(1989) 11 CAL CK 0008

Calcutta High Court

Case No: Appeal from original decree No. 303 of 1961

Union of India		APPELLANT
	Vs	
On the death of Nirode Kanta Sen, his heirs and legal representatives Nihar Kanta Sen and Others		RESPONDENT

Date of Decision: Nov. 10, 1989

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 18 Rule 18, Order 41 Rule 21, Order 41 Rule 22, Order 8 Rule 5, 109
- Constitution of India, 1950 - Article 136
- Evidence Act, 1872 - Section 115
- General Clauses Act, 1897 - Section 6
- Government of India Act, 1935 - Section 102
- Land Acquisition Act, 1894 - Section 23, 23(1), 23(1), 23(2), 25(1)
- Limitation Act, 1963 - Section 5, 8

Hon'ble Judges: Samarendra Narayan Bagchi, J; Amaresh Chandra Roy, J

Bench: Division Bench

Advocate: N.C. Das Gupta and N.G. Das, for the Appellant; P.N. Mitter, Padmabindu Chatterjee and Amalendu Kumar Sen, for the Respondent

Final Decision: Dismissed

Judgement

Amaresh Roy, J.

This appeal has been preferred by Union of India u/s 19 sub-section (1) (i) of the Defence of India Act, 1939, and is directed against an award dated 10th September, 1960, made by an Arbitrator appointed under clause (b) of subsection (1) of Section 19 of the Defence of India Act, 1939 read with sub-section (4) of Section 1 of that Act and Section 6 of the General Clauses Act X of 1897 by the Government of West

Bengal in exercise of the powers conferred by Notification No. 1365-OR-42 dated 19th September, 1942 issued by Government of India, Defence Department. There is also a cross-objection preferred by the Respondent in the appeal under Rule 22 Order 41 of the Code of Civil Procedure. The Arbitrator was appointed for disposing of the Reference above-mentioned by determination of compensation payable in respect of a requisition of properties by Order No. 64 dated 8th June, 1843, made under Rule 75 of the Defence of India Rules, 1939. The property consisted of lands, buildings and other materials on that land in mouza Brindabanpur, J.L. No. 75 within Kanksa Police Station in the District of Burdwan. The purpose of that requisition as it appears in the order of requisition was "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". It also appears from that Order No. 64 D.I. dated 8th June, 1943 that the requisition of that property was in connection with setting up Birudia landing ground for use of aircrafts. It may be mentioned that here it was the admitted case of the parties before the Arbitrator and also at all stages of the proceedings that construction work of that air-field on the land stated in October, 1942 when even before any formal letter of requisition was issued or any order of requisition was made, the military authorities occupied the land and the building standing thereon, including all furnitures and fixtures and other properties thereon by turning out the occupants. No inventory of the movable properties or of any thing at all was made either at the time when possession of the properties was so taken or long years thereafter.

2. In June, 1943 on receipt of a letter of requisition from Major James F. Hyland, Base Engineer (Air) the Land Acquisition Officer issued the Requisition Order No. 64 D. I of 1943-44 copies thereof were sent to Ex-Engineer, AV. Dn. and others and was directed to be served on interested persons and in the locality. The manner of service that was effected appears from Ext. 1 in the case in which the report of service says that ''not having found Nirode Kanta Sen present, his employee Jaladhar Das was asked to receive the notice but he refused to accept the same and put his signatures hence a copy was served by hanging on the front door of the kutchary house''. That service report is dated the 16th of June, 1943 and order-sheet in the land acquisition proceeding shows that it was received on 17th of June, 1943 and was filed with the records. Nothing further was done in that respect and next step in the land acquisition proceeding was taken by preparing schedule of properties in the locality. Nirode Kanta Sen filed his first claim on 22nd April, 1943, claiming Rs. 1,93,4321 up to that date. He followed it up by another on 6th of December, 1943 laying his claim at Rs. 2.49,914/-as compensation recurring and nonrecurring on various accounts regarding movable and immovable properties lying within the requisitioned area.

3. In the land acquisition proceeding the Collector made an offer of fair compensation by assessing recurring crop compensation at a total sum of Rs.

11,878.8 annas. That was disputed by claimant Nirode Kanta Sen. He asked to be informed about the basis of calculation on which the Collector had assessed flat compensation. But he was not given that information on failure of any agreement as to the amount of compensation there was an application made by Nirode Kanta Sen on 27.3.57 (in which claim petitions previously made were also annexed) for a reference to arbitration and thereupon the Reference Order we have mentioned above was made in August, 1957. The learned Arbitrator who has heard and disposed of the Reference was Sri A. K. Das District Judge, Burdwan. He was vested with the powers of the Arbitrator in the case by Government order No. 11042 Reqn. dated 1st June, 1959 and in that arbitration proceeding claim was made on behalf of the heirs of Nirode Kanta Sen, (who had in the meantime died) by reiterating the claims made on 22.4.1943 and 6.12.43 which were on record of the Reference received by the Arbitrator.

4. On behalf of the Collector of Burdwan a statement of fair amount of compensation was also filed before the Arbitrator in February, 1959 reiterating that crop compensation from 1349 to 1359 B. S. assessed at Rs. 844-7-0 and compensation for jungle land from 1349 to 1359 assessed at Rs. 3437-1-0 total amounting to Rs. ,11,878-8-0 was fair compensation. In that statement it was also stated that

(a) fair compensation for 1360 for culturable danga, Baid and Tank is Rs. 1356-4-0 out of which share of Shri N. K. Sen is Rs. 740-6-0.

(b) Fair compensation for cultural danga, Baid and Tank is Rs. 1122 out of which share of Shri N. K. Sen is Rs. 640.4.0.

(c) Fair compensation for jungle land from 1355 to 1361 will be Rs. 2103-8-0 pleas were raised.

(a).... that claimant having accepted payment without any objection the matter cannot be reagitated under the law.

(b) From 1362 B. S, all properties having vested in the State under Estates Acquisition Act, the claimants are not entitled to any compensation except what is payable under that Act.

The claimants Hiranmayee Debi, widow of late Nirode Kanta Sen and two sons of Nirode Babu, Nihar Kanta Sen and Nirmal Kanta Sen claimed that they have Patni right in respect of eight annas and twelve annas shares under Lalit Mohan Sinha Roy and Manilal Sinha Roy respectively in mouza Brindabanpur. Those documents of title are Exts. 6 and 6 (a) in the case and they show that by a deed of lease executed by Lalit Mohan Sinha Roy in favour of the predecessor-in-interest of Nirode Kanta Sen eight annas share of Touzi No. 33 lot Bahadur of the collec-torate of Hooghly district at an annual rent of Rs. 75 on receiving a selami of Rs. 225/-. In that deed of lease in respect of the Putni Taluk which is Ext. 6 in the case clauses 5 and 6 recite.

(5) I settle separate rent with you for taking grants ordinary stone-chip and white yellow and red earth etc. fit for the manufacture of bricks, tiles and potteries etc. that are there.

(6) Whatever compensation that maybe awarded for the land that may be acquired within aforesaid Mahal, either by the Government or by any company authorised by the Government, out of the same I will get 10 annas share and you will get the remaining 6 as. share and you will get proportionate abatement of rent for the land thus acquired.

By the other document the said Kadarpanath Mondal, predecessor-in-interest of Nirode Kanta Sen took lease in respect of the underground deposits of gravel etc. by the registered deed dated 17th January, 1922 which is ext. 6(a) in this case. By that document the grant of Raja Manilal Sinha Roy who was the owner of eight annas share in the Sand Mouza Brindabanpur gave a settlement "to take all those gravels, stone-chips, chalk deposits, white, yellow and red ochres that are the under and surface for purpose of manufacturing bricks tiles a selami of Rs. 951. That document gives a right ''to raise and sell the gravels, and stones as aforesaid and having raised the ochres from different plots as aforesaid to manufacture bricks, tiles potteries etc. by setting up mills and factories and sell the same''. In this document however, there is no reservation of the nature as appears in clause (6) of the other document (Ext. 6P) which we have quoted above. The claim also averred that Nirode Kanta Sen has built a homestead and also a Kutchary on a portion of that land. The building was one-storied three roomed bungalow with brick-built and cemented floort and brickwalls with a thatched roof in which there were furnitures of some value. Appertaining to that house was also a kitchen, a cowshed and a garage and a boundary wall and two wells. Nirode Babu used to live in that house sometimes with his family. On some occasions he had taken visitors of high status for entertaining them there as guests. Nirode Babu also intended to build a farm house on that land and a factory for the purpose of development in the business of manufacture of bricks and tiles from the sub-soil clay which were of very good quality. He also extracted gravel from underground and used to sell them. A considerable quantity of gravel so extracted was kept on the land at. the time when possession was suddenly taken by the military authorities as mentioned above. At that time the materials that had also been collected for building the factory house were lying on the land. Moreover, the entire land had Sal trees which are valuable timber and forest which yield fuel wood. Nirode Babu used to sell Sal, Murgas as timber and also used to sell fuel wood as product of that forest. Compensation as claimed under the headings :

(1) Culturable land including land cultivated after reclamation;

(2) Trees-fimber wood and fuel;

(3) Homestead including building and fixtures;

(4) Furniture and other overables within the homestead areas;

(5) Morrums excavated from the land and other underground deposits.

In the order of fair compensation made by the collector compensations were calculated under the heads--

Homestead area-culturable lands of the categories danga and baid, tank, sal jungle.

But nothing was awarded for the furnitures, fixtures and other movable properties and nothing at all for the underground deposits of Morrums, clay, etc. After that assessment of the compensation by the collector of Burdwan offers for crop compensation were made to the claimant and pursuant to that offer the claimant on two occasions received amounts, totalling to Rs. 11,878.8 annas first of these being receipt of Rs. 7,049-15 annas on 4th March, 1948 without noting any objection and the second such payment being on 25th of April, 1954 of Rs. 4,828.9 annas on which occasion payment was received by making a note, that it was, without prejudice to the claim. The consolidated voucher for these payments which is ext. ''0'' shows that 11.878.8 annas was assessed under two heads (1) crop compensation for the years 1349 to 1359 and (2) jungie compensation for 1349 to 1354 only.

5. The joint petition for reference to arbitration was made on 27th March, 1957. Thereafter between July, 1957 and beginning of 1959 there were several orders appointing Arbitrator, but these arbitrators had not taken up the reference for disposal. On 1st June, 1959 Sri A. K. Das (now the Hon''ble Mr. Justice A. K. Das a Judge of this Court) who was then the District Judge of Burdwan was appointed as Arbitrator and the case was taken up for hearing by him. He has made the award now under appeal.

6. It may be mentioned here that soon after that appointment of Arbitrator the claimants made a petition on 22nd July, 1959 praying for a local inspection of the property under requisition. Orders (were made on the order-sheet fixing dates for hearing on that application first on 8th Sept. 1959 then on 17th of September, 1959 and ultimately the date for hearing was fixed on 5th of November, 1959. On 5th of November, 1959, the lawyers for both the parties were heard regarding the petition for local inspection and order was made on 18th of November, 1959 allowing the prayer for local inspection. The local inspection by the Arbitrator was actually held on 29th of November, 1959 and a memorandum thereof was placed on the record on 30th of November, 1959. By an order of that date hearing of the reference was fixed by the learned arbitrator.

Ultimately the date of hearing was shifted to 7th of March, 1960. Before that date however, on 16th of February 1950 the claimant filed a petition praying for a direction for a joint survey of the property within dispute. Before any order appears to have been made on that petition, the order No. 25 dated 4th March, 1969 records that it WAS reported to the learned arbitrator that joint survey had already been

made and necessary reports thereof will be filed in a day or two. These reports are Exts. ''F'' and ''G'' in the case. Ext. ''G'' is dated 29th of February, 1969 and Ext. F is dated 2nd of March, 1960 the former i.e. Ext. G being a measurement report of clear felled area as found on survey between 27th of February, 1960 to 29th of February, 1960, and the matter i.e. Ext. ''F'' which refers to the statement of the measurement mentions that clear felled areas was 17.47 acres out of which 3.42 acres were within plot No. 123 and 14.05 acres were within plot No. 9. It also mentions that measurements of a pit from which moram was taken was found to be 67,1000 ft. Both these reports are by Sri T. Mallik, Kanungo who was examined as witness No. 2 for the opposite parties.

7. Before the arbitrator statement of fair amount of compensations was filed on behalf of Union of India on 24th of February, 1959 reiterating the total amount of Rs. 11.878.8 annas as fair and equitable. In that statement it was asserted that the owner has accepted payment of that amount without any objection and it was contended that the matter could not be reagitated under the law. The fair compensation for 1360 for culturable Danga, Baid and Tank was mentioned as Rs. 1,356.4 annas out of which the share of N. K. Sen would be only Rs. 740.6 annas. Another amount as fair compensation for culturable Danga, Baid and Tank in the share of N. K. Sen was mentioned as Rs. 640.4 annas and a fair compensation for jungle land from 1356 to 1361 was assessed at Rs. 2,103.8 annas. In that statement on behalf of the Union of India a point was raised that from 1362 B. S. all the properties had vested in the State under the provision of Estates Acquisition Act and as such the claimants were not entitled to any compensation except as have been provided under the provisions of the Estates Acquisition Act.

8. Five witnesses were examined on behalf of the claimant and two for Union of India. Contents and values of their testimonies and their probative effects will have to be considered when we deal with the extent of proof afforded by the witnesses for each party on the several contentions regarding material points of fact. It may be mentioned here that no evidence was given to show that the lands under requisition had. vested in State Government of West Bengal under Estates Acquisition Act or the owner had been paid any compensation for these lands under that Act. During the hearing of the Appeal before us an application for admitting in evidence certain documents on that point was made on behalf of the Appellant. We need to point out here the manner of approach to and the use of evidence made by the learned Arbitrator and also the law applied by him in arriving at his decision. The learned Arbitrator has pointed out in his judgment that before him it was agreed that an area of 199.04 acres of land Mouja Brinda-banpur was requisitioned in connection "with Birudia landing ground and that the military authority took possession without notice. It was also agreed that the actual, possession of the land was taken much earlier than the requisition notice itself and that retrospective effect was given in the requisition to legalise the unauthorised occupation. It was also admitted that the claimants had to leave possession of the property without notice

and without any opportunity of making inventory of the property. The military authorities also did not- make any inventory at any time after their occupation.

9. The learned Arbitrator classified the requisitioned property in five categories :

(a) Homestead.

(b) Trees-timber, wood and fuel.

(c) Culturable land including lands cultivated after reclamation.

(d) Furniture and other movable within the homestead area.

