

(1970) 09 CAL CK 0053
In the Calcutta High Court
Case No : F.As. 131 to 134 of 1960

State of West Bengal

APPELLANT

Vs

Northbrook Jute Mills Company Ltd.

RESPONDENT

Date of Decision : 22-09-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 3, Order 41 Rule 33, 2
Evidence Act, 1872 — Section 167
Land Acquisition Act, 1894 — Section 18, 23, 23(1), 23(2), 24(5)

Citation : 75 CWN 985 : (1971) 2 ILR (Cal) 222

Hon'ble Judges : Bagchi, J; Amaresh Roy, J

Bench : Division Bench

Advocate : S.C. Das Gupta and Dhruba K. Mukherjee, for the Appellant; Soumendra Kumar Basu, Sailendra Nath Baksi and Ajit Kumar Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Amaresh Roy, J.—These four appeals have been heard analogously and they arise out of four Land Acquisition cases in the Court of the District Judge, Hooghly, which were References u/s 18 of the Land Acquisition Act made by the Collector of that district in Land Acquisition Collector's cases Nos. 56(V)I of 1955-56 and 49(V) of 1955-56. In each of these two cases there were two claimants claiming 1/2 share of compensation each and the Collector made two awards in each of those Land Acquisition cases. There was no dispute regarding the share claimed by each claimant, but the amount of compensation awarded by the Collector was disputed by both the claimants. There were, therefore, four References concerning four awards made by the Collector in those two Land Acquisition cases.

2. In L.A. Case No. 56(V)I of 1955-56 quantum of land acquired is 5183 acres. The Collector awarded compensation at the rate of Rs. 1,200 per acre, total compensation in that case awarded by the Collector being Rs. 4,000-41 P. to one

claimant and Rs. 4,000-39 P. to the other. Out of that case References Nos. 519 and 520 arose. F.A. No. 131 of 1960 arises from Reference No. 519 and F.A. No. 132 of 1960 arises from Reference No. 520.

3. In L.A. Case No. 49(V) of 1955-56 quantum of land acquired is 4.204 acres. The Collector awarded compensation at the rate of Rs. 1,200 per acre, total compensation in that case awarded being Rs. 3,306-44 p. to one claimant and Rs. 3,306-45 P. to the other. Out of that case References Nos. 793 and 794. arose. F.A. No. 133 of 1960 arises from Reference No. 793 and F.A. No. 134 of 1960 arises from Reference No. 794.

4. The learned Judge who heard the four References has disposed them by one judgment raising the rate of compensation to Rs. 4,500 per acre and has directed that total compensation should be calculated at that rate and payment should be made to each of the claimants according to their share on that basis.

5. The two claimants are Northbrook Jute Mills Company Ltd. and Dalhousie Jute Company Ltd. who owned the lands acquisitioned jointly in equal shares and the first named company is the Respondent in F.A. Nos. 131 and 133 while the second named company is the Respondent in F.A. Nos. 132 and 134. Appellant in all the four appeals is the State of West Bengal.

6. Material facts, which are not in controversy, are that the jute mills of the two companies were started in 1908, the mills being situate in moum Gourhati Champdani in the district of Hooghly on the west of Grand Trunk Road, by the east of which road flows river Hooghly. Originally, the two mills were owned by a partnership firm carrying-on business under name and style Bird & Company Not only mill premises but also labour quarters of the mills were built on lands on which the mills stood. A Railway siding line was also laid for serving the mills. Extensive lands adjacent to the mills premises lying to the west and north of the labour quarters of the mills were owned by several Zemindars who had settled tenants on those lands adjacent to mills premises. Sri Jatindra Nath Bandopadhyay was one of those Zemindars who was the owner of superior interest of those lands. Bird & Company had purchased the interests of tenants under those Zemindars and thus came to possess those extensive lands as tenants claiming permanent mokrari mourashi and similar interests under those Zemindars. Those lands were purchased for extension of the mills. One of those Zemindars Sri Jatindra Nath Banerjee, however, was not inclined to admit that some of the tenants from whom Bird & Company purchased had transferable interests, and consequently dispute arose between him and Bird & Company Then, to settle the said dispute, the said Zemindar agreed to grant to Bird & Company permanent mokrari mourashi settlement of the said lands over which there was dispute at a selami of Rs. 500 and a permanent and fixed annual rent of Rs. 25 per bigha. Accordingly, he executed a patta on June 30, 1919, in respect of lands measuring 67 b. 10 c. 13 ch. 13 sqft. on receiving as selami amounting to Rs. 33,770-12-0, annual rent for that quantity of land being fixed at Rs. 1,688-8-0 payable in four list is of Rs. 422-2-0 each in Ashar, Aswin,

Poush and Chailra.

7. Latterly the two mills have been registered as two limited companies and Bird & Company (Pvt.) Ltd. has been the Managing Agents of both. It was not disputed either before the learned District Judge or before us that the lands which concern these cases lay within the boundaries of the area of the two mills who are the claimants.

