
(1940) 11 CAL CK 0017
In the Calcutta High Court

Province of Bengal

APPELLANT

Vs

Mahes Missir and Others

RESPONDENT

Date of Decision : 19-11-1940

Acts Referred:

Calcutta Improvement Act, 1911 — Section 24

Land Acquisition Act, 1894 — Section 49

Land Clauses Consolidation Act, 1845 — Section 92

Citation : AIR 1941 Cal 625

Hon'ble Judges : Lodge, J;Khundkar, J

Bench : Full Bench

Judgement

Khundkar, J.—These are two rules obtained by the Province of Bengal against orders of the Calcutta Improvement Trust Tribunal passed upon references u/s 49 (1), Land Acquisition Act, made by the First Land Acquisition Collector, 24-Parganas. Rule 567 of 1940 is not pressed and is accordingly discharged. Rule 566 of 1940 relates to premises No. 40, Lake Road, measuring about 6 bighas, 5 cottas, and 6 chittaks which was notified for acquisition by Government by a declaration No. 12578 L. A. dated 19th June 1937 published in the Calcutta Gazette of 24th June 1937. u/s 24, Calcutta Improvement Act, the present landlord, opposite party 10, subsequently entered into an agreement with the Calcutta Improvement Trust whereby the trust was to acquire a portion of the land measuring about 58 cottas and 12 chittaks, and the remaining portion of the land measuring about 66 cottas and 10 chittaks was to be exempted from acquisition on a payment of Rs. 48,900 to be made by the landlord to the board. Upon the plan attached to the agreement, the portion of the land to be acquired was coloured blue and the portion to be exempted was coloured pink.

2. It would be convenient hereafter to refer to the land to be acquired as the blue land, and the land to be exempted as the pink land. The pink land embraced certain small plots which were in the occupation of opposite parties 1 to 9 as tenants with a terminable and non-transferable interest. These persons had erected huts on their respective plots, but according to the evidence of the

present landlord, opposite party 10, their tenancies had been terminated by notices to quit. Two of the tenants opposite parties Sarabala and Sonalakshmi had actually surrendered possession, and against the remainder the landlord had instituted ejectment suits. The evidence further is that by virtue of a verbal permission granted by the predecessor of the present landlord, the tenants had constructed across the blue land a kutcha path connecting their bustee with the main road. By the sides of this path there ran kutcha drains and under the blue land ran water-pipes which served the bus-tee. The blue land was eventually acquired, and evidence adduced on behalf of the Improvement Trust was to the effect that after the acquisition the Trust has constructed a new road 150 feet wide to run along the south of the pink land, that this new road has sewerage and electric lighting, that access to the public road from the pink land has been improved since the acquisition, and that the acquisition has not prejudicially affected or impaired the use and occupation of the huts on the pink land.

3. When proceedings for the acquisition of the blue land were started before the First Land Acquisition Collector, the tenants opposite parties 1 to 9 claimed that the access to the pink land across the blue land and the water connections formed integral parts of their structures and prayed that their structures also be acquired u/s 49, Land Acquisition Act, and further that the question be referred to the Calcutta Improvement Trust Tribunal u/s 49, Land Acquisition Act. The Collector thereupon made a reference to the tribunal u/s 49 (1), Land Acquisition Act, for a decision as to whether the blue land which was intended to be acquired formed a part of the houses of the petitioners within the meaning of Section 49 (1) of the Act. The tribunal rejected the reference on the ground that it was incompetent, and the Collector proceeded to make an award in respect of the blue land and to take possession of the same. Meanwhile, the tenants, opposite parties moved this Court which eventually directed the tribunal to rehear the reference on the merits in the presence of the landlord opposite party 10. The tribunal by its judgment dated 26th February 1940 then answered the reference by holding that the blue land formed a part of the houses of the tenants opposite parties, and it is against that decision that this rule is directed. At the hearing before us, there has been considerable discussion as to whether the tenants opposite parties had any right of easement over the blue land. On their behalf it was argued that the access which they had over the blue land to the main road, the water connexion and kutcha drains, as well as the user by them of jheels upon the blue land were easements of necessity created by implied grants by the original landlord, and reliance was placed in this connexion on *Crowdy v. O'Reilly* ("12) 16 CLJ 417. In the view we take, it is not necessary to decide the question as to whether the tenants opposite parties as tenants of the pink land had rights of easement recognized by law over the blue land. For the purposes of the present decision we may assume that they had such rights. The main argument on behalf of the tenants opposite parties turned upon the construction of Section 49 (1), Land Acquisition Act, which is as follows:

