Rabindra Mohan Ghosh and Others Vs Anil Mohan Dey and Others

Court: Calcutta High Court

Date of Decision: May 25, 1965

Acts Referred: Calcutta Improvement Act, 1911 â€" Section 11, 43(2), 54, 6, 71
Civil Procedure Code, 1908 (CPC) â€" Section 100, 115
Constitution of India, 1950 â€" Article 227
Land Acquisition Act, 1894 â€" Section 18, 54, 9(1)

Citation: 70 CWN 156

Hon'ble Judges: Laik, J; D. Basu, J

Bench: Division Bench

Advocate: Bijan Behari Das Gupta and Sarojendrantah Das Majumdar, for the Appellant;Sudhansu Kumar Sen and Gaganendra Krishna Deb for Opposite Party No. 1 and Sushil Kumar Banerjee for Opposite Party No. 3, for the Respondent

Judgement

Laik, J.
This is an application in revision, both u/s 115 of the CPC and also under Article 227 of the Constitution of India, from a decision

of the President of the Calcutta Improvement Tribunal, agreed to by the assessors. It arises out of certain land acquisition proceedings, started for

the purpose provided in the Calcutta Improvement Act (Bengal Act V of 1911) which I would hereafter call for convenience, as the Act. The

Reference giving rise to the above Rule, arose before the Tribunal out of acquisition of premises No. 15/2A, Chhatawalla Guile, acquired under

C.I.T. Scheme No. 76. On October 9, 1952 the notice u/s 43(2) of the Act was published. The declaration u/s 6 and the notice u/s 9(1) of the

Land Acquisition Act (which I would hereafter call for convenience as the L.A. Act) were published on August, 4, 1955 and on May 23. 1956

respectively.

2. The owner of the land was Sri Anil Mohan Dey, opposite party No. 1 in the instant Rule. Yulin Cheu was not only the lessee of the land but the

owner of the structure on the same. To its adjoining east, is the premises No. 28, Blackburn Lane of which the petitioners are the owners, who

were the referring claimants before the Tribunal (claimants (a) to 2(d)). This Blackburn Lane premises was exempted from acquisition on certain

terms agreed to between the Trustees for the Improvement of Calcutta and the petitioners in a Deed of Agreement (Ext. E) dated May 17, 1958.

3. The petitioners applied before the Collector, claiming that they had a right of access over a strip of land appertaining to the said premises No.

15/2A, Chhatawalla Guile and they had also right of access through the staircase of the building of the said premises for reaching the first floor of

premises No. 28, Blackburn Lane. They further stated that they had also the right to have access of light and air through the doors and windows.

The acquisition therefore of premises No. 15/2A, Chhatwalla Guile is, according to them, the extinction of these rights. The petitioners accordingly

claimed Rs. 10,000/- on account of compensation.

4. On December 11, 1958, the Collector made the Award. He determined the amount of compensation for the land of the acquired premises No.

15/2A, Chhatawalla Guile at Rs. 10,000/- and odd in favour of opposite party No. 1. The amount of compensation for the right of easement

enjoyed by the petitioners, the owners of premises No. 28, Blackburn Lane, was fixed at Rs. 83/-; which was awarded to them. To the lessee, Y.

Cheu, the Collector awarded the sum of Rs. 40,000/- as compensation for the structure.

5. The petitioners were dissatisfied with the award of the Collector made in their favour. There was a reference, at their instance, to the Tribunal

u/s 18 of the L.A. Act. The opposite party No. 1 (Anil) also obtained a reference claiming enhancement of the value for the land. He further

contended that there was no easement right enjoyed by the petitioners and they objected to the deduction of the sum of Rs. 83/- and/or

apportionment made, by the Collector from the value of the land on account of compensation for easement. Y. Cheu, the lessee, also obtained a

reference objecting to the lower value of the structures.

6. The reference at the instance of the owner of the easement right viz., the petitioners, was heard by the Tribunal as a valuation case. Sri Dey, the

owner of the servient tenement, the opposite, party No. 1, and the lessee Cheu, contested. They denied even the existence of the easement right.

