*Present :* De Sampayo J. and Schneider A.J.

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FRASER *v.* BRITISH STEAM NAVIGATION CO., LTD.

*71—D. C. Colombo, 2,526.*

*Land Acquisition Ordinance, No. 3 of 1876 — Compensation — Is the purpose for which land is acquired to be taken into consideration in determining compensation ?*

In determining the amount of compensation to be paid to the owner of land acquired by Government under the Land Acquisition Ordinance, the Government Agent can take into consideration the purpose for which the land is acquired. The words " the damage sustained at the time of awarding compensation" should not be construed as meaning the damage actually suffered at that point of time without reference to the continuing damage caused by the acquisition. The " injurious affecting " must be estimated with reference to the date of the awarding of compensation, and according to the purpose for which the land is proclaimed to be required. The measure of the *injuria* will differ as the purpose.

THE facts appear from the judgment.

*A. Drieberg* and *H. H. Bartholomeusz*, for the defendant company, appellant.

*Solicitor-General* (with him *Fernando, C.C.*), for plaintiff, respondent.

*Cur. adv. vult.*

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January 31, 1921. SCHNEIDER A.J.—

Out of an extent of 11 acres 1 rood 24⅔ perches of the land called Mahawatta or Coomaraswamy's land, the Government acquired 2 acres 1·rood 6·52 perches for a public purpose under the provisions of the Land Acquisition Ordinance, 1876. The portion acquired is that abutting on Korteboam street and Alutmawata road, and shown as lot 8 in the survey plan marked P 1. The plaintiff, on behalf of the Government, and the defendant company agreed upon the amount to be paid as compensation for certain buildings and trees standing upon the portion acquired, but they were unable to agree upon the sum to be paid as the market value of the land and for the damages sustained by reason of the acquisition injuriously affecting the other portion which was not acquired.

The plaintiff, therefore, referred the matter to the District Court of Colombo under the provisions of section 11 of the Ordinance. The plaintiff offered compensation at the rate of Rs. 20,000 per acre as the market value of the land considered as bare undeveloped land, together with another 10 per cent. of that sum in consideration of the compulsory nature of the acquisition under the provisions of section 38 of the Ordinance. For damages he offered a like 10 per cent. The defendant company claimed as the market value of the land at the rate of Rs. 80,000 per acre, and as damages Rs. 50,000.

Section 21 of the Ordinance lays down what matters the Judge and assessors shall take into consideration in determining the amount of compensation. Applying the provisions of that section to this case the Court had to determine two questions:—

(1) What was the market value of the land at the time of awarding compensation (section 21 first)?

(2) What is the damage the defendant-company has sustained by reason of the acquisition injuriously affecting the other land of the company?

The Judge and the assessor appointed by the plaintiff awarded compensation at the rate of Rs. 25,000 per acre for the land and Rs. 7,000 as damages. They directed that the defendant company should pay the plaintiff's costs of action. The assessor appointed by the defendant company was of opinion that the market value of the land should be calculated at Rs. 45,000 per acre. He agreed that Rs. 7,000 was the sum to be awarded as damages. He was also of opinion that each party should bear his own costs.

The defendant company has appealed from the award of the Court.

There were two methods open for ascertaining the market value of the land acquired, viz., (1) by inquiring what the land would fetch if laid out in the most lucrative and advantageous way in which the owner could dispose of it, and (2) by finding out the

