APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

THE COLLECTOR OF POONA, (ORIGINAL DEFENDANT), APPELLANT, *v.* KA'SHINA'TH KHA'SGIWA'LA' AND OTHERS, (ORIGINAL CLAIMANTS), RESPONDENTS.* 1886. *February* 10.

Land Acquisition Act X of 1870, *land acquired under—Compensation, award of—Frontage and back sites—Parties—Lessees of such land, right of, to be joined in suit by the owner.*

The claimant, Káshináth, owned certain land, measuring 179,436 square feet, situated in the city of Poona. This land was originally devoted to agricultural purposes, and contained, also, a number of fruit trees and some buildings, and was in the form of a square enclosed and surrounded by houses on all sides, except towards the south, on which side it opened upon a large unoccupied area of garden land, also belonging to the claimant. The second and third claimants were the lessees of Káshináth. The said land was taken up by the Collector of Poona on behalf of the municipality of that city for the purpose of erecting a central market. The claimant, having declined to receive Rs. 12,880 offered to him as compensation, the Collector referred the matter to the District Judge, who, after deducting 21,532 square feet from the measurement of the whole land for roads, divided the rest, on the principle of frontage and back sites, in the proportion of one to three, appraising it at the average rate of eighteen sales enumerated in certain sale deeds at ten annas per square foot, and some at less than one anna. His award for the land was Rs. 30,674 for the land alone, Rs. 2,517 for the materials of buildings, Rs. 400 for trees, and Rs. 700 for severance. The sum total was made subject to Rs. 3,000 awarded to the second and third claimants for their unexpired leases. On appeal by the Collector to the High Court,

Held, that neither the principle of frontage applied by the District Judge nor the proportion of one to three for frontage and back sites was applicable to the claimant's land, which was surrounded on all sides by buildings, which shut it out from communication with the town, except by opening a passage of ten feet wide. As there was no evidence to show that there was any particular demand for land for building speculation, one and a half anna per square foot was to be regarded as the adequate value of such a large area as 179,436 square feet, subject to the lessees' compensation for their interest. The claimant was not entitled to the award of Rs. 700 on account of severance. The decree was, accordingly, varied by awarding Rs. 19,739-2 as compensation for the property, to which 15 per cent. was to be added, as provided by section 42 of the Land Acquisition Act X of 1870.

Held, also, that the claim of the claimants Nos. 2 and 3 was not triable in this suit. It was one exclusively between the co-respondents, and properly fell

* Appeal No. 19 of 1885.

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under section 39 of the Act. In so far as it was not objected to its being tried in appeal, they could be awarded reasonable damages, and Rs. 1,200 was ample compensation to them.

THIS was an appeal from an award of compensation by Sir W. Wedderburn, District Judge of Poona.

The Collector of Poona, with a view to acquire land for, and on behalf of, the Poona Municipality for the purpose of erecting a central market, fixed upon the land belonging to the claimant, Káshináth Khásgiwálá. After issuing notices and proclamations as required by the Land Acquisition Act X of 1870, the land was taken possession of on the 14th March, 1883. A summary inquiry was held, and Rs. 12,880 were offered to the claimant as compensation, which the claimant declined to receive. The Collector referred the matter for determination, under section 15 of the Land Acquisition Act, to the District Judge, who called upon the claimant and the Collector to appoint assessors to assist him. The Collector nominated the Mámlatdár as his assessor, who was also an *ex-officio* member of the municipality. The claimant objected, but his objection was overruled, and an award was made. The High Court subsequently quashed the whole proceedings and sent back the matter to be re-tried.

The land was originally devoted to agricultural purposes, and contained a number of fruit trees and some buildings. It was in the form of a square, measuring precisely 179,436 square feet, and was enclosed and surrounded by houses, except to the south, where there was a large unoccupied area of garden land. In his deposition the claimant stated that a road could easily be made from the great doorway on the road to the garden, as also two other roads. There being no land belonging to other persons intervening, the claimant alleged that he could establish communication with the outer world at a small cost. The claim, as stated by the claimant, was as follows :—

	Rs.
1. Value of the buildings	10,770
2. Do. of land, including sites of the buildings	43,171
3. Trees, unproductive	500
4. Do. productive, value of which is Rs. 4,000, out of which Rs. 3,500 are deducted as the value of the rights of the cultivators' balance ...	500

	Rs.
5. Damage in beauty and convenience to main buildings in consequence of destruction of the garden	6,000
6. Cost of Bráhman servant to cook food for idols in the temple, Rs. 120 per annum, capitalized ...	3,000
Total ...	63,941

There were also other claims. A sum of Rs. 43,171 was claimed for the land alone at the rate of annas four a square foot. As evidence of the market value of land taken up for building purposes by the municipality, the claimant put in several sale deeds of other land purchased by the municipality in the vicinity of the land in question.

The second and the third claimants were lessees under the first claimant. The assessor nominated by the claimant supported the claimant's valuation at four annas per square foot, but the assessor nominated by the Collector valued it at one anna per square foot.

