APPELLATE CIVIL

Before Mr. Justice Harries and Mr. Justice Rachhpal Singh

1935
December, 6

SECRETARY OF STATE FOR INDIA (DEFENDANT) *v.* ZAHID HUSAIN (PLAINTIFF)*

U. P. Town Improvement (Appeals) Act (III of 1920), section 3(1)(b)—Certificate that the case is a fit one for appeal—Form of certificate—Merely granting leave to appeal not sufficient —Appeal incompetent—Special leave to appeal—Should not be granted where appellant wishes to raise a point of law the opposite of which was urged by him and adopted by the lower court—Practice and pleading.

Under section 3(1)(*b*) of the U. P. Town Improvement (Appeals) Act the certificate, which when granted by the President of the Tribunal gives a right of appeal to the High Court, should state that the case is a fit one for appeal. The section therefore requires the President to be satisfied that the case is a fit one for appeal, i.e. that the questions involved are such that it is desirable in the interests of justice that the matter should be considered by a higher court; and it is essential that the certificate should show clearly upon the face of it that the President has considered the application for leave to appeal upon its merits and has come to the conclusion that the case is a fit one for appeal.

An order passed by the President, on the appellant's application for sanction to go up in appeal, in the terms "Sanction to go up in appeal is granted as prayed" was not a sufficient compliance with the terms of section 3(1)(*b*) and did not give the appellant a right of appeal to the High Court; there was nothing to show that the President applied his mind to a consideration of the grounds and came to a conclusion that the questions involved were such as to make the case a fit one for appeal; on the other hand it appeared from the record that the grounds of appeal were not even fully disclosed before the President.

In a case where a party had urged before the Tribunal to adopt a particular method of valuation to ascertain the market value of the property and the Tribunal had adopted it, and then the party wanted to appeal to the High Court on the ground that the method of valuation adopted by the Tribunal

*First Appeal No. 314 of 1931, from a decree of Zahur Ahmad, President of the Tribunal, Improvement Trust, Allahabad, dated the 25th of February, 1931.

was wrong, and prayed for special leave to appeal under section 3(1)(*b*)(ii) of the U. P. Town Improvement (Appeals) Act, it was *held* that special leave to appeal should never be granted in such circumstances.

Mr. *Muhammad Ismail* (Government Advocate), Dr. *K. N. Katju,* and Mr. *Kamta Prasad,* for the appellant.

Sir *Tej Bahadur Sapru,* and Messrs. *P. L. Banerji, Mukhtar Ahmad* and *Mansur Alam,* for the respondent.

HARRIES and RACHHPAL SINGH, JJ.:—This is a first appeal by the Secretary of State for India in Council against an award of a Tribunal acting under the U. P. Town Improvement Act (U. P. Act VIII of 1919).

In order to carry out certain improvements in the South Malaka area in the city of Allahabad, a house, No. 14, the property of the respondent was acquired compulsorily for the Allahabad Improvement Trust. The amount awarded by the Land Acquisition Officer for this house and the site upon which it stood was Rs.17,324. The present respondent was dissatisfied with the amount awarded by the Land Acquisition Officer and under the provisions of the U. P. Town Improvement Act he appealed to a Tribunal constituted under that Act. The Tribunal having considered the evidence in the case came to the conclusion that the amount awarded by the Land Acquisition Officer was insufficient and awarded the present respondent a total sum of Rs.25,247 for the house and land in question. The appellant being dissatisfied with this award has preferred an appeal to this Court.

The respondent, however, has taken a preliminary objection to this appeal, which, in our view, must prevail. He contends that this Court cannot hear the appeal by reason of the fact that the appellant has not obtained a certificate from the President of the Tribunal, certifying that this is a fit case for appeal. It will be necessary for us to consider in some detail the provisions relating to appeals in cases of this kind.

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Section 56 of the U. P. Town Improvement Act, 1919, provides that an Improvement Trust may, with previous sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act, 1894, as modified by the provisions of this Act, for carrying out any of the purposes of this Act.

The first stage for the compulsory acquisition of property is the valuation of such property to be acquired by the Land Acquisition Officer and in this case the award of that officer assessed the value of such property, as we have previously stated, at the sum of Rs.17,324. It is provided that where the owner of such property is dissatisfied with the award of the Land Acquisition Officer he may appeal to a Tribunal, see section 57 of the U. P. Town Improvement Act and section 18 of the Land Acquisition Act (Act I of 1894).

