CIVIL REVISION.

Before Mukherjea and Roxburgh JJ.

1939

May 22, 24.

MAHESH MISSIR

v.

PROVINCE OF BENGAL.*

Land Acquisition—*Reference against partial acquisition, when competent—Abandonment of acquisition by agreement—Appeal—Land Acquisition Act (I of 1894), ss. 48, 49(1)—Calcutta Improvement Act (Ben. V of 1911), ss. 24, 78—Calcutta Improvement (Appeals) Act (XVIII of 1911).*

Under s. 78 of the Calcutta Improvement Act, the owner of a plot of land, the acquisition of which was sanctioned by the Government, filed an application for the abandonment of acquisition before the Board of Trustees for the Improvement of Calcutta. This application was rejected by the Board. Thereafter, under s. 24 of the Calcutta Improvement Act, the Board and the owner of the plot entered into a formal contract, by which a part of the land was agreed to be acquired and the remainder was abandoned from acquisition. At this, the Collector, on the application filed by the tenants of the owner in respect of the part of the land agreed to be acquired, made a Reference to the Calcutta Improvement Tribunal under s. 49, sub-s. (*1*), of the Land Acquisition Act for the determination of the question as to whether the land sought to be acquired under the said agreement does or does not form a part of the house of the applicant tenants.

Held that the Reference was competent.

Per MUKHERJEA J. In view of the provisions of s. 48 of the Land Acquisition Act and s. 24 of the Calcutta Improvement Act, the Board of Trustees for the Improvement of Calcutta may abandon any acquisition of land apart from the provisions of s. 78 of the Calcutta Improvement Act.

Secretary of State for India in Council v. *Mahip Sha* (1) referred to.

No appeal lies to High Court under the Calcutta Improvement (Appeals) Act, 1911, against the order of the President, Calcutta Improvement Tribunal, rejecting a Reference made by the Collector under s. 49, sub-s. (*1*), of the Land Acquisition Act, 1894.

Sarat Chandra Ghose v. *Secretary of State for India* (2) followed.

Dalchand Singhi v. *Secretary of State for India* (3) referred to.

*Civil Revision, No. 591 of 1939, against the order of D. C. Ghose, President, Calcutta Improvement Tribunal, dated April 18, 1939.

(1) (1936) 41 C. W. N. 437. (2) (1919) I. L. R. 46 Cal. 861.
(3) (1916) I. L. R. 43 Cal. 665.

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Per ROXBURGH J. The precise time at which the Collector should make a Reference under s. 49, sub-s. (*1*), of the Land Acquisition Act is not clearly specified. But such Reference certainly can be made when the provisions of the Act have been clearly "put in force" and may be made even at an earlier stage.

CIVIL REVISION Case at the instance of tenants in a land, against the order of the President, Calcutta Improvement Tribunal, rejecting a Reference made by the Collector.

The material facts of the case appear from the judgment.

Bipin Chandra Mallik and *Bireswar Bagchi* for the opposite party. I have a preliminary objection. The present application in Revision is incompetent. *Dalchand Singhi* v. *Secretary of State for India* (1). Appeal is the proper remedy.

Surendra Madhab Mullick, *Probodh Chandra Kar* and *Sukumar Ghose* for the petitioners. No appeal lies. The case of *Sarat Chandra Ghose* v. *Secretary of State for India* (2) is exactly on the point.

The Reference by the Collector was quite legal and the learned President failed to exercise his jurisdiction in not going into the merits. Section 78 of the Calcutta Improvement Act is not the only section according to which the Board can abandon the sanctioned acquisition. By the agreement under s. 24 of the Calcutta Improvement Act, the Board clearly abandoned a part of the land from acquisition.

Mallik, for the opposite party. The agreement in this case cannot have the effect of abandoning the acquisition.

The other points raised in argument appear from the judgment.

(1) (1916) I. L. R. 43 Cal. 665. (2) (1919) I. L. R. 46 Cal. 861.

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MUKHERJEA J. This Rule is directed against an order passed by the Calcutta Improvement Tribunal, dated April 18, 1939, rejecting a Reference made to it by the First Land Acquisition Collector, Calcutta, under s. 49(*1*) of the Land Acquisition Act. The material facts may be shortly stated as follows:—Premises No. 40, Lake Road, which comprises an area of 6 *bighâs* 5 *cottâs* 6 *chhitâks* of lands, was scheduled for acquisition under the Land Acquisition Act as amended by the Calcutta Improvement Act, under declaration No. 12578-L.A., dated June 19, 1937. One Saradindu Mukherji, who is stated to be the owner of the premises, applied to the Board of Trustees for the improvement of Calcutta for exemption of this property from acquisition under s. 78 of the Calcutta Improvement Act. This application was rejected. Thereupon, there was an agreement entered into between the owner and the Board on January 24, 1939, by which a portion of the premises measuring 58 *cottâs* 12 *chhitâks* only, which was coloured blue in the map, was to be acquired and the balance measuring 66 *cottâs* 12 *chhitâks*, which was painted pink, was exempted from acquisition. Proceedings were then taken up by the Collector for the acquisition of the blue plot only and the petitioners, who are alleged to have huts on the pink portion, filed applications before the Collector stating *inter alia* that the land to be acquired contained a part of the access from the lake to their structures and that filtered water connections and drains to their huts also ran through that land. It was further stated that they had a right to use the water of the tank and *jhil* in premises No. 40, and 40/1, Lake Road. As the aforesaid access and water connections were said to constitute an integral part of the huts in the excluded portion they prayed for the acquisition of these huts as well. Upon that the Collector made a Reference to the Court under s. 49(*1*) of the Land Acquisition Act and the question referred for determination was whether the portion of the land intended to be acquired formed a part of the house of