8. By dint of two declarations made in April 1955, all published in the Calcutta Gazette in April and May 1955, lands were acquired for a public purpose, namely, for excavation of a canal connecting river Kunti with river Hooghly in connection with D.V.C. Project. By declaration No. 8334-L.A. dated April 30, 1955, three plots were acquired, namely,

Plot No. 3130(P) measuring 71 acres

Plot No. 3137(P) 230 acres

Plot No. 3138(P) 4-832 acres

Total 5-133 acres

That is the subject-matter of F.A. Nos. 131 and 133 of 1960. By declaration No. 6472-L.A. dated April 2, 1955, two plots were acquired, namely,

Plot No. 3138(P) measuring 4099 acres

Plot No. 3139(P) 105 acres

Total 4-204 acres/

That is the subject-matter of F.A. Nos. 132 and 134 of 1960.

9. Thus, in these four appeals we are concerned with four plots, namely,

Plot No. 3130 71 acres

Plot No. 3137 230 acres

Plot No. 3138 (4-832 acres (4099 acres

Plot No. 3139 105 acres

Total 9-387 acres

10. Only question raised is what should be the fair compensation for that quantity of land assessed at the market value at the date of the declaration u/s 6 of the Land Acquisition Act, 1894.

11. As we have mentioned already, the Collector made an award at the rate of Rs. 1,200 per acre which has been raised by the learned Judge to the rate of Rs. 4,500 per acre. The State of West Bengal has contended in these appeals that the Collector's award should have been accepted as fair compensation. The Respondent have sought to support the assessment made by the learned District

Judge.

12. Before the learned District Judge one set of evidence was adduced to govern all the four Reference cases. Oral evidence consisted of on the side of the Appellant State only one witness Radha Kishore Goswami, a Kanungo, who has admitted in cross-examination that he had no knowledge about the condition of the acquired lands at the dates of declaration. He, however, during cross-examination filed land acquisition maps which do not appear to have been prepared by him. Besides that oral evidence, eight documents, Ex. A-A7, were also produced for showing transactions of sale of land in the same mourn at prices which the State relied on for providing basis of rates for assessing market price of the acquired land. On the side of the claimants two witnesses were examined, P.W. 1 Dhirendra Nath Sarbadhikari, a consulting engineer and Valuer who provided opinion, Ex. 1, and P.W. 2 Lalit Mohan Chakravarty, head clerk of the Dal-housie Jute Mill, who testified to the character of the land, its location and potentialities and other elements relevant for assessing its market value. The document by which permanent mokrari mourashi right in the lands was secured by the mills in 1919 was also produced in evidence as Ex. 3. The claimants relied on that evidence in support of their claim at the rate of Rs. 15,000 per acre or Rs. 5,000 per bigha.

13. The learned District Judge in his judgment pointed out that Kobalas, Exs. A to A3, filed on behalf of the Collector, were of the year 1952 and not being so Proxies in time to the relevant year 1955 when the declaration for acquisition was made, he left them out of consideration of the other four Kobalas, Ex. A4 to A7, which are transactions of 1955, he also pointed out that two of them, Exs. A4 and A7, show that the vendor sold that land for the reason that the land being situated at a great distance from his house he was finding difficulty to manage the same. This has weighed with the learned District Judge as showing that the transaction of sale evidenced by that document was of the nature of sale under compelling circumstances and so he has left that transaction also out of consideration. Exhibit A5 has been also left out of consideration by him for the reason that it is a transaction of benami nature and not one between willing seller and willing purchaser in open market because it is a sale by a husband to his own wife. The learned District Judge, therefore, took into consideration only the transaction evidenced by Ex. A6 whereby "773 acre of safe land was sold for Rs. 1,500 which works out at about Rs. 2,000 per acre or just below that rate.

14. Taking that rate of Rs: 2,000 per acre for sali land it was contended for the State that the acquired lands which have been recorded in the C.S. records as sabi land should be valued as such. But the learned District Judge found on evidence that the lands lay within the boundary of the area of the two mills; so the value to the owners of the property was not its value as colourable land but its potential value as the building site. He therefore held, the Land Acquisition Collector had not followed correct principle when he made the assessment of the land in question on the basis of their being colourable lands and it was

erroneous. As in his view the lands were comparatively low, the learned District Judge held that the lands should be valued as building sites keeping in mind that those were comparatively low lands. He thus discarded the testimony of P.W. 1 and report Ex. 1 as mere ipse dixit which gave no basis at all and held that the patta, Ex. 3, provided "solid evidence" and also good basis for valuation. Ultimate decision of the learned District Judge has been expressed in his judgment in these terms:

So far as the lands covered by Ex. 3 lease are concerned, we have in that lease a good basis for the valuation thereof. We do not, however, know the exact character and location of all the plots, but it is found from the plan attached to the lease that quite a big chunk of the lands abutted on the G.T. Road and some other chunks lay close thereto. The acquired lands lay 200 to 250 yards off the G.T. Road.

Considering the above fact and considering the further fact that the lands under acquisition were liable to be submerged during heavy rain and taking into consideration also the fact that the value of lands must have gone up since the date of the lease in 1913, but considering at the same time that the Petitioners have not helped the Court by producing their documents of title in respect of these lands, I find following the principle enunciated in the cases referred to above by me that a value of Rs. 1,500 per bigha, i.e. Rs. 4,500 per acre, should represent the fair market value of the lands concerned in the year 1955". As the increased value allowed by this Court will require fresh calculation of the total dues of the awardees, the cases should be sent back to the L.A. Collector for a re-calculation of the dues of the Petitioners in the light of my observations above. Hence ordered. The claims be allowed on contest with costs. Hearing fee be assessed at Rs. 16 in each case. The L.A. Collector should assess the lands at Rs. 4,500 per acre, calculate the compensation on that basis and make payment of the balance to the awardees.