In the alternative, their defence was that the claim was too high and excessive. The Collector''s special defence was that he was not a necessary

party. The petitioners on the other hand contended that the Tribunal had no jurisdiction to enter into the question of the existence of the right of

easement.

7. The President found, inter alia, that the Tribunal had jurisdiction to enter into the question of the existence of the right of easement and that the

referring claimants (the petitioners herein) had failed to prove their right of easement either by prescription over 20 years or by way of grant or as

of necessity and as such they were not entitled to any compensation for the right of easement claimed by them. The Tribunal however could not

reduce the amount assessed by the Collector. The President of the Tribunal did not accept the contention of the Collector who was found to be a

necessary party. It was further found that clause (a) of the agreement (Ext. E) did not stand in the way of the referring claimants for the

compensation of their easement right. According to him, if the petitioners had succeeded in proving the existence of their right of easement, a sum

of Rs. 636/- should have been awarded to them in place of Rs. 83/- on account of compensation for extinction of the said rights. The assessors, as

already stated, agreed.

8. Against the said decision the instant Rule was obtained by the referring claimants. They, through their learned Advocate Mr. Bijan Behari Das

Gupta, not only repeated what they said before the Tribual but it was also contended that (a) having left open the question of apportionment to be

decided in a separate proceeding to be started hereafter the Tribunal should not have considered the question of the right of easement between the

parities, (b) that no opportunity was given to the petitioners to adduce evidence for proof of their acquisition of easement right by prescription for

over a period of 20 years.

9. The opposite party No. 1 (Anil), through his learned Advocate, Mr. Sudhanshu Kumar Sen, submitted on a preliminary point, that as under the

Act an appeal lay from the award of the Tribunal, the instant revision case was not maintainable. He next submitted that the Tribunal committed an

error, on the interpretation of the Agreement (Ext. E), in not holding that the petitioners disentitled themselves from the compensation for their

easement right. Mr. Sen further submitted that the question of easement was rightly decided in the valuation case and should not be decided in an

apportionment case. Lastly, according to him it is too late to complain, on the score of opportunity, as it was not prayed for by the petitioners

before the Tribunal to give such evidence.

10. To appreciate the preliminary point as to the maintainability of the appeal, the terms of the Calcutta Improvement Act should be briefly noticed.

Under it, a Board of trustees was constituted. It was invested with very wide powers for the purpose of carrying out the improvement Schemes.

The Board can acquire land for carrying out the purposes of the Act, either through private treaty or by compulsory acquisition, through the

machinery of the Land Acquisition Act, 1894 (Sections 68 and 69). For this purpose, it was trought that it would facilitate the proceedings of the

trustees if they had special Code of their own, instead of leaving it to be dealt with entirely by the L.A. Act. Chapter IV of the Improvement Act

deals with the acquisition and disposal of land. It provides that the trustees may make such acquisition under the L.A. Act. It proceeds to modify

the L.A. Act for the purposes of the Act. The modifications are contained partly in the body of the Act and partly in the Schedule thereto. They are

various and substantial. The effect is to enact, for the purposes of the Act, a special law, for the acquisition of land by the trustees, within the

limited area, over which their powers extend. The most important departure from the provisions of the L.A. Act is that a ''Tribunal'' is constituted

under the Act to take the place of the ''Court'' under the L.A. Act. This Tribunal is to consist of a President with judicial experience and two lay

assessors. By Section 71, Tribunal is to be deemed to be the Court under the L.A. Act ""except for the purposes of Section 54 of that Act."" This

exception operates to omit from the Act the general right of appeal to the High Court which is given by the L.A. Act and this is emphasized by a

further provision of the same Section that the award of the Tribunal ""shall be final"". Almost contemporaneously, Act XVIII of 1911 i.e., the

Calcutta Improvement (Appeals) Act, 1911 was passed to modify certain provisions of the Act. The said amending Act provides inter alia that

notwithstanding anything contained in that Act, an appeal shall lie in certain cases, one of which is, where the President grants a certificate, that the

case is a fit one for appeal, but subject to certain definite limitations therein set out. Section 71 was further amended in 1955 and the finality of the

award was made subject to the provisions of Section 77A, quoted hereafter, which was inserted in the said year.