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the petitioners within the meaning of s. 49 of the Land Acquisition Act. The Tribunal, by its order mentioned aforesaid, rejected the Reference on the ground that the Reference was incompetent. It is against this order that the present Rule has been obtained.

Mr. Bipin Chandra Mallik, who appears for the opposite party, has raised a preliminary point and he has argued that, as the order rejecting the Reference could have been challenged by way of appeal, the petition for Revision does not lie. I do not think that this contention is sound. From the decisions of the Tribunal, only a limited right of appeal is given by Act XVIII of 1911 and, as the Preamble of that Act says, an appeal lies only from the award of the Tribunal constituted under the Calcutta Improvement Act of 1911. I am unable to hold that a decision on, or a determination by the Tribunal of, any matter which has no Reference to compensation in some form or other, comes under the definition of an award. That no appeal lies in such cases has been expressly held by a decision of this Court in the case of *Sarat Chandra Ghose* v. *Secretary of State for India* (1). The case of *Dalchand Singhi* v. *Secretary of State for India* (2), upon which reliance has been placed by Mr. Bipin Chandra Mallik, cannot, in our opinion, be regarded as an authority in support of a contrary view. In that case, it was not disputed that an appeal would lie only against an award, but it was observed by the learned Judges that such orders had been dealt with in appeal by the Allahabad and Madras High Courts. The learned Judges, however, concluded by saying that, as there was a petition in Revision filed in that case, upon which a Rule was obtained, they had ample authority to deal with the matter under s. 115 of the Code of Civil Procedure.

We are unable to hold that the order passed by the Tribunal in the present case was an appealable order.

(1) (1919) I. L. R. 46 Cal. 861. (2) (1916) I. L. R. 43 Cal. 665.

Coming now to the merits of the case, it would seem that the Tribunal has rejected the Reference, relying on certain previous decisions of its own, where, under similar circumstances, the Reference was held to be incompetent. The reason in substance appears to be this. There was a declaration here made under s. 6 of the Land Acquisition Act, which covers the entire premises including both the pink and the blue plots. The agreement entered into between the Trustees on the one hand and Saradindu Mukherji on the other was not in pursuance of cl. (*4*) of s. 78 of the Calcutta Improvement Act and consequently there was no abandonment within the meaning of cl. (*5*) of that section. It is said, therefore, that, as there has not been an abandonment of the Land Acquisition proceedings with regard to the pink portion, s. 49 of the Land Acquisition Act is inapplicable, for it cannot be said that the provisions of the Act are being enforced for the acquisition of a part of the house, unless the acquisition of the lands, upon which the remaining part of the house stands, is abandoned. There can be no doubt, in my opinion, that unless, at the present moment, there has been an abandonment of the acquisition with regard to the pink portion, no question of Reference under s. 49 of the Land Acquisition Act can possibly arise. But the error lies in assuming that the only way of abandoning acquisition is that provided by s. 78 of the Calcutta Improvement Act. Section 78 lays down one particular method, according to which, if any area, the acquisition of which has been sanctioned by the Local Government, is not required by the Board for the execution of the scheme, the Board may abandon the acquisition proceedings in consideration of certain money payments being made by the owner or an agreement being executed by him in conformity with the provisions of that section. But even apart from s. 78 of the Calcutta Improvement Act there is nothing in the Land Acquisition Act or the Calcutta Improvement Act, which prevents the acquiring authority from abandoning a portion of the land in

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respect of which proceedings under the Act have been taken. As was observed by D. N. Mitter J. in the case of *Secretary of State for India in Council* v. *Mahip Sha* (1), it was consistent with common sense that the party, which had been given power to acquire lands for certain purposes, had also the power to abandon any such land which was intended to be acquired from acquisition, unless there was provision in the statute preventing such piecemeal acquisition. This is also the principle underlying s. 48 of the Land Acquisition Act. Under s. 24 of the Calcutta Improvement Act, very comprehensive powers are given to the Board of Trustees and they can enter into and perform any contract which they might consider necessary for carrying out the purposes of the agreement. There is nothing in law, therefore, which prevents the Board from abandoning any portion of the land intended to be acquired in pursuance of a contract entered into under the provisions of s. 24 of the Calcutta Improvement Act. Whether there has been abandonment or not in any particular case would of course depend upon the circumstances of that case. Mr. Bipin Chandra Mallik contends before us that the agreement in this particular case cannot amount to an abandonment, as there are various other things which are required to be done by the owner and, unless these things are done, the matter cannot be said to be complete. There is nothing, however, said on this point by the Tribunal and we have no materials before us upon which we can hold that the acquisition of the pink portion has not been definitely abandoned. On the other hand, the order of the Collector clearly suggests that the agreement has been acted upon and proceedings have been started to acquire the blue portion only to the exclusion of the pink plot.