15. Against that decision the State of West Bengal has appealed. The learned Government Pleader Mr. Sachindra Nath Das Gupta has sought to assail the judgment appealed from mainly on three grounds:

16. First, that potentiality as the building site is imaginary and opposed to the reality that having taken the land under patta Ex. 3 in 1919, its character has not been charged even in 1955. For that reason it should be valued as sali land.

17. Second, that none of the transactions evidenced by Ex. A to A7 should be discarded and valuation should be on average rate, of those eight transactions or on the average of four of them, that is, Exs. A4 to A7, in any event, the rate evidenced by Ex. A6 should be taken as the best value per acre.

18. And third, the rate calculated on the basis of Ex. 3 and then enhanced arbitrarily at 20 times of annual rent has been erroneous for several reasons:

(i) That was a fancy price paid in the particular circumstances properly

understood.

(ii) That was a rate paid in 1919 which is not podiums to 1955.

(iii) There is no evidence that value of land of the particular character and in this particular area has gone up in 1955 as compared to 1919 as imagined by the learned District Judge.

(iv) That calculation has been on wrong data and is incorrect arithmetic inasmuch as annual rent in Ex. 3 is Rs. 25 and not Rs. 50.

19. Against these contentions of Mr. Das Gupta the learned Advocate for the Respondents Mr. Somendra Nath Bose has contended that:

(1) Potentiality in the lands of the owner has been properly included by the learned Judge and that should have been at higher rate as factory site instead of merely building site. The lands cannot be valued as sali lands in 1955 merely because in C.S. records of 1937 it was so recorded.

(2) Transactions evidenced by Exs. A to A7 have been rightly discarded for good reasons in each instance, and

(3) Exhibit 3 has been properly taken as correct basis and, though an unfortunate error as to annual rent therein has been made, the rate arrived at is reasonable and fair compensation for these lands in 1955.

Mr. Basu for the Respondents has defended the decision given by the learned District Judge also on grounds other than appearing in the judgment. This he has sought-to do by invoking Order 41, Rule 3, Code of Civil Procedure, as we shall discuss presently.

20. Able and elaborate arguments advanced by the two learned Advocates on either side in support of their respective contentions we have summarised above inevitably lead us not only to careful examination of the nature, contents and value -of oral and documentary evidence adduced before the learned District Judge but also to consideration of points touching the fundamentals of law applicable to the case in certain respects.

21. This being an acquisition under the Land Acquisition Act (I of 1894) guidance for determining the amount of compensation to the award is provided in Section 23 of the Act. In the present case, first clause of Sub-section (1) is only relevant. That clause is in these terms:

Section 23(1).

First, the market value of the land at the date of the publication of the notification u/s 4, Sub-section (1). That simple rule clearly indicates what the relevant date for ascertaining the market value is. Question then" is, how the market value of that date is to be ascertained; market value has not. been defined in this Act or in any other statute. That simple word has, however, been the subject of large volume of legal literature in several High Courts in India and

also of the Judicial Committee of the Privy Council, before the Supreme Court of India made authoritative pronouncements both regarding its connotation with elements that should enter it, and the methods to ascertain it in divergent instances of various characters of property acquired.

22. In this High Court a clear definition of market value appears to have been laid down in 1910 in the decision in *Kailash Chandra Mitra v. Secretary of State* (1910) 17 C.L.J. 34 as the price that a owner willing and not obliged to sell can reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land. This High Court and also other High Courts in India deduced that from the general principles for determining compensation laid down in English decisions under Land Clauses Act of 1845 in England, because those do not differ from the general principles specified in Section 23 of our Land Acquisition Act, 1894. In 1939, the Judicial Committee of the Privy Council in an appeal from India which is in *Vyricheria Narayana Gajapatiraju, Raja v. The Revenue Divisional Officer, Vizagapatam* (1939) L.R. 66 IndAp 104 : ILR 1939 Mad. 532 (542) pronounced the law on the same subject. For its clarity and comprehensiveness we take the liberty of quoting from that judgment in some extensiveness of several passages:

The general principles for determining compensation that are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act of 1845 before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act of 1919. As was said by Wadsworth J. when giving judgment in the High Court in the present case: "It is well-settled that English decisions under the Lands Clauses Act of 1845 lay down principles which are equally applicable to proceedings under the Indian Act."

The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser, though not his compulsion may always be taken into consideration for what it is worth. But the question of what it may be worth, that is to say, to what extent it should affect the compensation to be awarded, is one that will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however," is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value for in excess of its "market value". But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at the market price, to use the words of Section 23 of the Indian Act. It is perhaps desirable in this connection to say

something about this expression "the, market price". There is not in general any market of laid in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by "the market value" in Section 23. But sometimes it happens that the land to be valued possesses some unusual, and it may be unique features as regards its position or its potentialities. In such a case the Arbitrator in ? determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him what a willing vendor might reasonably expect to obtain from a willing purchaser for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined [that time under the Indian Act being the date of the notification u/s 4, Sub-section (1)], but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor will be content to sell the land for its value as waste or agricultural land as the case may be. It explains that, in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in Section 24, Sub-section (5) of the Act and is the possibilities of the land and not its realised possibilities that must be taken into consideration.