49. The provisions of this Act shall not be put in force for the purpose of

acquiring a part only of any house, manufactory or other building, if the owner desire that the whole of such house, manufactory or building shall be so acquired:

Provided that the owner may, at any time before the Collector has made his award under S.11, by notice in writing, withdraw or modify his expressed desire that the whole of such house, manufactory or building shall be so acquired:

Provided also that, if any question shall arise as to whether any land proposed to be taken under this Act does or does not form part of a house, manufactory or building within the meaning of this section, the Collector shall refer the determination of such question to the Court and shall not take possession of such land until after the question has been determined.

In deciding on such a reference the Court shall have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house, manufactory or building.

4. It was contended that the tenants opposite parties were owners of the blue land within the meaning of Section 49 (1). In support of this argument reference was made to Section 3 (b) and to the clause "fourthly" of Section 23 (1). Section 3 (b) which affords an explanation of the expression "person interested" is as follows:

The expression "person interested" includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act; and a person shall be deemed to be interested in land if he is interested in an easement affecting the land.

5. Section 23(1) enumerates matters which the Court shall take into consideration in determining the amount of compensation to be awarded, and clause "fourthly" of that provision is in the following terms:

Fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immovable, in any other manner, or his earnings.

6. For the tenants opposite parties it was argued that as persons entitled to easements over the blue land they are "persons interested" in the blue land, and that the Court was bound to take their claims into account because the acquisition of the blue land injuriously affected their immovable property on the pink land. Our attention was invited to Section 92, Land Clauses Consolidation Act (8 and 9 vic. C. 18) which enacts that

no party shall at any time be required to sell or convey to the promoters of the undertaking a. part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof.

7. The construction placed upon this section by the Courts in England has been explained in a number of cases amongst which are the following which were cited

before us on behalf of the opposite parties : Lord Grosvenor v. Hampstead Junction Railway Co (1857) 118 RR165, Barnes v. South Sea Railway Co (1884) 27 Ch D 536, Caledonian Railway Co. v. Turcan 1898 AC 256 , Pulling v. London Chatham & Dover Railway Co (1864) 33 LJ Ch 505, Marson v. London Chatham & Dover Railway Co (1868) 6 Eq 101, McGregor v. Metropolitan Railway Co (1866) 14 LT 354 and Siegenberg v. Metropolitan District Railway Co (1884) 49 LT 554. In support of the rule it was contended that; the opposite parties are not owners of either the blue or the pink land within Section 49 (1), Land Acquisition Act, and that they are owners of only the huts on the pink land, and at best are entitled to no more than compensation under the provisions contained in Part 3 of the Act. Now, at the outset, it should be borne in mind that Section 49 occurs in part 8 which deals with miscellaneous matters not covered by the earlier provisions of the Act. The expression "owner" which occurs in Section 49 is nowhere denned in the Act, and though the expression "person interested" must obviously include "owner," the connotations of the two terms are by no means coincident. The word "owner" does not occur in Section 23 where in clauses "secondly," "thirdly," "fourthly" and "fifthly" the expression employed is "person interested." Section 23 is in Part 3 of the Act, which governs a reference relating, amongst other matters, to the compensation contemplated by Section 18. It is desirable to set out the exact language of these provisions. Section 18 is as follows:

18. (1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made -

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award,

(b) in other cases, within six weeks of the receipt of the notice from the Collector u/s 12, Sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.

8. Section 23 is in the following terms:

23. (1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration -

first, the market value of the land at the date of the publication of the notification under S.4, Sub-section (1);

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immovable, in any other manner, or his earnings;

fifthly, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and

sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration u/s 6 and the time of the Collector's taking possession of the land.

(2) In addition to the market-value of the land, as above provided, the Court shall in every case award a sum of 15 per centum on such market-value, in consideration of the compulsory nature of the acquisition.