(e)Moorams excavated from the land and other underground deposits.

For determining fair compensation the learned arbitrator categorised it in six different heads.:

(a)Homestead.

(b)Trees-timber wood and fuel,

(c)Gulturable land including lands cultivated after reclamation.

(d)Furniture and other movables brie within the homestead area

(e) Moorams excavated from the -19b land and.

(f) other underground deposits like Ochre, coloured clay etc.

10. It is noticeable that for the purpose of determining fair compensation Mooram was distinguished from other underground deposits but furniture in the Bungalow and other movables lying on the land within the homestead area were classed together in clause (d). What those other movables were appear from the evidence given in the case.

11. The requisition Order No. 64 DI dated 8.6.1943 mentioned the date on which possession was to be delivered by the owners as ''On and from. 1st October, 1942 until six months after the termination of the present war unless relinquished earlier''. For that reason the Arbitrator proceeded on the footing that the period; covered I by the requisition started from 1st October, 1942 and that the; question whether the military authorities actually came into possession in June and July 1942 were not relevant. He also noted in his judgment that the difference was so insignificant that the claimants did not press for it.

12 On another point of fact, namely whether an area measuring; 4244 acres within plot No. 9 was derequisitioned on 7th February, 1946 on a I notice served on Nirode Kanta Sen, it was admitted before the Arbitrator that the set area was not a compact position but scattered being surrounded by the remaining position of plot No. 9; which remained under military occupation, there was no access to the alleged derequisitioned area and neither Nirode Kanta Sen nor his heirs could never come

into possession- of that area. Consequently the learned Arbitrator proceeded -on the footing that the claimants are entitled to claim compensation for the entire area requisitioned. He also noted that in their statement u/s 19 of D. I. Act 1939 Union of India had not pleaded the ground of derequisition and therefore the learned arbitrator held that Union of India was not entitled to put forth such a plea at the trial.

13. Another undisputed point is the share of the claimants in the lands under requisitions. So far as the surface right in plot No. 9 is concerned Ext. 6 shows that Nirode Kanta Sen had acquired 8 annas and Ext. 7(c) shows that he acquired half of 1 anna 15 gandas 2 karas 14 tils. Thus his title in surface right in plot No. 9 comes to 8 annas 17 gondas 3 karas and 4 tils. Ext. 6 and 7 (c) shows that in plot No. 9)123 he acquired 5 annas 18 gondas and 5 tils. The shares so determined were agreed between the parties before the Arbitrator. The claimant however have claimed 16 as. under ground rights in lands of plot No. 9. For proper understanding of the manner in which Nirode Kanta Sen acquired those rights as they appear as from the documentary evidence may be mentioned here. By Ext. 6 Kandarpa Nath Mondal took a patni settlement from Rai Bahadur Lalit Mohan Sinha Roy of Chaukdighi of 8 annas share of the surface right of Mouja Brindabanpur by the registered deed of patni settlement on 25th Agrahayan 1327 B. S. corresponding to 10th December, 1920. Regarding that interest Kaiidarpa Nath Mondal executed a deed of lease: in favour of L. G. Dumaine on l7th Jaistha 1328 B. S. corresponding to 31st May, 1921. This documenjt is Ext. 4(b) in the case. The said L. G. Dumaine sold that interest to Jogendra Kumar Sen by a deed of sale executed on 10th Kartick 1328 B. S. corresponding to 27th October, 1921 which is Ext. 7 in the case. The said Jogendra Kumar Sen had granted a special power of Attorney in favour of Nirode Kanta Sen on 3rd Pous 1334 B. S. corresponding to 19th December, 1927 which is Ext. 5 in the case. Before that however, on 30th of Agrahayan 1334 B. S. corresponding to 16th December, 1927 the said Jogendra Kanta Sen had executed a deed of release in favour of Nirode Kanta Sen. This document was however, registered on 2nd February, 1928 and is Ext. 4 (a) in the case. The period that elapsed between execution and registration of that document was obviously the reason for the special power of attorney mentioned above.

14. It is noticeable that by Ext. 6 Kandarpa Nath Mondal had acquired the 8 as. patni interest of the surface right from Lalit Mohan and by Ext. 6(a) he acquired underground rights in respect of same land from Manilal Sinha Roy; no documentary evidence of any grant by Lalit Mohan Sinha Roy in favour, of the said Kandarpa Nath Mondal of the under-ground rights of the land of that patni was proved in the trial before the learned arbitrator. Before us on behalf of the respondent who are the heirs of Nirode Kanta Sen an application has been made for admitting as additional evidence a document by which the said Lalit Mohan Sinha Roy granted a permanent settle-ment of Kankar (mooram) stone-chips and white, yellow and red earth of clay, manufactured bricks, tiles and others that lay in the

underground of- the 8 annas shares of the said Mouja Brindabanpur belonging to said Lalit Mohan Sinha Roy. That document was not produced as proved before the Arbitrator through in advertence and mistakes of lawyers. The original document shows that the said grant of underground rights was made by Lalit Mohan Sinha Roy on the same date on which the patni in respect of the surface right was granted i.e. 25th Agrahayan 1327 B. S. corresponding to 10 December, 1920. By our order dated 28th July, 1969 we have allowed that prayer for receiving the original document as additional evidence under order 41 rule 27 C. P. Code and the original document has been received in evidence and marked Ext. H. C. (1) Formal proof of the document was dispensed with consent of the learned Advocates for both sides and the document being more than 30 years old has been taken as proved by its production. Regarding the other interest acquired from Raja Manilal Sinha Roy relevant document is Ext. 6(a) a registered deed of lease in respect of gravel etc. executed on 17th Jaistha 1328 B. S. corresponding to 31st May, 1921. By that document also Kandarpa Nath Mondal acquired that interest. That interest was sold bv Kandarpa Nath Mondal in favour of Rajendra Kumar Sen by a registered deed dated 5th April, 1922 corresponding to 22nd Chaitra 1329 B. S. The said Rajendra Kumar Sen in his turn executed a deed of release in favour of Nirode Kanta Sen on 2nd Asar 1354 B. S. corresponding to 17th June, 1947. The document is Ext. 4 in the case.

15. But through effect of those two series of documents Nirode Kanta Sen had acquired 8 annas interest in the surface right of lands in Mouja Brindabanpur by grants made by Lalit Monhan Sinha Roy in favour of his predecessor in interest Kandarpa Nath Mondal and Nirode Kanta Sen has also acquired 16 annas of sub-soil right by grants made by the said Lalit Mohan Sinha Roy and Raja Manilal Sinha Roy.

Nirode Kanta Sen also purchased 6 annas 6 gandas 2 karas and 2 crantis i.e. 3/8th share of Dag. No. 91123 by the deed of sale Ext. 7(b) executed by Benode Behari Roy on 7th Magh 1331 B. S. corresponding to 20th January 1925. He also purchased 1 anna 15 gondas 2 karas and 14 tils on the 8 annas share i.e. 17 gondas or 9 j 16th share in Mouja Brindabanpur by a deed of sale executed by Sm. Uma-sundari Dasi on behalf of her minor sons Amalapada Roy and Ramapada Roy. That deed of sale is Ext. 7(c) in the case. That is how the shares in the surface right and also in the underground rights had vested in Nirode Kanta Sen and that fact has not been disputed before us.

16. Main question that was raised in this appeal by the appellants Union of India and in the cross-objection by the claimants with regard to the law applicable to the compensation payable for the requisition that was made in 1942 u/s 19 of the Defence of India Act 1939 which now stands repealed and replaced by new legislation of the said subject.

The Defence of India Act, 1939 was passed under the plenary power of legislation which accrued to the Central Legislature under Sec. 102 of the Government of India

Act, 1935 on the Proclamation of Emergency made by the Governor General of India under sub-section (1) of the said section on the 3rd September, 1939. The said Proclamation of Emergency was revoked by the Governor General by Notification No. F. 5446 GG(S) dated the 1st April, 1946 in pursuance of CI. (a) of sub-section (3) of the said Section 102.

17. As a result of that the Defence of India Act, 1939 expired on the 1st October, 1946 that is six months after the revocation of emergency; vide sec. 1 sub-section (4) of the Defence of India Act, 1939. The further repeal of the Defence of India Act, 1939 by Act II of 1948 has been characterised by Mr. Mitter during his arguments as a surplusage which was by way of abundant caution and removal of doubts. It may not have been so far the reason of legislations that were made before expiry of D. I. Act, 1939.

18. Before the expiry of the Defence of India Act, 1939 the British Parliament enacted India (Central Government Legislature) Act, 1946 Sec. 3 or this Act, conferred on the Dominion Legislatures power to make laws providing for the continuance of requisitions made under the Defence of India Act, 1939. But by section 4 the power was limited to one year, in the 1st instance, capable of being extended to two years by notification by the Governor-General, and of being extended to a maximum period of five years by annual resolutions of the Dominion Legislature.

19. Under the powers conferred by that Section the Requisitioned Land (Continuance of Powers) Ordinance, 1946 was at first promulgated (before the expiry of the Defence of India Act) and then the Ordinance was later on repealed and replaced by the Act XVII of 1947 (The Requisitioned Land (Continuance of Powers Act, 1947).

20. By Sec. 3 of this Act it was provided that notwithstanding the 21. By Sec. 3 of this Act it was provided that notwithstanding the expiration of the Defence of India Act. 1939 and the Rules made thereunder and the repeal of the ordinance, all requisitioned lands shall continue to be subject to requisition until the expiry of the Act, sec. 6 provided that compensation for the requisition shall be determined and paid in accordance with the provisions of Sec. 19 of the Defence of India Act, 1939 and of the Rules made thereunder.

21. After Indian Independence Act and under Constitution of India which came into force on 26th January, 1950 belli the Central Legislature i.e. the Indian Parliament and the State Legislature acquired legislative competence to legislate with regard to requisition and acquisition of land. Parliament" has repealed the Act XVII of 1947 and replaced it by the Requisitioning and Acquisition of Immovable Property Act, 1952 (Act 30 of 1952). It was declared by sub-sec. (2) of Section 24 of this Act that any property which immediately before such repeal (repeal of Act XVII of 1947) was subject to requisition under the provisions of the said Act shall on the

commencement of ''this'' Act be deemed to be properly requisitioned under Sec. 3 of ''this'' Act and all the provisions of ''this'' Act shall apply accordingly.

22. The life of this Act was originally six years from the date of its commencement (14 March, 1952). It was later extended to 12 years by Act I of 1958.

23. At the date when the Arbitrator against whose judgment and Award this appeal has been preferred, was appointed, therefore, law applicable was Act, 30 of 1952. The order of appointment which is order No. 11042-REQN. dated 1st June, 1959 however does not make any reference to Act 30 of 1952. The text of that order is set out below :

Government of West Bengal Land and Land Revenue Department, Requisition Branch.

ORDER

No. 11042-Reqn.

Calcutta, the dt. 1st June, 1959.

Whereas the properties specified in the Schedule below were requisitioned by an officer of the provincial Government on behalf of the Central Government under rule 75A of the Defence of India Rules:

And whereas the said properties were released from requisition u/s 19B of the Defence of India Act 1939 (XXXV of 1939)'' before the commencement of the Requisitioned Land (Continuance of Power) Ordinance 1946 Act, 1939 (XXXV of 1039) has been repealed by the Repealing and Amending Act, 1947 (II of 1948).

And whereas no agreement can be reached in respect of the amount of compensation payable on account of such requisitioning of the said properties.

Now therefore, in exercise of the power conferred by clause (b) of sub-section -(I) of Section 19'' of the Defence of India Act 1939 ''(XXXV of 1939) with sub-section (4) of Section 1 of the said Act and Section 6 of the General Clauses Act 1897 (X of 1897) and with the Government of India Defence ''Department, Notification No. 1365-OR42 dated the ''19th September, 1942 the Governor is pleased to appoint Shri A. K. Das District and Sessions Judge Burdwan as ''an arbitrator for -the determination of'' :compensation payable in respect of :such "requisitioning of the said properties.

The scheduled land and building etc. of mouza Brindabanpur-J.L. No. 75 P S. Kanksha District'' Burdwan requisitioned by order No. 64 dated the 8th June,;1943 under 75A of D.I. Rules. By order of the Governor N. Chakrabarti,

Asstt; Secy to the Government of West Bengal/

24. At this stage we will deal with the argument of Mr. Nirmal Chandra Das Gupta on behalf of the appellant. Union of India, though advanced at the close of his arguments, really attacked the very basis of jurisdiction of the Arbitrator appointed by the order which we have just quoted. Mr. Das Gupta contended that, the arbitrator had not been legally appointed and he had no jurisdiction to make the award raising the amount of compensation payable to the Respondent on Several grounds. He recounted that fact that after the joint petition for referring the matter to arbitration was made on 27th of March, l957, on that very day. There was an -appointment of Arbitrator in Misc. Case No. 23 of 1957. Thereafter two other Arbitrators were, appointed successively on 24th of June, 1958 and 2nd of February, 1959 last of all there was the appointment of Arbitrator Sri A.K. Das the then: District Judge of Burdwan on 1st of June, 1959. All these appointments were: purported to have been made in exercise of. the power conferred by I disuse (b). of sub-section (1) of Section. 19 OF the Defence of India Act, 1939 (XXXV of 1939). read with subsection (4) of Section l of the said Act Section 6 of the General, Clauses. Act, 1897)...(X. of, 1897)and with the Government of India, Defence Department (Notification No. l365-CR-42 dated 19th of September 1942. Mr. Das Gupta''s first contention was that the. appointment made in 1959 was not made under Act 39 of 1952 as it should have been done and therefore the whole proceeding before the arbitrator culminating into the judgment and award appealed against was without jurisdiction and void abinitio. While advancing this argument Mr. Das Gupta also referred to Section 24 of Act 39 of 1952 which is in this terms :
24 Repeals and savings -- (1) the Requisitioned Land (Continuance of Powers) Act, 1947 the Delhi Premises (Requisition and Eviction) Act 1947 (XLIX of 1947) and the Requisitioning and Acquisition of Immovable Property Ordinance 1952 (III of 1952) are hereby repealed.

(2) For the removal of doubts, it is hereby declared that any property which immediately before such repeal was subject to requisition under the provisions of either of the said Act''s or the said Ordinance shall, on the commencement of this Act, be deemed to be properly requisitioned u/s 3 of this Act, and all the provisions of this Act shall apply accordingly : Provided that--

(a) All agreements and awards for the payment of compensation in respect of any such property for any period of requisition before the commencement of this Act in force immediately before such commencement shall continue to be in force and shall apply to the payment for any period of requisition after such commencement;

(b) any thing done or any action taken (including any orders, notifications or rules made or issued)'' in exercise of the powers conferred by or under either of the said Acts or the said ordinance shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken in the exercise of the powers conferred by or under either of the said Acts or the said ordinance shall be so far thing was done or action was taken.

