction to determine, the market

value of large tract of land. It is obvious that one Guntha constitute a very small portion of 46 Acres of land.

24. In the light of these decisions and many others, the proposition that sale rate of small plots of land cannot form the basis for determining the rate

of large areas, is applicable were the 'smallness' constitutes more than 100th part of the large tract of land acquired. In the case in hand 22 kanals

and 4 marlas constitute 1/13th portion of land acquired and by no standard it can be said to be small portion of land. That being so, it cannot be

held that the said proposition is applicable to the land in question.

25. It is well established that no property can be acquired without payment of compensation and the criteria for fixation of compensation is on the

basis of the sales as were closest in the point of time to the date of acquisition. The principle of fixation of the market value with reference to other

sales, comparable to the land in question is to reduce to the minimum the element of speculation. In the instant case there are no sale deeds, but

only determination of compensation of the adjoining land. On evidence it is established that the adjoining land and the land in question are similar in

the sense of their contiguity, quality, potential value, use and location. The appellant has claimed Rs, 20.000/ per kanal for the land in question

when in reference No. 3 of 1985 Rs. 15.000/ was found to be the fair and just

compensation for the adjoining land. The counsel for the appellant has also submitted that in August 1989 the government paid Rs. 33,000/ per kanal as the compensation for the land at Khonpoh, Rs. 34.000/ per kanal in the year 1992 for the land at Zewan/PathaChowk and Rs. 50.000/ per kanal. in the year 1990. The submission cannot prevail and the appellant cannot be allowed compensation at the said rate for the reason that the appellant has only claimed Rs. 20,00/ per kanal and no evidence has been produced to support the said plea. On the contrary the evidence produced shows that for the adjoining land Rs. 15000/ was paid as compensation consequent to the enhancement of compensation made in reference No. 3 of 1985.

26. A Judgement determining the market value is admissible in evidence for determining the market value of the land in question, provided the land to which the judgement pertains is in the vicinity of the acquired land even though not inter parties but for determination of compensation on the basis of said judgement, it is necessary that the land in question is similar to the land to which the judgement pertains. There is nothing on record to show that the location, shape, potentialities, similarities or tenure of the land in question is materially different from the adjoining land. No evidence on this count has been produced by Union of India. The judicially determined compensation for the adjoining land, therefore, is taken as a safe guide for determining the compensation of the land in question and the argument of the appellant claiming higher compensation is rejected. In the facts the circumstances of the case, it is therefore, held that the appellant in civil 1st Appeal No. 103/1998 is entitled to compensation at the rate of Rs. 15.000/ per kanal in respect of entire land measuring 313 kanals and 4 marlas and the findings of the arbitrator are modified accordingly. It is further held that the arbitrator was justified in awarding Rs. 15,000/ per kanal for 22 kanals and 4 marlas in respect of land comprised in survey No. 2727/2661/2582.

27. The parties have also joined is suits with regard to payment of interest and grant of solatium, as reflected in issues 5 and 8. The appellant is not entitled to solatium and interest on the compensation determined under the Jammu and Kashmir Reguistioning and Acquisition of Immovable Property Act, 1968.

28. No other point was urged by counsel for the appellant.

29. On the facts and circumstances and the reasons recorded above CIA No. 38/98 is dismissed. CIA No. 103 of 1998 is allowed as under:

the appellant is entitled to receive compensation at the rate of Rs. 15000/ per kanal in respect of land measuring 313 kanals and 4 marlas

comprised in survey No. 2582 and 2584 less the amount already received by the appellant. The appellant shall also be entitled to interest at the

rate of 6 % on the enhanced unpaid amount from the date of taking over of possession to the date of final recovery.