

granting the respondent permission to dispose of immoveable property, and the section of the Act which speaks of such permission is s. 90, which is contained in ch. VI of the Act which follows ch. V in which s. 86 occurs. But s. 90 does not say anything about the power of the District Judge to grant permission to dispose of immoveable property, and the power which the District Judge has to grant such permission must be that conferred upon him by s. 51, which precedes s. 86 and which provides that the District Judge shall have jurisdiction in granting and revoking probate and letters of administration in all cases within his district. The power to grant permission to an administrator to dispose of immoveable property must be considered as ancillary to the power vested in the District Judge in granting letters of administration.

STEVENS, J.—I also think that an appeal lies in this case and that the appeal on the merits should be allowed.

Appeal allowed.

1900
JULY 16.
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APPELLATE
CIVIL.
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28 C. 149.

28 C. 152.

[152] *Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Banerjee.*

NARAIN CHANDRA BORAL (*Claimant*) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Opposite Party*).^{*} [9th August, 1900.]

Land Acquisition Act (I of 1894), s. 8, cl. (b) and 23—Person interested—Lessee of a tank with right of fishery whether entitled to compensation.

For the purposes of the Land Acquisition Act, a lessee of a tank is in the same position as a yearly tenant of agricultural land. He is a "person interested" within the meaning of s. 23 of that Act, and is entitled to compensation.

THIS appeal arose out of a reference made by the Land Acquisition Deputy Collector of 24-Pergunnahs, under s. 18 of the Land Acquisition Act. The claimant, who is a fisherman by profession, held two tanks at a yearly rent of Rs. 125 under one Kedar Nath Koondoo Chowdhry and others. The said tanks were acquired by Government, and the Land Acquisition Deputy Collector awarded Rs. 34-8 as the price of the fish and compensation. The claimant objected to the amount, and hence the reference was made. The District Judge on the objection of the Government held that the claimant being only a yearly tenant of the tanks was not a "person interested" within the meaning of s. 23 of the Land Acquisition Act, and, therefore, he was not entitled to any compensation. The material portion of his judgment was as follows:—

"The price of fish does not fall within the perview of any of the clauses of s. 23. It might come under cl. (4), but the claimant has no land taken possession of by the Collector. The definition of 'person interested' does not apply to the claimant, who has not even an easement affecting the land acquired. Jalkar, no doubt, is an easement and immoveable property, but a fishery right differs from the fish captured in the exercise of that right. Then 'fish' is not included in the definition of 'land' contained in the Act, s. 3, cl. (a)."

Against this judgment the claimant appealed to the High Court.

Babu *Jyoti Prosad Sarbadhicary*, for the appellant.

Babu *Sirish Chandra Chowdhry*, for the respondent.

^{*} Appeal from Original Decree No. 407 of 1898, against the decree of C. P. Casperg, Esq., District Judge of 24-Pergunnahs, dated the 3rd of September 1898.

1900
AUG. 9.
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APPELLATE
CIVIL.
—
28 C. 152.

[153] *Babu Jyoti Prosad Sarbadhicary*.—The question is whether a lessee of a tank for a year is entitled to get compensation for the fish which he reared in it. The appellant's case comes clearly within cl. (4) of s. 23 of the Land Acquisition Act, and he is a "person interested" within the meaning of that section. Fishery or right of jalkar is a benefit arising out of land. Land includes profits arising out of it.

Babu Srish Chandra Chowdhry.—The appellant is not a "person interested" within the meaning of s. 23 of the Land Acquisition Act; see *The Secretary of State of India v. Shanmugaraya Mudaliar* (1).

1900, AUGUST 9. The following judgments were delivered by the High Court (MACLEAN, C. J. and BANERJEE, J.):—

MACLEAN, C. J.—This appeal must succeed. Speaking with all deference I feel some difficulty in appreciating the principle of the judgment of the lower Court. The learned Judge seems to me to have missed the real point in the case which shortly is this:—The Secretary of State has under the provisions of the Land Acquisition Act taken the requisite steps to acquire certain land including two tanks in the neighbourhood of Calcutta. The present appellant says that he is a yearly tenant at an annual rent of Rs. 125 of those tanks, and has been many years in possession of them as such yearly tenant. He is a fisherman by trade, he takes leases of tanks for the purpose of fishing, and makes, as he says, a substantial profit by his trade. He tells us in his petition how he makes a considerable profit by stocking the tanks with fish, catching the fish, and then selling them. Under these circumstances he says he is an annual tenant of these tanks and claims to be compensated by the Government for their compulsorily taking them. I think he is right. The Judge in the Court below is of opinion that he is entitled to nothing: I think the Judge is wrong. The appellant, as a yearly tenant of these tanks, is, for the purposes of the Land Acquisition Act, in the same position as a yearly tenant of agricultural land, and equally as much entitled to compensation. This seems sufficiently clear from the defini^[154]tions of "land" and "person interested" in the Act, coupled with sub-s. 4 of s. 23.