In these circumstances, it seems to me that, if the petitioner's case is true, circumstances are present which would justify the Collector in making a

(1) (1936) 41 C. W. N. 437.

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Reference under s. 49(*1*) of the Land Acquisition Act and, in our opinion, the matter ought to be investigated on its merits by the Tribunal.

The result is that the Rule is made absolute. The order of the Tribunal, dated April 18, 1939, is set aside and the matter is sent back to him in order that the Reference case may be disposed of on its merits and according to law. It is desirable that the Reference should be heard in the presence of Mr. Saradindu Mukherji, who is stated to be the owner of the plots, and it would be open certainly to the opposite party to raise any other contention relating to the maintainability of the Reference at the instance of the petitioners, who are stated to be the tenants in occupation of certain huts upon the land.

There will be no order as to costs in this Rule.

ROXBURGH J. On the merits, the simple question is whether the application of the tenants under s. 49 of the Land Acquisition Act, 1894, was premature or not. The order of the Tribunal is rather unfortunate in form, as it suggests that the only basis of decision is the fact that, as Government might change its mind and eventually go on with the acquisition, so the application of the tenants cannot be considered. The suit of a plaintiff might equally well be dismissed on the ground that he might subsequently change his mind and not execute his decree if obtained, and the first proviso to s. 49 itself makes provision, allowing the owner to change his mind at any time before the award is made. The point for decision is whether, under the law, circumstances exist by which the tenants have the right to make the application for a Reference; this is to be decided by reference to the terms of s. 49 itself, and to the facts. Under sub-s. (*1*) of s. 49, the provisions of the Act are not to be put into force for the purpose of acquiring a part of a house, manufactory or building, if the owner desire that the whole of such house, manufactory or building

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shall be acquired, and then, under the terms of the second proviso, provision is made that, if any question shall arise as to whether any land proposed to be taken under the Act does or does not form part of a house, the Collector is to refer the matter to the Court. It will be seen that the precise time at which the Reference is to be made is not clearly specified; certainly it must be made if the provisions of the Act have already and clearly been "put in force", but the terms of the second proviso of s. 49 are not inconsistent with a Reference being made at an earlier stage. In the present case the method, by which the provisions of the Act are to be put into force for the purpose of acquiring a portion of the premises in question, is by way of declaration and notice for acquisition of the whole, followed by an agreement under s. 24 of the Calcutta Improvement Act, made with the landlord for exempting a portion, and hence by eventual abandonment of the acquisition under s. 48. In such a case, it is even more difficult than in a case where the proposal to acquire a portion is a direct one, to determine the precise point of time at which it may be said that the provisions of the Act are being put into force for the purpose of acquiring a portion. In the present case there was originally an application for action under s. 78 of the Calcutta Improvement Act, but this was rejected by the Trustees, and the present proposal for action under s. 24 was adopted, and has been carried out to the extent of a formal agreement having been made. Mr. B. C. Mallik draws attention to the terms of sub-s. (*5*) of s. 78, to the effect that when an agreement has been executed in pursuance of sub-s. (*4*) or payment has been made under the proviso the proceedings for the acquisition shall be deemed to have been abandoned and contends that, on the analogy of those provisions, the stage for the present application in the analogous procedure by way of s. 24 and of eventual formal abandonment under s. 48 of the Land Acquisition Act has not been reached, but consideration of these provisions seems to support rather the

contrary view. It emphasises the fact that, in order to find out the whole land acquisition law applicable here, we have to read the Calcutta Improvement Trust Act and the Land Acquisition Act as one, and, as has been pointed out in *Secretary of State for India in Council* v. *Hindustan Co-operative Insurance Society, Limited* (1), incorporation of the provisions of the Land Acquisition Act into the provisions of the Calcutta Improvement Trust Act is a case of legislation by Reference, the terms incorporated being those of the Land Acquisition Act as it stood when it was adapted (in the schedule) and incorporated under ss. 69 and 71(*b*) of the Calcutta Improvement Act. In short, the present action, taken by way of agreement under s. 24 of the Calcutta Improvement Trust Act, for exemption of acquisition of part of the premises, following steps taken for acquisition of the whole, amounts to this that the provisions of Land Acquisition Act (as part of the Calcutta Improvement Trust Act) are being put into force for the purpose of acquiring a part only of the premises in question. The Collector himself appears to have understood the position to be such, for, in his order of Reference, after setting out the contentions of the applicants, he concludes :—

> I beg, therefore, to refer for the decision of the Court as to whether the portion of the premises intended to be acquired form part of the home of the petitioners within the meaning of s. 49(*1*) of the Land Acquisition Act.

I think, therefore, that the application was not premature, and that the Tribunal has failed to exercise the jurisdiction vested in it.

Rule absolute.

N. C. C.

(1) (1931) I. L. R. 59 Cal. 55; L. R. 58 I. A. 259.