It is provided by section 58(*d*) of the U. P. Town Improvement Act, 1919, that the award of the Tribunal shall be deemed to be the award of the court under the said Land Acquisition Act, 1894, and shall be final.

The U. P. Town Improvement Act, 1919, was modified by the U. P. Town Improvement (Appeals) Act, 1920 (Act III of 1920), and section 3 of this Act gives a party who is dissatisfied with the award of a Tribunal a right in certain circumstances to appeal to the High Court.

A party dissatisfied with the decision of a Tribunal constituted under the former Act may appeal to the High Court provided he has obtained from the President of the Tribunal a certificate that the case is a fit one for appeal, or where the High Court has granted special leave to appeal. It is provided, however, that the High Court shall not grant special leave to appeal unless the President of the Tribunal has refused to grant a certificate that the case is a fit one for appeal. In no case can the High Court give special leave to appeal if the amount in dispute is less than Rs.5,000. See section

3(1)(*a*) and (*b*) of the U. P. Town Improvement (Appeals) Act, 1920.

It is further provided by section 3(2) of this Act that an appeal shall only lie to the High Court on one of the following grounds, viz:

(i) The decision being contrary to law or to some usage having the force of law;

(ii) the decision having failed to determine some material issue of law or usage having the force of law;

(iii) a substantial error or defect in the procedure provided by the said Act which may possibly have produced error or defect in the decision of the case upon the merits.

It is contended on behalf of the respondent in this case that the appellant has not obtained a certificate from the President of the Tribunal as required by section 3(1)(*b*) of the U. P. Town Improvement (Appeals) Act, 1920.

After the Tribunal had made its award the present appellant applied on the 16th of May, 1931, that sanction be granted to go up in appeal to the High Court. This application is described as a "Petition under section 3(1) (*b*) (i) of Act III of 1920", and that is the section which requires a person desirous of appealing to the High Court against an award of a Tribunal to obtain a certificate that the case is a fit one for appeal from the President of the Tribunal. It is to be noted, however, that the prayer is that sanction be granted to the present appellant by the Tribunal to go up in appeal to the High Court and not that a certificate be granted that the case is a fit one for appeal. In the application no grounds are set out for the application beyond the general ground that the petitioner is greatly aggrieved by the award and is not satisfied with it and that he intends to go up in appeal before the High Court of Judicature at Allahabad.

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At the foot of this application appears a note initialled by the President of the Tribunal, dated the 18th of May, 1931. It would appear that the President of the Tribunal asked the Government Pleader for his grounds for making the application in question and the note sets out the reply of the Government Pleader. It reads as follows: "The Government Pleader stated that section 24 of the Land Acquisition Act read with the amendment of U. P. Town Improvement Act related to the case and that there were many other legal points which he did not want to disclose at that time and which he had noted in his written argument." There is a further note by the President of the Tribunal to this effect: "There was no application for bringing on the record the written argument, nor was it brought on the record and at the time the judgment was written it was destroyed. Therefore all those points should be brought to light now so that the court may have facility in passing orders." These notes as signed by the President of the Tribunal make it clear that the present appellant was not prepared frankly to disclose his grounds of appeal to the Tribunal. Beyond stating that section 24 of the Land Acquisition Act read with the amendment of the U. P. Town Improvement Act related to the case the Government Pleader gave no other ground. He appears to have mentioned that certain points were noted in the written argument but these were never brought on the record and such written argument was not in existence at the time of the application, so the President of the Tribunal had nothing before him to refresh his memory. There appears to us to be a lamentable want of frankness in the Government Pleader's other ground for this appeal, namely that there were many other legal points which he did not want to disclose at that time and which he had noted in his written argument. In our judgment counsel appearing for the Government in cases of this kind should put their

case openly and frankly before a Tribunal when they desire such Tribunal to grant them a certificate that the case is a fit one for appeal. From the note of the President of the Tribunal it is abundantly clear that the present appellant did not want fully to disclose his case to him lest presumably the other side should obtain information as to what his case really was.

On the 22nd of May, 1931, the President of the Tribunal passed the following order upon the present appellant's application, "Sanction to go up in appeal is granted as prayed", and such order is signed by the President.

