
(1959) 02 CAL CK 0009
In the Calcutta High Court
Case No : A.F.O.D. No. 80 of 1954

Jivandas Khimji

APPELLANT

Vs

Smt. Narbada Bai

RESPONDENT

Date of Decision : 11-02-1959

Acts Referred:

Calcutta Improvement Act, 1911 — Section 69
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 41 Rule 1, 9
Land Acquisition Act, 1894 — Section 11, 16, 18, 5A, 6

Citation : AIR 1959 Cal 519

Hon'ble Judges : K.C. Das Gupta, C.J.; R.S. Bachawat, J

Bench : Division Bench

Advocate : Niren De, for the Appellant; B.N. Dutt Roy, for the Respondent

Final Decision : Allowed

Judgement

Das Gupta, C.J.—The main question raised in this appeal is a question of law, namely, whether an award made by a Land Acquisition Collector u/s 11 of the Land Acquisition Act is a nullity, because of the omission of the Collector to include therein compensation claimed by the owner of an adjoining land in respect of easement over the land acquired, when such omission is the result of the Collector's opinion that no such compensation should be allowed. The respondent Narbada Baa brought the suit for a declaration that she was entitled to a right of easement in respect of certain windows on the ground, first and second floors on the western side of her premises No. 161, Lower Chitpore Road and to have access of light and air into the rooms, thereof through the said windows; for an injunction restraining the appellant, Jivraj Jivandas Khimji, from interfering with the right of easement and with the access of light and air through the windows for a permanent injunction directing him to remove and pull down obstructions which had been put up; for a permanent injunction restraining him from proceeding with the construction of a boarding or from putting up construction of any kind so as to obstruct the access of light, and for damages. Admittedly, 16 Ezra Street was acquired" by the Board of Trustees of the Calcutta

Improvement Trust under the provisions of the Land Acquisition Act and after an award under S, 11 of the Land Acquisition Act was made, the Collector took possession thereof. If this is a valid award the property vested in the Government is absolutely free from all encumbrances and so free from the operation of the easement, if any? which the plaintiff had in respect of the access of light to his premises. 161 Lower Ghitpore Road, The plaintiffs case is that he had, such an easement; that that easement had, not been in any way affected by the award inasmuch as the award is a nullity, and as the defendant had recently planted three iron pillars on the extreme eastern boundary of the premises No. 16; Ezra Street and placed iron angles crosswise upon these pillars with a view to putting up a hoarding, he brought the suit for the declaration of his right of easement and for other reliefs as mentioned earlier. In the court below the appellant challenged, inter alia, the plaintiffs averment as regards the existence at any time of any right of easement on the basis of which he could claim the access of light and air unobstructed by any construction on the premises No. 16, Ezra Street. We are no longer concerned however, with this aspect of the case as the conclusion of the trial court that there was such a right of easement at the date of the acquisition and also that if the constructions as alleged are put up, there will be an obstruction to light and air to the plaintiff's premises so as to amount to a nuisance, is not disputed. The main contention of the defendant which concerns us now was, as set out in paragraph 15 of his written statement, in these words "With further reference to paragraph 13 of the plaint the defendant states that by reason of the said Award and by reason of the said Collector having thereafter taken possession of the said premises No. 16, Ezra Street, Calcutta, the same vested in the Government absolutely free from all encumbrances as provided in the special statute of, Land Acquisition Act, and the right of easement even if any of the plaintiffs has been fully and completely extinguished by virtue of such vesting, by statute declared free from all encumbrances."

