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of the working expenses of the mine and connected with the business of the mine and these expenses will have to be taken into account before the actual amount of profit earned can be ascertained. It does not seem to me that in arriving at the profits the expense incurred in earning those profits should necessarily be what may be called voluntary expenses. If in fact the very nature of the business requires that certain expenses should be incurred before the profits can be ascertained then I think that such expenses can fairly be said to come within the meaning of sub-section (*ix*) of clause (*2*) of section 10 of the Act as expenditure incurred solely for the purpose of earning such profits or gains. In my opinion, therefore, the local rates which the assessee claims should be deducted from his taxable income in this case should be deducted before the assessment of his income is made.

No specific question is formulated for our opinion in the reference by the Commissioner of Income-tax but the points upon which he requires an opinion are clearly indicated and the answers to those points appear from the judgment just pronounced. I think that the assessee in this case is entitled to his costs of this reference. We think that the costs should be assessed at Rs. 300.

JWALA PRASAD, J.—I agree with the conclusions which have been arrived at by my Lord the Chief Justice.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Foster, J.

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December 20.

NITAI DUTT

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Land Acquisition Act, 1894 (Act 1 of 1894), sections 9 and 54—service of notice on one of three brothers, effect of—District Judge's order confirming Collector's award, appeal from.

*First Appeal No. 30 of 1921, from a decision of A. E. Scroope, Esq., I.C.S., District Judge of Manbhum, dated the 13th November, 1920.

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The mere fact that one of three brothers accepts a notice under section 9 of the Land Acquisition Act, 1894, on behalf of one or other of the others, does not raise a presumption that he had any authority to do so.

An order by the District Judge rejecting an application for revision of the Collector's award results in the award being confirmed, and, therefore, the order is appealable under section 54.

Appeal under section 54 of the Land Acquisition Act, 1894.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Abani Bhushan Mukerji and *S. C. Mazumdar*, for the appellant.

Lachmi Narain Sinha (Government Pleader), for the respondent.

DAWSON MILLER, C. J.—The appellant in this case is Nitai Dutt, one of three brothers who were the tenants of a house and some land in the town of Jharia in district Manbhum. The house and land were taken over by the Collector on behalf of the Government under the provisions of the Land Acquisition Act, 1894. Under section 9 of the Act notices were ordered to issue upon Nitai Dutt and his two brothers Brojo Dutt and Bhusan Dutt who were presumably members of a joint family occupying the house or a portion of the house and land in question. What happened when the notices were issued appears from the proceedings on page 3 of the paper book which states that notices issued to Brojo Dutt, Nitai Dutt and Bhusan Dutt were accepted by Bhusan Dutt for himself and for Brojo Dutt and Nitai Dutt. In due course proceedings took place under section 11 of the Act when some of the parties appeared and put forward objections and those objections were heard and disposed of. Before that it further appears that Bhusan Dutt appeared before the Collector on the 21st October and obtained time purporting to act on behalf of himself and his two brothers, including the

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appellant. Time was allowed, the proceedings were put off until the 27th October and on the latter date there was a further adjournment at the instance of Bhusan Dutt until the 13th November. No further action appears to have been taken by any party and on the 18th December the proceedings, under section 11 of the Act, were concluded and an award was made by the Collector. The total amount awarded in respect of the land was Rs. 3,300 some odd annas. The proportion of that sum awarded to Brojo Dutt, Nitai Dutt and Bhusan Dutt was Rs. 900. On the 17th January following the appellant presented a petition claiming a reference to the Court under the provisions of Part III of the Act and in that petition he gave as his reasons for wishing to have the matter referred to the Judge and the award re-opened first of all that the land belonged to him alone, that the compensation which had been awarded for the house was very small and that according to the market rate obtaining at Jharia the compensation for the acquired land was not less than Rs. 7,000 and also gave further reasons which need not be gone into. In the same petition he stated that he had received no notice as required under section 9 of the Act. The reason for stating that he had no notice was no doubt because of the provisions of section 25 of the Act which section is a part of Part III of the Act which refers to procedure in cases of reference to a Judge. That section provides for three classes of cases. The first clause of the section refers to the case where the applicant has made a claim for compensation pursuant to a notice given under section 9. In that case the amount awarded to him by the Court, that is to say by the Judge to whom the reference is made, shall not exceed the amount so claimed, and, at the same time, it shall not be less than the amount awarded by the Collector under section 11. The appellant contends that he did not come within that clause of the section as having had no notice he made no claim at all under the provisions of section 11. The second clause provides for the case where the applicant has refused to make such a claim

or has omitted, without sufficient reason, to make such a claim. In such a case the amount awarded by the Court shall, in no case, exceed the amount awarded by the Collector. It follows, therefore, that if without any sufficient reason he has refused to take action before the Collector when the award is made he cannot afterwards ask the Court, to which the matter may be referred, to award him more than the Collector has already done. The third case is under clause 3 and that relates to cases when the applicant has omitted, for a sufficient reason, to make such a claim. In such a case the amount awarded to him by the Court shall not be less than and may exceed the amount awarded by the Collector. The appellant's contention is that he *comes within* clause 3. He did omit to make a claim before the Collector under section 11 but he contends that there was sufficient reason for so doing, that reason being, as stated in his petition, that he received no notice as provided under section 9 and if he can make out such a case it seems to me quite clear that he is entitled to come within section 25, clause 3, and ask the Court to reconsider the question upon the grounds stated in his petition for reference.