25. Act 30 of 1952 contains also the provisions in Section 8 which is similar to the provisions in Section 19 (1) of Defence of India Act, I9&1 and there is no inconsistency between those provisions. In view of the history of legislation we have recounted and in view of the provisions of Section 6 of the General Clauses Act and also Section 24 of Act 30 of 1952 the order appointing the Arbitrator though purported to have been made in exercise of the power of the repealed enactments i.e. Defence of India Act, 1939, it must be deemed to be an order of appointment made in exercise of the power of the enactments which replaced that repealed enactment i.e. Act 30 of 1952 which was an Act to provide for requisition and acquisition of immovable properties for the purpose of the Union of India.

26. The second contention of Mr. Dasgupta in this branch of his argument was that the Arbitrator had acted beyond his jurisdiction by following the procedure of a suit under Civil Procedure. Code so much so that he had employed against the appellant''s rules of pleadings and non-traverse contained in order 8 rule 5 of the CPC and had also held a local inspection of the land under requisit on and based his decision on material points on what he had observed in that local inspection though Act 30 of 1952 does not give him power to do so as is given by Order 18 Rule 18 of Civil Procedure Code. Mr. Das Gupta also contended that for the same reason the Arbitrator has not any power to issue any commission for local inspection under Or. 26 of the said Code. Mr. Das Gupta could not, however, point out that any particular procedure laid down either in Section 19 of the Defence of India Act, 1939 or in either Section 8 of Act 30 of 1952 which an arbitrator appointed under those Acts would follow. It remains an outstanding feature that in Section 19 of the Defence of India Act, 1939 and Section 8 of Act 30 of 1952 that the Central Government shall appoint an arbitrator a person who is or has been or is qualified for appointment as a Judge of a High Court and the arbitrator shall after hearing the dispute make an award determining the amount of compensation which appears to him to be just. Against the award of the Arbitrator an appeal to the High Court is provided in Section 11 of Act 30 of 1952 as was provided in clause (f) of sub-section (1) of Section 19 of Defence of India Act 1939.

27. In the present case the appointment of the Arbitrator was made of a person who was then a District Judge. When an authority is created to determine the dispute of civil nature then the appointment is made of a person who is the presiding officer of a Civil Court. Where in all proceedings the procedure laid down in CPC must be followed and the particular statute which creates that authority does not lay down any special procedure, it is not only just and proper but insistently necessary for legal, proper and just disposal of the dispute in the proceeding arising upon such reference and appointments that the well-known and well-tested provisions of the CPC is not merely a safe and dependable guide for achieving just decision but also are basic rules of procedure which under Sec. 9 of the CPC must be followed. During the proceeding before the Arbitrator in the present case no objection was taken at any stage, nu particular prejudice has been complained or resulting from the legal

procedure being followed and no such ground appears to have been taken in the memorandum of this appeal. It appears to us that Mr. Das Gupta for the appellant Union of India raised this point at the close of his address only as an argument of despair. His purpose appeared to us to be to achieve an order of remand to an arbitrator freshly appointed as would give the appellants an opportunity of conducting the proceeding before the Arbitrator better than that was done in the proceeding from which the appeal has arisen.

28. We do not find any substance in this contention of Mr. Das Gupta and therefore reject it. We also note that the learned advocate for the appellant made it clear that he was fully conscious that none of these points were raised before the Arbitrator though each of them would be a point of jurisdiction that should properly have been taken at the earliest opportunity. This point raised by Mr. Das Gupta therefore fails.

29. On the merits Mr. Das Gupta''s first contended that the claimants having accepted payments of the full amount which was assessed as fair compensation by the Special Land Acquisition Collector, they are precluded from making any claim in excess of that amount. Facts relevant to that point as would appear from the record are that even before any final assessment was made or a fair compensation was determined, at a stage when calculation of damages to crops and jungles only had been completed by an order made on 3rd of March 1948 Rs. 7,049.15 annas was directed to be paid to Sm. Hiranmoyee Devi, Sri Nihar Kanta Sen and Sri Nirmal Kanta Sen heirs of deceased Nirode Kanta Sen being 80% of the sum offered to late Nirode Kanta Sen and that amount was received by Nirmal Kanta Sen by a Government Draft by signing a receipt on 4th March, 1948. Nothing happened for more than five years thereafter, until on 11th of August, 1953 the Land Acquisition Officer recorded an order saying ''It is found that nothing has been noted in the order sheet during the last five and a half years.....this is a serious matter and such thing must not happen in the future.....Shri Lakshi will please now take up this case and prepare the assessment register as'' early as possible. He will also take up the preparation of assessment of compensation (recurring) up to 1357 B. S." In the order dated 31.3.1954 only we find that Rs. 11,878.8 annas was assessed in favour of Nihar Kanta Sen, Nirmal Kanta Sen and Sm. Hiranmoyee Sen sons and wife of late Nirode Kanta Sen. It is noted in that order that Nirmal Kanta Sen has already received payment as an advance of Rs. 7,029.15 annas by a Government draft No. 9/69./962348 dated 4th March, 1948. That assessment was submitted to the collector for favour of approval on that date and it appears to have been approved on 1st of April 1954 and on 2nd of April 1954 an order was recorded in these terms "2.4.1954. Received collector''s approval D. O. to send the suit notice on the interested persons to receive payment at Sadar". On 25th April 1954 a petition was made on behalf of Sm. Hiranmoyee Devi Sri Nihar Kanta Sen and Sri Nirmal Kanta Sen along with some other persons, in which they say "we accept from the Government to our satisfaction and without any objection the compensation for food crops for the years 1349 B.S. to 1359 B.S. and for khas jungles for the year 1349

to 1354 B.S. in respect of Mouja Brinda-banpur acquired by Government for military purpose in D I. Case No. 64. Ext. A is that petition. That order dated 31st March, 1954 which records the assessment in favour of Nihar Kanta Sen itself mentions that the calculation was "on account of compensation for crops only from 1355 B.S. to 1359 B.S. Payments received towards that assessment cannot be viewed to be acknowledgment of the correctness of the fair compensation for all items of properties under requisition of which occupation was taken. Those items not only included paddy land and forest, but also included'' homestead, furniture and other movable properties that were there, valuable timber like Sal Murga etc. and underground deposits of Muram Ochre and valuable coloured Clay fit for manufacture of mercilised tiles bricks and cottages, Moreover, when the. second payment was taken on 25th;of April 1954 it was noted on the voucher that the payment was being taken without prejudice to the claim which had been preferred long before any of the payments was received. It is pertinent to note that on 21st of April 1954 the claimants who are the heirs of late Nirode Kanta Sen wrote a letter to the Land Acquisition Officer Burdwan which is Ext. D (1) in the case. By that letter claimants complained that they have never been appraised of the basis under which the allotments of compensation have been made on different heads and also asked for a detailed statement showing therein the amount of compensation made against reach different head. It was also mentioned in that letter that the payments received were without prejudice to the claim.

30. Such being the circumstances the contention of Mr. Das Gupta that the claimants are stopped from pressing the claim which they had made by petition dated 21st April 1943 and 6th of December 1943 must be overruled. There was no admission even, far less any representation. that could constitute estoppel under Sec. 115 of Evidence Act.

31. We hold that the assessment of Rs. 11,878.8 as. was neither calculated or assessed as compensation for all the properties requisitioned and taken possession, nor was that amount offered by the collector as final assessment of fair compensation payable to the owner of the properties, no basis of calculation was made known to the claimants at that stage. It was expressly only interim offer as damages caused to crops and jungles and not as compensation for the land requisitioned and damages to the Bungalow furnitures, ether movable properties and also to timber trees and forest yielding fuel wood. By receiving payment of that amount the claimants have not disentitled themselves to claim fair compensation assessment of which has been referred to arbitration.

32. On the question what should be fair compensation Mr. Das Gupta also strenuously argued that the amount assessed by the Land Acquisition Officer should be held to be a fair compensation and it should not have been altered or enhanced at all. That contention is wholly untenable and must fail because we have mentioned above that amount was only on account of compensation for crops for jungle land

for 1349 B.S. to 1354 B.S. and on account of compensation of Compensation only from 1355 B.Sn. to 1359 B.S, Neither the collector made the assessment of that! amount as fair compensation not Was any basis of calculation disclosed to the claimant who wanted to be informed about to, as appears in the letter Ext. D (1). Nor was any basis has been even attempted to be revealed by any evidence before the Arbitrator. What is more, before us Mr. Das Gupta was unable to mention far less to point out any material or evidence to show that the said amount was offered by the collector as fair compensation or any evidence to indicate what the basis of calculation was. He has repeatedly complained before us that he felt himself handicapped for lack of materials in evidence because the case for the Union of India was not properly conducted before the arbitrator and sufficient evidence was not produced. Mr. Das Gupta was justified in that complaint and we may add that the learned Advocate for the appellant was also demonstrably handicapped because during long hearing before us he had not the aid of proper instructions by any competent officer of the State Department concerned. The questions of fact on which assessment of fair compensation depended on technical matters like fixing of value of timber or forest products, underground minerals and deposit of Moram, Ochre and Coloured Clay etc. For fixing recurring compensation for the land under requisition, which has remained requisitioned for more than 25 years already without being converted to acquired property for which terminal compensation would have been relevant, detailed particulars within the competence and knowledge of the State were necessary evidence. But none was produced.

33. So the contention that the amount of Rs. 11,878.8 annas should be held to be the fair compensation has remained an unsubstantiated ascertainment without any basis at all. Only two witnesses were examined on behalf of Union of India before the Arbitiator. First of these O.P.W. 1 was an assistant in the collectorate and formerly was in the Acquisition Dept. under the Land Acquisition Collector of Burdwan from 1944-1955. He was the assistant who prepared the statement under orders of the Special Officer, Land Acquisition Dept. He has said in his deposition that he made the assessment of the profits and productions on the basis of Government approved rates and also prepared jungle rate of compensation on the basis of the report of the Special Land Acquisition Collector, A. K. Roy approved by the collector. He has proved the assessment statement and the voucher of payment which were marked Exts. N and 0. Ext. N shows that it is. a compensation of crop compensation only for the years 1349 B.S. to 1359 B.S. The consolidated voucher also shows that it was for crop compensation and compensation for jungle land for 1349 to 1354 B.S. and only crop compensation for the years 1355 B.S. to 1359 B.S.

On cross-examination this witness frankly revealed that the assessment was made by him on the order of Land Acquisition Officer and he had neither authority nor any initiative in the matter. He did not even go to the locality and he has no idea about the producer from land and tanks in Burdwan District. He has based his calculation on a report regarding jungle made by in other officer named S. Banerjee and could

not say upon what basis that report was made. That officer S. Banerjee has not been examined as a witness. Though his report dated 23.10.44 Ext. J was filed in the record its contents were not deproved by any witness. The only other witness was O. P. W. No. 2 Tulshi Charan Mullick.

He had held a joint survey in the case reports of which are Exts. F and G dated 2.3.60 and 29.2.60 respectively. In his deposition he also does not prove anything as the basis of calculation for assessment of fair compensation. He only provides the evidence that according to him fuel woods are usually cut in the intervals of five to ten years and there is no possibility of cutting fuel woods at the interval of three years. He says that the rate per acre is usually Rs. 3/ to Rs. 4/ According to this witness average price of big sal Morga was between Rs. 10 to Rs. 251- in 1947 and Rs. 8 to Rs. 20!- at about this time of the requisition. In cross-examination of this witness it was elucided that his source of knowledge is only his ancestral jungle in Bankura District and he himself had sold jungle only two or three times. He admitted that he has no idea about the jungle in Burdwan District. But he truthfully said that during the joint survey he has noticed lot of big trees. Such evidence does not give any countenance to the contentions of the appellant that the amount of Rs. 11878.8 annas should be accepted as a fair compensation. The learned arbitrator has rightly rejected it and properly proceeded to examine what should be the fair compensation on the several headings claimed by the respondent.

Before we proceed to examine the contending claims on each of those headings and the decision of the Arbitrator in respect of those we will deal with the argument of Mr. Das Gupta for the appellant and also those of Mr. Mitter for the respondent regarding the correct basis on which different items of properties should be valued either for terminal compensation on the basis of damages or for recurring annual compensation. Mr. Das Gupta contended that this being a case of requisition only, recurring compensation for loss of income per year should be calculated for all items of properties. According to him that compensation should be on the basis of letting value of the entire area treating the occupying authority as a statutory tenant so to say.

34. For this proposition Mr. Das Gupta relied on a decision of this Court in case of (1) Province of West Bengal Vs. Raja of Jhargram, . It appears that that was also a case of requisition under Rules 75A of the Defence of India Rules for the Jhargram air-field and the property consisted of portions of two khas jungle known as Bandhi jungle and chua jungle belonging to Raja of Jhargram. The District Magistrate of Midnapore offered as fair compensation Rs. 38,000/- and odd. The claim was made for Rs. 4,55,483-14 annas. The arbitrator, in that case had allowed Rs. 3,26,325.14 annas as compensation following practically the claim as put forward on behalf of the claimant, though the said claim was not the entire claim as made by him. Their Lordships held at the outset that both the parties and also the arbitrator had not proceeded on proper line in assessing the compensation. Then their Lordships

observed in the judgment: "when a property is compulsorily acquired the compensation payable is the market value of the property acquired together with such claims as may be admissible for costs of removal, severances etc. After a property is requisitioned for a certain period the requisitioning authority is bound to pay such compensation as may be deemed reasonable for the period of requisition. If at the time of derequisition it is found that there had been damages inflicted during the period of requisition and the property returned is not in the same condition as it was when requisitioned Government is liable for what is technically known as terminal damages". Their Lordships then pointed out the difference in law in respect of payment of compensation when land is acquired under the Land Acquisition Act, 1894 and when the land is acquired or requisitioned u/s 19 of the Defence of India Act and observed. "Under the Land Acquisition Act the Land Acquisition Collector makes the award which is of a binding character unless the claimant or party interested makes a reference. Whereas in the case of an acquisition u/s 19 of the Defence of India Act there are negotiations between the collector and the claimant and what the collector does is to make an offer which is not binding unless the claimant accepts the same and finality is reached."