It would be a strange thing to say that, if instead of an annual tenancy it had been one for a term of years, the tenant was entitled to no compensation. I do not propose to say what, in this case, the amount of compensation ought to be, but the case must be remanded to the learned Judge in the Court below to ascertain, upon the evidence, what is the amount of compensation to be paid. The appellant is clearly entitled to something: the Collector took that view.

The appellant must have his costs of this appeal.

BANERJEE, J.—I am of the same opinion. The learned Judge in the Court below has held that the appellant is not entitled to claim any compensation under the Land Acquisition Act, because he is not a "person interested" within the meaning of s. 23 of that Act, and his reason is thus stated in his judgment: The definition of 'person interested,' in s. 3 (b) does not apply to the claimant who has not even an easement affecting the land acquired. A jalkar, no doubt, is an^c easement and immovable property, but a fishery right differs from the fish captured in the exercise of that right." But the learned Judge overlooked the position that the claimant was admitted to have, in the very objection of the Government pleader to which he gave effect. For this is how he states

(1) (1898) I. L. R. 16 Mad. 369; L. R. 20 I. A. 80

that objection in his judgment : " To-day the Government pleader raises the legal difficulty that, as claimant was a yearly tenant of the tanks in suit, this Court cannot, under the Act, decide the point abovementioned." If the claimant was a yearly tenant of the tanks, he was a person clearly interested in the land covered by the tanks. It is quite true that it is not every person whose earnings are injuriously affected by the acquisition of land that is entitled to compensation under cl. 4 of s. 23 of the Land Acquisition Act. That is clear from the decision of the Privy Council in the case of *The Secretary of State for India v. Shanmugaraya Mudaliar* (1). But the case with reference to which their Lordships held that on claim for compensation could arise under cl. 4 of s. 23 was very different from the present. That was a case [155] of quarry-men who claimed compensation on the ground of their earnings being affected, though they had no interest in the land. Here the claimant claimed an interest in the land which had been acquired, and the very objection to his claim admitted that he had that interest.

Appeal allowed, case remanded.

28 C. 155.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis W. Maclean, Kt., C. I. E., Chief Justice,
Mr. Justice Prinsep, and Mr. Justice Hill.*

CHOONEY MONEY DASSEE (*Defendant*) v. RAM KINKUR DUTT
AND OTHERS (*Representatives of the Plaintiff*).^{*}
[23rd Nov. & 21st Dec. 1900.]

Right of suit—Survival of right—Survival of such right after a Hindu widow's death where her sons have sold their interest—Arbitration and Award—Reference for valuation of property in suit—'Valuator' as distinguished from an 'Arbitrator'—Judgment in terms of award—Civil Procedure Code (Act XIV of 1882), ss. 506, 522.

Where the suit was for injunction and damages for encroachment upon the property of which the plaintiff (a Hindu widow) was a life tenant, and an order was made by consent that the defendant was to purchase the plaintiff's interest in the said property and pay her the price to be settled by certain referees nominated by the parties; and where the plaintiff died after the valuation of her said property had been made, and its price ascertained and reported upon by the referees to the Court, and the suit was revived by the Lower Court at the instance of the representatives of the deceased plaintiff, and judgment given in their favour according to the said valuation treating it as an award: *Held*, that the suit had been properly revived in the name of her representatives the right to sue surviving to them.

Held, further, that the referees were, in effect, rather valuers than arbitrators, and no judgment therefore could properly be given, under s. 522 of the Code of Civil Procedure, in terms of their award. *Carus-Wilson v. Greene* (2) referred to.

THIS was an appeal from a judgment of Mr. Justice AMEER ALI, dated 8th of December 1899.

One Denomoney Dassee, a Hindu widow, was the original plaintiff in this suit. She obtained upon partition a one-third share [156] of the house No. 6, Gobinda Chunder Sen's Lane in Calcutta, to be enjoyed by her during the term of her natural life, and her two sons Ram Kinkur and Hari Das the remaining two-thirds. The sons sold their shares, and

^{*}Appeal from Original Civil, No. 2 of 1900, in Suit No. 794 of 1898.

(1) (1898) I. L. R. 16 Mad. 369; (2) (1886) L. R. 18 Q. B. D. 7. L. R. 20 I. A. 80.