1922.

DINKARRAO GANPATRAO v. NARAYAN VISHWANATH.

law and damages may be recovered for a breach thereof. According to the Privy Council decision in *Maharaj Bahadur Singh* v. *Balchand*[1] such a covenant is unenforceable as a covenant since it infringes the rule against perpetuities. Perhaps it might be argued that the case of *Maharaj Bahadur Singh* v. *Balchand*[1] was for possession of land and not for damages and that the observations of their Lordships of the Privy Council had no reference to a claim at law in damages. But even if that be so it seems to me that a contract with regard to land which is calculated to defeat the rule against perpetuities which is one of public policy is void under section 23 of the Indian Contract Act.

The covenant for pre-emption contained in the sale deed, dated the 18th day of September 1878, is void and the question for the determination of which this Originating Summons has been taken out should be answered in the negative.

Solicitors for the appellant : Messrs. *Dabholkar & Co.*

Solicitors for the respondent : Messrs. *Mulla & Mulla : Patell & Ezekiel.*

Appeal allowed.

G. G. N.

[1] (1920) L. R. 48 I. A. 376.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1922.

March 31.

THE GOVERNMENT OF BOMBAY, APPELLANT *v.* N. H. MOOS, RESPONDENT*.

Land Acquisition—Tolca tenure—Valuation of land as quarry—Acceptance of such basis by parties before the Collector—Reference to High Court—Evidence insufficient for valuing land as quarry—Government's interest—Principles of valuation—Land Acquisition Act (I of 1894).

*O. C. J. Appeal No. 128 of 1921 : Reference No. 8 of 1920.

Land of Toka tenure, situated at a hill in the north of Bombay was compulsorily acquired by the Government of Bombay in pursuance of a Notification published on 16th May 1916. The annual rent payable to the Government was Rs. 18-5-5, but the Government had a right to increase the assessment in the year 1929-30 to the rate of four per cent. on the value of the land. In the proceedings before the Land Acquisition Officer, the claimant and the Government proceeded to value the property on the assumption that the land was in the quarry region and that quarrying could be carried on to a considerable depth. Accordingly, the Land Acquisition Officer calculated the value of the land on hypothetical estimates of the value of the marginal land to be left by the claimant and the values of *moorum* and stone, the said values being written back for a certain number of years at a certain percentage.

The matter being referred to the High Court at the instance of the claimant the trial Judge came to the conclusion that in view of the experiments made on the land it did not appear that as a business proposition the land in reference would be used as a quarry but that as both parties had since the date of the Notification proceeded on the valuation of the property as a quarry, that basis of valuation should not be rejected. He varied the estimates of the Land Acquisition Officer, however, and awarded the claimant Rs. 42,969-12-0 which included an allowance for the flat land when levelled. The Government was awarded Rs. 4,246, the assessment taken at four per cent. on the value of the land in 1929-30, being capitalised at eight per cent. and written back for 13½ years at the same rate. On appeal by the Government,

Held, setting aside the award of the trial Judge, that as the evidence showed that the land could not be valued on a quarrying basis and that the claimant had failed to establish that a purchaser, taking into consideration the potentialities of the land whether for building or quarrying purposes, would be prepared to pay anything more than Rs. 7-8-0 a square yard, according to which the value of the land would not exceed the estimate of the Acquiring Officer, such estimate must be accepted as correct and the claimant was not entitled to claim anything in excess thereof.

(2) That in valuing the interest of the Government in the land, the assessment on the land could not, in the circumstances of the case, be expected to increase in 1929-30 to a higher rate than two per cent. and the same should be capitalised at six per cent. and written back at the same rate to the date of acquisition.

Per MACLEOD C. J. :—A method which has been generally used to arrive at the present value of rent is to capitalise at a certain rate and then write it back to the date of acquisition, the rate of capitalisation and the rate of writing back being the same.

1922.

GOVERNMENT OF BOMBAY v. N. H. MOOS.

