1873

SADUT ALI KHAN v. KHAJEH ABDOOL GUNNEY

KHAJEH ABDOOL GUNNEY v. MUSSAMUT ZAMOOR-UDOONISSA KHANUM.

villages and the creation of the tenure took place. Therefore, it seems to their Lordships that they must accept the *ikrarnama* as established, and act upon it accordingly. If they do that, it appears to them that, inasmuch as the *ikrarnama* declares the rent to be permanent, the case for enhancement altogether fails, and that the decree of the Indian Courts in the second suit ought also to be affirmed.

The result will be that their Lordships will humbly advise Her Majesty to affirm both the decrees under appeal, and to dismiss each appeal with costs.

Appeals dismissed.

Agent for appellant in the first, and respondent in the second, appeal: Mr. *Oehme*.

Agents for respondent in the first, and appellant in the second, appeal: Messrs. *J. S.* and *A. P. Judge*.

ORIGINAL CIVIL

Before Sir R. Couch, Kt., Chief Justice, and Mr. Justice Markby,

1872
Feby. 14.

IN THE MATTER OF THE LAND ACQUISITION ACT (X OF 1870.)

HEYSHAM *v.* BHOLANATH MULLICK.

BHOLANATH MULLICK *v.* HEYSHAM.

Land Acquisition Act (*X of* 1870), *ss.* 30, 35—*Appeal—Difference of Opinion between Judge and Assessors—Compensation—Evidence, taking down—Act VIII of* 1859, *s.* 172.

Under s. 30, Act X of 1870, an appeal lies from the decision of the Judge where the differs from the Assessors, whether the Assessors agree with one another or not.

THESE were appeals under the Land Acquisition Act (X of 1870) from the decision of N. H. Thomson, Esq., one of the Judges of the Small Cause Court, Calcutta, who had been appointed to hear cases under the Act.

1872

IN THE MATTER OF THE LAND ACQUISITION ACT.

HEYSHAM. v. BHOLANATH MULLICK.

BHOLANATH MULLICK. v. HEYSHAM.

The Justices had ordered certain land to be taken for the purpose of making a municipal market, and the Collector, Mr. Heysham, issued a notice, under s. 9 of the Land Acquisition Act, to all the persons claiming compensation in respect of the land proposed to be taken. Six claimants appeared, and of them four accepted the amount of compensation tendered them. The other two claimants, of whom Bholanath Mullick was one, refused to accept the amount offered, and their claims were referred by the Collector, under s. 15 of the Act, for the determination of the Court.

The amount of compensation tendered by the Collector was Rs. 71,512-6-4.

The following was the substance of the Assessors' opinion :—

Mr. Clarke considered the mode adopted by the Collector in valuing the land, supposing it to be fairly occupied, and yielding as much as under ordinary circumstances it could be expected to yield, *viz.*, by awarding a sum which invested in Government securities would yield equal revenue, was a method of awarding compensation to the owner, not only just, but liberal ; that the sum which the owner was deriving as rent from the land, *viz.*, Rs. 424 a month, was a correct basis for estimating the market value of the land ; that, on the evidence, there was no ground for believing that, under the present circumstances, the land could reasonably be expected to yield more ; that the evidence established that 14 years' purchase was the ordinary market price of land in Calcutta, and in some instances less had been given ; and that looking at the price which was shown to have been paid by private individuals for land in the immediate neighbourhood, he estimated the gross annual value of the land at Rs. 5,088. From this he deducted 12 per cent. for taxes and collection charges, *viz* Rs 710, leaving a net annual value of Rs. 4,378, and allowing 16 years' purchase, awarded the claimant a sum of Rs. 70,048.

Baboo Jodoo all Mullick estimated the value of the land with reference to the probable rental which would be derived if the whole land was let out, allowing for space, for openings, and for by-ways. He thought that one-sixth was sufficient to allow for lanes and by-ways ; that the evidence showed that the land had

1872

IN THE MATTER OF THE LAND ACQUISITION ACT.

HEYSHAM. *v.* BHOLANATH MULLICK.