11. The reason for this somewhat unusual course of legislation viz., the Calcutta Improvement (Appeals) Act, 1911 is to be found in what had

happened previously in Bombay. There in 1898 the local legislature enacted a City Improvement Act (Bombay Act IV of 1898) upon which the

Calcutta Act is probably to some extent modelled. The Bombay Act set up a similar Tribunal to perform the functions of the Court under the L.A.

Act and enacted that the award of the Tribunal should be final, subject to an appeal to the High Court in any case in which the President should

certify the case as a fit one for appeal. The validity of this Act was questioned in Hari v. Secretary of State, ILR 27 Bom. 424, in which it was held

that this particular provision, giving the limited right of an appeal to the High Court, was ultra vires the local legislature. Accordingly Act XIV of

1904 was passed by the Governor General in Council to validate the Bombay Act. It was evidently the intention of the then Bengal Legislature to

follow, in the matter of appeals from the Tribunal under their Act, the general lines of the Bombay enactment and this could only be done safely,

with the aid in their case also, of the higher legislative authority. This result was achieved by the combined action of the two legislatures in 1911.

12. The Act after being supplemented by Act XVIII of 1911, which I have already stated, was repealed in part by Bengal Act I of 1922. It was

repealed in part & amended as well, in the years 1915, 1920 & 1939. It was only amended at least on eight occasions from 1923 to 1950.

Several sections of the Act were amended in the year 1955 giving rise to the Calcutta Improvement (Amendment) Act, 1955 (West Bengal Act

XXXII of 1955). The amendment which is particularly relevant for the present purpose, is an amendment by Section 44 of the said Act of 1955,

by which a new Section viz., the said section 77A was inserted after Section 77. It reads as follows:--

77A. (1) An appeal shall lie to the High Court from an award under this Chapter, in any of the following cases, namely:--

(a) where the decision is that of the President of the Tribunal sitting alone in pursuance of clause (b) of section 77;

(b) where the decision is that of the Tribunal, and--

(i) the President of the Tribunal grants a certificate that the case is a fit one for appeal, or

(ii) the High Court grants special leave to appeal:

Provided that the High Court shall not grant special leave unless the President of the Tribunal has refused to grant a certificate under sub-clause (i)

and the amount in dispute is five thousand rupees or upwards.

(2) An appeal under clause (b) of sub-section (1) shall only lie on (one or more of) the following grounds namely:--

(i) the decision being contrary to law or to some usage having the force of law ;

(ii) the decision having failed to determine material issue of law or usuage having the force of law ;

(iii) a substantial error or defect in the procedure provided by the said Act which may possibly have produced error or defect in the decision of the

case upon the merits.

(3) Subject to the provisions sub-sections (1) and (2), the provisions of the Code of Civil Procedure, 1908 with respect of appeals from original

decrees shall so far as may be, apply to appeals under this section.

(4) An appeal under this section shall be deemed to be an appeal under the Code of Civil Procedure, 1908, within the meaning of article 156 of

the First Schedule to the Indian Limitation Act, 1908.

(5) The Chief Judge of the Court of Small Causes of Calcutta shall, on application, execute any order passed by the High Court on appeal under

this Act as if it were decree made by himself.

13. The argument addressed by Mr. Das Gupta to us is, that the new Section 77A would be of no effect on the maintainability of the appeal. The

decision, challenged in this revision case, is according to him, not an award of the Tribunal; firstly because it is really a pronouncement of the

judgment by the President and secondly because that even after Section 77A, the Act will not have the same effect as that of the L.A. Act which

has lost its existence after being incorporated in the Improvement Act.

