

required by law. In my opinion the contract was one and it is in writing, though the items of work to which the contract related were bound to be numerous.

With great respect, I am unable to agree with the view expressed by SMITH, J., that this written agreement by itself is not sufficient. I agree with the view expressed by BENNET, J., that this written contract fulfils the requirements of section 97. My answer to the question referred, therefore, is that the plaintiff's claim for the various items is not barred by the provisions of section 97 and that the written contract of April 2, 1930, satisfies the requirements of that section. Let the case be sent back to the Bench concerned for disposal.

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MUNICIPAL  
BOARD,  
AGRAv.  
RAM LALSulaiman,  
C. J.

*Before Mr. Justice Bennet and Mr. Justice Harries*

SECRETARY OF STATE FOR INDIA (DEFENDANT) *v.*  
NURAN BIBI AND ANOTHER (PLAINTIFFS)\*

1936  
April, 23

*U. P. Town Improvement Act (Local Act VIII of 1919), sections 57, 59(6)—Tribunal determining amount of compensation—One of the assessors absent on one day of hearing, when some witnesses were examined—Substantial error or defect in procedure—Jurisdiction.*

A Tribunal constituted under the U. P. Town Improvement Act was engaged in hearing a case regarding the determination of the amount of compensation to be paid for an acquisition. One of the three members of the Tribunal was absent on one day, on which three witnesses were examined. On a subsequent day all the members were present and the case was argued and a judgment was given in which all the three members concurred:

*Held*, that owing to the absence of one of the members on a date when evidence was heard the Tribunal had no jurisdiction to give the judgment and it must be set aside. Section 59(6) of the U. P. Town Improvement Act shows that the Act contemplates that when one member is temporarily absent another member must be appointed in his place and it is not possible for the Tribunal to proceed in the absence of a member. Section 64(1)(b) empowers the President of the Tribunal to give a decision alone in certain matters, but the

\*First Appeal No. 41 of 1933, from a decree of the Tribunal Improvement Trust, Allahabad, dated the 11th of September, 1932.

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determination of the amount of compensation is not one of such matters.

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There being want of jurisdiction, and not merely a substantial error or defect in the procedure, it was immaterial whether it could or could not be shown from the record that a material error had arisen in the judgment owing to the absence of one of the members on a date on which the three witnesses had been examined.

The Government Advocate (Mr. *Muhammad Ismail*), for the appellant.

Dr. *K. N. Katju* and Messrs. *Mansur Alam*, *Zarair-ul Haq* and *Mahboob Alam*, for the respondents.

BENNET and HARRIES, JJ.:—This is a first appeal by the Secretary of State for India in Council against a decree of the Allahabad Improvement Trust Tribunal. The Tribunal had an application before them against the award of the then acquisition officer for compensation for certain premises. The amount of compensation was increased by the Tribunal by Rs.4,600. The objection which has been taken is that the Tribunal was not properly constituted during the course of the trial of the case and therefore its award was without jurisdiction. The order sheet for the 25th August, 1932, one of the dates of the hearing, states that two members of the Tribunal, out of three, were present and one member Hafiz Ghazanfar-ullah was absent on that date. The Government Pleader took an objection that the case should not be taken up as one of the assessors was absent. The two members present, however, decided to proceed with the hearing of witnesses and on that date three witnesses were heard, one on behalf of the plaintiff and two on behalf of the defendant. On a later date the three members of the Tribunal were present and the case was argued and a judgment was given in which the three members of the Tribunal agreed. The point before us is whether the trial was one within the jurisdiction of the court below when the court acted contrary to the provisions of the Act on a certain date. The provisions of the U. P. Town Improvement Act, Act VIII of 1919, are particularly clear on the point. For a

compulsory acquisition there are several sections beginning with section 56. In section 57 it is provided that "A Tribunal shall be constituted, as provided in section 59, for the purpose of performing the functions of the court in reference to the acquisition of land for the Trust, under the Land Acquisition Act, 1894." In section 59 it is laid down that the Tribunal shall consist of a President and two assessors. In sub-section (6) it is provided: "When any person ceases for any reason to be a member of the Tribunal, or when any member is temporarily absent in consequence of illness or any unavoidable cause, the authority which appointed him shall forthwith appoint a fit person to be a member in his place." Therefore the Act contemplates that when one member becomes unavoidably absent another member must be appointed in his place, and it is not possible for the Tribunal to proceed in the absence of a member. In section 64 there is a provision in sub-section (1)(b) for the President of the Tribunal to give a decision alone. But this is merely in certain matters—the determination of the persons to whom compensation is payable and the apportionment of compensation between those persons. It is not possible for the President to act alone for the purpose of determining the amount of compensation to be paid for acquisition. Reference has been made to Act III of 1920 by which the U. P. Town Improvement Act of 1919 is modified, and it provides for an appeal on the ground of a substantial error or defect in the procedure provided by the Act which might possibly have produced error or defect in the decision of the case upon the merits. We do not consider however that the present case is one which merely amounts to a substantial error or defect in the procedure. On the contrary we consider that the question is whether the Tribunal had jurisdiction at all and if the Tribunal had no jurisdiction the appeal would lie under section 3(2)(i), the decision being contrary to law.