When the matter came before the Judge he considered that there was no allegation in the petition for reference, that the petitioner was not served with notice and was therefore incapable of filing a claim. On looking to the notice of reference, to which I have already referred, it appears quite clear that the learned Judge was in error in stating that there was no allegation in the petition, that the petitioner was not served. On the contrary the petition begins by submitting that the petitioner has received no notice as to the area of the land which was acquired on the 18th December, 1918, but he states that after the acquisition of the land a notice was issued in his name and in the names of two other persons to the effect that the sum of Rs. 900 would be paid to them as compensation. The learned Judge, when the matter came before him, refused to grant the petitioner

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time to produce certain documents to prove the rate for the land which he had asserted and the reason apparently why he did so was that the petitioner had made no attempt to meet by evidence the preliminary objection taken by the Government Pleader that he had preferred no claim at all under section 9 of the Act in pursuance of notice under that section. The Vakil for the objector had stated that his client was not served with notice but no evidence was taken before the learned Judge upon this question and the learned Judge said :

> " The presumption is that notices were duly served and the reference contains a statement to that effect. It was for the objector to rebut that presumption and the allegation was evidently only an after-thought."

In my opinion no such presumption as that which the learned Judge relied upon arises in this case for the simple reason that we know what the actual facts were. Those facts are stated in the reference itself from which it appears, as already stated, that the notice issued upon Nitai Dutt was not served upon him but was served upon his brother who apparently accepted it on his behalf. The mere fact that one of the three brothers accepts a notice on behalf of one or other of the others does not, in my opinion, raise any presumption that he had any authority to do so. Under section 9 of the Act it is provided in terms that in addition to a general notice the Collector shall also serve notice on the occupier, if any, and on all such persons known or believed to be interested therein or to be entitled to act for persons so interested. By section 3 of the Act, clause (*b*), the expression " Persons interested " includes all persons claiming an interest in compensation to be made on account of the acquisition of the land under the Act. It was, therefore, incumbent upon the Collector to serve a notice upon each of the persons interested as defined in that section and it was not sufficient for him to serve a notice merely upon one of three brothers each of whom was equally interested under the Act. Nor can it be suggested that Bhusan Dutt was a person entitled to act for the appellant because, under section 3,

clause (*g*), the persons entitled to act are there set out and they comprise only trustees, a married woman in certain cases and the guardians of minors or the committees or managers of lunatics. It cannot, therefore, be said that Bhusan Dutt in this case was a person authorized to act on behalf of his brother. It may turn out when the facts are actually known that the appellant was well aware that the notice had been issued upon him and did in fact authorize his brother to act on his behalf but in the absence of any express evidence to that effect we can only speculate as to what the real truth was. We do not know in the least what the relationship between these brothers was, or whether when Bhusan Dutt acted on behalf of his brother he was doing so *bonâ fide* or with some other motive. At any rate there is no evidence before the Court at all from which it can come to any satisfactory conclusion upon this matter and it seems to me that the case will have to go back to the Judge for him to determine under section 25, clause (*3*), whether, in the circumstances to be ascertained by evidence, the appellant has omitted for a sufficient reason to make a claim under section 11 of the Act.

I ought to state that a preliminary point was taken on behalf of the respondent to the effect that no appeal lay from the decision of the Judge in this case and in support of that contention he relied upon section 54 of the Act which provides that subject to the provisions of the Civil Procedure Code, applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or any part of the award in any proceedings under this Act. The Court there referred to is the Court of the District Judge to whom the matter was referred and the argument is that in the present case the petitioner's application for revision having been rejected there was in fact no award of the Court in any proceedings under the Act and that, therefore, there was no appeal permissible within the provisions of section 54. This argument, in my opinion, cannot be sustained. What

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in fact happened was that the award made by the Collector was affirmed by the District Judge when the reference to him took place. The result of dismissing the claim referred had the effect of confirming the Collector's award and whether the award was varied or whether it was confirmed there is, in my opinion, in either case, an appeal permissible under section 54. Moreover it appears from the decree drawn up in pursuance of the Judge's decision that the order was that the reference be dismissed and the Collector's award be upheld. In my opinion there is no substance in the preliminary objection.

The result is that this matter must go back to the learned Judge to determine upon evidence whether or not the appellant was actually served, or, if in fact he was not served, whether he afterwards authorized his brother to appear and act on his behalf. I think that the Judge should have evidence, if possible, from the serving peon. It may be that the service in the circumstances was perfectly regular because if the appellant could not be found then it was permissible for the peon to serve another member of the family instead of the appellant himself. I also think that the learned Judge should insist upon having before him both the appellant himself to give his version and Bhusan Dutt who certainly purported to act on behalf of his brother, and if he had no authority in fact to act on behalf of his brother, then some explanation would certainly be required from that witness. I think the appellant is entitled to a refund of the court-fee. Let a certificate issue to that effect. The case was not tried by the learned Judge. It was dismissed upon a preliminary point which has turned out to be without substance. I think that the general costs of this appeal should abide the final result of the reference before the learned Judge.

FOSTER, J.—I agree.

Case remanded.