BHOLANATH MULLICK. *v.* HEYSHAM.

been let on an average at Rs. 3-8 a *kata* a month, which, after deducting 12 per cent., would, at 16 years' purchase, give Rs. 591 *per kata*; that the deduction for lanes and openings would leave the price *per kata* at about Rs. 500; that Rs. 50 *per kata* should be deducted for the land occupied by the filled-up tank. He awarded accordingly Rs. 1,47,000 as the market value of the land.

Mr. Thomson thought that the estimate proposed by Baboo Jodoolall Mullick was considerably in excess of, and that of Mr. Clarke somewhat less than, what appeared from the evidence to be the market value of the land; that the valuation of the Collector was also too small; that there was ground for believing that, if fully let, the land might reasonably be expected to yield about one-sixth more than its present rental; that on this basis, and after deducting 12 per cent. for taxes and collection, the net annual value of the land would amount to Rs. 5,232; that, allowing on the evidence 18 years' purchase, the price to be given would be Rs. 94,176, or about Rs. 320 *per kata*. He awarded the claimant under cl. 1, s. 24, Act X of 1870, Rs. 94,176 as the market value of the land in question, and a further sum of Rs. 14,125 under s. 42, being 15 per cent. on the amount awarded in consideration of the compulsory nature of the acquisition. The Judge's total award was Rs. 1,08,301, with interest as provided by s. 42 at 6 per cent. per annum from the date when possession of the land was taken. He allowed Rs. 1,492-2-5 to the claimant for costs, and Rs. 300 to each of the Assessors for their services.

The *Advocate-General* (Mr. *Graham*) and Mr. *Lowe* for the appellant in the first, and respondent in the second, appeal.

Mr. *Woodroffe* and Mr. *Marindin* for the respondent in the first, and the appellant in the second, appeal.

Mr. *Woodroffe* in the first appeal took a preliminary objection that no appeal would lie in this case. The right of appeal is given by s. 35, Act X of 1870, and it is submitted that that section only applies to a case were the Judge has differed from

1872

IN THE MATTER OF THE LAND ACQUISITION ACT.

HEYSHAM. v. BHOLANATH MULLICK.

BHOLANATH MULLICK. v. HEYSHAM.

the Assessors as to the amount of compensation, and the Assessors have agreed, and not to a case like the present where the Judge has differed from both the Assessors as to the amount of compensation, and the Assessors have differed from each other. Another objection was taken that the evidence had not been taken down by the Judge in writing as provided by s. 172, Act VIII of 1859, which is made applicable to the procedure under Act X of 1870, and therefore could not be made use of one appeal. The cases of *In the matter of Adjudiaprasaud* (1) and *In re Lakmidas Hauzraj* (2) were referred to.

Mr. *Marindin* on the same side.

The *Advocate-General, contra.*—The words of the Act are clear. If there was a difference of opinion as to the amount of compensation between the Judge and Assessors, and in this case there was, an appeal would lie; see s. 30. If the Legislature had wished to take away the right of appeal in such a case as this, they would have said so in express terms. S. 172, Act VIII of 1859, has been followed in this case. The Judge's notes of the evidence form part of the record in the case. The case of *In the matter of Adjudiaprasad* (1) was an appeal under the Insolvent Act, and was a case governed by a special Act, which contained strict provisions as to evidence (3). The respondent has himself appealed. [An agreement was come to at the suggestion of Couch, C. J., that the evidence taken down at the trial by the attorney for the respondent, to be supplemented or corrected by the Judge's notes, should be taken as the evidence in the case.]

Mr. *Lowe* on the same side.

Mr. *Woodroffe* in reply.

The judgment of the Court (on the preliminary point) was delivered by

COUCH, C.J.—The case of two Assessors differing a to the amount of the compensation, and the Judge entertaining a

1872 *Feby.* 1.

(1) 7 B. L. R., 74.
(2) 5 Bom. H. C., O. C., 63.
(3) See Insolvent Act (11 & 12 Vict., c. 21), s. 73.

1872

IN THE MATTER OF THE LAND ACQUISITION ACT.