But how is the increase accruing to the value of the land by reason of its potentialities of possibilities to be measured ? In the case instanced above of land possessing the possibility of being used for building purposes, the Arbitrator (which expression in this judgment includes any person who has to determine the value) would probably have before him evidence of the prices paid, in the neighborhood, for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the degree of possibility that the land might never be so required or might not be so required for a considerable time. In the case, however, of land possessing potentialities of such an unusual nature that the Arbitrator has rift similar cases to guide him, the value of the land must be ascertained in some other way! In such a case, moreover, there will in all probability be only a very limited number of persons capable of turning the potentialities of the land to account.

If the owner of the land is the only person who can do so, the value to him must be ascertained by reference to what profit he might thereby have been able to derive from the land in the future. Take as an example the case of an owner of a vacant land that adjoins his factory. The land possesses the potentiality of being profitably used for an extension of the factory. But the owner is the only person who can turn that potentiality to account. In valuing the land, however, as between him and a willing purchaser, the value to him of the potentiality would necessarily have to be included.

The same consideration will apply to cases where the owner is not the only person but merely one of the persons able to turn the potentiality to account. The value to him of the potentiality will not be less than the profit that would accrue to him by making use of it had he retained it in his own possession. But now take the case where the owner is himself unable to turn the potentiality to account whether by promotion of a company or otherwise. In such a case there may be several other persons who would be able to do so or there may be only one. If there are more than one, it is recognised by all the authorities that have been cited to their Lordships, and seems to be consistent with common sense, that the owner is entitled to be paid the value to him of the potentiality though the ascertainment of its value may in many cases be a matter of considerable difficulty. The truth of the matter is that the value of the potentiality must be ascertained by the Arbitrator on such materials as are available to him and without indulging in feats of the imagination. Upon the question of the value of the potentiality where there is only one possible purchaser there are some authorities to which their Lordships will have to refer. But dealing with the matter apart from authority it would seem that the value should be the sum which the Arbitrator estimates a willing purchaser will pay and not what a purchaser will pay under compulsion. It was contended on behalf of the Respondent that, at an auction where there is only one possible purchaser of the potentiality, the bidding will only rise above the market value sufficiently to enable the land to be knocked down to that purchaser. But if the potentiality is of value more than one possible purchaser of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To come to him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it....

For these reasons, their Lordships have come to the conclusion that, even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the Arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers and that he is no more confined to awarding the land's market value in the former case than he is in the latter.

23. Another decision of this Court pronounced in 1944 is *Province of Bengal v. Uma Charan Law* (1944) 48 C.W.N. 608 . It was observed in that judgment:

We may say at once that there is good authority for the proposition that the phrase "market value" as used in Section 23(1) of the Land Acquisition Act means the same thing as the phrase "value of the owner", used in the Land Clauses Consolidation Act of England. After all, the Act requires compensation to be paid to the owner on the compulsory acquisition of his land. The value of the land to the owner therefore must be the basis for the determination of the compensation. But the standard must be not a subjective standard but an objective one. Ordinarily, the objective standard would be, as has been observed by Sir Lawrence Jenkins in the case of *Kailas Chandra Mitra v. Secretary of State for India in Council*, the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale of the property. In the case of compulsory acquisition, the property must be valued not only with reference to its condition at the time of the declaration but its potential value must be taken into consideration. That is a well-settled principle, and in the case of *Fraser v. City of Fraserville* the principle on which the potential value is to be assessed is discussed at explained.

Quoting Lord Buckmaster's observation in *Fraser v. City of Fraserville* (1919) A.C. 187 which said:

The value to be ascertained is the value to the seller of the property in its actual condition at the time of, the expropriation with all its advantages and with all its possibilities excluding any advantage due to the carrying out of the scheme in which the property is compulsorily acquired, the question of what is the scheme being the question of fact for the Arbitrator in each case.

That judgment of this Court then laid down:

Those are the fundamental principles on which the value to the owner is to be calculated. The value to the owner may also be determined by capitalizing the rent. The amount of the annual rent, which is to be capitalized, may be taken to be what the owner was actually receiving at the relevant point of time, or it may be taken to be at a figure other than the figure that the owner was actually receiving at the relevant time which the Court may consider fair. This is what we understand to be the law.

That exposition of law was available to the learned District Judge when he heard and disposed of the Reference cases out of which these appeals have arisen. We may also mention that more recently the Supreme Court of India has dealt with Section 23 of the Land Acquisition Act and has pronounced methods of valuation for ascertaining the market price in a case in *Raghubans Narain Singh v. Government of U. P.* AIR 1967 S.C. 465 (468). In that judgment Shelat J. speaking for the Court has observed:

Since his evidence was not challenged either on the ground that his offer was not

bona fide or that he offered to buy under compulsion or under any special circumstances there was no valid reason why the High Court should have refused to accept the appreciation of his evidence by the District Judge and resort to a method of valuation not always adequate, viz. the annual crop value. Such a method of valuation is not adequate, at least for two reasons: (1) that the owner may not have so far put his property to its best use or in the most lucrative manner and (2) in a case like that present the grove had not yet started giving the maximum yield. Such a method of valuation by ascertaining the annual value of the produce can and should be resorted to only when no other alternative method is available.