Reference has been made by learned advocate to certain rulings. In *Rohilkhand and Kumaon Bank v.*

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*Row* (1) there was a reference at page 474 as follows: "In the case of *Khelut Chunder Ghose v. Tara Churn Koondoo* (2) PEACOCK, C.J., made observations which apply in principle to the question before us: 'I apprehend that all acts of a judicial nature to be performed by several persons ought to be performed when they are all present together, and that a final decision ought not to be pronounced in a case in which they differ, until by conference and discussion of the points in difference they have endeavoured to arrive at a unanimous judgment.'" In *Nand Ram v. Fakir Chand* (3) at page 528 there was a reference to the ruling in *Rohilkhand and Kumaon Bank v. Row* (1) and it was also stated: "What the parties to a reference to arbitration intended is that the persons to whom the reference is made should meet and discuss together all the matters referred, and that the award should be the result of their united deliberations." In *Thammiraju v. Bapiraju* (4) there was a case where a suit was referred to arbitration and objection was taken to the award on the ground that one of the arbitrators had not attended the meeting when witnesses were examined by the other arbitrator and it was held that the award was invalid by reason of misconduct on the part of the arbitrators within the meaning of section 521(a) of the Civil Procedure Code.

On behalf of the respondents Dr. *Katju* argued that it could not be shown from the record that any material error arose in the judgment owing to the absence of one of the assessors on the date when the evidence of these three witnesses was recorded. We consider however that the question is not one which might arise under section 167 of the Evidence Act as to the improper admission or rejection of evidence and whether independently of that evidence there was sufficient evidence for the decision at which the Tribunal arrived. In our opinion the matter goes much deeper and it is a question of

(1) (1884) I.L.R., 6 All., 468.

(3) (1885) I.L.R., 7 All., 523.

(2) (1866) 6 W.R., 269.

(4) (1888) I.L.R., 12 Mad., 113.

whether the Tribunal had or had not jurisdiction. We consider that owing to the absence of one of the assessors on a date when evidence was heard the Tribunal ceased to have jurisdiction and therefore the decree passed by the Tribunal must be set aside. We accordingly set aside the decree of the Tribunal and we remand this application to the Tribunal for disposal according to law.

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### SPECIAL BENCH

*Before Mr. Justice Niamat-ullah, Mr. Justice Harries  
and Mr. Justice Rachhpal Singh*

#### REFERENCE UNDER THE STAMP ACT\*

1936  
April, 28

*Stamp Act (II of 1899), sections 2(5) and 6; schedule I, articles 5 exemption (a), 15, 41, 43—Bond—Mortgage of crops—  
—Agreement—Agreement for sale of goods or merchandise  
exclusively.*

(1) Where a document, attested by witnesses, was executed, mortgaging the standing sugarcane crop and the next year's crop on the executant's fields against an advance received from the mortgagee, and also stipulating to supply the said crop exclusively to the mortgagee at a certain rate:

*Held* that the document was, firstly, a mortgage of crops, falling under article 41 of schedule I of the Stamp Act; and, secondly, it was a bond as defined in section 2(5)(c) of the Act as it contained a specific stipulation, which was over and above the transaction of mortgage and not a necessary or integral part thereof, by which the executant undertook to deliver the sugarcane crop to the other party exclusively, and therefore falling under article 15 of schedule I of the Act. As the document filled this dual character, the higher of the two stamp duties was payable, in accordance with section 6 of the Act.

This document did not come within exemption (a) under article 5; for the document, taken as a whole, could not be considered to be a mere agreement, as an interest in property was created thereby and it was a mortgage and not merely an agreement. Apart from this, the exemption did not apply for the reason that the document was not "exclusively" an agreement for the sale of goods or merchandise, in view of

\*Miscellaneous Case No. 34 of 1936.