APPEAL from the decision of Kajiji J. in a reference under the Land Acquisition Act.

By a Notification No. 5141, dated 16th May 1916, published in the Bombay Government Gazette of 18th May 1916, the land in reference measuring 3,521-4-9 square yards and situated at Golangi Hill near Parel Tank Road, Bombay, was notified for acquisition for the purpose of construction of works for the Tata Hydro-Electric Power Supply Co., in connection with its transmission line.

The tenure of the land was Toka, and the occupant had to pay an annual rent of Rs. 18-5-5, but the Government had a right to increase the assessment in 1929-30, and levy a rate of four per cent. on the value of the land.

The persons interested in the land at the date of the reference were N. H. Moos, Receiver appointed by the High Court in Suit No. 688 of 1917 and as such representing the occupant, and the Government of Bombay.

On the supposition that the land contained good building stone both parties proceeded to value the property on the assumption that quarrying could be carried on to a depth of 83·95 feet. Accordingly both parties furnished their respective estimates for (1) marginal land to be left by the claimant at its deferred value, (2) the value of the *moorum* at a certain depth and the value of the stone, both values being written back for a fixed period of years at a certain percentage and (3) the value of Government claim based on capitalisation of assessment.

The Collector estimated the cubical contents of the marginal land and after deducting the same ascertained the net quarriable contents dividing them into *moorum* and stone. *Moorum* was valued at Re. 0-12-0 and stone

at Rs. 1-12-0 per 100 cubic feet, the total amount awarded for *moorum* and stone, written back for 4 years at ten per cent. being 24,954·88. Adding to this the deferred value of the marginal land, fixed at the lump sum of Rs. 1,500, the total award came to Rs. 26,454·88. Out of this the value of the Government's interest in the land was fixed at Rs. 7,982, arrived at on the basis of the whole land being valued at Rs. 7-8-0 per square yard. Deducting the claim of the Government and adding the usual fifteen per cent. for compulsory acquisition and Rs. 500 as compensation for severance, the occupant claimant was awarded Rs. 21,743·88.

The occupant claimant, by his attorney's letter, dated 21st February 1920, applied to the Collector to refer the matter for the determination of the High Court under section 18 of the Land Acquisition Act, 1894, stating therein: (1) that the area of the marginal land allowed was excessive; (2) that the writing back ought to have been at six per cent. there being no uncertainty or risk in quarrying the hill; (3) that stone should have been valued at a higher rate and (4) that only the capitalised value of the Government assessment should have been allowed in respect of the Government claim.

The reference in the High Court was heard by Kajiji J. Expert evidence was led, both sides calling surveyors, engineers and quarrymen. His Lordship was of opinion that in view of experiments made on the land by digging pits therein coupled with the evidence of expert architects it was doubtful whether as a business proposition the land could be used as quarry, but as both parties had proceeded in the matter of valuation on the basis that the land in reference was a quarry land it was too late to reject that basis. Accepting the said basis of valuation, therefore, his Lordship proceeded to value the

1926

GOVERNMENT OF BOMBAY v. N. H. MOOS.

occupant claimant's interest on the same lines as the Collector and awarded him Rs. 42,969-12-0. This figure was arrived at by reducing the area of the marginal land, allowing Rs. 1-14-0 for 100 cubic feet of stone, writing back the values of *moorum* and stone for 4 years at six per cent. and by further allowing deferred value of flat land at Rs. 6-8-0 per square yard and writing it back for 5 years at six per cent. The interest of the Government for Toka after 13½ years (i.e., in 1929-30) was assessed after capitalising at eight per cent. the value of a four per cent. assessment in 1929-30, and the Government were awarded Rs. 4,246-0-0.

The Government of Bombay appealed.

Sir Thomas Strangman, Advocate General, for the appellants.

