

(1919) 12 PRI CK 0007

In the Privy Council

Case No : Privy Council Appeal No. 78 of 1918

Trustees for the Improvement of Calcutta

APPELLANT

Vs

Chandra Kant Ghosh

RESPONDENT

Date of Decision : 16-12-1919

Acts Referred:

Citation : (1920) AIR(PC) 51

Hon'ble Judges : Parmoor, Lords Sumner, Viscount Finlay, JJ.

Advocate : Morgan, Messrs, B. Dube, DeGruyther, Upjohn, G.B. MacNair, W. Garth, A.M. Dunne, W.W. Box and Co., Messrs, Price and Co., J. Simpson, for the Appearing Parties.

Judgement

Lord Parmoor

This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 22nd August, 1916, affirming a judgment and decree of the first Subordinate Judge of the 24 Pergunnahs. The respondent brought the present suit for a declaration that the appellants had no power under the provisions of a Road Improvement Scheme, framed under the Calcutta Improvement Act of 1911, to acquire certain land owned by him, and that all proceedings in connection with the acquisition of such land were ultra vires and of no effect. Both the lower Courts have decided in favour of the respondent, holding that the land in question is not required for the Road Widening Scheme and that its acquisition for any other purpose is not warranted under any of the provisions of the said Act. The appellants obtained leave to appeal to His Majesty in Council and submit that the judgment and decrees of both Courts should be reversed and the suit dismissed.

The decision of the appeal depends upon the construction to be placed on certain sections of the Calcutta Improvement Act, 1911, an Act under which improvement schemes for Calcutta may be framed by the appellants (therein called the Board) and sanctioned by the Local Government. Whenever the Local Government does sanction an improvement scheme, there is duty to announce

the fact by notification, and the publication of a notification is conclusive evidence that the scheme has been duly framed and sanctioned. This provision does not affect the right of the respondent to institute a suit to have it declared that the Board in framing the scheme acted ultra vires or that the scheme as sanctioned does not authorise the appellants to acquire by compulsion the land in question. During the course of the argument the attention of their Lordships was directed to a number of decisions upon various Acts of Parliament giving compulsory power for the acquisition of land, but in each case the decision must depend upon the provisions of the particular Act and the purposes for which and conditions under which in such Act land may be compulsorily acquired. It becomes necessary, therefore, to consider what were the considerations on which the Board acted in framing the scheme, and whether the scheme as sanctioned gives the Board the powers which they are seeking to enforce.

The preamble of the Act recites in general terms that it is expedient to make provision for the improvement and expansion of Calcutta by opening up congested areas, laying out and altering streets, providing open spaces for purposes of ventilation or recreation, demolishing or constructing buildings, acquiring land for the said purposes, and for the rehousing of persons of the poorer and working classes displaced by the execution of improvement schemes, and otherwise as thereafter appearing. It is not necessary further to consider the preamble.

Section 2 enacts that an improvement scheme means a general improvement scheme or a street scheme, or both. In the present case the scheme was a street improvement scheme framed for the purpose of creating new, or improving existing means of communication and facilities for traffic. Section 39 enacts (inter alia) that whenever the Board are of opinion that for the purpose of creating new or improving existing means of communication and facilities for traffic, it is expedient to lay out new streets or to alter existing streets, (including bridges, causeways and culverts), the Board may pass a resolution to that effect and shall then proceed to frame a street scheme for such area as they may think fit.

At a meeting of the Board on the 17th September, 1912, Resolution No. 5 was passed. This resolution was approved at a meeting of the Board on 8th October, 1912, at which it was resolved that the scheme for the widening of Russa Road, as far as Hazra Road, prepared in accordance with resolution No. 5 of the 17th September, 1912, should be adopted and notice issued under sections 43 and 45.

It was argued on behalf of the respondent that lands had been included by the Board within the area of the scheme, not because they were wanted for any of the purposes of the Act but with the object of exacting an exemption fee from the owners, although the Board were actually not anxious to acquire the buildings and would possibly, or probably, fail to make a profit, if they did actually acquire and re-sell the land. Under section 78 owners may apply to the Board requesting that the acquisition of their land should be abandoned in

