default of payment the mortgaged property will be sold subject to the right of Puran Chand and his heirs to recover possession upon the death of Musammat Lachho.

1926

LACHMI CHAND v. LACHHO.

Appeal allowed.

Before Mr. Justice Dalal and Mr. Justice Pullan.

SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE PARTY) v. MUHAMMAD ISMAIL KHAN AND OTHERS (APPLICANTS).*

1926 *December*, 20.

Act No. 1 of 1894 (*Land Acquisition Act*), *section* 24, *clause* (3)—*Acquisition of land for a new market—Owner's old market injuriously affected—Compensation.*

With reference to clause (3) of section 24 of the Land Acquisition Act, 1894, a person whose land is expropriated for the purpose of establishing a new market cannot claim compensation on account of a previously existing market on other land of his, at a short distance from the proposed new market, being likely to be injuriously affected by the opening of a new market close by.

So *held* by WALSH, A. C. J., and PULLAN, J., DALAL, J., dissenting.

The Collector of Dinagepur v. *Girja Nath Roy* (1), *Rameshar Singh* v. *Secretary of State for India* (2), *Guru Das* v. *Secretary of State for India in Council* (3), *Cowper Essex* v. *The Local Board for Acton* (4), *In re The Stockport Railway Company* (5), *Metropolitan Board of Works* v. *Mc Carthy* (6), and *Hopkins* v. *Great Northern Railway Company* (7), referred to.

THIS was an appeal by the Secretary of State for India in Council against an award made under section 26 of the Land Acquisition Act, 1894, by the

* First Appeal No. 356 of 1923, from a decree of D. C. Hunter, District Judge of Bulandshahr, dated the 16th of May, 1923.

(1) (1897) I.L.R., 25 Calc., 346. (2) (1907) I.L.R., 34 Calc., 470.
(3) (1900) 18 C.L.J., 244. (4) (1889) L.R., 14 A.C., 153.
(5) (1864) 33 L.J., Q.B., 251 (6) (1874) L.R., 7 H.L., 243.
(7) (1877) 2 Q.B.D., 224.

1926

SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUHAMMAD ISMAIL KHAN.

District Judge of Bulandshahr. The land in question was notified for acquisition under section 6 of the Act, for the purpose of establishment of a market. The persons who owned the land to be acquired were also owners of other land situated about half a mile away, upon which a market already existed. The District Judge assessed the value of the land at Rs. 1,800. But he also awarded an additional sum of Rs. 6,200 under the provisions of section 23, clause (4), of the Act, which lays down that, in determining the amount of compensation to be awarded, the court shall take into consideration 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, movable or immovable, in any other manner.

Against the latter part of the award an appeal was filed on behalf of the Secretary of State. It was conceded that the applicant's own market would suffer by the establishment of another within a distance of half a mile. But it was urged that, even if the applicants' income from their market was reduced on account of the establishment of the Government market, the damage was prospective and did not take place at the time of the Collector's taking possession of the land Inasmuch as at the time of taking possession there was no market on the acquired land, consequently there was no damage *at that time*.

The main argument, however, on behalf of the appellant was that the court was barred from taking such damage into consideration by reason of the third clause of section 24 of the Act, which precludes the consideration of any damage sustained by the person interested in the land which, if caused by a private person, would not render such person liable to a suit.

1926

SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUHAMMAD ISMAIL KHAN.

On this appeal—

Mr. *G. W. Dillon*, for the appellant.

Dr. *Surendra Nath Sen* and Babu *Surendra Nath Gupta*, for the respondents.

The judgement of DALAL, J., after stating the facts as above, thus continued:—

The first objection is easily answered. The Act requires that the Government shall proclaim the purpose for which the land is to be acquired, and there can be no doubt that as soon as this purpose was proclaimed the market value of the applicants' market was reduced by the fear that its income would suffer diminution by competition of the new market. This was damage sustained by the applicants at the time of the taking possession by the Government of the acquired land. There is nothing prospective or uncertain about it. It is quite possible that the new market may prove a failure and the applicants' old market may retain its custom. Those are considerations for the future. What the Court has to see is whether a prudent man desiring to purchase the market would be influenced or not and would offer a lower price or not, because of the alarm caused by the threatened opening of a market on the acquired land by Government. It stands to reason that the acquisition of this land by Government with the intention of establishing a market thereon will reduce the sale value of the applicants' market.