B. J. Desai and *Mulla*, for the respondent.

MACLEOD, C. J. :—This is an appeal from the decision of Mr. Justice Kajiji in Land Acquisition Reference No. 8 of 1920. The land in reference was notified for acquisition on the 16th May 1916, it admeasured 3,521⅓ square yards, and was situated on the Golangi Hill. The photograph of the model at p. 11, Part III, gives us the best idea of the land and its surroundings. Before the Collector it was valued on what I may call a quarrying basis, that is to say, the total cubic contents of stone and *moorum* were calculated and a particular value was given to them, written back according to the period estimated to be taken up for quarrying. Nothing was allowed for the land after the quarrying was finished. The total value arrived at by this method was for all interests Rs. 26,454·88. As the land is Toka the amount of the Government interest was deducted. Then to what was left was added fifteen per cent. for compulsory

acquisition plus Rs. 500 for compensation for severance awarded to the appellant. The total for all the claim was Rs. 21,744.

The learned Judge, after considering all the evidence before him with regard to the basis of valuation, came to the conclusion that if all the materials that were placed before him had been placed before the Land Acquisition Officer, the Land Acquisition Officer would not have valued the land on the quarrying basis. But the learned Judge thought himself bound to hold that the land should be valued on the quarrying basis because that was the basis which was followed according to the evidence on both sides before the Land Acquisition Officer. We think the learned Judge was wrong in valuing the land on the quarrying basis when on the evidence before him he was of opinion that the land could not be used as a quarry. Even then on the evidence the learned Judge valuing the land on the basis that it would be used as a quarry valued all interests at Rs. 41,611, but valued the Government interest on a different basis to that on which it had been valued by the Collector, with the result that the amount awarded to the claimant was Rs. 37,365 plus Rs. 5,604-12-0, fifteen per cent. for compulsory acquisition.

Two questions arise: (1) what was the proper market value of all interests in the land to be acquired? and (2) what should be deducted for the value of the Government interest as the land was held on Toka tenure? It seems to have been admitted, at any rate for the purposes of argument before us, that the land would be worth in the market Rs. 7-8-0 a square yard if it was used for building purposes. There is no evidence whatever that a purchaser would have offered more than Rs. 7-8-0 a square yard for this land. No

1922.

GOVERNMENT OF BOMBAY v. N. H. MOOS.

evidence was called on either side of any purchases of the land in the neighbourhood, and we have to rely mainly on expert evidence as to what a purchaser would be likely to give for this land. No doubt one is entitled to consider that a purchaser looking at the land, and wanting to buy it, would take into consideration the fact that it rises in places to a height of about eighty feet above the ordinary level, and that if he did not wish to build on the surface, he could get some value out of the *moorum* and stone beneath the surface. But all those calculations of the value of the cubic contents of the land above the ordinary level plus the deferred value of the land on the level when the material above it has been removed, appear to me to afford very little assistance to a Court which has to decide what should be the market value of the land at the date of the notification, because no evidence has been adduced from which the Court could hold that a purchaser would enter into all those elaborate calculations and base his offer for the land on the certainty that they would be realised. In all my experience I have never come across a purchaser who said he made hypothetical calculations of this character before he purchased; they are used by experts to justify an opinion which is as a rule equally valuable and less assailable without them; and the general fallacy underlying all these hypothetical calculations is this, that they result in the total profit a purchaser may expect on the most favourable estimates, which is a different thing from what a purchaser would give on an estimation of the profit which he would be likely to make, taking all risks into consideration.

Now the learned Judge in considering the evidence with regard to the quarrying potentialities of the land seemed to place far more reliance on the evidence for Government than on the evidence for the claimant.

[His Lordship after discussing the evidence of the witnesses proceeded :—]

I think that Kajiji J. was quite right in thinking the evidence showed that the land should not be valued on a quarrying basis. It all amounts to this. There is *moorum* and stone underneath the land. Whether it would pay a purchaser to extract it, would be purely problematical, and it has not been shown that a purchaser would be prepared to pay anything more than Rs. 7-8-0 for the land taking all its potentialities, whether for building or for quarrying purposes, into consideration. We think, therefore, that the Collector's estimate of the value of the land was correct, and that the value of all interests taken on the basis of his award should be Rs. 26,454·88 plus Rs. 500 compensation for severance.