HEYSHAM. v. BHOLANATH MULLICK.

BHOLANATH MULLICK. v. HEYSHAM.

different opinion as to the amount of the compensation, is quite as likely, if not more likely, to arise, than the case of the Assessors differing from each other, and the Judge agreeing with one of them. Certainly, unless the language of this Act was very clear in excluding such a case as that, I should not come to the conclusion that the section did not apply to it. Now the two sections, 29 and 30, appear to be intended to embrace all the different cases which would arise. S. 29 provides :—" In case the Judge and one or both of the Assessors agree as to the amount of compensation, their decision thereon shall be final." The other section appears to provide for cases where the decision of the Judge should prevail. If we were to adopt what has been contended for by the respondent that this section and s. 35 do not apply where the Assessors do not agree, and there is only a difference of opinion between the Judge and both the Assessors, there would clearly be in this Act no direction as to what is to be done in that case. I think the Act should be read as meaning a difference of opinion between the Judge and the Assessors, whether the Assessors agree with each other or not. The ss. 29 and 30 so read will include all the different cases which can arise. Unless the language of the Act were very clear, I should not be disposed to put such a construction on it as to deprive the parties of the right of appeal when the Judge did not agree with the Assessors, and the latter did not agree with each other. In my opinion there is as much reason for giving an appeal when the Judge differs from the Assessors when they differ from each other, as when they agree. I take the Act to mean that the award shall not be final whenever there is a difference of opinion between the Judge and the Assesors. For these reasons I think an appeal does lie in this case.

The appeal was then argued on the merits, and the following judgment was delivered by

COUCH, C.J.—This case comes before us under the provisions of the land Acquisition Act, 1870, in consequence of the Judge of the Small Cause Court having differred from the Assessors as to the amount of compensation to be awarded, and both parties have appealed from the decision of the learned Judge.

We have considered the matter and the opinions of the learned Judge and both Assessors.

One of the Assessors, Mr. Clarke, in giving his opinion, takes the present rent as a correct basis for estimating the value of the land, and gives 16 years' purchase after deducting 12 per cent. for taxes and collection charges. He takes the rent at Rs. 424, which, according to the evidence, is produced by one half of the land which is the subject of compensation. Baboo Jodoolall Mullick, the other Assessor, estimates the value of the land upon the probable rental if the whole was let, allowing one-sixth for lanes and by-ways, and deducts the 12 per cent., and gives 16 years' purchase on the amount of the rental after the deduction. He also deducts Rs. 50 *per kata* for 100 feet by 120 feet, which he considers to be the extent of the land occupied by the filled-up tank. Both the Assessors take the rent at Rs. 424. We think that shows that they understood the witnesses who were called as proving, although there was some discrepancy, that that was the gross rental, and that taxes and the cost of collection ought to be deducted from that amount. It is also to be mentioned that Jodolall Mullick, the Assessor whose opinion is very favorable to the claimant, and who is disposed to allow him all that he could possibly be entitled to, takes no notice of the *salami*. And as that does not appear in the books of the claimant, we think the Assessors were right in disallowing it, and we ought not to take it into consideration. The learned Judge of the Small Cause Court takes another view of the mode in which the amount of compensation ought to be assessed. He takes the present rent of one-half of the land, and adds one-sixth, which is equivalent to the rental of one-twelfth more of the property let at the same rate. In fact, he treats the matter as if the value of the land was to be calculated on the supposition that seven-twelfths only of it would constantly be let at the same rate as the half which is now let. He, in like manner, deducts 12 per cent. for taxes and collection charges, evidently sharing in the view of the Assessors that that amount ought to be deducted from the rent of Rs. 424. But he goes beyond Jodoolall Mullick with respect to the number of years' purchase, and gives 18 years. Now, with regard to that we

1872

IN THE MATTER OF THE LAND ACQUISITION ACT.

HEYSHAM. v. BHOLANATH MULLICK.