24. In a more recent decision in Chaturbhuj Pande and Others Vs. Collector, Raigarh, , guidance is available how to devote consideration to oral and documentary evidence. We quote below the passages which appears to us to be material for the present case:

The learned Additional District Judge computed the net income from each orange tree at Rs. 100"and of mosambi tree at Rs. 70 to Rs. 80 per year. He capitalized that income at 12 years" purchase and thus arrived at the compensation payable in respect of those trees. In so doing, he heavily relied on the oral evidence adduced by the Appellants. We may mention at this stage that there was absolutely no documentary evidence to support the claim of the Appellants.

The evidence of the first Appellant as well as that of the witnesses did not commend itself to the learned Judges of the High Court. They opined that the claim of the Appellants was a highly exaggerated one and the evidence of the witnesses supporting that claim was unacceptable. Relying on certain official reports and the pamphlets published by certain individuals as to the yield from orange, mosambi and guava trees, average span of life of those trees and the market value of orange, mosambi and guava the High Court reassessed the compensation payable and came to the conclusion that the total value of the trees in the orchard in question could be reasonably fixed at Rs. 58,566.

Mr. S.T. Desai, Learned Counsel for the Appellants, complained that the High Court was not right in looking into documents which were not a part of the records of the case particularly when his clients had not been given any opportunity to rebut the conclusions reached therein. It appears that these documents were looked into by the learned Judges after the conclusion of the arguments. If the High Court wanted to take into consideration any fresh evidence, it should have admitted the same in accordance with law. In that event, the Appellants would have got the opportunity to rebut the evidence. That having not been done, we do not think it was open to the High Court to rely on those documents. We accordingly exclude from consideration those documents.

But that is of no assistance to the Appellants. As mentioned earlier, the High Court has refused to rely on the oral testimony adduced in support of the Appellants' claim as regards the value of the orchard. It is true that the

witnesses examined on behalf of the Appellants have not been effectively cross-examined. It is also true that the Collector had not adduced any evidence in rebuttal; but that does not mean that the Court is bound to accept their evidence. The Judges are not computers. In assessing the value to be attached to oral evidence, they are bound to call into aid their experience of life. As judge of facts it was open to the appellate Judges to test the evidence placed before them on the basis of probabilities.

25. From these decisions emanating from high authorities we have quoted above and also from other well-known decisions we have not mentioned only to avoid verbosity, firm rules appear to have been judicially established which the learned Advocates for both sides before us very fairly and properly acknowledged. Those rules relevant for the present case are:

- (i) Market price has to be fixed by reference to date of declaration u/s 6.
- (ii) Market value of the land is its value to the owner who is willing to sell and what he may expect to get from a willing purchaser.
- (iii) The value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all advantages and with all its possibilities.
- (iv) The value of potentialities must be ascertained on such materials as are available without indulging in feats of imagination.
- (v) In the context of building potentiality many questions will have to be asked and answered; whether there is pressure on the land for building activity, whether the acquired land is suitable for building purposes, whether the extension of the said activity is towards the land acquired, what is the pace of the progress and how far the said activity has extended and within what time, whether buildings have been put up on lands purchased for building purposes, what is the distance between the built-in-land and the land acquired and similar other questions" will have to be answered. It is the overall picture drawn on the said relevant circumstances that affords the solution.
- (vi) For ascertaining market value the value to the owner may also be determined by capitalizing the rent as one of the methods though not the only method. But, method of valuation by the annual crop value is not always adequate, (vii) Method of valuation may be (i) opinion of experts, (ii) price paid within a reasonable time in bona fide transaction of purchase of lands acquired and the lands adjacent to the lands acquired and possessing similar advantages and (iii) a number of years" purchase of the actual or. immediately prospective profits of the lands acquired.
- (viii) For considering oral evidence, Court is not bound to accept the statements of witnesses only because they have not been effectively cross-examined or evidence in rebuttal has not been adduced. Judges are not computers...they are bound to call into aid their experience of life and test the evidence on the basis

of probabilities.

(ix) It is not open to Court to look into and rely on documents not properly proved and brought in evidence by giving the other side opportunity to produce evidence in rebuttal. If use is made of inadmissible evidence or unproved documents, appeal Court will exclude them u/s 167, Evidence Act.

These are by no means exhaustive but are only those which are relevant for our purposes in the present case.

26. Keeping those established rules in mind we proceed to examine the contentions raised and evidence relied on by the contending Advocates one by one.