35. Their Lordships (R. P. Mooker-jee and Renupada Mukherjee JJ.) also referred to a judgment of another division bench of this court (R. C. Mitter and Akram JJ.) reported in (2) 50 C.W.N. 825, AIR 1946 Cal 416 where R. C. Mitter J. explained the basis for compensation for a limited period when property is under requisition to the effect that the compensation is to be determined for the period the property is in occupation of the military authorities and the compensation for the damage done is to be assessed, separately. It was emphasised that it is an error to overlook the intrinsic difference between proceedings under the Land Acquisition Act and those under the Defence of India Act and it is in error also to take the amount offered by the collector or the amount which had at one stage been mentioned by the Government Pleader as in his opinion a fair amount of compensation was to be binding unless the contrary view is made out by evidence.

36. Regarding application of principle of reinstatement Their Lordships (R. P. Mukherjee and Renupada Mukherjee JJ.) elaborately discussed authorities and decisions on English law on the subject to extract the guiding-principle in these words :

The tests which should be applied for introducing the principle of reinstatement are that the income derived from the premises acquired would not in the special circumstances of the case constitute a fair basis in assessing the value to the owner. This is because of the special character of the use to which the premises had been put to at the time of the acquisition. It is the nature of the business which is to be disclosed that requires the first consideration. Secondly there must be a bonafide intention to be reinstated and thirdly the costs of reinstatement are not unreasonably abnormal or have no relation to the market value'' of the property

under acquisition.

37. There is no occasion for applying the principle of reinstatement in a case on a problematical calculation of estimated loss for a quarter or a fifth of a century and in attempting to provide for reinstatement where such reinstatement is either not feasible or there may be reasonable doubt whether it is practical or not to provide for reinstatement".

38. Then by examining the evidence in that case their Lordships held which reference has already been made we must hold that on the facts of this present case the principle of reinstatement cannot be attracted" Their Lordships also held :

(1) The claimant is entitled to the fair income which would have accrued to him during the period when the property was under acquisition.

(2) He was also entitled to the damages which had been inflicted during the period of requisition and held against the suggestion that the value of the trees which had been removed or uprooted would be the fair compensation because such a valuation would not be fair in the circumstances of that case or because of the special nature of the property in question". It is also noticeable that their Lordships set aside the judgment and decree passed by the Arbitrator and declared that the claimant is entitled to :

(1) Compensation for the fuel trees removed--Rs. 19,291/-

(2) Compensation for the removal of other sal trees etc. Rs. 11,684/-

(3) Compensation for the loss of income for 20 years including the year during which the property was under requisition at the rate fixed by the arbitrator compensating thereby damages for the trees cut or uprooted.

Rs. 1,47,600

TOTAL Rs. 1,78,575/-

This judgment of the Division Bench of this Court does not therefore support the proposition of Mr. Das Gupta that the basis of compensation should only be the letting value per year, the requisitioning authority being treated as a statutory tenant so to say.

39. We may also refer to the judgment of the other Division Bench (Mitter and Akram, JJ.) in the case of Province of Bengal v. The Board of Trustees for the Improvement of Calcutta, reported in 50 C.W.N. 825 : AIR 1946 Cal 416 for our guidance. That was also a case of requisition under the Defence of India Act and Rules of a large area of land that was described as "The Lake Area one of the beauty spots in the town of Calcutta." Their Lordships pointed out that though Rule 2 (ii) of the Defence of India Rules defines the term "requisition" and rule 75A deal with requisition of movable and immovable property, Section 19 of the Defence of India

Act does not in terms speak of requisition. It was held that it contemplates the case of temporary acquisition and compensation has to be awarded to the Owner of the land requisitioned on the basis of Section 23(1) of the Land Acquisition Act of 1894, with such adaptations as the nature of the case may require. The material part of the dicta laid down in that judgment are in these words.

As sub-section (2) of Section 23 of the Land Acquisition Act has not been made applicable the owner would not be entitled to the statutory compensation of fifteen per cent. Leaving aside clauses secondly to sixthly of Sec. 23 (1) which are not material to the case before us, the position is that where land has been acquired out and out under the Defence of India Rules the owner must have the "market-value" thereof, which means the fair price which a willing seller not obliged to sell would have got for a willing purchaser at the date of the notification for acquisition; and that where only as interest in land has been acquired under these rules, as for instance, only possession, the owner must have the ''market value'' of that interest, if by its nature it has a value there is no escape, as there is the statutory liability under Sec. 19(1) (e) of the Defence of India Act to pay compensation on the basis of the "market value" of the interest acquired. The ground given by the Province of Bengal as stated in the Collector''s reference in support of its contention for symbolic compensation is in judgment unsubstantial, for if pushed logically, it would mean that no compensation would have to be paid to the owner in the case of an out and out acquisition where the land was at the time of the acquisition lying vacant. The true test seems to us to be not what the owner was doing with it at that time but what he could have done at that time, if he so wished or in other words what right he had then.
On the particular facts of that case his Lordship then observed that when the ownership of the land requisitioned is restricted to the extent that it cannot in law be put to any use other than specified use and has no right to sell, lease or let or hire the same or any portion thereof, a question arises whether the owner is entitled to get compensation for losing its possession by reasonable acquisition. On that question it has been observed in the judgment:

The question is not free from difficulty. So far as we are aware there is no precedent in the Indian High Court and the cases decided in England which have a bearing on the question, do not speak with one voice.

Then only a passage in that judgment which says :

We have already held that the effect of a requisition under the Defence of India Rules is to deprive the owner of his possession. He must therefore get the value of his possession. Looking from another aspect, the requisitioning authority gets the possession from the owner and becomes, so to say, a statutory tenant. The basis of compensation must therefore be fair rent and we hold accordingly". In view, contemplation of a ''statutory tenant'' as the basis of compensation occurring in that

judgment is not a law laid down for general application in all cases of requisition, but was introduced for application only in the case of restrictive owner to repel the argument in support of the contention for symbolic! compensation which was held to be unsubstantial for the reasons that appear in that very judgment in the passage we have already quoted. The guidance appearing in the judgment in the case of (1) Raja of Jhargram (60 C.W.N, 185 : S.C. 1955 Cal. 392) remains up to now a precedent of great value.

40. When that correct test is applied to the facts of the present case, it clearly appears that the learned arbitrator has not calculated compensation on correct basis applicable to each particular class of property, and has failed to distinguish between movable properties which have been destroyed and irretrievably lost to the owners for which damages en basis of terminal compensations should be awarded and properties for which recurring compensation for loss of income per year should be awarded. The learned Arbitrator has also awarded those, though he has rightly rejected the plea that Rs. 11,878.8 as. should be awarded as total compensation.

41. Question before us therefore, is how the compensation in this case should be calculated on the several heads claimed by the claimants. As we have already mentioned, it is not disputed and it has also been firmly established by evidence in this case, that the total area of requisitioned land is 199.04 acres. Within that area there are-

Culturable land	16.55 acres
Tank	3.36 acres
Road	88 acre
Jungle land	176.91 acres"

and also a homestead covering an area 74 acre. That homestead consisted of a bungalow of three rooms built on pucca plinth and pucca walls, the roof being of straw. There were furniture in that homestead and it was surrounded by a pucca boundary wall and had the amenities of two walls and a garage and also kitchen, storeroom etc. It has also been established by evidence that on that land had been stored materials for construction of a factory which materials were like iron joists, beams etc. Moreover it is the admitted case of both parties and also clearly established by evidence that there were underground deposits below the surface of the land under requisition. Those deposits may be classified under two heads.

(1) Morrums and grabbles about which there is evidence that more than 67,000 cft. of Morrums had been dug out and was kept on the land when possession was taken by the requisitioning authorities. That digging had resulted in a tank area of which is 3.36 acres. The morrums so kept on the surface was appropriated and utilised by the military authorities who came into possession.

(2) Valuable underground deposits, of Ochre and coloured clay which according to the evidence produced in the case was of very good quality for manufacturing tiles and potteries. The intended factory was for the purpose of exploiting these underground deposits by setting up efficient machinery for manufacture of tiles and potteries out of the clay lying as underground deposits. It could not, however materialise because possession was taken by requisitioning authorities before the factory was constructed. Those materials collected for building the intended factory were the other matter lying on the land within the homestead area. It is also in evidence that sal trees of considerable girth were felled and the forest was also cut down in its entirety for the purpose of constructing the airfield and laying out hanger and runways for use by aircrafts. Under these heads the claimants have claimed full value of properties that have been completely appropriated and also as damages for the demolition of the homestead and cutting down of the timber and also of forest for pressing that claim the claimants, who are Respondents in the appeal have preferred a cross-objection which has been valued at Rs. 32,00,000/-.

42. Before we proceed to consider the evidence produced and arguments advanced on behalf of the respondents in support of the cross-objection by applying different considerations for the different categories of properties, we need to dispose of a preliminary objection that was raised by Mr. Das Gupta for the appellant about the maintainability of the cross-objection as a whole. That contention was that though Section 19(1) (f) of Defence of India Act, 1939 provides an appeal to High Court from the decision of the Arbitrator, there is no provision for any cross-objection in that Act. Mr. Das Gupta has argued that right to prefer a cross-objection as laid down in order 41 rule 22 C. P. Code will not apply and therefore the claimants have no right to prefer a cross-objection which can only be by a right created by statute. In support of that argument of his Mr. Das Gupta relied on the Supreme Court decision reported in (3) Hanskumar Kishanchand Vs. The Union of India (UOI), and also on the decision of that Court reported in (4) Soorajmull Nagarmull Vs. Commissioner of Income Tax, Calcutta, . None of the cases cited by Mr. Das Gupta has any direct bearing on the question raised by him as preliminary objection to the cross-objection and neither of them lend any support to the proposition.

43. In the case reported in (3) AIR 1958 S.C. page 947 question raised was regarding maintainability of further appeal to the Supreme Court on the decision of the High Court in an appeal under sub-section 2 of Section 19 of Defence of India Act, 1939 on that question. In that case Supreme Court held that an appeal to Supreme Court would not lie for the reasons discussed in that judgment. We need not go into the

details of the reasons for the view appearing in that judgment^ because it has been pointed out by Mr. Mitter for the respondents that in a later decision reported in (5) Deputy Commissioner and Collector, Kamrup and Others Vs. Durga Nath Sarma, that earlier decision and the reasons that prevailed for the view taken in that earlier decision have been dissented from. In that latter decision reported in Collector of Varanasi Vs. Gauri Shankar Misra and Others, it has been stated.

We may now turn our attention to the decision of this court in (3) Hanskumar Kishanchand Vs. The Union of India (UOI), on which as mentioned earlier, Shri Goyal placed a great deal of reliance in support of his preliminary objection. The principal question that arose for decision in that case was whether the decision rendered by the High Court u/s 19(1) (f) was a judgment decree or final order within the meaning of these words found in Section 109 of the Code of Civil Procedure. The court accepted the contention of the Solicitor General appearing for the respondent, the Union of India, that it was not a judgment, decree or final order and that being so no certificate under Sees. 109 and 110 of the CPC to appeal to the Federal Court could have been given by the High Court. In that case this court was not called upon to consider the scope of Article 136. Therefore, it did not go into the question whether the decision appealed against could be considered as determination falling within the scope of Article 136. The observation in this Court''s judgment that the provision for appeal to the High Court u/s 19(1) (f) can only be construed as reference to it as an authority designated and not as a court, does not receive any support from those decisions. Nor do we find any sound basis for that conclusion. With respect to the learned Judge who decided that case, we are unable to agree with that conclusion. In our judgment while acting u/s 19(1) (f) the High Court functions as a ''court'' and not as a designated person.
44. The decision of the Supreme Court in that earlier decision (3) (1953 S.C. 947) therefore has lost its force as law stated by Supreme Court yet the latter decision of Supreme Court (5) (1968 S.C. 384) appears to have escaped the notice of the learned Counsel for the Appellant Union of India and was not cited by him before us.

45. The question whether a cross-objection can be preferred by the respondent when an appeal has been preferred in High Court was not even a question raised or decided either directly or by implication even remotely in the case relied on by Mr. Das Gupta. He need only point out that in the other case relied on by Mr. Das Gupta reported in Soorajmull Nagarmull Vs. Commissioner of Income Tax, Calcutta, also that question did not arise. The question in that case was whether an appeal lies against an award of the Arbitrator when the claim was rejected by the arbitrator and no compensation was awarded at all. The decision turned on interpretation of clause (f) of subsection 1 of Section 19 of the Defence of India Act 1939 read with rule 19 of the Defence of India Rules particularly the second proviso in that rule. Their Lordships upheld the decision of this court holding that in those circumstances appeal would not lie. Their Lordships repelled the argument that the restriction

limiting the right of appeal must be strictly construed as a restriction only in those cases where some amount is awarded but the amount so awarded is less than Rs. 5000. Their Lordships held "The rule does not contemplate that that bar to the maintainability of the appeal will be effective only if some amount is awardded but the compensation so awarded is less than Rs. 5000/-. If the arbitrator rejects the claim and refuses to award anything, the case would in our judgment, fall within the second proviso to Rule 19 as being one where the amount of compensation does not exceed Rs. 5000. In arriving at that decision their Lordships observed in the judgment also An appeal is a creature of statute, the arbitrator not being a court subordinate to High Court an appeal would lie only if it is expressly so provided. The legislature has provided that where the amount of compensation awarded does not exceed Rs. 5000/- no appeal shall lie against the award. The second proviso to Rule 19 enacts a rule of which a parallel is difficult to find the right to appeal does not depend upon the claim made by the claimant either before the acquisition authority or the arbitrator or before the High Court, it depends solely upon the amount of compensation awarded by the arbitrator however, unusual the rule may appear to be it would not be open to the court to extend the right to appeal and it enables a claimant whose claim has been rejected completely to appeal to the High Court. The right to appeal is exercisable only if the amount of award exceeded Rs. 500.
In the view of the case the High Court was right in not entertaining the appeal, the appeal fails and dismissed".

46. That decision also therefore does not lend support to Mr. Das Gupta''s proposition that when an appeal has been preferred and is maintainable the Respondent in the appeal will not have a right to prefer a cross-objection for raising the amount of award as compensation by the Arbitrator to higher amount.