The District Judge awarded Rs. 30,674 to the claimant. He relied mainly on two statements of sales of plots of land in the city, contained in exhibits A and B. The average rate of eighteen sales enumerated in exhibit A was ten annas per square foot, whilst of those in exhibit B less than one anna. The District Judge held these rates applicable to frontage and back sites respectively, and, after deducting 21,532 square feet from the entire area for road, divided the remainder 157,904 square feet in the proportion of one to three, and awarded Rs. 30,674 for the land, Rs. 2,517 for the materials of the buildings thereupon, Rs. 400 for the trees and Rs. 700 for severance. The aggregate amount of the award was subject to Rs. 3,000, which was awarded to the lessees (the second and third claimants).

The Collector appealed to the High Court.

Macpherson (*Dáji Abáji Khare* with him) for the appellant:—The principle of frontage and back sites applied by the lower Court would not apply, as the land was on all sides enclosed and surrounded by houses so as to cut off all intercourse with the outer world. In awarding compensation to the claimant, the price

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given by the municipality for similar land in the vicinity of the claimant's land should be taken into consideration. The principle of award of compensation to be applied in cases where land is taken for public purposes is to be with reference to the value of the interest of the owner thereof—*Stebbing* v. *The Metropolitan Board of Works*(1); *Penny* v. *Penny*(2)—and not in reference to the value it would be to the acquirer. In what advantageous way could the land be laid out for building purposes by the claimant is, at best, the standard of compensation; and, situated as the land was, the claimant could not have obtained a higher price for it, or built thereon very desirable buildings, nor was there a great demand for claimant's land. The demand on account of the alleged severance creating a necessity to employ a cook to carry offerings of food to the temple, is merely sentimental.

Jardine (*Shámráv Vithal*, Ráv Sáheb *Vásudev Jagannáth Kirtikar* and *Vishnu Krishna Bhátvadekar* with him) for the respondents:—The principle of frontage and back sites as laid down in *Premchand Burral* v. *The Collector of Calcutta*(3) was rightly applied by the Court below. With a small outlay of money the claimant could have opened intercourse with the outer world and turned his land to advantage. There is an increasing demand for land in Poona for building purposes, and the claimant's land, being in the heart of the city, was sought after.

SARGENT, C.J.:—The only question we have to determine in this appeal is, what compensation should be awarded to the respondents for the land taken up by the appellant for a public purpose under Act X of 1870. The land contains 179,436 square feet, and is situated in the city of Poona. Respondent No. 1 is the owner, and respondents Nos. 2 and 3 are his tenants holding under a lease for ten years, dated 15th April, 1882.

Both parties agree that the principle upon which the compensation should be assessed is correctly stated in *Premchand Burral* v. *The Collector of Calcutta*(3), *viz.*, that the value of the property should be determined, not necessarily according to its present

(1) L. R., 6 Q. B., 37. (2) L. R., 5 Eq., 227

(3) I. L. R., 2 Calc., 133.

disposition, but laid out in the most lucrative and advantageous way in which the owner could dispose of it, which, in the present case, it was urged by the respondent No. 1, and not disputed by the appellant, would be by laying it out for building purposes. The question, then, is, what would be its market value if so laid out; and the most reliable evidence on that question must be the rates per square foot at which similar building sites in the neighbourhood have recently been sold. A large body of evidence is recorded on this point; but, as the District Judge observes, "it is not easy to understand rightly the bearing of this mass of evidence consisting of some 300 documents and depositions." The respondent No. 1 claims for the land Rs. 43,171 at the rate of 4 annas per square foot, and the assessor, Ráv Bahádur K. L. Nulkar, nominated by him under the Act, supports him in this estimate of the value. The other assessor, however, Mr. F. D. Ghásválá, nominated by the Collector, values the land at Rs. 8,950 at the rate of one anna per square foot; and the District Judge awards Rs. 30,674. In arriving at this conclusion, he has relied chiefly on two statements of sales of plots of ground in the city, marked A and B, and prepared by the respondent and appellant respectively. The average rate of eighteen sales, enumerated in statement A, is about 10 annas per square foot, whilst of those enumerated in statement B it is less than 1 anna. The District Judge has availed himself of both of these rates as applicable to frontage and back sites respectively, into which, after deducting 21,532 square feet on account of roads from the entire area 179,436 square feet, he considers the remaining 157,904 square feet may be properly divided in the proportion of one to three, as was done in the Calcutta case already referred to.

We are, however, unable to agree with the District Judge in regarding any portion of the site in question as "frontage" having a special value, as was the case in the sales enumerated in statement A and as regards the land dealt with in the Calcutta decision, where the plots had considerable length of frontage on public thoroughfares or streets. Here, on the contrary, the land is surrounded on all sides by buildings which shut it out from the main arteries of the town, with which communication can

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only be opened by one passage of about 10 feet wide. It would be impossible, therefore, to take the average rate given by statement A as a fair value for any part of the respondent's land. Nor would the proportion of one to three for frontage and back sites, adopted in the Calcutta case, be applicable to land so situated. Certain sites would doubtless fetch a higher value than others if the land were laid out for building purposes; but the distinction between frontage and back sites has, we think, scarcely any practical importance in assessing its value. We may also remark that, in many of the sales included in statement A, the lands were taken up to make approaches and to set back houses and for other purposes inconveniencing the owners, and that the matter may well have been settled by the Municipality on liberal terms, which could afford no accurate test of the real value. Moreover, some of the plots were purchased with buildings on them, which must have affected in some degree the value paid for the lands.