2. The main dispute in the trial court was therefore over the question whether the award of the Collector was a nullity. Among the grounds averred by the plaintiff as the basis of his case that the award was a nullity were the statements that the Collector had arbitrarily refused to adjudge upon the claim put forward by the plaintiffs predecessor-in-interest, Mussamat Halima Ariff Bham, who, at the date of the acquisition, was the owner of 161 Lower Chitpore Road, and / or to admit evidence relating to her right of easement in respect of the ancient lights. This case does not appear to have been stressed at the trial and it is sufficient to say that the evidence on the record clearly shows that the Land Acquisition Collector did consider the matter and held an enquiry and after consideration came to the conclusion that the said Mussamat Bham was not entitled to any compensation in respect of the easement. The ground on which reliance was ultimately placed in the trial court and also before us for the contention that the award was a nullity, was the fact that no compensation was included in the award in respect of this easement right. Another averment of the

plaint which has to be mentioned is that the Collector did in fact keep the right of easement alive By his award and so even if the award be valid, the right of easement has not been extinguished or prejudiced or affected by the award and, alternatively, the award is invalid because the right of easement has been kept alive even though, under the law, such an easement cannot be kept alive.

3. The vital issue in the case is therefore issue No. 3 as framed in the trial court which is in these words:

"Has the right of easement, if any, been extinguished by reason of the allegations pleaded in paragraph 15 of the written statement?"

Issues Nos. 9 and 10 also raised the same question in another form issue No. 9 being "Was the alleged acquisition of premises No. 16, Ezra Street free from encumbrance within the meaning of Section 16 of the Land Acquisition Act by reason of the matters pleaded in the plaint?" and issue No. 10 being, "Did the Award in any way affect the plaintiff's right of easement, if any?" The learned Judge has answered all these questions in the negative. The basis of his conclusion is that the award was a nullity. The reason as given by him for the decision is that "in view of the requirements of Sections 11 and 16, the award, in my view is bad on the face of it." In another portion of the judgment the learned Judge has said:

"In my view, the statute must be construed strictly, and it must follow from what has already been said that material provisions of the Act were not complied with and the award for that reason would appear to be bad, apart altogether from the question of construction."

From the reference to "what has already been said" it appears that the learned Judge was thinking of his statement in the previous paragraph which is in these words:

"The argument on behalf of the plaintiff is that as no compensation was awarded, the award concerned was a nullity and that consequently there was no vesting of the property in the Government free from encumbrances or at all, as provided for in Section 16. If the plaintiffs predecessor had an easement, the Collector was bound u/s 11 to award compensation, unless of course there was an arrangement under Sub-section (4) of Section 31 of the Act." It appears that in the concluding portion of the judgment the learned Judge was of opinion that any arrangement purporting to be under Sub-section (4) of Section 31 to keep alive the easement would be invalid and that "an award which allows an easement to subsist would be invalid as being repugnant to the provisions of Section 16".

4. The question of construction of the award to which the learned Judge refers in the passage from his judgment already quoted arose on a statement made in the award by the Land Acquisition Collector in the following words:

"No compensation is allowed for easement of Premises Nos. 17, Ezra Street and 161 and 162 to 164, Lower Chitpore Road as the existing windows which open on

a strip of land in between will be allowed to open as before."

The proper construction according to the learned Judge was that the Collector was stating that the windows would have the same access of light and air as before.

5. Another defence raised by the appellant was that the suit was bad for non-joinder of the necessary parties, namely, the Government of Bengal and the Trustees for the Improvement of Calcutta. The learned Judge came to the conclusion that these were not necessary parties and the suit should not fail because of such non-joinder.

6. On the basis of his conclusions the learned Judge held that the plaintiff was entitled to the main reliefs sought and gave her a declaration as regards easement as prayed for, an order of injunction restraining the appellant from interfering with that right of easement in respect of the windows concerned by the construction of the proposed hoarding or by the completion thereof and also a mandatory injunction directing the appellant to remove and pull down within a specified period the construction mentioned in paragraph 16 of the plaint.