47. Mr. Das Gupta''s contention against the maintainability of the cross-objection is in the whole based on the provision in Section 19 of Defence of India Act, 1939, in clause (f) of which a right of appeal to High Court against an award by the arbitrator has been created but there is no express words giving a right to prefer cress-objection in such an appeal by the respondents to the appeal. He contends that not only an appeal is a creature of the statute, but also a cross-objection should be held to be so. We are unable to accept that argument. It is settled law that when a statute directs an appeal shall lie to a court already established then that appeal must be regulated by the practice and procedure of that court. That rule was stated by Viscount L.C. in National Telephone ''when a question is stated to be referred to an established court without more, it is my opinion, imports that the ordinary incident of the procedure of that court ought to attach and also that any general right of appeal from its decision likewise arises". That statement of the law was accepted as correct by the Supreme Court in (6) National Sewing and Thread Company v. James Chad-wick and ors. Limited AIR 1953 S.C. 357. In that judgment Mahajan J. speaking for the court also quoted the passage occurring in the

judgment of Privy Council in the case of (7) Adai-kappa Chietia v. Chandrasekhar Thepa AIR 1948 Privy Council 12 which are in these words "where a legal right is in dispute and the ordinary courts of the country are seized of such dispute the courts are governed by ordinary rules and procedure applicable thereto and an appeal lies if authorised by such rules notwithstanding the legal right claim arises under special statute it does not, in terms confer the right of appeal". His Lordship quoted another passage from the judgment of the Privy Council in the case of (8) Secretary of State for India v. Ceriman Rama Rae AIR 1946 Privy Council 21 which are in these words "it was contended on behalf of the appellant that all further proceedings in courts in India or, by way of appeal were incompetent these being excluded by premises of the statute which is quoted. In their Lordship''s opinion this objection is not well founded for the view is that when proceeding of this character reached the District Court that court of appeal too as one of the ordinary courts of the country with regard to whose procedure orders and decrees the ordinary rules of the CPC apply." Mahajan J. proceeded to observe "that facts of the case laid down above really were not exactly similar to the facts of the present case, a principle enunciated therein as one of general application and as an opposite application to the facts and circumstances of the present case. Section 76 of Trade Marks Act confers a right of appeal to High Court but says nothing more about it. That being so the High Court being seized as such of the appellate jurisdiction conferred by Section 76 it has to exercise its jurisdiction in the same manner and it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a single Judge his judgment becomes subject to appeal u/s 15 of Letters Patent, there being nothing to the contrary in the Trade Marks Act. "The learned Judge then elaborately discussed a contrary view expressed by this court in the case of (9) India Electric Works Ltd. Vs. Registrar of Trade Marks, and held that contrary view to be erroneous and then observed "Rights created by the Trade Marks Act are civil cases for the protection of the persons carrying on trades under marks which have acquired reputation..... for safeguarding the right and have given effect to right agreed by the Act and the High Court as such when note has been given appellate jurisdiction over the decision of this tribunal. It is not easy to understand on what ground it can be said that the High Court while exercising this appellate jurisdiction has to exercise it in a manner different from its other appellate jurisdiction. It seems to us that this is merely an addition of new subject-matter of appeal to the appellate jurisdiction already exercised by the High Court. The force of the observation in our opinion applies with full force to the question we are now considering.

48. We have "already referred to the decision of the Supreme Court in (5) AIR 1968 S.C. page 384 which has held that in entertaining and hearing the appeals preferred u/s 19 (1) (f) of the Defence of India Act 1939 High Court exercises jurisdiction not as a designated authority but; as High Court. In exercising that jurisdiction in this appeal all the incidence and procedure that attach generally to appeals in this court are applicable, it cannot be overlooked that Section 96 of the CPC that provides the

right of appeal to the court does not speak of a cross-objection by the respondent for expressly creating such right. It is only in the procedural part of the Code in Order 41 Rule 22, that provision has been made enabling a respondent to "take any cross-objection decree which he could have taken by way of appeal. By its characters that right is an ordinary incident of an appeal which is like the respondent''s right to support the decree on any of the grounds decided against him in the court below, which is also mentioned in rule 22 of order 41 of C. P. Code.

49. No special procedure has been prescribed in the Defence of India Act or Rules applicable to the appeals provided in Section 19(1) (f) of Defence of India Act 1939. The question whether a cross-objection will lie when a special statute creates a right of appeal but nothing is stated expressly as to the procedure regulating such appeal was directly raised before a Division Bench of this court (Harris C.J. and Bachawat J.) in the case of (10) Ramasray Singh and others v. Bihison Sinha and others reported in Ramasray Singh and Others Vs. Bibhisan Sinha and Others, . It was an appeal under sub-section 3 of Section 38 of Bengal Money Lender''s Act 1940 from the judgment of the District Judge which held that the cross-objection filed before him was misconceived and refused to entertain the cross-objection. It was held by this court that where nothing is stated expressly as to procedure against an appeal before a District Judge the law will import that the ordinary procedure of that Court of Appeal will apply and that ordinary procedure of an appeal is that respondent has right to file cross-objection and therefore it is clear that the respondent has the right to file the cross-objection.

50. With that view of law we are in full agreement and we respectfully follow it. Though it was said to the right of the respondent in an appeal before the District Judge it fully applies to rights of respondent in appeal in High Court because same law and principles will govern rights of respondent in this court also. So we hold that objection as to maintainability of a cross-objection filed by the respondent is not well founded and we overrule that objection. There is another aspect from which the objection raised against maintainability of cross-objection can be overlooked as Section 19(1) (f) which provides the right of appeal against an award of an arbitrator also provides that the appeal may be preferred within one month from the date of the award made by the Arbitrator that High Court may entertain the appeal after the expiry of the said period if it is satisfied that the appellant is prevented by sufficient cause from filing the appeal in time. In the present case the claimant filed memorandum in the form of a cross-objection valued at Rs. 32 lakhs on 28th April, 1982 by paying full cross-fees thereon i.e. a court fee of Rs. 10,0001. Though presentation of that memorandum was beyond the period of one month from 10th September, 1960 on which date the arbitration made the award the delay in filing that Memorandum was obviously because it was filed as a cross-objection under order 41 rule 21 of the Civil Procedure Code, calculating the period of limitation from the date of service of notice of appeal on the respondents which was on 28th day of March 1962 as has been stated in that Memorandum. If cross-objection

would not lie according to law then the delay was, clearly a mistake of law on the part of the legal adviser of the claimants. Such mistakes of lawyers have consistently been laid to be sufficient cause under Sec. 5 of Limitation Act for condoning the delay in filing appeals. If cross-objection does not lie as is contended by Mr. Das Gupta on the present case, it would be only just and proper to treat the Memorandum of cross-objection as a Memorandum of appeal preferred by the claimants and to condone the delay and entertain it as an appeal against the same award has been appealed against by the appellant Union of India. Mr. Das Gupta on behalf of the appellant has not raised any objection to that and he has made it clear that such delay caused by mistake of law. on the part of the lawyer should be held to be sufficient cause for condoning the delay and he would not raise any objection to the Memorandum being treated as a memorandum of cross-appeal. So the preliminary objection has no practical content. But we have held that in law also the preliminary objection has no merit or force. Now we proceed to consider the cross-objection on merits on behalf of the respondent-cross- objector. Mr. Pramatha Nath Mitter has contended that not only the learned Arbitrator has been in error in the very basis of his approach that in respect of all the items of properties on concession in this case will only be recurring compensation calculated on annual loss of income there were other errors. Broadly these errors have been categorised by Mr. Mitter as (1) in his view every item in schedule A of the claim was furniture (2) several items of movable properties which were lying in the homestead were not taken into account for assessing compensation thereon and (3) in calculating compensation for several items namely 13 to 100 in the claim the amount has been arbitrarily reduced. All these evidence regarding their values adduced by the claimants were not controverted at all and should have been taken as admitted.

51. Mr. Mitter''s first contention was that there should have been terminal compensation awarded for movable properties which were on the requisitioned land when possession was taken and which properties have been completely destroyed or appropriated by the requisitioning authority or contractors on this behalf.

52. This part of argument of Mr. Mitter was sought to be met by Mr. Das Gupta by pointing out that under rule 75 (A) (4) of Defence of India Rules 1939 terminal compensation is payable only for movable properties requisitioned. He pointed out that the requisition order in the present case Ext. 1 was made in exercise of powers conferred by sub-rules 1, 2 and 5 of Rule 75A of the Defence of India Rules 1939 in respect of only land described in the schedule below the order. In the printed form in which the requisition order Ext. 1 was made, the printed portion referring to building together with compound, the roof and fixtures and fittings have been scored out.

53. Mr. Mitter in reply countered Mr. Das Gupta''s points by referring to the order by which reference to arbitration was made which has described the properties

requisitioned in the schedule as ''land and building etc. Relying on that expression in the reference order Mr. Mitter at one stage sought to contend that sub-rule 2 of Rule 75A speaks of acquisition and therefore terminal compensation is payable as provided in sub-rule 4 of Rule 75A because the requisition order was under sub-rule 2 also. This contention of Mr. Mitter cannot be accepted. An examination of rule 75A clearly shows that under sub-rule 1 requisition may be of movable or immovable properties made by requisitioning authority to use or deal with the property requisitioned in such manner as may appear to be expedient. The second portion of sub-rule 2 gives power to acquire the requisitioned property by serving notice. Sub-rule 3 provides that on service of notice provided in the second portion of sub-rule 2 the property shall vest in the Government free from any mortgage, pledge or other similar encumbrance till the period of requisition thereon had ended. Then only sub-rule 4 provides payment of compensation for movable property requisitioned or acquired in pursuance of sub-rule 1 or sub-rule 2. In the present case the requisition order was of immovable properties i.e. the land and not by movable property--Even under the authority of that requisition order possession was taken of movable properties lying on the requisition land and such movable property taken should have been requisitioned also. There has been no notice of acquisition of requisitioned movable property to acquire it, as is necessary under second portion of sub-rule (2). The position thereby obtained is that movable property has not been requisitioned under sub-rule (1) nor any movable property has been converted to acquisition by any notice under sub-rule (2). Therefore sub-rule 4 of rule 75A of Defence of India Rules 1939 cannot in terms be attracted to the present case.

54. Mr. Mitter however advanced another branch of his argument in support of his contention that terminal compensation of full value is payable for the building and several items of movable properties that were lying on the land when possession was taken by the requisitioning authorities. He pointed to the evidence of the case that at the time when possession was taken the Bungalow with its amenities like ring well, boundary wall, kitchen, garage bath-room etc. was being used as a dwelling house. Though the owner thereof Nirode Kanta Sen did not live there permanently because he was in service under the Government and was posted at different places, he used to live there with his family when he came on leave and also respectable businessmen and high officers posted at Burdwan on many occasions had gone there on hunting excursion and lived in that Bungalow. That establishes its character of a dwelling house of good quality. Not only that so valuable materials for constructing the intended factory for manufacture of tiles and pottery by exploiting the underground coloured clay had been collected and kept on the land of that dwelling house. The Bungalow had in it furniture of considerable value. That evidence has not been controverted. On the contrary the existence of those movable properties and furniture were accepted as fact in the several reports brought in evidence. The arbitrator also found so. Soon after taking possession the

requisitioning authorities have completely demolished the Bungalow and have either appropriated or destroyed all these movable properties and also has felled valuable timbers i.e. Sal trees. Evidence is clear felled area was more than 17 acres. During the proceeding before the arbitrator a local inspection was made and learned arbitrator in his memorandum on that local inspection has recorded. "From what I saw of the runways, I do not think the runways are included in the 17 acres because the runways are very wide and covers a wide area. If these runways are not included within 17 acres, a fresh joint survey will be made so as to ascertain the area covered by the runways and in the adjoining areas. It seemed to be that this 17 acres which was found completely denuded of trees did not include the runways.

55. There is no doubt that the entire forest was made desolate by reckless cutting of trees. There is practically no big tree although stumps of big trees are still traceable. There are (torn) growing sal trees".

56. Mr. Mitter has contended that the properties lost to the owner by such wanton destruction must be included for assessing compensation to the extent of their full value. Mr. Mitter has also referred to the successive enactments we have discussed in the earlier part of this Judgment culminating in Act. 30 of 1952 particularly Sec. 8 of that Act. On behalf of the appellant Union of India Mr. Das Gupta also has argued that compensation should be calculated according to the provisions of that Act. Section 8 of Act 30 of 1952 provides for principle and method of determining compensation. Sub-section 2 of Section 8 is in these terms."

The amount of compensation payable for the requisitioning of any property shall consist:

(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 re-occupying 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 been sold on the date of acquisition or;

(b) twice the price which the requisitioned property would have fetched in the open market, it had been sold on the date of requisition, whichever is less.

By referring to clause (b) of that sub-section particularly para, (i) of clause (b) Mr. Mitter has argued that pecuniary loss due to requisition mentioned in that para. (1) includes the damages caused by destruction of properties.

57. We have already referred to a decision of this Court reported in (1) Province of West Bengal Vs. Raja of Jhargram, where law has been discussed elaborately to show that the basis of recurring compensation of requisitioned property instead of awarding terminal compensation as is payable on acquisition is based on the doctrine of replacement. When however, it is shown by evidence that property taken possession of under requisition order has been destroyed outright the contemplation of replacement is wholly inapplicable. The Bungalow that has been destroyed and the furniture therein that have been taken away, every item of movable property on the homestead land that has been appropriated or destroyed, valuable timbers that have been used for their own purpose by the requisitioning authority, are all properties lost for ever and the doctrine of replacement cannot be attracted to them. Mr. Mitter has also added another factor by invoking for consideration that the purpose of requisition and the mode of dealing with the properties having been to set up a permanent airfield with extensive and efficient runways seen by the arbitrator ring local inspection taken'' with the fact that the requisitioned land had been retained already for more than 25 years now, all go to show that it was a case of virtual acquisition and there is no intention of the requisitioning authority either to derequisition the land or to replace the movable properties that have been lost to the owner. Though we hold that the said contention of Mr. Mitter have considerable force, it is not necessary to speculate about the intention of the requisitioning authority because from the evidence in the case and the finding of the learned arbitrator that have not been challenged before us it is clear that these items of movable properties we have mentioned above have been destroyed, so much so that no contemplation of replacing them can be brought into use. We have therefore reached the conclusion that for all those items of admitted movable properties the claimants are entitled to compensation by calculating the market value at the date when requisition was made and possession was taken.

58. First of these items is the homestead consisting of the Bungalow with its kitchen, ring well and compound wall. The learned arbitrator referred to the evidence about cost of construction of the property provided by P.W. 4 Jaladhar Das and P.W. 2 Girija Bhusan Ray.

P. W. 2 Jaladhar was an officer under Nirode Kanta Sen and claimed to have direct knowledge of the cost of construction of the Bungalow. He said the cost to be Rs. 20,000/- to Rs. 22,000.

P. W. 2 Girija Bhusan gave evidence only by estimate by comparision with Rajbundh Dak Bungalow which was built under his supervision at a cost of about Rs. 12,000/ - and is estimated cost of the Bungalow of Nirode Kanta Sen was half thereof i.e. Rs. 6000 together with estimated cost of the ring well at Rs. 1200/- and that of compound wall at Rs. 7001 total cost estimated came to about Rs. 8000.