9. Now, the expression "person interested" is, as already stated, explained in Section 3 (b) as including persons claiming an interest in compensation, and including also persons interested in an easement affecting the land to be acquired. It is reasonably clear that the expression "person interested" has an application much wider than the word "owner" in the ordinary accepted meaning of that word. An owner may certainly claim compensation under the provisions of Part 3. But the broad question we have to answer is whether a "person interested" who may not strictly be considered an owner may avail himself of the rights conferred by Section 49. In our judgment the explanation contained in Section 3 (b) can afford assistance only in the matter of claims for compensation within the scope of Part 3 of the Act, and furnishes little, if any, guidance in the elucidation of Section 49. We are fortified in this conclusion by certain provisions contained in Part 2 of the Act which relate to compensation, Section 9 (1) which relates to notice is as follows:

The Collector shall then cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him.

10. Section 11 relates to the inquiry which the Collector must hold. It is in these terms:

On the day so fixed, or on any other day to which the inquiry has been

adjourned, the Collector shall proceed to inquire 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 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.

11. Section 16 confers upon the Collector the power to take possession and requires that this shall be done after an award u/s 11 has been made. It is as follows:

When the Collector has made an award u/s 11, he may take possession of the land, which shall thereupon vest absolutely in the Government free from all incumbrances.

12. Where the Legislature has enacted provisions of so precise and detailed character in relation to claims for compensation by a "person interested," it is not easy to see how the special remedy provided in Section 49 can be invoked by a "person interested" who does not answer to the specific word "owner" contained in S.49. It has been suggested that the last clause of Section 49 (1) lays down the test of ownership. The language of that clause is:

In deciding on such a reference the Court shall have regard to the question whether the land "proposed to be taken is reasonably required for the fall and unimpaired use of the house, manufactory or building.

13. We are unable to accept such a contention, In our judgment the words "in deciding on such a reference" do not mean in deciding whether the claimant is the owner [of. the house, manufactory, building or land in question, but in deciding whether the application of a person who is assumably the owner should be granted. Such an assumption might well be challenged, and if it were negatived the section would not apply at all. In the present case the opposite parties are assumed to be persons who have more rights of easement over the blue land. Had they claimed the compensation for which provision is made in Part 3, on the ground that their huts on the pink land would be rendered valueless by the acquisition of the blue land, and for expense and inconvenience caused to them by reason of their having to surrender, abandon or otherwise terminate their possession of the pink land, their claim would have been understandable. But their contention that the structures erected by them on the pink land as well as their interest, such as it was, in that land be acquired, is a very different matter. Section 49, on the face of it, requires that the claimant should be "owner" of the "land to be acquired as well as of the house, [manufactory, or building of which he maintains it to be a part. As pointed out in the argument

advanced in support of the rule unity of ownership is a necessary pre-requisite. Now it is admitted that the opposite parties claim in respect of the blue land no more than certain rights of easement, and that though they are owners of the huts erected by them on the pink land, their rights of tenancy in that land are non-transferable, terminable and indeed precarious. Two questions arise: (1) Did their rights of easement entitle the tenants-opposite parties to be regarded as owners of the blue land within the meaning of Section 4.9? (2) Were the tenancy rights of the opposite parties in the pink land and the huts constructed by them "houses" or "buildings" which u/s 49 the Collector could be compelled to acquire? These two questions may conveniently be considered together in the light of the authorities cited before us by the learned advocates on behalf of each side.

14. It may be stated at once that the English cases recognize limited ownership, and this follows from the Preamble of the Land Clauses Consolidation Act (8 & 9 vic. 0-18), where owner is denned as meaning any person enabled to sell and convey lands to the promoters of the undertaking. In *Lord Grosvenor v. Hampstead Junction Railway Co* (1857) 118 RR 165 the trustees of a charity intended to build an almshouse with a garden in front on land purchased by them. Before the building was completed a railway company required to take under the Lands Clauses Consolidation Act a portion of the land which it was proposed to lay out as a garden. It was held that the land was part of a house within the meaning of Section 92. In this case it was laid down that the word "house" must be read in its ordinary legal sense and could include all that would pass under a conveyance of the house. In *Barnes v. South Sea Railway Co* (1884) 27 Ch D 536, a railway company sought to acquire a paddock which lay behind a house. The house and garden were surrounded by a wall in which there was a gateway opening on the paddock. The paddock was surrounded by a high hedge and from the gateway in the wall a back road to the house passed through the paddock to the public road which ran along the far side of the paddock fence. It was held that the paddock was part of the house within Section 92, Land Clauses Consolidation Act. With regard to this case it is sufficient to say that ownership of both the house and the paddock were vested in the same person. In *Caledonian Railway Co. v. Turcan* 1898 AC 256 the material facts appear from the head-note which is as follows:

A railway company were entitled by a section in their special Act, notwithstanding Section 90, Land Clauses Consolidation (Scotland) Act, 1845, to take a portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder, if the portion taken could; in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto, The company gave notice to treat for 232 square yards, a portion of the scheduled property, which formed an access used jointly by the respondents and another firm. The respondents required the railway company to take the whole of their property. A statutory submission to arbitration containing the question, whether or not the portion of land containing

the 232 square yards could be severed from the remainder of the property of the respondents without material detriment, reserving only the question whether Section 90, Lands Clauses Consolidation (Scotland) Act, 1845, applied, was entered into. Before the arbitrator the railway company offered to allow access to the remainder of the respondents' property under a bridge over the portion taken. The arbitrator found that the portion containing 232 square yards could not be severed without material detriment to the remainder of the respondents' property, and awarded compensation upon the assumption that the company was bound to take the whole premises. In an action to recover the amount awarded:

Held, affirming the judgment of the Second Division of the Court of Session, that whether the arbitrator was right or wrong in declining to take the offer of the company into consideration in assessing the compensation, his award, until set aside by a proper process, was binding on the Court, and could not be reviewed.

15. This case can have no application for the purposes of the present discussions because the decision was that of an arbitrator which the House of Lords was unable to review until the award was set aside by a proper process. In *Pulling v. London Chatham & Dover Railway Co* (1864) 33 LJ Ch 505, Lands Clauses Act, was held to apply to a leasehold interest. In *Marson v. London Chatham & Dover Railway Co* (1868) 6 Eq 101 the facts were as follows: A public house was bounded on one side by a street, and in front by a vacant piece of ground, not fenced off from the street, and separated from the house only by a narrow foot pavement, also without a fence, which was ordinarily used by the public as a thoroughfare, though sometimes closed. The piece of land had been treated as passing to the lessee by every demise of the public house since 1809; it was used by customers of the public house, and it furnished the only means of approach for vehicles to the front door of the house. It was held that the piece of land came within the definition of a curtilage, and was part of the house within the meaning of Section 92, Land Clauses Consolidation Act. The fact of real importance in this case would seem to have been the circumstances that the land had always passed with the house in every lease since 1802. *McGregor v. Metropolitan Railway Co* (1866) 14 LT 354 was a motion to restrain a company from entering upon or taking from the plaintiff a part only of his property which consisted of a house and garden. The house and part of the garden were comprised in one demise, and the other part of the garden was comprised in another demise, both demises being for 99 years. In granting an interim injunction, the Vice-Chancellor expressed the opinion that u/s 92, Lands Clauses Consolidation Act, the company were bound to take the whole of the premises comprised in the two demises. *Siegen-berg v. Metropolitan District Railway Co* (1884) 49 LT (ns) 554 was also a motion to restrain a railway company from taking a part only of the plaintiff's business premises without taking the whole. The plaintiff used two houses with internal communication as one house for the purposes of one business, holding them under separate leases of even date from the same lessor. The Court held that the two houses constituted one entire house within the meaning of Section 92, Land Clauses Consolidation Act, so that if the

company took the premises comprised in one lease, they were bound to take those comprised in the other.

16. In our judgment the English cases referred to afford little guidance in the interpretation of Section 49, Land Acquisition Act, by reason of the English system of landholding and of the definition of "owner" contained in the Land Clauses Consolidation Act. Coming now to the Indian decisions upon which reliance was placed on behalf of the opposite parties, we are bound to say that while respectfully agreeing with the conclusions reached in the special facts of those cases, we do not consider them to be any authority for the proposition urged before us in answer to the rule. *Krishna Das v. Land Acquisition Collector of Pabna* ("12) 16 CLJ 165 was a rule to show cause why a Land Acquisition Deputy Collector's order rejecting an application for a reference u/s 49, and his subsequent refusal to make a reference u/s 18 should not be set aside. This Court made the rule absolute, holding inter alia, that the petitioner was competent to apply u/s 49 for a reference to the civil Court, and that in that reference the question for inquiry would be whether the land acquired by the Deputy Collector formed the only means of approach to the petitioner's godown or was reasonably necessary for the proper working of his salt business. On behalf of the tenants opposite parties considerable stress was laid on a passage at p. 168 of the report which is in the following terms:

The word "owner" is not defined in the Act, but an owner must be deemed to be one of the persons interested in the land being acquired: see Section 3(b) of Act 1 of 1894. Reading Section 10 of the Act we think that the proprietor, sub-proprietor, mortgagee, tenant or sub-tenant are all owners for the purposes of Section 49. The petitioner is a tenant of some kind. He is therefore admittedly interested in the acquisition of the land, which for the purposes of Section 49, until the civil Court finds otherwise, may be presumed to be part of his salt godown.