Then the next question is as to the valuation of the Government interest, and that is a question of considerable difficulty. There always must be a difficulty in apportioning the total value, arrived at after valuing the land as free-hold, between the various parties who have interests in the land, because if an attempt is made to value each of those interests according to its market value, the total value of those interests valued in that way would be most unlikely to correspond with the market value of the land as a free-hold. Now this land is Toka land, the occupant of which has to pay at present an annual rent of Rs. 18-5-5. In 1929-30 Government have a right to increase the assessment, and they could levy a rate of four per cent. on the value of the land. It has in such cases generally been taken as the basis for the prospective assessment that the land will be of the same value in 1929 as at the date of acquisition. The rent, therefore, the Government could charge in 1929-30 might amount to

1922.

GOVERNMENT OF BOMBAY v. N. H. MOOS.

Rs. 1,056. A method which has been generally used to arrive at the present value of that rent is to capitalize at a certain rate and then write it back to the date of acquisition, the rate of capitalisation and the rate of writing back being the same. This is purely an artificial method of arriving at the value of the Government interest, and if it were possible to get evidence of what is paid in the market for Toka land as compared with free-hold, the Court would be in a much better position to arrive at the difference which represents the present value of the Government interest. However we have not got that evidence. We, therefore, have to arrive at the value of the Government interest as best as we can. I do not think that a universal rule can be laid down applicable to all cases. If the land is valued at the present time at a very low rate and owing to its situation it can be estimated that in 1929 it will be much more valuable so as to be able to bear an assessment of four per cent. on the present value, no doubt that could be taken as a basis for valuing the Government interest. But in this particular case we have to consider whether in 1929 this land could possibly bear a rent of Rs. 1,056 a year. It seems to me the claimant's argument that we cannot calculate that the assessment would be raised higher than two per cent. in 1929 requires to be considered. Looking at the situation of the land, whether we consider that in 1929 all the land would be reduced to the ordinary level by quarrying, or whether we consider the land will remain as it is, if the Government rent is to be taken at Rs. 1,056, there would be practically nothing left for the occupant, as he could hardly expect to get a higher rent from a tenant if he let it out either on a building lease or for any other purpose. I quite admit we are in a region of pure speculation, but I think we ought to do that which is most fair to the claimant.

We should not expect that the assessment would be increased to a higher rate than two per cent. in 1929, but at the same time we think that the rate on which it was capitalized, namely, eight per cent., was wrong and that it should be capitalized at six per cent. and written back at the same rate. The result is that the value of the Government interest is reduced by one half on the amount of the award of the Collector.

The award of Mr. Justice Kajiji is set aside and the Collector's award is varied by apportioning to Government Rs. 3,991 instead of Rs. 7,982. The claimant will get Rs. 3,991 more plus fifteen per cent. and interest at six per cent. on the whole from the date of Collector's taking possession up to this day. The Government is entitled to withdraw such amount as has been paid into Court in excess as a result of Mr. Justice Kajiji's award. Government to get seven-eighths of their costs throughout.

SHAH, J :—I concur.

Solicitors for the appellant: Mr. *J. C. G. Bowen.*

Solicitors for respondent: Messrs. *Ardeshir, Hormusji Dinshaw & Co.*

Appeal allowed.

G. G. N.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

1922

September 8

GANPATI NANA POWAR AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* JIVANABAI KOM SUBANNA BY HER MUKHTYAR BABURAO TUKARAM KASHID (ORIGINAL PLAINTIFF,) RESPONDENT*.

Power-of-attorney—Defective power-of-attorney—Defect not affecting merits of case or jurisdiction of Court—Court not justified in disturbing decree in appeal—Civil Procedure Code (Act V of 1908), Order III, Rule 2

*Second Appeal No. 705 of 1921.