On a summary consideration, the second objection of the learned Government Advocate raises difficulties in the way of the applicants. The way the learned Government Advocate argued was this: Suppose the acquired land had belonged to a neighbour *A* of the applicants and *A* had opened a market on this land in competition with that of the applicants,

1926

SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUHAMMAD ISMAIL KHAN.

Jwala, J.

the applicants would have had no right to sue. In our opinion, the difference is that the land did not belong to the Government, and it is the power of the statute which enables the Government to open the market. There can be no doubt that under the English law compensation would be allowed. In *Cowper Essex* v. *The Local Board for Acton* (1), the land was desired to be acquired for sewage works under statutory powers incorporating the Lands Clauses Consolidation Act, 1845. Evidence was given that the existence of sewage works, *even if conducted so as not to create an actionable nuisance, depreciated the market value of the appellants' other lands for building purposes.* The acquired land was let on long building leases; of the other lands part was in hand, and was let for short periods for brick making. The land taken was separated from the other lands, in part by other property of the appellant's and in part by a railway. The jury gave a verdict, in addition to the value of the land taken, for a further sum or damage sustained by reason of the injuriously affecting the other lands by the exercise of the respondents' statutory powers. It was held by the House of Lords that the jury was correct in awarding the further sum, as compensation might be awarded for damage to be sustained by reason of the injuriously affecting the appellants' other lands, not only by the construction of the sewage works but by their use. It was further held that the damage was not too remote to form the subject of compensation, even though no nuisance might be caused. This decision approved of the decision in *In re The Stockport Railway Company* (2).

The learned Government Advocate argued that those cases depended on the special wording of the Lands

(1) (1889) L.R., 14 App. Cases, 153. (2) (1864) 33 L.J., Q.B., 251.

Clauses Consolidation Act, 1845, and that their application to India was specifically prevented by the third clause of section 24 of the Land Acquisition Act (I of 1894). We do not agree with this argument. In 1900 a Full Bench of the Calcutta High Court in *Guru Das* v. *Secretary of State for India in Council* (1), held that the principles of these English cases were applicable to the Indian Act. In that case the appellants contended that as the municipality had only taken a portion of their land and intended to use the portion so taken, for the purpose of erecting thereon a sewage discharge dépôt, their adjoining lands would be injuriously affected and they claimed compensation for such injurious affection. The claim appears to have been opposed by the Secretary of State for India on the same ground as is put forward here, that the English cases on the subject were not applicable. The learned Chief Justice, in delivering the judgement of the Court, said at page 247 :—

"Now I come to the question of injurious affection, and I think I am doing no injustice to the argument of the learned senior Government Pleader, when I say that although there is a slight distinction in the language of the English Land Clauses Act in the section relating to injurious affection as compared with the language of section 23, sub-section (4), of the Land Acquisition Act of this country, he felt that he could not successfully contend as a matter of law that the principle laid down in the case of *Cowper Essex* v. *The Local Board for Acton* (2) and other similar cases in the Courts of England was not applicable to the case now before us. In my opinion that principle is applicable, otherwise it would be difficult to see to what class of cases section 23 of the Land Acquisition Act can properly apply."

(1) (1900) 18 C.L.J., 244.

(2) (1889) L.R., 14 App. Cases, 153.

1926

SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUHAMMAD ISMAIL KHAN.

The learned Judge of the lower court has based his finding on the ruling of the Calcutta High Court in *The Collector of Dinagepur* v. *Girja Nath Roy* (1). This judgement was approved by another Bench of that Court in *Rameshar Singh* v. *Secretary of State for India in Council* (2).

Dalal, J.

We construe the third clause of section 24 so as to limit it to damage claimed by persons other than those to whom the acquired land belonged. Those are cases like the one of the *Metropolitan Board of Works* v. *McCarthy* (3). In this case Lord PENZANCE said :—

"There are many things which a man may do on his own land with impunity, though they seriously affect the comfort, convenience, and even pecuniary value which attach to the lands of his neighbour. In the language of the law these things are *damna absque injuria*, and for them no action lies. Why then, it may surely be asked, should any of these things become the subject of legal claim and compensation because instead of being done, as they lawfully might, by the original owner of the neighbouring land, they are done by third persons who, for the public benefit, have been compulsorily substituted for the original owners?"