7. As I have already indicated, the main question in appeal is whether the award is a nullity because no compensation in respect of the easement right claimed by Mussammat Bham was included in the award. As I have already said, the position is, not that the Collector did not consider the question. If he had not applied his mind to the question and had refused to adjudge on it as was alleged by the plaintiff in paragraph 9 of the plaint, there would be good reason to think that an imperative-requirement of the statute was not complied with and that, consequently, the award was invalid. Clearly, however, the Collector applied his mind to the question, discussed the matter on several days and then finally came to a conclusion. It is to be noticed that in the same award the Collector had to consider the claim for compensation in respect of easement enjoyed by some other lands and while as regards some of these he included no compensation, he did include compensation in respect of the claim of easement by some of the lands. Thus we find that claimants Nos. 2(a) to 2(d) owners of No. 7 Parsi Church Street were given a sum of Rs. 540/8/- inclusive of the statutory allowance in respect of their right of easement and claimants Nos. 3(a) to 3(e) owners of Nos. 8 and 8/1 Parsi Church Street, as trustees of the Trust Estate of Jivandas Khimji, were allowed a sum of Rs. 241/8/- in respect of the right of easement claimed by them for their premises. At the same time, Jivandas Khimji as owner of premises Nos. 162 to 164 Lower Chitpore Road was allowed nil, that is, allowed no compensation in respect of the right of easement claimed by him. The orders made on the 5th of May 1938, 16th of May, 1938, 24th of May 1938, 27th of May 1938 and 30th of May 1938 show clearly the Collector's application of mind to the question and the discussions he had in this matter. Having applied his mind, he came to the conclusion as regards the claim made by Mussammat Bham in respect of the easement for premises No. 161, Lower Chitpore Road that no compensation should be allowed for the land. The question is whether by coming

to this conclusion and as a result thereof, not including any compensation in respect of the easement in favour of the owner of 161 Lower Chitpore Road, he was disobeying some imperative requirement of the law. It is useful to set out in this connection the requirements of Section 11 which requirements, according to the plaintiff, were not complied with. The section is in these words:

"On the day so fixed, or on any other day to which the enquiry has been adjourned, the Collector shall proceed to enquire into the objections (if any) which any person interested has stated pursuant to a notice given u/s 9 to the measurements made u/s 8, and into the value of the land at the date of the publication of the notification u/s 4, Sub-section (1) and into the respective interests of the persons claiming the compensation and shall make an award under his hand of--

(i) the true area of the land;

(ii) the compensation which in his opinion should be allowed for the land; and

(iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him."

It is important to notice the language in Clause (ii) of the section, namely, "the compensation which in his opinion should be allowed for the land." Far from requiring that the Collector must award compensation in respect of every claim the statute clearly requires that the Collector should form his own opinion as to what compensation should be payable. Mr. De, in my opinion, rightly argued that this duty cast on the Collector to form an opinion as regards the compensation payable did not mean that in every case he was to hold that some compensation was payable. Whether any compensation is payable or not is a matter on which he has first to form an opinion, if he finds that any compensation is payable, then he has also to form an opinion as regards the quantum of compensation. When therefore, a Collector after applying his mind and in pursuance of the duty enjoyed by the section forms an opinion on the question of compensation payable in respect of the claims made for any interest and comes to a conclusion that no compensation is payable, he is doing only what the section requires him to do. I am unable to see how it can be said that by forming the opinion that no compensation is payable, the Collector has failed to comply with any requirement of this section.

8. There can be no doubt on principle and on authority that when a statute authorises such acquisition of land, the statutory requirements must be strictly complied with. As was stated by this Court (Mookerjee and Teunon, JJ.) in *Roghunath Das v. Collector of Dacca* 11 C LJ 612 :

"When statutory rights of an exceptional character have been created, the conditions prescribed by the Statute for the exercise of such rights must be strictly fulfilled, and if an attempt is made at merely nominal compliance with the

provisions of the Statute in the exercise of such rights, the Courts are not powerless to afford relief to a person who is aggrieved by the adoption of such a course."