15. On the terms of the Improvement Act, read with the modifying Acts, I am of opinion that it contains in itself a sufficient answer to the

contention with which we are dealing. The joint effect of the Acts of 1911, read with the amendments, particularly in 1955, on introduction of

Section 77A, is to give a right of appeal to the High Court though it is undoubtedly a Special and strictly limited right. The provision for the finality

of the award was no doubt intended to exclude any further appeal, but in my judgment the deliberate exclusion of Section 54 of the L.A. Act from

this Act and insertion of Section 77A were sufficient indication of the intention of the legislature that there should be no appeal at all beyond the

High Court and this finds expression in the words of Section 71(d) viz., ""the award of the Tribunal shall be deemed to be the award of the Court

under the said Land Acquisition Act, 1894, and shall subject to the provisions of Sections 77A, be final.

17. If, therefore, as is contended on behalf of the petitioners that there is no appeal to this Court which is claimed in the present case, it would in

my opinion, be clearly repugnant to the provisions of the Act. Section 77A itself, is sufficient to dispose of the ground upon which the contention

rests that no appeal lies. If effect is given to Mr. Das Gupta''s argument it seems to follow that Section 77A is wholly superfluous. This is the most

cogent objection to this contention raised by Mr. Sen. I have therefore come to the conclusion that the provisions of the Act with its amenments

particularly of the year 1955, would prevail and I would not be forced to hold that no appeal lay from the decision in this case.

16. The contention of Mr. Das Gupta that the decision is not an award is of little substance. It is a pronouncement of the judgment by the President

to which the two lay assessors agreed. Section 77A(1) (b) uses the expression ''decision'' which undoubtedly it is. What is an award is to be found

in Section 11 and several other Sections of the L.A. Act. When the matter comes to the Court it becomes little difficult to accept that it is still not

an award. The petitioners even themselves have admitted and treated the decision as an Award. In my view, the judgment or decision, moved

against in this Rule, is nothing but an award under the Act.

17. Secondly, I regard the Improvement Act as doing nothing more than incorporating certain provision from the L.A. Act. For convenience of

drafting it did so, by reference to that Act, rather borrowed from the same instead of setting out for itself at length the provisions which it desired to

adopt. The independent existence of the two Acts is therefore recognized. The offspring of the parent Act namely the Award, survives in the

incorporating Act. I have not been referred to anything in the general rules of construction which supports the contention of the petitioners nor to

any authority which favours them.

18. Hence it seems to me right to hold that an appeal, though strictly limited in nature as in Section 100 of the Code of Civil Procedure, lay against

the award, as in the instant case and consequently the application u/s 115 of the CPC is not maintainable.

19. Now proceeding on the footing that we are deciding an appeal, the point, that the question of title viz.; acquisition of easement should not have

been decided, keeping the apportionment case pending, is also of no substance and cannot be accepted. The petitioners being dissatisfied with the

said award of Rs. 83/- in respect of their claim for compensation made the Reference to the Tribunal for determination of the question of valuation.

The opposite parties Nos. 1 and 2 also made two separate applications to the Collector for making a reference to the Tribunal for determination of

the question of valuation made in respect of their respective claims. The opposite party No. 1 again, started an apportionment case. The Collector

thereon made one single reference to the Tribunal in respect of the application filed by the petitioners as well as by the opposite parties Nos. 1 and

2. The said Reference was numbered as Case No. 40 of 1961. The President of the Tribunal thereafter found that there are three distinct valuation

references, which should be heard separately. Accordingly, the reference of opposite party No. 1 (Anil Mohan Dey) was marked as Case No. 40

of 1961; that of the petitioners was marked as Case No. 40A of 1961 and that of the opposite party No. 2 (Y. Cheu) was marked as Case No.

40B of 1961.