The claim here was not by the person whose land was acquired but by a neighbour who claimed compensation because of acts done by the Works after acquisition. Similarly, where the tenant of a public house claimed compensation for the loss of profits which he had sustained by reason of a railway company having pulled down the adjoining houses (which did not belong to him and had been acquired by the company from other persons), it was held that

(1) (1897) I.L.R., 25 Calc., 346. (2) (1907) I.L.R., 34 Calc., 470 (488).
(3) (1874) L.R., 7 H.L., 243.

he was not entitled to compensation, for, if any private person had purchased and pulled down the adjoining property, no action would have lain against him. We are of opinion that it is to provide against such claims, by persons other than the owners of the land acquired, that the third clause of section 24 was enacted.

Having approved of the lower court's finding that compensation is due to the respondents for injurious affection of their market by the acquisition, we must proceed to determine the amount of compensation. As rightly pointed out by the learned Government Advocate, we must take into consideration the time of the Collector's taking possession. In our opinion it is not the correct procedure to make an estimate of the probable loss that the respondents may suffer in future. In fact, there may be no loss ultimately, and even no market may be constructed by the Government. What we have to consider is the diminution of its value by the general report that a new market was to be started within half a mile of the respondents' market. The real test will be by what percentage the value of the property was decreased on account of the proclamation. We must, therefore, first determine the value of the property. The lower court appears to have made a very generous estimate of the income derived by the respondent from the market, but in default of other evidence we must accept its finding. It fixed the annual income at Rs. 2,685: Rs. 1,155 from *tehbazari* and weighment dues, Rs. 130 from Thursday and Sunday markets, and Rs. 1,400 from the *parao*. We think that it is a fair estimate to assess the value at sixteen times the income. The value of the property will, therefore, be Rs. 42,960. Such an assessment of value was made by the Full Bench in the case already quoted,

Dalal, J.

1926

SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUHAMMAD ISMAIL KHAN.

Guru Das v. *Secretary of State for India in Council* (1). We have considered all the circumstances of the acquisition and the distance of the respondents' market from the proposed market. We think that the threat of the opening of a new market did not reduce the value of the respondents' market by more than ten per cent. We, therefore, allow them Rs. 4,296.

Fifteen per cent. shall be added to this sum for compulsory acquisition. We amend the decree of the lower court accordingly and fix the total compensation at Rs. 6,096 with an addition of fifteen per cent.

We direct the parties to bear their own costs of both the courts.

We only direct future interest to run at six per cent. per annum and no past interest as the amount of compensation was in dispute and not finally determined till today.

PULLAN, J. :—The question to be determined in this appeal is the right of an owner, whose land has been acquired for the purpose of opening a market, to receive compensation for loss of profits derived from an existing market on other land.

As it is conceded by the learned Government Advocate that the opening of the new market must interfere with the profits derived from another market half a mile distant, it is not necessary to consider the possibility that no loss might be incurred. But the law does not compensate for any and every loss that may befall an owner of land and compensation can be awarded only if the conditions laid down in the Land Acquisition Act are complied with.

If it be held that the statute excludes consideration of the purpose for which the land is acquired, the

(1) (1900) 18 C.L.J., 244.

present case is not one in which compensation can be awarded, for the mere acquisition of the plot has no effect on any rights of the landlord in other land. But the cases in which mere acquisition affects rights on or earnings from other land are rare, and it would be a narrow interpretation of section 23, clause 4, of the Land Acquisition Act which would exclude from the word acquisition all consideration of the purpose of acquisition. The statute, moreover, is founded closely on the English law, and although the authority of the judgement of the Court of Appeal in *Hopkins* v. *Great Northern Railway Company* (1), may be cited in favour of that view, other decisions, notably the *Cowper Essex* case (2), show clearly that in England the purpose of the acquisition is taken into account. In the latter case damages were awarded because the land was acquired for a sewage farm, which would affect injuriously the value of adjoining property, and the former case found that the mere building of a bridge did not affect the interest of a ferry owner, but the use to which the bridge was to be put. This is not strictly parallel to the case of a market, which as soon as it is opened, that is, as soon as the land is taken over for the purpose of holding a market thereon, *ipso facto* affects the earning capacity of another market in the immediate neighbourhood.

Pullan, J.

On the other hand the case of a sewage farm gives the owner a better claim than that of a market, for the presence of such a farm will deter other persons from becoming tenants of the adjoining land, and will affect its selling and letting value, whereas the opening of a market may actually enhance the value of the land in the neighbourhood. But the Indian statute does not deal only with the effect of the acquisition of land, it expressly specifies earnings,

(1) (1877) 2 Q.B.D., 224. (2) (1889) L.R., 14 A.C., 153.