27. First question is whether the acquired lands should be valued as sali land or as building site or factory site. Only material relied on by Mr. Das Gupta for the Appellants for contending that the character of land is sali or colourable is that in C.S. record those plots have been so recorded. There is no evidence, oral or documentary, produced by the Collector to show that at the date of acquisition the character of the land was sali. On the other hand, both the witnesses for the claimants said in their depositions that the land was meant for extension of the mill and factory and was high land and did not appear to be low land. It is admitted on both sides that sali land means low land fit for cultivation of paddy or jutes. While the opposite party witness No. 1 has admitted on cross-examination that he has no knowledge about the condition of the acquired lands at the date of notification. P.W. 2 who is serving the Dalhousie Jute Mills for about 20 years has deposed that he has never seen the plots to be cultivated. Situation of the land spoken of by P.W. 2 clearly shows that it is not only contiguous to the labour quarters of the mill but also is within the boundaries of the mill. In such state of evidence it cannot be held that character of land at the relevant time was sali or colourable.

28. Evidence provided by the patta, Ex. 3, is that these lands with other contiguous lands were purchased by the Mills from the tenants who claimed mokrari mourashi or permanent right under their zamindaries. One of the Zamindars Sri Jatindra Nath Bandopadhyay, however, did not admit that some of those tenants had permanent mokrari mourashi right in lands measuring 67 bighas and odd.

29. For resolving that dispute with the said Zamindar and for perfecting their title by securing undisputed permanent right, the Mills paid a selami of Rs. 33,770-12-0 for that 67 bighas at the rate of Rs. 500 per bigha and agreed to pay annual rent of Rs. 25 per bigha. That clearly indicates that the Mills were intending to secure for them permanent right in the lands that would give them right to effect permanent and pucca structures for extension of the Mills either for adding to the factory itself or for building more labour quarters, or for any other purposes of the Mills. That transaction was in 1919. In the hands of the Mills the character of the lands had ceased to be sali or colourable and assumed

the character of factory premises capable of being used as building site for the purposes of the Mills. Not only so, purpose and prospect of its use by the owners, that is the Mills, as part of the mill area, either by building factory or offices or labour quarters or by using the lands for play-grounds for their employees or other amenities that a modern industrial establishment may require was not only a possibility but also a near probability since 1919. It is true as Mr. Das Gupta pointed out that even in 1955 the lands had not actually been used for those purposes. But, that does not affect the potentiality of the lands as factory premises which it already had assumed in the hands of the Mills. Potentiality is in its nature a future possibility and need not be an achieved reality. The lands were in 1955 the Mills premises in reality and had all the potentialities as budding premises or factory premises. We, therefore, agree with the learned District Judge that for assessing market price the lands should not be valued as sali lands but it should be valued as building site or factory site.

30. Mr. Soumen Bose for the Respondent has urged that factory sites are more valuable than building site and for that proposition he has cited the decision of this Court in Secretary of State for India in Council v. Naresh Chandra Bose (1926) 44 CL.J. 1. He points out that in that case contiguity of other factories, particularly of Ichapur Gun and Shell Factory on the east bank of river Hooghly, was the reason for assessing fallow lands as factory site at rates higher than mere building site. That being so, he contended that the lands in the present case being part and parcel of the Mills premises on the opposite west bank of river Hooghly with all the amenities and advantages of Railway sidings and contiguity to G. T. Road and the river, it should be valued at rates higher than building site. This contention of Mr. Bose has considerable force and will have to be dealt with when we consider the rate of valuation.

31. On the question whether the rate should be less for the reason that the lands are low or waterlogged, Mr. Bose has contended that evidence in the case does not justify that finding of the learned District Judge which Mr. Das Gupta for the Appellant has supported. Evidence on that point is provided by P.W. 2 who has said in examination-in-chief that these are high lands but in cross-examination said that acquired lands used to be waterlogged in case of heavy rain. The opposite party witness No. 2, who said the lands in 1958 only after the khal in acquired lands had been excavated, said in his deposition that the unequaled portions lay waterlogged. In our view from that evidence, an inference that the acquired lands were low lands is not justified. Even the lands which are not low may be waterlogged in case of heavy rain and high banks of a canal when excavated may impair drainage of abutting lands and make it waterlogged in Genetic basin of Hooghly district where the lands are situate. The learned Judge Tias imagined much more than evidence in the case shows. We, therefore, do not agree with his finding, the acquired lands are low lands. The value should not be depicted for that reason.

32. Next point, argued by Mr. Das Gupta, is the value of the acquired, land

should be assessed by taking into account the rates evidenced by transactions shown in kobalas Exs. A to A7. It is true that market price of land at the relevant date may be assessed on the basis of the rates shown by bona fide transactions of sale and purchase of land which are comparable units. That is one of recognised methods of valuation. Mr. Das Gupta in his arguments has acknowledged that law is now settled that for such comparison certain definite elements have to exist; though all the elements may not exist together, preponderance of several important elements that make sale of lands comparable transactions mainly are that those lands should be (i) of similar character as far as may be, (ii) reasonably podiums to acquired land, (iii) should have similar amenities, and advantages, and (iv) these should be transactions of time reasonably podiums to the date of acquisition.