It has been urged before us by counsel for the present respondent that this is not a certificate which gives the appellant a right to appeal to this Court. All that the certificate states is that sanction to go up in appeal is granted, whereas section 3(1)(*b*) of the U. P. Town Improvement (Appeals) Act requires a certificate from the President of the Tribunal that a case is a fit one for appeal. "Sanction to go up in appeal" merely means that leave to appeal is granted and such a certificate does not show that the President of the Tribunal thought the case was a fit one for appeal. Indeed, it would be extremely difficult for the President of the Tribunal to form any opinion upon the merits of the proposed appeal for the reason that the Government Pleader did not see fit to disclose to him what his real grounds were. It appears to us that the President of the Tribunal was not in a position to form any real opinion upon the merits of the proposed appeal and consequently all he could do was to sanction an appeal or in other words to give his leave to the appellant to appeal to this Court. There is nothing in the order which suggests to us that the President ever considered whether the questions involved were such that it was desirable in the interests of justice that the matter should be considered by a higher court. It is clear from the

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terms of section 3 of the U. P. Town Improvement (Appeals) Act, 1920, that appeals are not to be encouraged and that unsuccessful parties should only be allowed to appeal where the case is difficult and involves important questions of law and procedure. Before granting a certificate giving leave to appeal the President of the Tribunal must certify that the case is a fit one for appeal and that is very different from the President being required merely to give leave to appeal. We can well imagine cases where a President, though not regarding the case as involving any difficult point requiring the consideration of a higher Tribunal, may grant leave to appeal merely on the ground that he did not wish to prevent the unsuccessful party agitating the matter further in a higher Tribunal. Sanctioning an appeal merely amounts to this that the President sees no reason why the appellant should not go to appeal. That is not sufficient to comply with the terms of section 3(1)(*b*) of the U. P. Town Improvement (Appeals) Act, 1920, as that sub-section requires the President to be satisfied that it is a fit case for appeal before he grants the application for leave to appeal and when granting the application he must state in the certificate that the case is a fit one for appeal.

It has been contended before us on behalf of the appellant that a certificate such as the one existing in this case is sufficient to comply with the terms of the Act. It has been contended that we should give a liberal meaning to the phrase "Sanction to go up in appeal is granted" and construe it as meaning that the President regarded the case as a fit one for appeal.

When any certificate is granted under section 3(1)(*b*) of the U. P. Town Improvement (Appeals) Act it is, in our opinion, of the utmost importance that this certificate should show clearly upon the face of it that the President of the Tribunal has considered the application for leave to appeal upon its merits and has come to the

conclusion that the case is a fit one for appeal. There appears to be no authority directly upon this point, but cases have been cited to us where their Lordships of the Privy Council have considered certificates granted by High Courts in India granting leave to appeal to His Majesty in Council. In these cases great stress has been laid upon the exact form of the certificate granted. In *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (1) their Lordships lay down that when any certificate is granted under order XLV of the Civil Procedure Code it is of the utmost importance that the certificate should show clearly on the face of it upon which ground it is based, or if it is intended to come under section 109(*c*) that the discretion conferred by section 109(*c*) was invoked or was exercised. LORD BUCKMASTER who delivered the judgment of the Court observed: "When any certificate is granted under that order (XLV) it is, in their Lordships' opinion, of the utmost importance that the certificate should show clearly upon which ground it is based, and they regret to find that the certificate in this case is at least ambiguous. It runs in these terms: 'It is hereby certified that as regards the value of the subject-matter and the nature of the question involved, the case fulfils the requirements of sections 109 and 110 of the Civil Procedure Code and that the case is a fit one for appeal to His Majesty in Council.' There is no indication in the certificate of what the nature of the question is that it is thought was involved in the hearing of this appeal, nor is there anything to show that the discretion conferred by section 109(*c*) was invoked or was exercised."

In the present case also there is nothing to show on the face of the certificate, which reads "Sanction to go up in appeal is granted as prayed", that it was ever pointed out to the President of the Tribunal that the law required him to be satisfied that it was a fit case for

(1) (1920) I.L.R., 44 Mad., 293.

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appeal before granting a certificate or that he was so satisfied before he granted the certificate in question. From the record it would appear that the grounds upon which the President should have been asked to find that the case was a fit one for appeal were never disclosed to him and it would appear as if he never applied his mind to the real point which he had to determine.