It is unnecessary to mention numerous other authorities where this view has been forcibly enunciated and I have no hesitation in agreeing with the learned trial Judge that the provisions of Section 11 must be strictly construed. I am unable to agree, however, that the strictest construction justifies the Court to hold that not only must the Collector form an opinion as regards the compensation payable, but also that opinion must always be in the affirmative in favour of payment of compensation. It is true that the right of the Sovereign to acquire the property of an individual must not be exercised without payment of compensation that may be due. To say that, however, is not to say that merely because a claim is made by a party, that claim has necessarily to be allowed. I am unable to read into the provisions of Section 11 any requirement that compensation must always be paid in respect of a claim. My conclusion, therefore, is that the fact that after a proper consideration of the matter the Collector decided against awarding any compensation in respect of the easement claimed by the owner of 161 Lower Chitpore Road does not amount to any violation of the requirements of Section 11 and that the validity of the award cannot be challenged on the ground of such non-payment.

9. It is urged, however, that this view is opposed to the view taken By this Court in *Bijoy Kumar Addy v. Secretary of State* 25 C LJ 476: (AIR 1917 Cal 373). That was a case in which, after land has been acquired, the Collector in making the award did not assess compensation for the land, being of opinion, in view of the terms of the *Kabuliyat* executed by the predecessor of the claimant in favour of the Collector, that in the event of the land being required by Government, the holder must relinquish it without receiving any compensation. At the instance of the claimant a reference was made to the Civil Court u/s 18 of the Land Acquisition Act. The Special Judge was also of the opinion that no compensation need be awarded for the land. On appeal to this Court it was urged that it was obligatory upon the Collector as also upon the Special Judge to provide for compensation for all lands acquired under the Land Acquisition Act, *Mookerjee and Cuming, JJ.*, were of the opinion that the acquisition was being made on the assumption that the interest was to be acquired and paid for and that it was beyond the competence of the Collector and the Special Judge to hold that there was no interest which could be acquired or for which compensation was payable. They allowed the appeal saying: "In the case before us, there is thus no valid award either by the Judge or by the Collector, Whatever the rights of the claimant may be, his land must be assessed and compensation must be awarded under the provisions of Section 23 read with Section 26. When such compensation has been assessed and awarded, a question of apportionment may arise and will in the present case necessarily arise between the Government on the one hand and the claimant on the other. Whatever may be the true measure of the rights of the claimant as a tenant under the Government at the date of the

declaration, the Government was undoubtedly in the position of landlord and would be entitled to a share at least of the compensation money awarded for the aggregate of the right in the land. It is not necessary at this stage to determine, on what basis the apportionment should be effected; that question will arise only after compensation has been assessed". In allowing the appeal this Court further said: "The decree of the Special Judge is set aside and the case remitted to the Collector in order that he may make a proper award after determining the compensation payable in respect of the land acquired."

10. It is important to notice that the jurisdiction that was exercised by this Court in that case was itself jurisdiction under the Land Acquisition Act. If the award was a nullity, the reference u/s 18 would be invalid and this Court also would have no jurisdiction in appeal to give such directions as they did. It seems reasonable in my opinion to think therefore, that though the language used there was that there was no valid award either by the Judge or by the Collector, what their Lordships meant was that there was no proper award and that is why in the concluding portion they said "the case is remitted to the Collector in order that he may make a proper award after determining the compensation payable in respect of the land acquired." Even if this case 25 C LJ 476: (AIR 1917 Cal 373), may be considered to be an authority for the proposition that where land is being acquired and the Collector arbitrarily refused to allow compensation, such arbitrary exercise of jurisdiction would amount to no jurisdiction and would result in the invalidity of the award, I am unable to see that this case is any authority for the wide proposition that the statute requires that whenever a claim is made in respect of any interest in land, the Collector is bound to award some compensation.

11. The decision of the Privy Council in *Luchmeswar Singh v. Chairman of the Darbhanga Municipality* ILR Cal 99, on which reliance was also placed on behalf of the respondent is really of no assistance. In that case though no award was made, the Collector proceeded to deal with the transfer to the Darbhanga Municipality of a plot of land which belonged to the appellant, Lachmeswar Singh, who was then a minor, as an acquisition under the Land Acquisition Act and made an offer of Re. 1 as compensation for the land. This offer was accepted by the Manager of the Court of wards on behalf of the Maharaja. The Privy Council held that the offer and acceptance of the rupee was a colourable attempt to obtain a title under the Land Acquisition Act without paying for the land. There can be no doubt that if in that case the authorities had also gone through the formality of making an award and made therein a compensation of Re. the award would be invalid, inasmuch as that would be a colourable transaction, a nominal compliance with the law and not a real compliance and a fraud upon the Act, When there is nominal compliance with the requirements of law and not real compliance and fraud is in effect being practised, the award is in law not an award under the Act, though it purports to be under the Act. That case is of no assistance to the respondent in her argument that unless some compensation is paid the award is a nullity.