59. The learned arbitrator also noticed the evidence that the Collector had assessed the value of the building at Rs. 12,786/- but did not agree with collector''s finding. The arbitrator''s finding is that the value cannot exceed Rs. 10,000/-. Though he arrived at that finding, the learned arbitrator did not assess compensation for the building on that value basis but he proceeded on the basis of compensation for loss of use of the Bungalow. Relying on the evidence that after possession was taken by the military authorities Nirode Babu had to live in a rented house paying monthly rent of Rs. 130/- the learned arbitrator held that the claimants were entitled to recurring compensation at the rate of Rs. 100/- per month for the period of requisition.

60. In our view that basis has been an error as we have held that correct basis of compensation for the Bungalow which has been demolished and destroyed is the compensation of the value at the market rate at the date of requisition. In assessing value of the Bungalow at Rs. 10,000/- also the learned arbitrator has been in error by rejecting the evidence of P. W. 4 Jaladhar Das without assigning any reason and fixing the value of the Bungalow on the guess work of P. W. 2 Girija Bhushan, who was also a witness for claimants examined to give evidence on another point. In his deposition he only hazarded a casual opinion that Nirode Babu''s Bungalow would cost only half the cost of Rajbundh Das Bungalow. He is, not an expert and such opinion has no value in evidence at all.

61. Mr. Das Gupta for the appellant has sought to '' deprecate the value of evidence provided by P. W. 4 Jaladhar by arguing that as he was an employee of Nirode Kanta Sen, he is a partisan witness and also interested to exaggerate the cost of construction of Bungalow and that in 1925 when the Bungalow-was built Jaladhar was only a boy of about 15 years he being aged 50 years in 1960 when he deposed. This in our view does not affect the value of Jala-dhar''s evidence. As he was an employee who actually spent the money for construction of the house and maintained accounts thereof, Jaladhar is not only a competent witness but also a witness of considerable value. He cannot be disbelieved only because he was an employee of Nirode Babu. His age in 1925 calculated by reference to his age mentioned in record of deposition cannot be safely relied. It is noticeable that in some of the important documents of title proved in this case line Ext. 7(c) executed in the same year 1925, Jaladhar signed as a witness. That indicates that he was a

major at the time and also provides corroboration of his evidence that in 1925 he was an important and trusted employee under Nirode Babu. For those reasons we consider the evidence of Jaladhar to be reliable and true that in 1925 the Bungalow was built at a cost of about Rs. 20,000/-. Calculating depreciation for the period of above 20 years that elapsed when it was destroyed in 1945 at 30% market value would come to Rs. 14,000 Sometime before requisition was made and possession was taken there were additions made by constructing the ring well and the compound wall. Jaladhar''s estimate of cost of ring well at Rs. 3,000/ and compound wall at Rs. 1200/- are in our view also dependable and reliable evidence. It will be reasonable to take the market value at Rs. 50% of the cost of the wall and the ring well. Adding Rs. 2,0001- for those improvements market value of the homestead with all its amenities in 1942 may safely be assessed at Rs. 16000/-.

62. The learned arbitrator has assessed the market value of furniture in the Bungalow at Rs. 5001-. That has not been disputed by Mr. Das Gupta or Mr. Mitter and we hold that amount to be fair market value of these furniture in 1942.

63. Mr. Mitter however has assailed the decision of the arbitrator to disallow any amount as compensation for the iron joists and other materials lying on the land of the homestead collected for building a shed for factory, though he found as a fact that (1) Nirode Babu collected a few pugmills and chimneys for brick making and also sending equipments for making bricks and tiles.. (2) he took 3 pugmills, 3 chimneys for firing bricks and also moulds and cupsized materials for extracting pigments. (3) He also collected beams, joists, etc. for constructing a factory house. Only reason for disallowing any compensation for these materials mentioned by the learned arbitrator in his judgment is that relying on the testimony of P. W. 2 Girija Bhusan he found that not much progress was made. Although Nirode Babu had an idea to carry out the project but it did not materialise. In that part of his judgment the learned Arbitrator clearly appears to have mixed up the two issues--one regarding value of factory materials and the other regarding compensation for the underground minerals which he intended to extract and exploit in the contemplated factory. That had led to the confusion of thought that because setting up a factory with proper equipments that would enable him to exploit the valuable coloured clay lying underground, the claim on the head of ''Steel Joists etc'' which existed very much in fact even according to his own findings are ''undoubtedly unacceptable''.
For the materials collected and kept on the land of the homestead, the claimants are entitled to market value as damages or financial loss, while for the underground minerals below the surface of requisitioned land they are entitled to recurring compensation. The arbitrator has erroneously disallowed both. Now we are considering the damages for the movable properties lying on the surface. The underground minerals will be considered later. Evidence regarding the materials for factory are provided by P. W. 1 ''I was President Kanksa Union Board from 1940 to 1954. I know Nirode Kanta Sen of Brindabanpur Mouja. Nirode Babu had his

residence there. He lived there and collected materials for making tiles and as a matter of fact, made some bricks and tiles. He had a pugmill there and some accessories including wooden casts for moulding. Bricks and tiles were burnt in chimney kilns. He also collected materials for building a house and farm house. He had already a house and timber for doors and windows".

P. W. 2 "there was a pit for raising moorams and Nirode Babu used to sell moorams. I cannot say the rate of moorams. We used to import moorams from Gopalpur which was of better quality which was of Rs. 101 per 150 cft.

Shortly before the occupation of the area by the military also I had been to Nirode Babu''s house. Nirode Babu had a good stock of furniture in his house and picnic parties used to go there occasionally. There was an iron structure for construction of a building besides beams of teak wood and a large quantity of cement drums prior to the military occupation in Nirode Babu''s house. These were collected for building purposes.

P. W. 4 "The house was meant for residential and Nirode Babu had an idea of settling down there after retirement. Nirode Babu made samples of bricks and tiles and also extracted painting materials from the pigment of the clay. He took 3 pugmills 3 chimneys for burning bricks and also moulds and cupsized materials for extraction of pigments. He also collected beams joists etc. for constructing a factory house. These were inside the Bungalow".

P. W. 3 "Nirode Babu brought 3 chimneys and instrument for pugmill and machine for making bricks and tiles, Nirode Babu had furniture in his house." None of these witnesses were cross-examined on the point by asking question to challenge the existence of these materials on the land of the homestead and inside the Bungalow. The learned Arbitrator has found that they existed. Evidence shows that all those materials have been removed and either used and appropriated or destroyed by the requisitioning authority. The claimants have lost them for ever and no question of replacing them can arise after the length of time that has elapsed since possession of those movable properties were taken.

Claimants laid claim for value of those movable properties detailed in item 12 to 100 in schedule A to the claim petition dated 6th December 1943 at an amount of about Rs. 17500. There is no evidence in the oral testimony or any document regarding the market value of these testimony or any document regarding the market value of these materials or even the costs at which those materials were purchased by Nirode Babu. The claimants produced some correspondence with an English Company including quotations for prices of machinery and appliances for manufacture of bricks and tiles and potteries but these do not show that any of those were either accepted by Nirode Babu or orders were placed for purchasing the machinery. The claimants did not include in their claim any amount for any machinery they paid on this head. It consists only of the materials collected for

building a factory in which those machineries were contemplated for setting up. Regarding the account papers it has been the testimony both of Jaladhar, claimant''s witness No. 4 and also of Nirode Babu''s son Nihar Kanta, claimant''s witness No. 5 that whatever account papers Nirode Babu had were kept in the Bungalow on the requisitioned land and because possession of the Bungalow was taken suddenly they cannot retreat those account papers. The learned arbitrator pointed to the facts that some correspondence have been produced and commented that if those could be produced why other account papers could not be produced. In that respect the learned arbitrator has omitted to take into consideration the testimony of Nihar Kanta that while all accounts regarding the property were kept in the Bungalow, the registered documents regarding the property were kept in their Calcutta House. It appears quite probable that the title deeds of the correspondence that was being carried on with the English Company for purchase of valuable machinery were with Nirode Babu at his Calcutta house at the time when possession of the Bungalow was taken. That does not render the testimony that whatever account and vouchers existed for the purchase of construction materials for the factory were kept in the Bungalow on the requisitioned land where the factory was contemplated to be set up. The suggestion made in cross-examination to Nihar Kanta that the accounts have been withheld or purpose was denied by him, as he had definitely said that the registered document regarding the property was kept in Calcutta house, where he found Ext. 1 series that is, the correspondence and quotations for purchase of machinery. That shows that those correspondence were kept by Nirode Babu in Calcutta. This witness is an electrical Engineer and at the time he deposed before the learned arbitrator he was the head of the Electrical Engineer''s Department under the reputed firm of Martin & Burns. We do not find any reason to disbelieve this witness.

In that state of evidence the learned arbitrator found that the claimant''s witness No. 2 gave more or less a correct estimate of the possession yet he seems to have completely neglected to consider the testimony of that witness Girija Bhusan Roy who has clearly said that he saw some parts of the pugmill machine lying there. There was a lime bhata also. Shortly before the occupation of the area by the military authority this witness went to the house of Nirode Babu and saw that Nirode Babu had a stock of furniture in the house and picnic party used to go there occasionally. There was also a structure for construction of building, besides beams of teak wood and a large quantity of cement drums prior to the military occupation in Nirode Babu''s house. These were collected for building purposes. That testimony of a disinterested witness does not justify the finding of the learned arbitrator that the claim of chimneys and steel joists etc. are not acceptable because for supporting the chimneys no cover is necessary far less a cover resting on steel joists etc. The learned arbitrator has been carried away by his view that the idea of constructing a factory was still a dream. Upon the evidence Nirode Babu''s dream of setting up a full fledged factory has not certainly been realised but that was because at a time

when Nirode Babu had collected the construction materials the property was suddenly requisitioned without any notice whatsoever.

64. Existence of the articles for construction of factory has been proved beyond doubt. The requisitioning authority took possession but did not make any inventory of those movable properties either when they got possession or at any time thereafter. The joint inspection report dated 27th May, 1949 which has been produced in evidence and marked Ext. C in its paragraph 4 comments fully. As for the furniture a list of which has been submitted by the owner we are to say that it was not possible to verify the whole list now after the lapse of so many years. Though in the past the matter was discussed and rediscussed, it has not been possible to get into the actual fact. While the Spl. L.A. officer Burdwan disallowed the claim altogether though he could not support with proper facts, the landlord went on insisting all the time. As it is well known the house was occupied long before the actual requisition which has been admitted by the Spl. L.A.O. it is not denying the fact that there has been irregularity in occupation. We therefore think that to come to a settlement we are to depend on local evidence. All the witnesses we examined opined that there were most of the things. The written statements have been filed before us by those who actually carried the things from Burdwan. We therefore think that the whole things should be valued at the (term) and W. B. rate and a probable sum offered to the owner. This is for the D. D. to decide.
The learned arbitrator allowed compensation only in respect of pugmill and some other items and put the figures of Rs. 3000/- and did not allow any fair compensation for those iron materials for construction of the factory. We cannot agree with that view. Though we accept the learned arbitrator''s view that there may have been some inflation or exaggerations in the claim made on those heads, we hold that fair compensation on this head should be fixed at Rs. 14,500/- and not merely Rs. 3,0001-for the pugmills. That amount taken with the value of the furniture in the Bungalow fair compensation for which has been assessed by the learned arbitrator at Rs. 500/- comes to Rs. 15.000/.

65. We have already assessed the compensation for the destruction of the Bungalow at Rs. 15,000/- that amount together with the compensation for the furniture and factory materials together therefore, comes to Rs. 30,000/-. Next item is with regard to morrams which have been dug out and stagged on the surface. At the time when the claim was first made the claimants mentioned that moorams measuring about 15000 cft. was remaining stagged when possession of the property was taken. There is no dispute about that. At the joint inspection thereafter it was agreed that up to 1949 67,000 cft. moorams were raised by the requisitioning authority which extended the area of the tank to about 4 acres. The total moorams on the surface therefore was 82,000 cft. The claimants laid their claim at the rate of Re. 1/ per 100 cft. of the moorams on the surface. Jala-dhar the witness No. 4 for the claimants also gave oral testimony that Nirode Babu used to sell mooram at the rate of Rs. 10/- per

1000 cft. That also calculates at the same rate. There is no dispute as to that rate also. In the claim submitted to the collector of land acquisition on 6th December, 1943 it was stated that "Your petitioner had dug out 50,000 cft. to 60,000 of moorams for the purpose of construction of road connecting the Grand Trunk Road with the Mouza under reference. Your petitioner has been apprised that the said moorams had been utilised by M/s. India Construction Co. in execution of a contract under C.P.W. Dept.. with all the pecuniary advantages to the said company and without any pecuniary advantages to his Majesty''s Government or to your petitioner. Further another contract under the said C. P. W. Dept. has dug out about 50,000 cft. of Moorams and has utilised the same to his own benefit at the cost of His Majesty''s Government and your petitioner". In the joint inspection report of 1949 Ext. C it has been stated as regards moorams we measure the actual area from which the same has been taken it comes to 105 ft. X 50 ft. X 9 ft. (height). That brings the figure to 47,250 cft.. This basis of calculation is obviously faulty because area of the tank that has resulted from digging of moorams has been shown to be 3.96 acres that is about 12 bighas taking the depth of the tank at 9 ft. that will give a figure of 15,55,200 cft. There is no indication in the whole of the evidence and the materials produced what quantity of moorams could be expected from every 100 cft. of digging. In our view a reasonable estimate will be 100 cft. of mooram in every 500 cft. of digging taking the total area of digging at 15 lakhs cft. that basis of calculation will give 3 lakhs cft. of moorams which has been dug out and appropriated. The claimants are entitled to get compensation for that quantity of mooram at the rate of Rs. 1/ per 100 cft. amount of compensation on that head therefore comes to Rs. 3000/-.

66. Next item is the forest destroyed. Before the learned arbitrator it was agreed that 17 acres was completely denuded of trees and it was also conceded that there were big sal and other valuable timber trees in that area. There were some fruit trees also but not many. The learned arbitrator in his memorandum of local inspection has doubted whether extensive area covered by runways of ''the airfield were included is that 17 acres the joint inspection that was held during the pendency of the proceeding before the Arbitrator does not indicate that the clear felled area shown as 17 acres include also the area covered by the runways. It will be reasonable to hold that at least 20 acres had been denuded of trees by destroying all timbers and trees standing thereon. For such destruction it is not enough to calculate only recurring compensation for loss of income annually. Correct basis in our view will be to include damages caused during possession for which no replacement is contemplated even if the land at any time may be derequisitioned. The sample survey jointly made by the parties disclose that 100 timber trees per acre existed that has been accepted by the learned arbitrator as the basis of the entire area requisitioned. Taking that basis in the 20 acres of clear felled area total number of trees in that area will be 2,000 valuable trees.