A similar view was taken by their Lordships of the Privy Council in an earlier case, *Radha Krishn Das* v. *Rai Krishn Chand* (1). In that case a Bench of this Court passed an order in these terms: "Let a certificate issue that the case is a fit one for appeal to His Majesty in Council." But the certificate granting leave stated: "It is certified that though the valuation of the case is below Rs.10,000, yet as regards the value and nature of the case it fulfils the requirements of section 596 of Act XIV of 1882." Their Lordships held that such a certificate was not a proper foundation for leave to appeal and no proper leave had been given. They pointed out that the certificate of leave to appeal and not the order for such certificate is the document which the Judicial Committee are bound to consider and act upon in considering whether leave to appeal has been properly granted or not; and unless the certificate upon which leave to appeal is based is in such a form as to justify that leave, they ought to hold that the leave has not properly been given. They further held that even assuming that the order for the certificate might be looked at, the Judicial Committee would require to be satisfied that the court had exercised its judicial discretion upon the matter in deciding whether in order to comply with section 595 and section 600 of the Code the case was a fit one for appeal to His Majesty in Council, and in this case they were not satisfied (there being no reasons given and no grounds stated in the form of the certificate) that the judicial mind of the court had ever

(1) (1901) I.L.R., 23 All., 415.

been applied to that question. Similarly in the present case there is nothing to show on the face of this certificate that the President of the Tribunal had exercised his judicial discretion upon the matter in deciding whether the case was a fit one or not for appeal to the High Court. From the form of the certificate he may or may not have thought so, but the law requires that the form of certificate granted should make it clear that his mind had been directed to the question which he had to decide and that he had decided that it was a fit case for appeal.

In our judgment the principles enunciated by their Lordships of the Privy Council in the two cases cited above relating to certificates granted by High Courts in India for leave to appeal to His Majesty in Council apply to the present case. That being so, we are bound to hold that the appellant in this case has not obtained a certificate which entitles him to prefer an appeal and consequently we cannot hear the appeal unless it is a proper case in which special leave to appeal should be granted by this Court.

Application for such special leave to appeal was made to us by the learned Government Advocate on behalf of the appellant, but in our judgment this is a case where no such leave should be granted.

On behalf of the respondent it was contended before us that this Court could not in the circumstances of this case grant special leave because such can only be granted where the President of the Tribunal has refused to grant a certificate that the case is a fit one for appeal. It is said in this case that the President of the Tribunal has not refused to grant such a certificate. He has granted a certificate but not a certificate such as is required by the statute. It is said that the form of the application to him makes it clear that he was never asked to certify that this was a fit and proper case for appeal and therefore it cannot be said that he ever refused to grant such

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a certificate. This point, however, is not of importance in this case, because even assuming that the form of the order passed by the President of the Tribunal amounts to a refusal to grant a certificate that the case is a fit one for appeal we are not satisfied that it is a case where special leave should be granted.

It has been contended before us that the method adopted by the Tribunal in assessing compensation was wrong and that the assessment of the value of the land and of the buildings thereon which was adopted by the court was not a permissible method when determining the value of the property. It has been pointed out to us that what the Tribunal has to determine is the market value of the property and therefore that the method adopted in this case is contrary to law. Section 23(1) of the Land Acquisition Act provides that in determining the amount of compensation to be awarded for land acquired under this Act the court shall take into consideration firstly the market value of the land at the date of the publication of notification under section 4(1) and secondly certain heads of damage sustained by the owner of the property. It is urged in this case that the method adopted has been a valuation of the land and the structures thereon and that such is not a method for ascertaining the market value of the property. The contention urged before us now does raise an important question of law, and that being so, we could, in a proper case, grant special leave to appeal under section 3(1)(*b*)(ii) of the U. P. Town Improvement (Appeals) Act, 1920. However, the present case does not appear to us to be a case in which we should exercise our discretion in granting such leave to the appellant. From a perusal of the record it is abundantly clear that the Government Pleader on behalf of the present appellant never contended before the Tribunal that the method of valuation adopted by the Tribunal was in any way improper or incorrect. On the contrary, from the very commence-

ment the valuation of the property in this case has proceeded upon the basis of a valuation of the land, plus a valuation of the buildings erected upon it.