12. Reliance was also placed by the plaintiff-respondent on the decision of this Court in *Rameswar Singh v. Secretary of State* ILR Cal 470. That was a suit brought by the plaintiff to recover compensation on account of injury to a terry by reason of the acquisition of certain lands under the Land Acquisition Act. The question raised was whether a suit would lie in the Civil Court in respect of such claim for damages. It was held that no such suit was barred. This Court was of opinion that by reason of irregularities in connection with the land acquisition proceedings, the award therein was no bar in respect of the claim for damages with regard to the ferry. They considered it unnecessary to decide whether the irregularities were sufficient to affect the validity of the title to the land taken up. While this case is good authority for the proposition that the statutory requirements as regards notice have to be strictly complied with and unless there has been waiver by the interested party, these irregularities might affect the conclusive character of the award, it does not in any way support the plaintiffs case that non-payment of compensation, on the finding that compensation is not payable in law, makes the award invalid.

13. I am unable to agree, therefore, with the learned Judge that the non-payment of compensation to Must. Bham in respect of the easement claimed by her for her premises No. 161 Lower Chitpur Road has made the award a nullity.

14. Nor am I able to agree that the award is invalid because of the provisions of Section 16 of the Land Acquisition Act. Section 16 provides that "when the Collector has made an award u/s 11, he may take possession of the land, which shall thereupon vest absolutely in the State, free from all encumbrances." The learned Judge seems to think that if in making the award the Collector keeps easements alive that being in conflict with the provisions of Section 16 the award becomes invalid. For myself I would be inclined to think that if the Collector in his award keeps the easements alive the directions as regards the easements remaining alive would be ineffective, because they are against the express provisions of the statute. It is unnecessary for me to consider the further question whether the award will be a nullity, if the Collector has made an order keeping the easements alive, as, in my view, the Collector cannot in the present case be reasonably said to have kept any easements alive. In the first place, it is necessary to remember that the Land Acquisition Collector must be assumed to know the provisions of Section 16 and the position in law that after an award has been made and the Collector has taken possession, the land vests absolutely in the Government free from all encumbrances, including rights of easement. When this assumption is made, as it must necessarily be made, very strong and unequivocal language is necessary to justify a conclusion that the Collector has, in the face of such a provision in law, kept the easements alive. In the present case I am unable to see that he has used language which can justify the conclusion that he was keeping the easements alive. The language by which it is urged the easement was kept alive has already been set out above and runs thus; "No compensation is allowed for easement of premises No. 17 Ezra Street and 161 and 162 to 164, Lower Chitpur Road, as the existing windows, which

open on a strip of land in between, will be allowed to open as before." An attempt is made to read into the words "to open as before" the intention of the Collector to say that the windows will get the same amount of lights as before. With great respect to the learned Judge, who accepted this argument, I am unable to see how the words "windows will be allowed to open as before" can be interpreted to mean "the windows will be allowed to get the same amount of light as before." It is urged that unless the windows were being intended to get the same amount of light as before, there was no point of giving this fact of the windows being allowed to open as before, as a reason why no compensation would be allowed for easement. This argument is obviously based on the assumption that the Collector came to a conclusion that Must. Bham had a right of easement in respect of her land for access of light and air over 16 Ezra Street. I do not think it is proper or reasonable to read such a conclusion in the words used by the Collector. On a reasonable interpretation of the words used, they mean, in my opinion, nothing more than this, that the Collector was not deciding that Must. Bham had a right of easement, but thought that even assuming that she had such a right of easement, she was not entitled to any compensation in view of the fact that the opening of the existing windows could not be interfered with, as by reason of the existence of an open strip of land they would be allowed to open as before and any structure on 16 Ezra Street could not possibly affect this.