1926

SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUHAMMAD ISMAIL KHAN.

apart from land. *Finding that the very proclamation of the acquisition of this land for the purpose of opening a new market affects the future earning of the landlord from his existing market, we see no reason to exclude the case before us from the operation of section* 23 *of the Land Acquisition Act, if that section is complete in itself.*

Pullan, J.

But section 23 of the Act is limited by section 24, which lays down certain circumstances which must not be considered in awarding compensation, although presumably the case otherwise falls within the purview of section 23. The third clause runs as follows, "(the court shall not take into consideration) any damage sustained by him, i.e., the person interested, which, if caused by a private person, would not render such person liable to suit." This clause is based on the principles followed by the English courts, and we are as much bound to accept the leading English authorities when they favour the Crown as when they appear to favour the public. The principle is that unless something is done which would be actionable if done by a private person, there is no right to compensation. Lord CAMPBELL in *In re Penny* (1), said:—"Unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed." This dictum was re-affirmed by Lord CHELMSFORD in *Ricket* v. *Directors of Metropolitan Railway Company* (2), and the *ratio decidendi* of the decision referred to above, *Hopkins* v. *Great Northern Railway Company* (3) was that the owner of the ferry could not base an action against a private person who had diverted traffic from the ferry by constructing a bridge. The owner of a

(1) (1857) 7 E. & B., 660. (2) (1867) L.R., 2 H.L., 175 (187).
(3) (1877) 2 Q.B.D., 224.

ferry is in a position closely analogous to that of a person who maintains a market, but the ferry owner has a better right to a monopoly than the owner of the market, and it is not even alleged before us that the respondent in this case would have been able to sustain an action for damages against a private person who started another market in the neighbourhood. It is, therefore, suggested that section 24, clause (3), refers to claims made by third parties, but in my opinion this view is negatived by the wording of the clause. This clause is part of the grammatical sentence which commences the section, and the person who sustains the damage can only be the person who in the second clause has a disinclination to part with the land. He cannot be changed into a person "other than the owner" without express words to that effect. I am unable to construe the section to mean anything else than that a person interested, including the person whose land is acquired, is not entitled to compensation for damages which, if caused by a private person, would not have rendered that person liable to a suit. The damages in the present case are the loss caused to the respondent by the opening of a market in competition with his own market. Had he suffered that loss through the private enterprise of some other person, he would have had no cause of action against him, therefore he has no claim for compensation on this account from the Crown. It is true that in one English case, *In re The Stockport Railway Company* (1), there is a suggested qualification of the English principle, and this has been followed with some hesitation in the *Cowper Essex* decision above quoted. But it must be remembered that the latter decision dealt with the case of a sewage farm, and a private person setting up a sewage farm in such a position as to destroy the value

(1) (1864) 33 L.J., Q.B., 251.

1926

SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUHAMMAD ISMAIL KHAN.

of his neighbour's land could hardly be immune from an action for damages. Moreover, there is no indication that the Indian Legislature intended to restrict the application of the general principle of the English law in the manner adopted in one decision. The Act which has, by the broad construction which we have been able to put on section 23, enabled owners to obtain compensation for loss of profits elsewhere, caused by the use for which a portion of their land is acquired, has very clearly restricted the owners to cases in which a similar act by a private person would have been actionable. The Judge of the court below suggests that the act of the private person might amount to trespass, but any attempt by a private person to use the land of another would be *ipso facto* actionable, and it is not the act of acquisition which is to be considered here, but the damage caused by opening a rival market.

I am, therefore, unable to agree with the lower court in awarding damages for loss in respect of the earnings of the owner's other market and *parao*, and it is unnecessary for me to deal with the difficult problem of assessing these damages.

In my opinion the appeal should be allowed, and the compensation reduced to the amount allowed by the Collector.

BY THE COURT.—We are not agreed on the question whether the respondents should receive compensation for injurious affection of their land other than the land compulsorily acquired. We refer the following question for decision by another single Judge or Bench.

Under the circumstances of the present case described in the two judgements of the Judges of this

Bench, are the respondents entitled to receive compensation for the alleged injurious affection of their other land, or are they barred from claiming such compensation under the third clause of section 24 of the Land Acquisition Act?

When the opinion of the third Judge or Bench is received we shall pronounce judgement, if necessary, on the amount of damages to be awarded to the respondents.

The file shall be laid before the Hon'ble Chief Justice for necessary action.