67. Regarding the prices of each tree the learned Arbitrator has calculated at Rs. 50 per tree although he erroneously thought that prices per tree at Rs. 89.8 as. was the agreed price per tree. He is clearly in error, we do not find any justification for fixing that price at Rs. 501 for each tree as fixed by the learned arbitrator. Although the rate of Rs. 89.8 as. per tree was not an agreed rate but only a claim by the owner, neither in any evidence nor in any of the documents produced on behalf of Union of India at any stage that claim of Rs. 89.8 as. per tree destroyed was disputed. It will be safe therefore in our view to calculate at the rate of Rs. 801 per tree as fair compensation. The amount of compensation on this head therefore comes to Rs. 1,60,0001. Besides destruction of the valuable timber which we have discussed above evidence also shows that forest yielding fuel wood has also been destroyed in considerable area. For that destruction also it is not enough to calculate compensation on the recurring basis of annual loss. The claimants are entitled to have the prices of forest destroyed on damage basis.

The total area of jungle is 176.91 acres. For laying out the airfield we have already shown that at least 20 acres have been completely denuded of trees. In that area the forest yielding fuel woods also has been destroyed. The learned arbitrator has calculated on annual basis that the claimants are entitled to Rs. 3,000/ every 5th year in the share of the claimants in the entire area which has calculated as 23 acres in plot No. 9J23 and in 150 acres in plot No. 9. A forest that will yield such a income for roughly 170 acres would in 20 acres of land contain forest trees yielding fuel woods of the value at least of Rs. 7000/. On damage basis therefore for the value of forest destroyed we assess a fair compensation of Rs. 7000/.

68. In our view therefore as damages and financial loss was caused by destruction of properties which have caused loss to the owner, the amount of fair compensation are as shown below :

(1) Bungalow	Rs. 15000/-
(2) Furniture in Bungalow	Rs. 500/-
(3) Factory materials	Rs. 14000/-
(4) Sal timbers destroyed	Rs. l,60,000/-
(5) Moorams kept on surface	Rs. 3000/-
(6) Forest of fuel wood destroyed	Rs. 7000/
TOTAL	Rs. 20,000170

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69. This loss was caused at the date when possession was taken and certainly the owner has suffered that loss on the date when requisition order was issued on 8.6.1943. From that date up to June 1968, 25 years have elapsed. The amount of damages we have assessed has been withheld in these long years and a question will arise whether the claimants are entitled to interest on the total sum of Rs. 2000001 assessed as compensation on the basis of damages for destruction of movable properties. We will deal with the question of interest hereinafter.

Next comes question of annual compensation for loss of income of requisitioned land. Out of the total area of 199.04 acres which actually are requisitioned although the requisition notice mentioned only 107.36 acres, it has been shown by the evidence on the record that culturable land was 16.55 acres jungle land was 176.91 acres area occupied by the homestead was 74 acres the tank dug by extracting mooram was 3.96 acres and roads accounts for 88 acres. Taking these items one by one the biggest item will be Sal forest covering 176.21 acres. The learned arbitrator has proceeded on the footing that trees and movable properties attached to earth as has been laid down by the Supreme Court in (11) Smt. Shantabai v. State of Bombay and others reported in AIR 1958 S.C. 532 and also that cutting of timber trees where sal or other varieties were and as the matter stands there is no distinction between the clear felled area of 17 acres and the rest 176.91 acres. He therefore calculated the number of trees per acre shown as a result of joint local survey accepted by both the parties. Assessing value of each tree at Rs. 501 as was mentioned above the learned arbitrator reached the total value of trees at the figure of Rs. 4,76,250. Having done so that learned arbitrator has accepted the argument advanced before him on behalf of the Union of India that the damages from the land and the trees are in the nature of terminal compensation which can be paid only after the property is derequisitioned, and held that the petitioners are only entitled to get the value of the possession of the trees. For valuing that possession of trees he has calculated it on the basis of interest at the rate of 41/2 on the total value of the trees for the period under requisition. This in our view is an erroneous mistake. The learned arbitrator relied on the well-known decision reported in (2) AIR 1946 Calcutta 416 (The Province of Bengal v. The Board of Trustees for the Improvement of Calcutta) to which we have already made reference. In that decision only in respect of compensation for the land which were parks in the hands of the Trustees for the Improvement of Calcutta there being in the act itself restrictions upon right of transfer their Lordships held that the effect of requisition under the Defence of India Rules is to deprive the owner of his possession, he must, therefor get the value of his possession. In the same passage their Lordships also said in their judgment:

Looking from another aspect the requisitioning authority gets the possession from the owner and become, so to say, a statutory tenant. The basis of compensation must therefore be fair rent and we hold accordingly" Sal forests are not parks and there is the restriction upon right to transfer by the owner. He can lease out Sal forest for such annual rent and for such periods as he likes. The question therefore is what amount should be regarded as fair rent.

70. It is well known that Sal forests in this part of eastern India which are locally called ''Garh'' are estates which are settled with tenants under leases for a period of 20 years or were for annual rent fixed giving them the right to fell and take matured trees of specified girths and ages. Such leases are called "Garpattans".

71. The general character of the land would be in this case of such a ''Garh'' or sal forest. Though there is no evidence that Nirode Babu used to settle or lease out the ''Garhs'' by such leases but least evidence has been given by his officer Jaladhar that prices of the high sal trees varied from Rs. 501-to Rs. 150/. The decision we have just mentioned is the authority for the proposition that compensation must be tested not by what the owner had actually done but by what he could have done. It has been laid down in the judgment reported in (2) AIR 1946 Cal. 416 on which the learned arbitrator has relied:

The true test seems to us would be not for what the'' owner was doing at that time but what he could have done at that time if he so wished or in other words what right he had then.

72. By the character of the land as appearing from the evidence the best use to which Nirode Babu could have put the land measuring about 176 acres in the requisitioned area is by settling the land at an annual rent giving right to the lessee or tenant the right for taking matured sal trees as valuable timber therefore the correct basis for assessing fair compensation for that area of requisitioned land would undoubtedly be the rent basis of the sal forest. We have allowed as damage by assessing the value of the sal tree felled in an area of 20 acres of the requisitioned area. That comes within the second clause in Section 23 subsection (1) which provides for.

"The damage sustained by the person interested by reason of taking any standing crops or trees which may be on the land at the time of the Collector''s taking possession thereof" but for assessing the recurring compensation for the remaining area of the land measuring about 150 acres by assessing the value of the land on rent basis the value of the trees standing thereon need also be taken into consideration. In a recent case reported in (12) Chaturbhuj Pande and Others Vs. Collector, Raigarh, the Supreme Court while dealing with the statutory compensation of 15% under sub-section 2 of Section 23 of the Land Acquisition Act observed:

The High Court in our opinion was wrong in disallowing the statutory allowance permitting by Section 23(2) over the value of the trees. The High Court erred in thinking that the value of the trees falls under the second clause of Section 23 (1). The first clause of Section 23 provides for determining the market value of the land acquired. Section 3(a) describes that the expression ''land'' includes benefits arising out of land and things attached to the earth. Therefore trees that are standing on the land were a component part of the land acquired. The High Court failed to induce that what was acquired are not the trees but the land as such, value of the trees was ascertained only for the purpose of fixing the market value of the land.

73. If that clear statement of law is kept in mind then the argument advanced on behalf of Union of India before the learned arbitrator that to value the sal trees for the purpose of assessing the compensation for land on rent basis would tantamount to awarding terminal compensation is clearly fallacious. The learned arbitrator fell into an error when he accepted that argument and proceeded to value the tree''s but instead of including the value of the trees for determining market value of land on rent basis for recurring compensation he awarded allowed interest at the rate of 4�% on the value of the trees only assessed for the years that have elapsed since requisition of the land was made.

74. Mr. Mitter on behalf of the claimants seems to contend that the value of the trees assessed by the learned arbitrator should be taken at 50% thereof as the annual income that the sal forest would fetch and press for calculation on that basis for as many years that have elapsed since requisition of land was made. We are clearly of the view that such basis of calculation will also be erroneous.

75. Correct basis in our view would be to take into consideration the fact agreed between the parties before that. arbitrator that in the area covered by the sal forest there were 100 sal trees per acre. Making allowance for clear felled area of 20 acres, in remaining area of about 150 acres therefore that would be 15000 sal trees. All such. trees would not be matured enough for felling all at the same time. It will be reasonable in our view that only 10% of the total number of trees will ha available for felling in each year as matured trees. Total number of trees will, remain constant by new growth. Value of each tree being Rs. 80 as fair market price. The prospective tenant to take settlement of such a forest that will give an annual gross income of Rs. 120000]-(1,500 multiplied by 80) may reasonably be expected to take lease of the forest land at an annual rent of Rs. 50,0001-. The claimants have roughly 3/8th share in plot No. 91123 sal forest may be taken as 20 acres in that plot, they have 9116 share in plot No. 9 sal forest in that plot is approximately 130 acres. Those shares with that proportion of area in the two interests roughly gives about half share of that rent income to Nirode Babu. Annual rent to which the claimants would be entitled by settling the land for reasonable long term of years would be Rs. 25,000/- that is the fair rent as the market value assessed by the land under sal forest in the requisitioned area.

76. Another item which the claimants have vehemently pressed is compensation for the underground deposits of two classes that is moorams and coloured clay. Nothing has been awarded on that head by the learned arbitrator. On behalf of Union of India it has been contended that no evidence having been given as to the prospective income by leasing out the land for extraction of moorams and coloured clay nothing should be awarded on this head.'' It is however, to be noticed that in giving evidence for value and quantity of mooram that were extracted and kept on the surface sufficient evidence has been given to provide the basis for assessing the value of these underground deposits. Accepting the reasonable standard we have assessed that in an excavation of about 4 acres 15000 cft. is the total cross section dug. We have also accepted the basis that for every 500 cft. dug 100 cft. of mooram can be extracted. On a basis that out of the total area of 199 acres mooram can over a period of 10 years be extracted from 160 acres which i:-: 40 times of 4 acres multiplying 1500000 with 40 of the total dug areas would come to 60000000 cft. digging 5,00,00,000 cft. as safe basis of dug area 1,00,00,000 cft. of mooram can be extracted over a period of 10 years. That will give the figure of 10,00,000 cft. of mooram per year which at the rate of Reaper 100 cft. that will give annual gross income of Rs. 10,000/-. The land therefore could be settled for mooram extraction to a willing party at an annual rent payable to the owner of Rs. 5,0001-. The claimants have 16 as. right to the underground deposits. The recurring annual compensation on the head of moorams the claimants are entitled to at the rate of Rs. 5000/-. Regarding the coloured clay for which Nirode Babu intended to set up a factory and proceeded to prospecting it by having the quality of clay examined it by experts and entering into correspondence for purchase of machinery to manufacture bricks, mercilised tiles and potteries from that coloured clay. We have also held that he had gone further to collect materials for constructing a factory shed but his dream might not materialise because before any further progress could be made the land was requisitioned and possession was taken by the requisitioning authority. All that shows that evidently Nirode Babu could have earned an income by extracting and utilising coloured clay in the contemplated factory. We have held above that out of every 500 cft. of excavation 100 cft. will be mooram it will be reasonable in our view to think that at least 200 cft. per every 500 cft. of excavation will be valuable coloured clay. By utilising the total quantity of coloured clay on that basis for manufacturing bricks, mercilised tiles and potteries a net annual income from the factory can reasonably, be expected to be at least Rs. 20,000/-. Total annual compensation on these 3 heads would come to :

(1) Sal forest	Rs. 25000/- per year
(2) Moorams	Rs. 5000/- per year
(3) Coloured clay	Rs. 20000/- per year
	Rs. 50,000/-

77. Another small item remains for inclusion in the recurring annual compensation that is on the head of cultivable land area of which is about 17 acres which is about 50 bighas. In Burdwan paddy lands yield very high level of produce. This area is not far from Durgapur which has now the benefit of irrigation by canals. Taking all these into consideration annual rent per bigha may reasonably be fixed at Rs. 10/- the cultivable area will therefore yield an annual income of Rs. 500/-.

78. For the area of about 50 bighas which is danga land the petitioner''s claim for crop compensation at the rate of Rs. 100/ per bigha per acre. Special Land Acquisition Officer allowed crop compensation at the rate of Rs. 30/per bigha per acre from 1348 B.S. though the area was not in dispute the rate of compensation per year was disputed between the parties, the learned arbitrator in his judgment has observed that the average yield of crop also was not disputed nor the ceiling prices of the paddy but he held that so far as the produce of land is concerned the claim that 8/10 maunds of paddy per bigha were produced from the danga land converted into agricultural land was too high to put the yield as 5 maunds per bigha and making allowance of half of producer''s as cost of cultivation the yield per bigha would be 2  maunds. Fixing the compensation for the danga land at the rate of Rs. 171 - per bigha, calculating at that rate for the 50 bighas for 18 years the total amount comes to Rs. 15,3001- in 9116 share and the claim of the compensation on this head was fixed at Rs. 8,6001- for the years 1349 to 1366 B. S.

79. This process of calculation appears to us to be wrong annual rate of compensation for the cultivable land should be on the rent basis. For the appellant Mr. Das Gupta has contended that rate per bigha should be calculated as rupee 1 per year. For the respondent Mr. Mitter has not seriously disputed the amount of compensation awarded by the Arbitrator on this head but he has contended that if the annual compensation is calculated on rent basis then rent in this area of paddy land in Burdwan District should be at the rate of 101 per bigha. He argued that the area is not far from Durgapur which has now the benefit of irrigation by canals and yield per bigha in Burdwan is much higher than 5 maunds on which basis the learned arbitrator has calculated. It has to be remembered that immigration by canal has been available in this area in the middle of fifties and not before. At the time when the lands have been taken by the requisitioning authority in 1942 this area was not yielding high rate of produce per bigha claimed by the respondents. There is no evidence that Nirode Babu had undertaken khas cultivation of the land. Taking all the evidence in consideration we held that compensation on the basis of rent at the rate of Rs. 2/ per bigha per acre can be reasonable and fair compensation of 50 bighas. That comes to Rs. 100/- on rent basis.