15. Some argument was advanced before us to show that the evidence adduced in the case showed that the strip of land mentioned in the passage really appertained to 161 Lower Chitpur Road and it is urged that unless the Collector had the intention of saying that the easements would be kept alive, the concluding portion of the passage would be meaningless. It has to be remembered, however, that even though it is now found on evidence that the strip of land appertained to 161 Lower Chitpur Road, there is nothing to show that the Collector was satisfied about such ownership. On the contrary, the use of the language "in between" makes it reasonable to think that the Collector had not come to a conclusion as regards ownership. The language "in between" would suggest that in his view the strip of land was not shown either to belong to 17 Ezra Street or to 161 Lower Chitpur Road. Neither Mr. Parks' evidence as to what took place between him and the Land Acquisition Collector nor the note made by a clerk of the Land Acquisition Collector, Sri Dinesh Chandra Chakravarty, is, in my opinion, relevant to show what the Collector had in mind in using the language as he did in the above passage. On a careful consideration of the words actually used by him, I have come to the conclusion that he was not keeping alive any right of easement in favour of the predecessor of the respondent, Mat. Bham.

16. My conclusion, therefore, is that neither of the reasons given by the learned Judge for his finding that the award is invalid can be sustained.

17. Mention has to be made of another argument which appears to have been

raised before the trial Judge, and was also repeated here, namely, that Section 5-A of the Land Acquisition Act has not been complied with. Though the learned Judge did not base his conclusion on this argument, he has recorded a finding that the defendant had failed to prove that Section 5-A of the Land Acquisition Act was not applicable to these Land Acquisition proceedings. The answer to the question whether Section 5-A was applicable or not depended on the answer to the question of fact whether the acquisition was being made under the Calcutta Improvement Act or not. As the learned Judge himself recognises. Section 5-A would have no application if the acquisition was being made under the Calcutta Improvement Act. Section 69 of the Calcutta Improvement Act provides that "the Board may, with the previous sanction of the State Government, acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of the Act." When such sanction is given, the acquisition has still to be proceeded with under the provisions of the Land Acquisition Act 1894. It has, however, been decided by the Privy Council that the provisions of the Land Acquisition Act which would be applicable to such an acquisition would be the provisions as they stood at the date of the Calcutta Improvement Act. It is in consequence of this, that Section 5-A of the Land Acquisition Act, which was inserted in the year 1923 by Act XXXVIII of 1923, does not apply to acquisition proceedings made for the purpose of the Board on sanction given in accordance with the provisions of Section 69. Whether the acquisition has been made on the strength of Section 69 of the Calcutta Improvement Act or not is, however, a question of fact. If the plaintiff wanted to make a case that Section 5-A was applicable to these proceedings, and so the declaration u/s 6 was invalid in law, having been made without waiting for the period of thirty days, which is allowed u/s 5-A to interested parties to object to the acquisition, it was necessary that he should raise this point definitely. This point was not raised in the plaint and rightly no issue was framed. How in that state of things the plaintiff could be allowed to urge the point, that in view of the provisions of Section 5-A the declaration u/s 6 was invalid in law, I fail to see. It has to be noticed in this connection that the plaintiff nowhere even suggested in the plaint that the declaration u/s 6 was invalid.

18. The learned Judge has found fault with the defendant for not producing before the Court the necessary papers which only would show that the acquisition was u/s 16 of the Land Acquisition Act. If an objection on the basis of Section 5-A of the Act had been taken by the plaintiff in the plaint, the defendant would have the duty of producing proper materials before the Court to convince the Court that the acquisition was u/s 69 of the Calcutta Improvement Act. The point not having been raised, there was really no duty on the defendant to produce such papers.

19. In my opinion, the plaintiff cannot raise any objection on the basis of the provisions of Section 5-A because that point was not taken by him in his plaint.