33. Measured by these tests none of the transactions evidenced by Exs. A to A7 appear to be comparable at all. All those are transactions of sale of sali lands which is not the character of the acquired lands. Location of those plots have not been shown by any evidence, not even by the several maps produced in evidence though the descriptions in the Kobala show that those plots are in the same mouaa.. There is no evidence at all if the amenities, advantages and disadvantages of those plots were in any way even approximately similar to those attaching to the acquired lands. First three of the important elements necessary for giving comparable basis are absent in all the eight transactions shown by kobalas Exs. A to A7. Moreover, transactions in Exs. A to A3 are of 1952--more than three years earlier than the date of acquisition. It is a notorious fact that as a sequel to the partition of the country and advent of large population into West Bengal and also by the result of Development Plans in this country, prices of all lands increased by leaps and bounds all over West Bengal in general and in the industrial belt of Hooghly district in particular between 1950 and 1955. For those reasons prices of any land in 1952 do not provide comparable basis for 1955.

34. Mr. Das Gupta contended that transactions evidenced by Exs. A4 to A7 are of 1955 and those should be held to be comparable. Though proximity of time of transactions are availing in those instances, none of the other important elements, not even proximity of location is appearing in evidence. Character of those lands being sali, they are not comparable with acquired lands which we have found to be building site or factory site within the mill area. Those arc reasons enough for holding that none of the transactions relied on by the Appellants, including the transaction shown by Ex. A6, is comparable unit. While holding so, we need mention that we agree with Mr. Das Gupta's contention that the learned District Judge was in error in thinking that merely because a vendor was selling a plot for the reason of its distance from his house, that makes the transaction a compulsive sale and not a voluntary sale. Such subjective notion is no more than valuntary financial adjustment by the owner which is the reason for his own free decision without compulsion. It has nothing to do with the objective value of land sold nor takes away valuntary nature of the transaction.

35. Only material in evidence, therefore, remains for consideration is the rate that appears in patta Ex. 3 which is a document of 1919. Mr. Das Gupta has rightly pointed out that important element of proximity of time is not attaching to that piece of evidence which has been relied on by the learned District Judge. But, at the same time that transaction being in respect of a chunk of land measuring above 67 bighas out of which about 30 bighas (9-387 acres) has been subject of this acquisition, it undoubtedly provides good basis for comparison because all the other important elements necessary for making it comparable, namely amenities, advantages and disadvantages along with character of land and its location and proximity are same because it is the same land. Preponderance of those similarities are overwhelming and that similarity to the extent of sameness to a great extent overcomes the distance of time. The question for comparison only is that being-the price in 1919 shown by patta Ex. 3 what should be a fair price of the same land in 1955 in the hands of the owner who has been expropriated by acquisition. We, therefore, accept Mr. Bose's contention and agree with the learned District Judge that the rate shown in patta Ex. 3.provides good basis for fixing fair price of the acquired land in 1955.

36. Mr. Das Gupta, however, has pointed out that, in deciding rate shown by patta Ex. 3, the learned District Judge has made a mysterious but grievous arithmetical error when he took annual rent in that document to be Rs. 50 per bigha. The document shows, it was Rs, 25 per bigha. Even on the basis accepted by the learned District Judge twenty times of annual rent added to selami of Rs. 500 per bigha gives a figure of Rs. 1,000 per bigha or Rs. 3,000 per acre.

37. Mr. Bose has readily conceded that there was that arithmetical error, because the original document, Ex. 3, shows that annual rent per bigha was fixed at Rs. 25 and not Rs. 50. But, Mr. Bose has supported the rate of Rs. 4,500 per acre fixed by the learned District Judge on other grounds invoking Order 41, Rule 33, Code of Civil Procedure. Those other grounds pressed by Mr. Bose are: a careful examination of the contents of patta Ex. 3 which is a document more than 30 years old shows that selami of Rs. 500 fixed in that document was not the entire value of the interest claimed by the Mills. The Mills had already purchased tenants' interests in these and other contiguous lands. Though there is no evidence available when these purchases were made and at what prices the selami of Rs. 500 per bigha fixed by patta Ex. 3 was the additional amount per bigha that was paid by the Mills for resolving the dispute regarding the permanent right that Mills claimed as tenant and the Zamindar was not inclined to admit in respect of those 67 bighas. Therefore, according to Mr. Bose, real price that should be added to twenty times of annual rent should be the amount paid by the Mills for purchase of tenants' right amount of selami paid by the Mills to the Zamindar for resolving the dispute over permanency of tenants' rights. According to Mr. Bose, the fact that Rs. 500 per bigha was paid by the Mills to the Zamindar in 1919 provides a reasonable inference that the Mills had paid at least that rate per bigha as price for purchase of tenants' interests, whenever between 1908 and 1919 they may have made those purchases. This gives an

equation of Rs. 500 as price and Rs. 500 as selami? Rs. 500 as 20 times as annual rent of Rs. 25? Rs. 1,500 per bigha or Rs. 4,500 per acre fixed by the learned District Judge.

38. Mr. Das Gupta did not admit correctness of that equation proposed by Mr. Bose, but Mr. Das Gupta could not effectively assail by any cogent reason. Mr. Bose's pointer that price paid for tenants' interests should be added to the rate of Rs. 500 per bigha. In the particular circumstances of the case and in the particular state of evidence we have discussed above, we hold that Mr. Bose's equation should be accepted as fairly correct.