consideration of the payment of a sum to be fixed by the Board in that behalf. The object of this section is to give an opportunity to owners of land to request the abandonment of its compulsory acquisition, and it only comes into operation where land has been properly included in a scheme, as required for purposes of the Act. To have included land within the area of the scheme, not because it was wanted for purposes of the Act, but in order to exact an exemption fee from the owner, would in the opinion of their Lordships, have been a misuse of the powers conferred upon the Board, and if in fact the Board had included the land of the respondent in the scheme merely for the purpose of exacting exemption fees, the Board would have acted *ultra vires* and the respondent would have been entitled to succeed in his action although it might have been anticipated that, by means of such fees, funds would be obtained to ease the burden of the expenditure to be incurred in the execution of the scheme. After the scheme had been sanctioned, an application of the respondent requesting that, under section 78, the acquisition of his land should be abandoned, in consideration of a payment by him, was considered by the Board and rejected on the ground that his land was required for the "lay-out" which evidently refers to the lay-out of land not actually required in the execution of the street widening. The same expression is to be found in the evidence of Mr. Bompas, the Chairman of the Board, but their Lordships do not find that the evidence of Mr. Bompas is in any way inconsistent with the inference to be drawn from the record of what passed at the Board when Resolution No. 5 was passed on the 17th September, 1912.

On the 17th September, 1912, a proposal was brought before the Board in favour of gazetting all land from which there was a reasonable chance of obtaining an exemption fee. This proposal was directly negatived, and only two members of the Board voted in its favour. In the opinion of their Lordships, this decision disposes of the allegation that the Board framed the area of the scheme on the principle of including land for the purpose of exacting exemption fees, whether or not such land might in their opinion be required for the execution of the scheme or affected by the execution thereof.

At the same meeting, and after the above proposal had been negatived, the Chairman asked for definite instructions in regard to the Russa Road scheme, and after voting it was determined that all property abutting on the Russa Road should not be gazetted for acquisition but only those properties which as a matter of fact it would pay the Board to acquire and sell again. The effect of this decision would be to limit the proposal of land acquisition to those properties only of which the value, in the opinion of the Board, might be enhanced by the execution of the scheme, or in other words, to those properties from which a sum, in the nature of recoupment, might, in the opinion of the Board, be obtained in aid of the expenditure to be incurred. Finally, the Chairman asked the opinion of the Board as to the area which should be included in the Russa Road scheme. There were three alternative projects. It was decided that the scheme should provide only for the widening of Russa Road and the taking up for recoupment purposes of land unoccupied or occupied by buildings of small value.

A plan showing the area finally included in the scheme was submitted to the Local Government, and a copy, as sanctioned, was produced before their Lordships. It is not suggested that the land of the respondents is required for the execution of the road widening and it is, at no point nearer than 55 feet to the widened line on the west side of the street.

After an improvement scheme has been framed certain notices must be given; and after the hearing of persons entitled to make objection, representation or dissent, the Board may apply to the Local Government for sanction of the scheme. The sanction of the Local Government was notified in the Calcutta Gazette of the 21st January, 1914, and the publication of the notification in respect of any scheme is conclusive that the scheme has been duly framed and sanctioned. It becomes necessary, however, to consider whether the Board had authority under the Act to frame a scheme on the terms of Resolution No. 5 of the 17th September, 1912, and secondly, whether, if the scheme was duly sanctioned by the Local Government, it gives the Board the powers of compulsory acquisition of the land of the respondent.

Section 41 of the Act enacts that every improvement scheme shall provide for the acquisition by the Board of any land in the area comprised in the scheme, which will in their opinion be required for the execution of the scheme. It was argued on behalf of the Board that the land of the respondent came within the provision of section 41, in that it was land which, in the opinion of the Board, was required for the execution of the scheme. It is not necessary to consider what might be included under the terms of section 41, but the scheme, now under consideration, was a scheme for the widening of Russa Road, as far as Hazra Road, and it cannot be said that the land of the respondent was required for the execution of this widening. As already stated the land of the respondent at the nearest point was 55 feet away from the western border of the Russa Road after it had been widened to 100 feet as proposed in the scheme.

The case really depends upon the construction of section 42. Under this section, an improvement scheme may provide for the acquisition by the Board of any land in the area comprised in the scheme which will in their opinion be affected by the execution of the scheme. The land of the respondent is within the area delimited on the plan attached to the scheme, but it was argued on his behalf that it was not land affected by the execution of the scheme. The land was included in the scheme because, in the opinion of the Board, it would pay them to acquire it and sell it again, and the question arises whether land can be compulsorily purchased in order that the Board may have the benefit of such enhanced value, and use any profit on the transaction in ease of the burden of public expenditure. "Land" is defined to have the same meaning as in the Land Acquisition Act, 1894, in which the expression "lands" includes benefits to arise out of land; but, apart from this definition, land would, using language in its ordinary natural sense, be said to be affected by the execution of a scheme, whenever its value was thereby either enhanced or diminished. It is not