[The following is the answer to the reference :—]

WALSH, A. C. J. :—In my judgement the third clause of section 24 of the Land Acquisition Act is a bar to that portion of the claim, allowed by the District Judge, in respect of which this reference has been made under section 98 of the Code of Civil Procedure.

The head of claim represents an attempt to capitalize the depreciation in the capital value of the land retained by the claimant, due to the legitimate future use of the land acquired, and to the loss of earnings liable to accrue to the claimant by reason of such user as a market; in other words, to legitimate competition. This is, no doubt, damage by reason of the possibility of the acquisition injuriously affecting the claimant's other property through his earnings. It is no doubt also true that it has been estimated at a capital sum at the time of the Collector's taking possession, representing the depreciation in capital value, caused by the fear likely to be entertained by hypothetical purchasers today of the diminution in future earnings. This would be legitimate enough if it were a legal head of damage. But it is damage sustained by the claimant which, if caused by a private person, would not render such person liable to a suit in India,

1926

SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUHAMMAD ISMAIL KHAN.

and the Court must not, therefore, take it into consideration. I cannot agree with my brother Mr. Justice DALAL that the "him" in this provision must be taken to relate to a third person. It can only relate "to the person interested" mentioned in the preceding clause, i.e., the claimant.

I think it may possibly lead to misunderstanding to seek guidance from the English decisions, except in so far as it is necessary to explain ambiguous provisions of the Indian statute which seems to have been an attempt to codify the general principles laid down in England. But it is clearly wrong to follow an English decision where doing so would involve doing violence to a statutory provision in the Land Acquisition Act. The effect of the English decisions seems to be to allow compensation where the user necessarily does physical injury, which would ordinarily amount to an actionable nuisance, such as a railway passing so near to a cotton mill as to expose it to the risk of fire and an additional burden for insurance, or a sewage farm so situate as by smell and sentiment actually to affect the standard of comfort or enjoyment and, therefore, the selling value of the land. There is no case like the present in which competition, consequent upon the acquisition, has been treated as actionable *per se*. To do so would be to compensate for the compulsory acquisition, which is a special head of damage otherwise provided for.

I think it necessary only to refer to the decisions in India which have been cited. I doubt whether I should agree with *The Collector of Dinagepur* v. *Girja Nath Roy* (1). But the *ratio decidendi* of that case is put on another ground in the judgement of the Judges who decided *Rameshar Singh* v. *Secretary of State for India* (2), and the decision of the latter case,

(1) (1898) I.L.R., 25 Calc., 346. (2) (1907) I.L.R., 34 Calc., 170 (488).

1926

SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUHAMMAD ISMAIL KHAN.

which was not cited before the Subordinate Judge in this case, is clearly an authority for the appellant, with which I agree. The decision in *Guru Das* v. *Secretary of State for India* (1), does not touch this case, though, if I may say so, I entirely agree with it. It dealt with land retained by the claimant, which would be injuriously affected by the proximity of the sewage dépôt, amounting ordinarily to an actionable nuisance, and also with compensation for severance. I think the appellant is right and that this head of claim is excluded by section 24, clause (3).

[On receipt of the answer to the reference, the original Bench held that the respondent was not entitled to any sum over and above the market value of the land awarded to him.]

Appeal allowed.

PRIVY COUNCIL.

J. C.*
1927
March, 4.

SHEOBARAN SINGH (PLAINTIFF) v. KULSUM-UN-NISSA AND OTHERS (DEFENDANTS).*

[On appeal from the High Court at Allahabad.]

Pre-emption—Insolvency—Custom of Pre-emption—Wajib-ul-arz—Sale by Official Assignee—Provincial Insolvency Act (III of 1907), section 16, sub-section 2(a).

When a share in a village in which a custom of pre-emption exists has vested in the Official Assignee under the Provincial Insolvency Act, 1907, section 16, a sale by him is subject to the custom. An Official Assignee takes the property of an insolvent exactly as it stood in his person, with all its advantages and all its burdens.

The record in a wajib-ul-arz of a custom of pre-emption is sufficient to establish the custom without oral evidence in confirmation. *Digambar Singh* v. *Ahmad Sayed Khan* (1), followed.

* *Present*:—Viscount DUNEDIN, Sir JOHN WALLIS and Sir LANCELOT SANDERSON.

(1) (1900) 18 C.L.J., 244.
(2) (1914) I.L.R., 37 All., 129; L.R., 42 I.A., 10.