80. For the tank area of which is 3.90 acres no evidence has been produced on behalf of claimants the Special Land Acquisition Collector awarded compensation at the rate of Rs. 451-per acre for 1349 B.S. and at the rate of Rs. 60 per acre from 1350 B.S. The learned arbitrator accepted the award of the year 1350 and allowed

compensation for the tank at the rate of Rs. 601 - per year. He calculated the total compensation - for the period 1349-1360 B.S. i.e. from 1942-1953 and arrived at a figure of Rs. 134201 in the share of the claimants therefore he awarded Rs. 2430]-. We accepted that assessment to be reasonable and fair compensation for the tank. In the share of Nirode Kanta Sen annual return from the tank will be about Rs. 28/- only.

81. For the 22 mango trees also there is no evidence and the learned Arbitrator accepted the award given by the Special Land Acquisition Officer at the rate of Rs. 1/- per tree per year. Annual compensation on this head will therefore be only Rs. 221.

82. For arriving at the total amount for annual compensation the several small items that should be added to the amount of Rs. 50,00O/- (which is the aggregate of'' three main items namely (1) Sal forest, (2) Moorams and (3) coloured clay therefore may be summarised below :

(a) 50 bighas of cultiv-		
able land		Rs. 5001-
(b) Crop Compensation		
for 50 bighas		Rs. 100.001
(c) Tank with area of 3.95 acres according to the share of claimants		
		Rs. 28.00/-
(d) 22 mango trees		Rs. 22.00/-

Though the total amount of these four small items is a small amount for Rs. 650/ - per year the number of years that have elapsed since possession of the requisitioned property was taken is more than 25 years and for that reason the small annual compensation of these heads also has grown to a considerable amount above Rs. 16,000/-and cannot be neglected.

83. Total annual compensation for all the items we have discussed above therefore amounts to Rs. 50050 the claimants are entitled to this amount for each year that has elapsed since the date on which possession was taken by the requisition Order No. 64 D.I. dated 8.6.43 was 1st October 1942.

84. Next comes the question of interest for those amounts. The learned arbitrator has allowed interest of 41/2 per year on the whole Pinount of compensation and also the annual compensation awarded by him. On behalf of the appellant Mr. Das Gupta has contended that no interest can be allowed on the amount of compensation on the Defence of India Act 1939. He points out that there is no provision of interest in the Defence of India Rules as is provided in Section 28 of the Land Acquisition Act of 1894. He has relied on the decision of the Madras High Court in the case of (13) Associated Oil Mills Ltd. Katpadi v. Provincial Government of Madras, ILR 1945 Mad 567. That decision of the Madras High Court no doubt interpreted Section 19 (1) (e) as limiting power of the Arbitrator to award compensation only in accordance with the provision of Section 25(1) of the Land Acquisition Act and supports the contention of Mr. Das Gupta. But that decision has been dissented from the Division Bench of this Court (Das and Guha JJ.) in the case of the (14) Province of Bengal v. Ramkrishna haw and Company reported in 54 C.W.N, page 801. By that judgment of this court it has been held that Section 19.(1) (e) of the Defence of India Act has not taken away the power of the Arbitrator to fix fair amount of compensation to which owner was entitled and to allow interest of the amount of compensation fixed. We respectfully agree with that view and reasons therefor that have been discussed in the judgment delivered by the Hon''ble Mr. Justice G. N. Das.

85. As an additional reason in support of that view we may add that besides 19(1) of the Defence of India Act merely states the principle which the court has to consider in assessing the amount of compensation to be paid and requires the arbitrator ''to have regard'' to the provision of Section 23 (1) of the Land Acquisition Act, there is a fundamental difference between an award made by the collector under Land Acquisition Act 1894 and the offer made by the collector u/s 19 of the Defence of India Act, 1939. That difference has been pointed out in the decision reported in (1) 60 C.W.N. 185 at page 195 in these words "under the Land Acquisition Act the Land Acquisition Collector makes the award which is of a binding character unless the claimant or party interested makes a reference.'' Whereas in the case of an acquisition under S. 19 Defence of India, Act there are negotiations between the collector and the claimant and what the collector does is to make" the offer which is not binding unless the claimant accepts the same and finality is reached."

Because of that binding character of the award made by the collector under Land Acquisition Act provision u/s 28 of that Act is in these terms.

If the sum which, in the opinion of the court, the collector is out to have awarded as compensation, the award of the court may direct that the collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into court.

86. We have discussed above and held on the authority of Division Bencn judgment of this court reported in (2) AIR 1946 Calcutta page 416 that temporary requisition is

in its nature acquisition only for a limited period. While in case of acquisition terminal compensation is payable all at once, in case of requisition compensation for annual loss of income is payable to the persons whose land has been taken possession of. In the case cited above (14) (54 C.W.N. page 801) at page 805 G. N. Das J. has observed :

"In my opinion, a person whose land has been ^acquired under the Act is entitled to received the full compensation for the loss of his property. The plainest principle of justice requires that the acquirer should not retain the price of the land and the use thereof without paying to the person whose land has been acquired, compensation in the shape of interest or the price of the land. This is fully supported by the following observations of Lord Shaw in the case of Ratanlal Choonilal Panna-lal v. Municipal Commission for the city of Bombay (6) to which our attention has been drawn by Mr. Mitter appearing for the respondent. The observation runs thus:

Their Lordships are of opinion that the right to interest depends upon the following broad and clear consideration. Unless there be something on the contract of parties which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the other hand, the new owner has possession, use and fruits, on the other the former owner parting with these has interest on the price. This is sound in principle, and authority ''fully warrants it.

87. In our view this principle applies not only to the case of permanent acquisition but also to the case of temporary acquisition which is called requisition. Adhering to that principle that the arbitrator has awarded interest at a reasonable rate in his discretion on the amount that was payable to the claimants from year to year the view taken by the arbitrator in the present case award of such interest cannot be assailed.

88. Before we conclude we have to notice another argument presented by Mr. Das Gupta on behalf of the appellant Union of India contending that the land had vested in the State of West Bengal under the provisions of Estates Acquisition Act from 1st Bai-shak 1362 B.S. which corresponds to 15th April, 1955. Therefore it is contended that after that date no recurring compensation is payable to the claimant for the requisitioned land. This is a point which the learned Government Pleader appearing before the Arbitrator for the Union of India also raised during his argument but no evidence at all having been given whether in fact the whole or any part of the requisitioned land had, vested in the State under the Estates Acquisition Act. The learned Arbitrator has observed "This I do not think comes within the scope of any decision to be made by me as arbitrator nor is there sufficient material before me for decision of the question". He referred to the terms of reference which directed him to determine the compensation in respect of the items mentioned in requisition No. 64 and proceeded to calculate compensation due for the period mentioned in requisition till the year in which he decided the case i.e. 1959-60. Before us also Mr.

Das Gupta would not lay his hand on any evidence but invited us to infer that land in excess of the ceiling fixation by Estates Acquisition Act must have vested in the State on the relevant date that is 15th April 1955- such inferences are not permissible first because there is no material to show what will be the ceiling of quantity of land in Nirode Kanta Sen''s family would be treated as a Hindu undivided family, secondly because upon evidence and all the admitted case of the parties the general character'' of the total area of requisition is one sal forest and also underground minerals in the area.

89. Mr. Das Gupta during the hearing before us filed application praying for certain documents marked A & B received as additional evidence under order 13 rule 41 of the Code of Civil Procedure. Documents marked A is a notification No. 16666 L. ref. dated 4th November, 1954 fixing the first day of Baishak of the Bengali year 1362 as the date on which state in the right of a intermediary in each state as estates in the District of Burdwan shall vest in the state from all intermediaries second bench of documents marked B are khatians of records of right prepared during revisional settlement according to the provision of West Bengal Estates Acquisition Act intending to show that plots Nos. 9 and 9] 123 has been recorded as jungle land in the said petition it was stated in para. 5 that the finally published record of rights cannot be put in evidence and Ext. before the learned Arbitrator however inadvertantly and in para. 7 it was stated that the appellant respectfully submits that there was no wilful latches negligence or deform in not producing documents at the trial. By our order made on 28th of July, 1969, we rejected the application for taking additional evidence mainly on the ground that these documents were within the power of Mr. Das Gupta''s clients to produce before the arbitrator but that was not done without any satisfactory reason appearing for such non-production and the claimants had no opportunity to produce contrary evidence on that point. Even if those documents were taken into consideration they do not advance the case of the appellant because where the land in question have been vested in the State under Estates Acquisition Act and is dependent on many other questions of fact on which no evidence has been given before the arbitrator. One of those flows from the Section 28 of the Estates Acquisition Act which provides that in case of mines if any intermediary was operating the mine directly then although the superior title will vest in the state intermediary shall be a lessee under the Act in respect of those mineral rights. Section 28 of the Estates- Acquisition Act is in these terms:

"Right of intermediaries directly working mines. So much of the land in a notified area held by an intermediary immediately before the date of vesting (including sub-soil rights therein, but excluding rights in hats and bazars not in the khas possession of the intermediary and lands comprising forests, if any) as was comprised in or as appertained to any, mine which was being directly worked by him immediately before such date shall take effect from such date to be deemed to have been leased by the State Government, or in default of agreement as may be settled by the Mines Tribunal.

Provided that all such terms and conditions shall be consistent with the provisions of any conditions shall be consistent with the provisions of any Central Act for the time being in force relating to the grant of mining leases". That provision of law and its effect has been discussed by my learned brother Bagchi J. in a recent decision (unreported) in the case of (15) Bar Das, Dey. & Co. v. Mohant Srimant Dandi-swami Hrishikesh Ashram in Appeal from Appellate Decree No. 712 of 1962 (since reported in 73 C.W.N. 920) which was delivered on 14th of March 1969. As it has been ''held there:

In'' Section 28 the two expressions ''mine'' and directly ''worked by him'' are of much importance. As the provision in Section 28th of the Estates Acquisition Act in regard to a mine directly worked by an intermediary are contrary to the provisions of Section 6 sub-section (1) clauses (h) and (i) of the Act the provisions of Section 28 would prevail over the provisions of Section 6 subsection (1) clause (h) and (i) of the Act. Therefore, in regard to the present case, the provisions of Sections 27 and 28 of the Estates Acquisition Act would get better of the provisions of Section 6 sub-section (1) clauses (h) and (i) of the Act.

90. We respectfully agree with that view. That is not a provision which can be read in Section 23 of the Act for determining the amount of compensation to be awarded. In Section 23 of the Land Acquisition Act also there is no provision allowing interest on amount of compensation because under the Land Acquisition Act the court only revises an award made by the collector which is otherwise final by Section 28 of that Act. Power has been given to court to award interest not on the whole amount of compensation fixed by court but ''only'' on differences between the collector''s award and compensation fixed in the reference. Under the Defence of India Act fixation of compensation to be paid in case of acquisition whether permanent or temporary, the matter is entirely within the jurisdiction of the arbitrator. The arbitrator need only ''to have regard'' to the provision of Section 23(1) of the-Land Acquisition Act and is not directly bound by the terms of that section. On the side of the claimants evidence has been given which we accept as true that entire area of land requisitioned is in underground deposits of moorams, ochre and coloured clay etc. which undoubtedly are minerals within the meaning of Mines Act. Evidence of excavation of Moorams has been given and also the claimants'' intention to exploiting other minerals by setting up a factory has been shown clearly. Therefore it must be held that the appellants have failed to show their lands have vested in the State under the Estates Acquisition Act on the point raised by Mr. Das Gupta on their behalf must fail.

In the result the appeal fails and is dismissed. The cross-objection succeeds in part and is allowed with proportionate costs. The claimants are entitled to the amounts mentioned below calculated upto October 1969.

Total compensation for damages : By destruction of property Interest on that amount at the rate of 4% per annum for 27 years upto 1st October 1969 compensation for loss of income for 27 years upto 1st October 1969 at the rate of Rs. 50,650 per year Interest at the rate of 4%per annum on the amount of for 27 years up to 1st Oct. 1969	Rs. 2,00,000/- Rs. 2,43,000/- RS. 13,67,550/- Rs. 63,539.75
TOTAL	Rs. 18,74,089.75

a question may arise if the claimants should get interest also on the amount that accrued annually as interest on the total annual compensation for 26 years. The amount of annual interest at 5% on Rs. 50,650/- comes to Rs. 2,532.50 and for 26 years it would come to Rs. 34200/-. Though that is considerable amount and though it is very much arguable for the claimants that they are entitled to that amount also, on devoting consideration to the justice of the case we have decided by exercise of our discretion not to include that amount for the reason that in view of the nature of the case, it would not be proper exercise of discretion to allow interest on annual interest due on the amount of annual compensation.

91. Before we part with this case we have also to notice that the learned arbitrator at the end of his judgment expressed astonishment why the lands have remained requisitioned for such long period instead of it being converted to acquisition. The learned arbitrator has observed that the Union of India has not seen the wisdom of acquisition outright and thereby committed to rational decision to act with promptness so that the Public Exchequer may not be denuded to large amount of money. That in our view is not the concern either of the Arbitrator when making the award according to law nor is it a concern of this court in disposing of this appeal. The property was requisitioned under the Defence of India Rules in 1942 at a time when the second world war was at its peak not only in the continent of Europe and the High Seas and also in the eastern theatres of that war in Asia and Pacific Ocean, but also had reached the borders of India. Obviously the Requisition Order was made for the purpose of effective Defence of India against the then enemies. That was a temporary need at the time when India was under the British suzerainty. Within two years from the end of the war that foreign suzerainty ended and India achieved Independence on 15th of August, 1947. By that historical fact and also by the loud events soon after both within the borders of India and outside new needs may very well have arisen for the purpose of requisitioning authority which by

transference of power from the British Sovereign to the Republic of India has been a Sovereign Government Union of India. Those needs that may be contemplated in some respect to the needs for developments of this country were also the needs for defence of India against external aggression which as a matter of history has loomed large during the years that have elapsed and also for maintenance of peace and order within the borders of India during the unquiet years and has followed after independence. What would have been the best wisdom or the rationality of the decision of continuing temporary requisition instead of converting into permanent acquisition are matters of the executive authorities. They are the best judges of their action. The courts are concerned only with the rights of the parties upon the facts as they exist. For those reasons we recall the comments that have been made by the learned arbitrator at the end of his judgment in para. 44.

92. The appeal and cross-objection are disposed of as above. The collector''s office is directed to draw up a fresh award according to this judgment. If the decree is not satisfied within 31st December, 1971 the court competent to execute the decree on application made by or on behalf of the claimants shall report the case for orders of the State Government of West Bengal

The appeal is dismissed. The cross-objection succeeded in part. We allow proportionate costs of cross-objection to the extent of its success payable by the appellant Union of India to the cross-objectors.

Bagchi, J.

I agree.