With respect to the sales referred to in statement B, most of them, like those in statement A, were made under very different conditions from those which obtain in the case of the land in question. There are, however, two instances in it (Nos. 1 and 2), which, we think, are sufficiently similar to the present case to enable us to take them as a guide in fixing what would be a fair compensation for the respondent's property. No. 1 is a sale of 774 square feet at the rate of 2 annas and 1 pie, and No. 2 of 22,364 square feet at the rate of 2 annas and one and a half pie per square foot. In No. 1, the present claimant No. 1 was the seller, and one Gholap was the purchaser; and in No. 2, one Paránjpe was the seller, and the Municipality, whom the appellant represents, was the purchaser. The facility of access would appear to be about the same in No. 2 and the land in question. The material distinction between them is in the extent of area, which is eight times as great in respondent's land; and as there is no evidence to show that there is any particular demand for land for building speculation, it is plain that some reduction should be made in determining the market value of so large an area, and we think that one and a half anna per square foot for the entire area of 179,436 square feet, (subject to a deduction for the com-

pensation for the tenants' interest in the land which would have had to be bought up by respondent if he had laid his property out for building purposes), would be a fair valuation of the respondent's property. We see no reason to interfere with the District Judge's award as to the building materials and the trees. But as to the award of Rs. 700 for severance, we do not think the claimant No. 1 is entitled to anything on that account. The claim is put forward on the ground that the employment of a half-time Brahman cook would be necessary for the service of the temple. Upon the evidence in the case, no such necessity is made out, and the grievance that offerings to the idols in the temple would have to be carried through the public, and would thereby lose their religious efficacy, is too sentimental to admit of any compensation being awarded to it. We, accordingly, disallow this item.

As to the claim for compensation by the tenants, (co-respondents Nos. 2 and 3), it appears that they had an unexpired lease of nine years of the land for gardening purposes, and that there was a considerable number of fruit trees upon the land when possession was taken. As persons interested in the land under section 3, they are entitled to share in the total compensation awarded for the fee simple of the property on the supposition of its being laid out for building purposes, which would necessarily extinguish their interest in the land. The District Judge has dealt with this question as if the co-respondents had also a claim against the Municipality for compensation for a wrongful act arising out of their conduct in taking possession. But, if the Collector or Municipality have violated the law, they may be liable in an action for damages, but not in this proceeding, which is exclusively concerned with compensation as regulated by the Act. The question was strictly one between the co-respondents, and properly fell under section 39; but it was, apparently, entertained by the District Judge with the consent of all the co-respondents, and as no objection was taken to our deciding it in this appeal, we proceed to do so. It appears that the co-respondents 2 and 3 held under a lease for ten years, dated 16th April, 1882, by which it was provided, that, if turned out before expiration of the lease, they should be paid reasonable

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damages. Looking at the whole of the evidence, and especially that of the claimant Kushábá, we think that Rs. 1,200 would be ample compensation to the claimants 2 and 3.

We agree with the District Judge in thinking that for the mere possibility of any treasure trove in the land in dispute no compensation can be awarded, and also that the question of the alleged right of pre-emption cannot be dealt with in these proceedings under the Act. The claimant No. 1 claims to have his right to carry water through the aqueduct reserved to him, and Mr. Macpherson says he has no objection to that.

We, accordingly, vary the award of the District Judge, and award Rs. 19,739-2 as the compensation for the property, to which 15 per cent. must be added as provided by section 42. From this sum, Rs. 1,200, with an addition of 15 per cent., should be paid by the Collector to claimants 2 and 3, and the remainder to claimant No. 1. Interest to be paid on these sums at 6 per cent. from 14th March, 1883, the day on which possession was taken by the Collector. As to the costs, we think that as the compensation ultimately awarded exceeds the sum fixed by the Collector, he must pay the first respondent his costs before the two District Judges, but the first respondent must pay the appellant the costs of this appeal.

Decree varied.

APPELLATE CRIMINAL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhai Haridás.

1886. *March* 1.

GOVIND BHAICHAND AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* KA'LNA'K AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act XV of 1877, Art. 147—Mortgage—Mortgagee, suit by a, to realize mortgage debt by sale of mortgaged property, under power of sale—Cause of action—Construction.

By a mortgage bond the first defendant mortgaged on the 1st January, 1864, certain property to plaintiffs' deceasd father, with an implied power to sell the same if the debt was not satisfied at the expiration of seven years from that date.

*Second Appeal, No. 721 of 1883.