20. When this revisional application was moved before this Court, the apportionment case of opposite party No. 1 was pending before the

Tribunal. To the order of the Tribunal, that the three cases are to be heard separately, the petitioners did not object. When the evidence was given

and there was cross-examination as to the petitioners'' title regarding acquisition of the right of easement, there was again no objection on behalf of

the petitioner. There is neither any miscarriage of justice by going into the question of title. Mr. Das Gupta though rightly contended that in the case

of B.P. Chunder v. B.K. Rahatji, 49 C.W.N. 203 the question as to whether the Tribunal should go into the question of title, was neither pointedly

raised nor decided except in the directions given in the remand order it seems to be no less logical to hold that the question of title, if necessary,

might and should be decided in valuation cases only. Otherwise, it would not be possible to carry out the provisions of the Act and to pass an

effective award for compensation in certain cases. In my opinion there is no bar on the Tribunal in the Act not to go into the question of title, in

such cases. Accordingly, the Tribunal acted rightly in deciding the question of acquisition of easement right in the petitioners" valuation cases even

when the apportionment case was kept pending. I do not find any illegality or irregularity therefor. No prejudice is suffered either by the petitioners.

The finding that the petitioners had failed to prove that they had acquired a right of easement, is affirmed by us, being based on good evidence. Mr.

Sen is right in submitting that as the petitioners did not apply for an opportunity for giving evidence for proof of title, they should not be heard for

the first time in this Court to make a grievance on the said score.

21. The finding of the Tribunal however that clause (m) of the agreement (Ext. E) dated May 17, 1958 does not stand in the way of the petitioners

claiming compensation for easement right is, in my opinion, erroneous and cannot be accepted. Clause (m) between the trustees on the one hand

and the petitioners on the other, reads as follows:--

(m) the fact of exemption of the pink land does not entitle the applicants to retain the right of easement they may enjoy over any adjoining land

which may be acquired by the Board.

22. The pink land, measuring two cottahs and seven chittaks, in premises No. 28, Blackburn Lane, of which the petitioners are the owners, is

exempted by the Board from acquisition under the said terms of the agreement, because in my judgment, the petitioners had foregone the right of

compensation for extinction of any easement right over any adjoining land, which is acquired by the Board, namely, premises No. 15/2A,

Chhatawalla Guile in the instant case. It would not be incorrect to hold that this clause disentitled the petitioners to retain the right of easement they

might have enjoyed over any adjoining land acquired by the Board and consequently the claim for compensation for the extinction of such right by

the acquisition of the adjoining land is unsustainable. This in my opinion is the more cogent reason for the interpretation of the aforesaid clause (m)

in the agreement.

In my judgment the Collector is a necessary party in such cases and the Tribunal was right in so holding.

23. Moreover, even if it was an appeal it would not have been proper for us to interfere on the facts of the instant case, in view of the limited scope

and nature of the appeal. Though it is a special Act with a special provision for the appeal and a special remedy has been provided, it is difficult to

discover that the basis of the judgment is erroneous or contrary to law. It is in essence a question of fact. Mr. Das Gupta contends as a last resort

that he can avail of the constitutional provision of Article 227 to move this Court. The tests of Article 227 have been laid down by the Supreme

Court in cases more than one. It is well known that the extent of jurisdiction under Article 227 is not appellate so that every mistake of law may be

corrected. It is equally true that the power of superintendence of this Court, under Article 227 though important, is to be exercised sparingly. But it

is again important to remember that it cannot be defined precisely or exhaustively. To attempt to lay down a set of iron rails on which the power of

superintendence, is always to run, would in my opinion, be perilous. It must be left to be determined judicially in the facts of each case. It is a

properly constituted Tribunal, which has exercised its jurisdiction entrusted to it. It is not influenced by extraneous or irrelevant considerations. The

decision is not perverse, arbitrary or illegal. Therefore, I do not think that the power under Article 227 should be invoked in the instant case. This

contention of Mr. Das Gupta also fails.

We have had the advantage of a fuller discussion of what is undoubtedly the questions of some intricacy; but for the reasons stated in this

judgment, there is no substance in this Rule and the same should be discharged and I think that justice in this respect would be done by directing

that the petitioners should pay no costs in this Revision Case.

D. Basu, J.

I agree.