immaterial to observe that there was at the date of the passing of the Calcutta Improvement Act no novelty in the recoupment principle (*Galloway v. London Corporation*. 1866 I. H. L. 34 = 35 L. J. Ch. 477 = 14 L.T. 865 = 12 Jur. (N.S.) 747. But whether this principle has been sanctioned in the Calcutta Improvement Act must be determined on the language used, and the case of *Donaldson v. South Shield Corporation* 1899 68 L. J. Ch. 162 = 79 L. T. 685. Shows, if authority is necessary, that where an act authorises land to be taken for the actual works only, a local authority, or other public body, will be restrained from taking more than is actually necessary for such works. There would appear to be nothing either in the general scheme of the Act, or in special context, which is inconsistent with giving the word "affected" its ordinary and normal sense, but it was suggested in the argument on behalf of the respondent that the Act did not authorise the Board to acquire land unless such land was either physically affected by the execution of the scheme or injuriously affected, whether by severance, or in some other manner. Land which would be physically affected by the scheme comes under the provision of section 41, and to limit the land which a Board may acquire so under section 42 to the land, which they must acquire under section 41, would be in effect to make illusory the powers granted in section 42. The meaning of the phrase "injuriously affected" was well known in, compensation law and practice when the Calcutta Improvement Act was passed, and the phrase occurs in section 23 of the Land Acquisition Act, 1894. To introduce the limitations connoted by the word "injuriously" would be in effect to alter the language of the section, and, had the Legislature desired to introduce this limitation there would have been no drafting difficulty of any kind. A special argument that section 42 should be limited to cases of severance was based on the terms of section 49 of the Land Acquisitions Act 1894, as read in conjunction with sec-42 and section 78 of the Calcutta Improvement Act, 1911. Section 49 of the Land Acquisition Act, 1894, is a section not unusual in Acts giving power for the compulsory acquisition of land, and enacts that the provisions of the Act shall not be put in force for the purpose of acquiring a part only of any house, manufactory, or other buildings, if the owner desire that the whole of such house, manufactory, or other building shall be so acquired. There is no limitation to cases of severance either in section 42 of the Calcutta Improvement Act, 1911, or section 78, and there is no ground for implying any limitations as affecting the authority of the Board for the acquisition of land under section 42. The result is that in the opinion of their Lordships none of the suggested limitations to the usual and normal meaning of the word "affected" in section 42 are admissible, and that there is no reason, either in the general purpose of the Act or the special context, that the word should not be construed in its ordinary sense, and that, as so construed, section 42 authorises the acquisition of the land of the respondent, which was inserted in the scheme because, in the opinion of the Board, it would be enhanced in value by its execution.

Among the cases called to the attention of their Lordships was that of the *Metropolitan Board of Works v. McCarthy*. 1874 7 H.L. 243 = 31 L.T. 182 = 43

L.J. P.C. 385= 23 W.R. 115. In that case McCarthy was a lessee and occupier of a house in close proximity to a draw-dock which opened into the Thames. He had no right in any way to the use of the dock except as one of the public, but his premises being in close proximity to it, his use of it for the purposes of his business was very constant. The dock was entirely destroyed by the works of the Thames embankment, and McCarthy sought compensation. The case submitted to the Court stated that

"by reason of the destruction of the dock, and the destruction thereby of the access to and from the Thames, the plaintiff's premises became and were, as premises either to sell or occupy in their then condition and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value."

It was held in this case that McCarthy was entitled to compensation, but if in such a case compensation was properly given to the owner, it would not appear to be unfair that where premises in close proximity to a widened street are thereby enhanced in value, such value should ensure to ease the burden of public expenditure provided that the interests of the owner are properly protected. In this case the respondent would be entitled to the value of his land assessed on the same principles as the value of the land actually required for the execution of the widened street and the effect would be not to deprive him of the value of his property, but only that he would not obtain the additional value due to the proximity of his land to the improvement scheme-

It was further argued on behalf of the respondent that, although the land of the respondent might be acquired by agreement, it was not subject to compulsory acquisition. Section 69, under the head of "compulsory acquisition." empowers the Board, with the previous sanction of the Local Government, to acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of the Act. It was said that to take land for the purpose of recoupment is not to take it in order to carry out any of the purposes of the Act, but only to provide a means whereby such purposes can be carried out. It is difficult to understand the distinction which is suggested. If the Board are authorized to acquire land affected in value by the execution of the scheme in order to provide funds in case of the public burden the acquisition of such land is directly in the purposes of the Act, and the powers of compulsory acquisition are clearly applicable thereto. Section 81 of the Act confers on the Board wide powers for the holding or disposal of any land vested in them or acquired by them under the Act amply sufficient for dealing with any land acquired under section 42 and not required for the actual execution of the Street scheme.

In the result their Lordships are of opinion that the appeal should be allowed with costs here and below and they will humbly advise His Majesty accordingly.