20. If I had considered it proper to go into the question, I would have for myself

had no hesitation in thinking that a reasonable conclusion from the very language of the declaration, which was published on the 3rd December, 1936, and the declaration u/s 6, which was published on 10-12-1936, is that the acquisition was being made u/s 69 of the Calcutta Improvement Act. The opening words of the Notification are "Whereas it appears to the Governor in Council that land is likely to be required to be taken by Government at the expense of the Calcutta Improvement Trust, for a public purpose, viz., for improvement schemes * * * *" The same words are used in the declaration u/s 6. It would be unreasonable in my opinion to think, in the face of this language, that sanction had not been obtained u/s 69 or that the acquisition was being made under the Land Acquisition Act apart from the provisions of the Calcutta Improvement Act.

21. My conclusion being that the Judge's decision that the award is a nullity cannot be sustained, the necessary consequence is that the plaintiffs suit must be dismissed. It is, therefore, really unnecessary to consider the other main defence raised by the defendant, namely, that the suit is bad for non-joinder of parties. The position in law undoubtedly is that in the absence of necessary parties a decree will not be made in favour of the plaintiff. The question as to what parties are necessary is often not easy to determine. One test which has all along been recognised as of great importance is that when in the absence of a party the Court cannot give an effective remedy, that party is a necessary party. I am unable to see that the Court cannot give the plaintiff the reliefs she has asked for in this case merely because the State of West Bengal and the Trustees for the Improvement of Calcutta are not before the Court. It may be that if the suit had succeeded, the position would have been inconvenient to the present defendant, as the award being a nullity no title vested in the Government and so the Trustees also acquired no title and could pass no title to the defendant. Apart from that, the defendant may well be entitled to obtain from the Improvement Trust and the Improvement Trust from the State Government and ultimately the State Government from the real owners, to whom the full compensation has been paid without making any deduction for the easement, a sum of money to represent the loss to the defendant by reason of this declaration of easement right and the creation of an impediment to his unrestricted enjoyment of the land. I am unable to persuade myself that these facts justify the conclusion that in the absence of the State of West Bengal and the Trustees an effective relief cannot be given.

22. Mention may be made in this connection of the two tests laid down by this Court in the case of *Durga Charan Sarkar v. Jotindra Mohan Tagore* ILR Cal 493. "In order that a party may be considered a necessary party defendant", said Banerjee and Stevens JJ., "two conditions must be satisfied, first, that there must be a right to some relief against him in respect of the matter involved in the suit; and second, that his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." I do not see that the plaintiff has any right to

relief against either the State Government or the Improvement Trust. If, as her case is, the award is a nullity, neither the Government nor the trustees have any interest in the land and there is no question of any relief being asked against them. It might be that the plaintiff has a right to some relief against the original owners of the land, namely the Lahas, to whom the land returns if the award is invalid; and if an objection had been taken that the suit was bad for non-joinder of the Lahas that would require careful consideration. No such objection on the ground of the Lahas not being joined has, however, been taken, so that it is unnecessary for us to consider whether the Lahas are necessary parties or not. Even if the Lahas were necessary parties, the suit cannot fail on the ground of nonjoinder of the Lahas as no objection as to their nonjoinder was taken.

23. A question was raised that the suit was not maintainable inasmuch as the special remedy provided in the Act itself must be followed by the aggrieved party. There can be no doubt that if the award is not a nullity as claimed, the procedure of a suit is not open to the plaintiff. She brought a suit, however, on the basis that the award was a nullity and on that basis the existence of special procedure for correcting errors in the award by a reference u/s 18 is no bar to the maintainability of the suit. On my finding that the award has not been shown to be a nullity, it is clear that the plaintiff cannot get any relief by way of a suit.

24. I would, accordingly, allow this appeal, set aside the decree made by the learned Judge and dismiss the suit. Parties will bear their own costs in the Court below. The appellant will get his costs of the appeal.

25. Certified for two Counsel.

Bachawat, J.

26. I agree.