39. Mr. Bose sought to go further by arguing, as we have noticed earlier in this judgment, that rate for building site a higher rate should be assessed for factory site which character the acquired lands had at the time of acquisition in the hands of the owner, that is the Mills. For that proposition he relied on the judgment of this Court in *Secretary of State for India in Council v. Naresh Chandra Bose* (Supra). That decision was pronounced in 1926 regarding value of factory site on the east bank of Hooghly in 1917 and supports Mr. Bose's contention. But, in the particular circumstance of the present case we have arrived at the conclusion that there would be no difference in rate per bigha in 1955, whether the lands are valued as building site or factory site. Pressure on land added after the partition of 1947 and the fast growth of population in West Bengal had put the rate per bigha of building site at par with factory site. Therefore, there should not be any increase over Rs. 4,500 per acre for these lands which were the factory sites according to our findings. In any event, higher rate cannot be decreed, because Mr. Bose's clients have not appealed against the Award made by the learned District Judge.

40. The assessment made by the learned District Judge at the rate of Rs. 4,500 per acre may also be justified on another ground not specifically mentioned in his argument by Mr. Bose. That ground to us appears to be one in respect of which the learned District Judge has committed an error on a fundamental point. That error though of a subtle nature need be pointed out. As we have discussed above, the learned Judge for the purpose of capitalizing annual rent for the lands at 20 years purchase took the annual rent that is mentioned in patta Ex. 3. In doing so, we have also pointed out instead of taking Rs. 25 per year he took Rs. 50 per year. We have held that was an arithmetical error in taking that rate. We need, however, point out that for capitalizing the annual income it is the probable income per year of the owner expropriated by acquisition that has to be taken into account. The annual rent mentioned in patta Ex. 3 is not the income of the owner, i.e. the Mills could expect from the land, but is really the rent that the Mills were paying to the landlord. So, to take that as the annual income of the owner, i.e. the Mills, is an error on principle. In true, persecution of that evidence it is in our view reasonable to, hold that in fresh hands of the owner of the land at the date of the acquisition the owner, that is the Mills, could very probably make an income from the acquired land as they were at the rate of Rs. 75 per

bigha, but of that the Mills were paying Rs. 25 per bigha to the superior landlord ; therefore, Rs. 75, Rs. 25-Rs. 50 would be the real income per bigha per year. That may be taken as the probable income of the owner that gives an equation of Rs. 500 per bigha as selami 20 times, Rs. 50, i.e. Rs. 1,000-Rs. 1,500 per bigha or Rs. 4,500 per acre, even according to the equation that was adopted by the learned District Judge. So, we accept Mr. Bose's contention that either by adding what the Mills had paid price for purchase of the tenancy interest to the selami that he paid under palla Ex. 3 or by adhering to that selami as the price and correcting the error in principle as to the probable income per bigha in the hand of the owner at the date of the acquisition the figure arrived at by the learned District Judge, i.e. Rs. 4,500 per acre, is justified as the fair compensation for the acquired land.

41. In the result, in either view the appeals fail, but in the circumstances we do not award any costs.

42. Although we hold that the assessment of fair compensation made by the learned District Judge at the rate of Rs. 4,500 per acre should be confirmed, we have to notice that the Award made by him is not in conformity with Section 26 of the Land Acquisition Act. We have mentioned already that in ordering portion of his judgment he has directed the Land Acquisition Collector to assess the land at Rs. 4,500 per acre, calculate compensation on that basis and make payment of the balance to the awardees. In the decree drawn up according to that judgment also the same directions have been made. That is not in conformity with Section 26 which is in these terms:

26(1). Every award under this part shall be in writing signed by the Judge and shall specify the amount awarded under clause first of Sub-section (1) of Section 23, and also the amounts (if any) respectively awarded under each of the other clauses of the same Sub-section, together with the grounds of awarding each of the "said amounts.

(2) Every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of Section 2, Clause (2), and Section 2, Clause (9) respectively of the Code of Civil Procedure, 1908.

It has to be noticed that the Award made upon Reference u/s 18 is by dint of Sub-section (2) of Section 26 shall be deemed to be a decree and is, therefore, executable as such. It is not open to the Tribunal or the District Judge hearing the Reference u/s 18 to leave the actual drawing up of the decree to the Land Acquisition Collector, because in that event it will not be in the executable form at all. The decree as drawn up in this case, therefore, has to be set aside, and the case - % remitted back to that Court for drawing up the decree in accordance with Section 26 of the Land Acquisition Act.

43. The market value of 9.387 acres of land acquired shall be calculated at the rate of Rs. 4,500 per acre. In addition to the market value so calculated, a sum of 15 % on that amount shall be awarded under Sub-section (2) of Section 23.

On the amount in excess of the amount that was awarded by the Collector so arrived, interest at the rate of 6 % per annum from May 1, 1955, till payment. These should be separately specified in the Award in favour of each of the two claimants in equal shares as required by Section 26 of the Land Acquisition Act (I of 1894).

44. The appeals are, therefore, dismissed and we set aside the decrees because of its improper form and remit the case back to the trial Court for drawing up of a proper decree in accordance with the decision of that Court which we have affirmed. The parties in this appeal will bear their own costs throughout.

45. Records be sent down as early as possible.

Bagchi, J.

46. I agree.