17. Our own opinion in regard to the expression "person interested" which has been set out above, is not quite in consonance with this reasoning, but this lack of identity in view is of no consequence here since the observation quoted is mere obiter regard being had to the real ratio decidendi of the decision. *Khairati Lal v. Secy. of State* ("89) 11 ALL 378 was a case under the Land Acquisition Act, 1870, (10 of 1870). u/s 63 of that Act, the claimant urged that the Local Government which had appropriated a part of the compound and some out-offices attached to his dwelling house should acquire the whole property. The Allahabad High Court upheld this contention holding that the correct interpretation of Section 55 was the same as that put upon Section 92, Land Clauses Consolidation Act. This decision followed the English authorities which turn upon the statutory definition of "owner" a. decision which should not, in our judgment, be blindly adopted in relation to Section 49 regardless of the conditions of landholding in this country and of the special facts of individual Indian cases. Reference should also be made in this connexion to the case in *The*

Secretary of State for India in Council Vs. R. Narayanaswami Chettiar and Others, in which *Khairati Lal v. Secy. of State* ("89) 11 ALL 378 was referred to, and in which it was pointed out that the Indian Act, 10 of 1870 and the English Act did not contain a clause similar to that in Section 49, which was inserted to meet such decisions as that in *Khairati Lal v. Secy. of State* ("89) 11 ALL 378 : see also *Venkataratnam v. Collector of Godavari* ("04) 27 Mad 350 . In *The Secretary of State for India in Council Vs. R. Narayanaswami Chettiar and Others*, , it was held that on a reference u/s 49, in coming to a conclusion whether a portion of the house "is reasonably required for the full and unimpaired use of the house," regard should be had to the existence of ample space within the compound in which a similar portion could be built without any particular inconvenience to the use of the house, and if there is such space, the whole house need not be acquired. Upon the analogy of this case, and in support of the rule it has been argued not without force, that the acquisition of the blue land would not have disturbed the opposite parties' alleged rights of easement, since the evidence showed that the Improvement Trust had after the acquisition constructed a pucca road 150 foot wide with sewerage and electric lighting fin run by the south of the pink land.

18. In support of the rule it has been argued that "owner" in the Indian Act implies the entire bundle of rights constituting absolute ownership. It would be hazardous to accept this contention in its entirety. In India there are various kinds of land tenure and freehold is rare. There are superior interests, and under these subordinate interests of different classes. The elements of permanency, heritability and alienability attach to those interests in various degrees, and it is not easy to draw an absolutely hard and fast line between ownership and non-ownership for the purposes of Section 49, Land Acquisition Act. The rights of a zamindar, a tenure-holder, the holder of a building lease, an occupancy raiyat, might conceivably fulfil the conception of ownership within the meaning of Section 49 in certain circumstances. But each case must depend upon its own special facts. In the present case to hold that the opposite parties are owners of the blue land and owners of houses on the pink land within Section 49 would lead to absurdity. If their claim is confined to the value of the huts, and to damage caused to them by reason of their having to give up residing in those structures, the claim is a claim for compensation which is governed by the provisions contained in Part 3 of the Act. If, on the other hand, their claim extends to the land on which the huts are standing, they surely cannot insist that the Collector should be compelled to acquire the landlord's interest which he does not require and which the landlord does not wish to part with. As to their own rights in the land, these are according to the evidence, of no value whatever since the tenancies have all been legally terminated.

19. We do not think that such rights of easement as the opposite parties are assumed to have enjoyed in the blue land entitled them to insist that the Collector should acquire their "houses" on the pink land. We are of opinion that Rule 566 of 1940 should be made absolute. The order of the tribunal dated 26th

February 1940 is set aside with the result that the application of the opposite parties u/s 49 stands rejected. The petitioners are entitled to their costs, hearing fee being assessed at two gold mohurs in each rule.

Lodge J.

20. I agree.