As we have stated previously these proceedings commenced by an award of the Land Acquisition Officer who acts for and on behalf of the Collector of the district. The award of the Land Acquisition Officer is binding upon the Government and if it is accepted by the owner of the property the matter is at once concluded. That officer is an officer of the Government and it is to be observed that he valued the property in question by first valuing the land and then the buildings erected upon it. He valued the land at the sum of Rs.1,224 and the buildings erected upon it at Rs.16,100 including compulsory allowance making a total valuation of Rs.17,324. It was against this award that the present respondent appealed to the Tribunal and very naturally the Tribunal proceeded to consider the merits of the case upon the basis of the valuation of the Land Acquisition Officer. The present respondent called evidence to show that the Land Acquisition Officer had undervalued the land and the buildings and the present appellant tendered in evidence the valuation of the Land Acquisition Officer and this indeed was the only evidence tendered by him. In short, the present appellant put forward the valuation of the Land Acquisition Officer as a fair valuation of this property for the purposes of the compulsory acquisition. By tendering and relying upon such evidence he impliedly contended before the Tribunal that the method adopted by the Land Acquisition Officer was the fair and proper method of assessing the value of this land in accordance with the Land Acquisition Act and the U. P. Town Improvement Act. The appellant now contends that the method of assessing the compensation adopted by the Tribunal was contrary to law, yet it is clear from the record that he actually invited the Tribunal to assess the compensation in that

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manner. That being so we are wholly unable to hold that this is a case where we should exercise our discretion and grant special leave to appeal.

It is true that the Land Acquisition Act requires the Tribunal to assess the market value of the property, but this of course may be done in many ways. Where a party invites the Tribunal to adopt a certain method of valuation to ascertain the market value of the property, such a party cannot at a later stage ask this Court for special leave to appeal upon the ground that the Tribunal has acted in accordance with his own method of valuation. In short, the appellant now asks this Court to grant special leave upon the ground that a wrong method of valuation has been adopted by him throughout the proceedings, which method of valuation the Tribunal adopted at his invitation. In our judgment special leave to appeal should never be granted in circumstances such as exist in this case.

A very similar view was taken by another Bench of this Court in an application for special leave to appeal in the case of the *Secretary of State for India* v. *Lala Misri Lal,* decided on 10th December, 1931. In that case the President of the Tribunal had refused to grant a certificate and a Bench of this Court refused to grant special leave because the legal point raised as to the method of valuation adopted had never been raised in the proceedings before the Tribunal.

We consequently refuse to grant the appellant special leave to appeal and the appeal must therefore be dismissed as incompetent. The respondent must have the costs of the appeal.

It was further contended before us by counsel for the respondent that there was no proper memorandum of appeal in this case by reason of the fact that it was filed without the authority of the Secretary of State for India in Council. The contention is that the appeal was filed upon the instructions of the Collector of Allahabad and

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that according to the rules framed by the Government a Collector has no authority to instruct anyone to file an appeal. It was conceded in argument by the learned Government Advocate that in this case the Collector had no express authority but he urged that an authority to perform such an act could be implied. He further contended that even if the appeal was filed without the authority of the Secretary of State we should in the particular circumstances of the case extend the time for appealing and thus make the appeal competent. These contentions involve points of considerable difficulty and importance but we do not consider it necessary or desirable to decide them in this judgment. We have decided that the present appeal is incompetent by reason of non-compliance with section 3 of the U. P. Town Improvement (Appeals) Act and such concludes the matter. The point as to the authority of the Collector to institute proceedings by way of appeal does not arise in this case and any observations on the point would therefore be merely *obiter* and not binding upon any other court. That being so, we leave the point open and express no opinion upon it in this judgment.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

BOMBAY BARODA AND CENTRAL INDIA RAILWAY (DEFENDANT) *v.* DWARKA NATH (PLAINTIFF)*

1935 *December*, 13

Railways—Negligence—Allowing grass to grow high on railway land close to the rails—Grass set on fire from running engine, and fire catching on to tall grass on plaintiff's neighbouring land and his haystacks and trees—Contributory negligence—Negligence apart from breach of any statutory duty—Railways Act (IX of 1890), section 13.

On the track of a railway dry grass, two feet high, was standing on the land between the rails and the fencing; across the fencing was the plaintiff's land, on which tall grass, six feet high, was standing close up to the fencing; part of the grass

*Appeal No. 33 of 1935, under section 10 of the Letters Patent.