BHOLANATH MULLICK. v. HEYSHAM.

think that the learned Judge has gone too far. Heralall Seal, one of the witnesses for the claimant, although in his examination-in-chief he put it as high as 18 years, says in cross-examination that at an average rate the land could have been bought at 14 or 15 years' purchase. We think, on the evidence, that 16 years' purchase would be a fair allowance. But in saying that 16 years' purchase is a fair allowance in this case, we must not be understood as laying that down as a rule in cases of this kind. Every case must depend on its own circumstances, on the evidence given and the nature of the property. The number of years' purchase which it would be right to allow with regard to one sort of property, might not be a fair allowance for other kinds of property, and we wish to guard ourselves against being understood as laying down any rule as to the number of years' purchase which ought to be allowed. On the evidence, we think that 16 years' purchase is sufficient to allow in the present case.

The other question which has to be considered is as to the deduction which should be made from the total quantity of land for what may be supposed to be generally unlet, and what would be required for lanes and by-ways. Mr. Rowe, one of the witnesses for the Justices, says that in tenanted lands about one-third is usually taken up by lanes and vacant lands, and it seems to us that the allowance of the learned Judge of the Small Cause Court for the land which may be expected to yield a rent is not sufficient. He has allowed too little, as Jodoolall Mullick has allowed too much; Jodoolall Mullick having deducted for only lanes and by-ways. We are of opinion that two-thirds of the land might reasonable be expected to be let upon an average number of years, although half only is now let; and in estimating the amount of compensation to be allowed, we think it right to take two-thirds of the land as let, and as the part unlet would probably be the worst part of the land, the two-thirds may fairly be expected to produce a rental at the same rate as the half now produces.

Applying these principles to the case, the result is this: the present rental of half the land is Rs. 424 a month. If to that we add one-third, which is equivalent to one-sixth of the whole land, we get the rental of two thirds of the whole. That sum is

1873

IN THE MATTER OF THE LAND ACQUISITION ACT.

HEYSHAM. v. BHOLANATH MULLICK.

BHOLANATH MULLICK. v. HEYSHAM

Rs. 141-3-3, making a total of Rs. 565-3-3 as the monthly rental of the land. That makes an annual rental of Rs. 6,783-9-6, being little short of Rs. 6,784. Deducting from that 12 per cent. for taxes and collection charges amounting to Rs. 814-0-7, we have Rs. 5,969-8 9, which at, 6 years' purchase is Rs. 95,518-2-4, and that is the amount of compensation which we think ought to be awarded, to that the 15 per cent. is added, the amount is Rs. 1,09,845-9-7, which is the sum we consider ought to be awarded.

In the Court below Rs. 1,492-2-5 was allowed to the claimant as costs, and to each of the Assessors Rs. 300. As we in fact give to the claimant more than the learned Judge gave, it is equally proper that he should have his costs. I do not know whether under the Act it is necessary for us to make any order about those costs, but in case of any doubt we confirm the allowance of costs. With regard to the costs of the appeal, we think the parties should pay their own costs.

Attorneys for Mr. Heysham: Messrs. *Berners & Co.*

Attorneys for Bholanath Mullick: Messrs. *Trotman & Co.*

APPELLATE CIVIL

Before Mr. Justice Markby and Mr. Justice Birch.

1873
May 13.

BRINDABUN CHUNDER ROY (PLAINTIFF) *v.* TARACHAND BUNDOPADHYA (DEFENDANT).*

Act VII of 1859, *s.* 230—*Possession—Title—Limitation.*

The defendant purchased in 1856 from the Official Assignee certain property belonging to one *D*. In 1867, he brought a suit against the heirs of *D* for possession of the property purchased; he obtained a decree in May 1869, under which he obtained possession in May 1870. In June 1870, the plaintiff filed a petition under s. 230, Act VIII of 1859, alleging that he had purchased the property claimed from the heirs of *D* in 1864, and had been in possession until he was ousted by the defendant, and that he was not a party to the suit

* Special Appeal, No. 1198 of 1872, from a decree of the Officiating Judge of East Burdwan, dated the 29th May 1872, affirming a decree of the Subordinate Judge of that district, dated the 30th September 1871.