prices at which lands in the vicinity had been sold and purchased, and, after making the necessary allowances, deducing from such transactions the price which the land would probably fetch if offered for sale to the public. Counsel for the appellant submitted two contentions on appeal. He first urged that the land was pre-eminently suited as a site for the erection of workshops and offices in connection with a marine engineering business, or for the erection of buildings for the storage of tea, rubber, and other local produce. Neither the Judge nor the assessors have valued the land upon this basis. The evidence proves clearly that the coal dust emanating from the coal sheds which are in close proximity to the land render it unsuitable for use for stores. The coal dust compelled St. Thomas's College, which is much further away from the coal sheds, to abandon its home and to seek a habitation elsewhere. Upon the evidence adduced it is neither practicable nor possible to ascertain the market value of the land as a site for marine engineering works. No scheme was put before the Court showing how the land might be developed upon that footing, and what it would fetch or what profit it would produce when so developed. As a site for such engineering works, it is no doubt advantageously situated from its proximity to the harbour and the docks for repairing ships. But the effect of the evidence is obvious, that there is no demand for land to be used for such a purpose either at the present time or within a reasonable time in the future. Mr. Hutson's evidence establishes that there is no room for a new firm to enter into profitable competition with the three firms which are already established in their several places of business, and there is no evidence that they desire or contemplate removal elsewhere. The only inquiry for this land for the purpose of a marine engineering business was that made by Mr. Hutson in 1912 and 1917, at a time when his firm was faced with the contingency of being driven out of their place of business, and was anxiously looking about for some other suitable land. His firm is now securely settled in its present place under a lease extending beyond the next fifty years. The fact that Mr. Hutson might have then paid at the rate of Rs. 60,000 per acre for this land is of no value, because he was the only possible purchaser, and his necessity has ceased to exist.

It seems to me, therefore, that it is neither desirable nor practicable to estimate the market value of the land upon the footing submitted by the appellant's counsel.

The course adopted by the learned Judge and both the assessors for determining the market value appears to me to be consistent with the evidence, and to be the most reasonable in the circumstances. They considered that the best use to which the land could be put would be for the building of small tenements for the class of labourers which is employed in and about the harbour, and of small houses for boutiques and residences for persons of very small means.

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The evidence is clear that the part of the town in which the land is situated, although deemed fashionable for the residence of the wealthier class of the population over thirty years ago, has been almost entirely abandoned for the purpose of such residence. Counsel for the appellant accordingly submitted, as his second contention on this part of his case, that, assuming that the right test for ascertaining the market value had been adopted by the Judge and assessor, their conclusion is in error, as the sale purchase transactions they had proceeded upon were not the appropriate ones. He argued that Mr. Hutson's evidence should be taken as proving that the market value of the land was more than Rs. 60,000 per acre, that the price paid for Seyadu's land should have been adopted as a good test of value, that the Government should be deemed to have valued the land upon which the Mutwal Mills or Hutson's Works stand at Rs. 60,000 per acre for the bare land, that the price paid for St. Thomas's College either by the oil company or by the Government was not a fair test, nor the prices at which the several other lands in the vicinity had changed hands. All these arguments were addressed to the lower Court also.

Since the argument in appeal I have re-read the whole of the proceedings in the case. I have been struck with the care with which the learned Judge of the lower Court had in his judgment entered into the several sales of lands in the vicinity, of which evidence had been produced, and the reasons given by him for his conclusion that the market value of the land is Rs. 25,000 per acre. I agree with the reasons given by him. It would serve no useful purpose for me to examine the several transactions in detail. He has awarded Rs. 5,000 per acre more than the price at which the Government appraisers had valued the land. If he has erred, it appears to me that he has inclined on the side of generosity towards the defendant company. I have not been convinced of an error in his reasoning, nor have I been convinced that the assessor appointed by the defendant company has shown good reason for his conclusion that the land should be valued at Rs. 45,000 per acre. I would, therefore, uphold the finding that the market value of the land is Rs. 25,000 per acre. The plaintiff had allowed 10 per cent. on the market value of the land as compensation in consideration of the compulsory nature of the acquisition. This 10 per cent. the Court has not awarded. In my opinion there is no reason for depriving the defendant company of this addition to the actual market value. I would, therefore, direct that this 10 per cent. should be added to the sum awarded by the Court as the market value of the portion of land which has been acquired.

I will now proceed to consider what sum should be awarded as damages. These damages are awarded under the provision in section " 21, thirdly." The appropriate words are " the damage (if any) sustained by the person interested at the time of awarding

compensation, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner (that is than by severance), or his earnings." On this point the provision in section " 22, fourthly," must not be lost sight of. It is to the effect that the Judge and assessors shall not take into consideration in determining compensation " any damage which, after the time of awarding compensation, is likely to be caused by or in consequence of the use to which the land acquired will be put."

Under this head of damages the Judge and both the assessors awarded Rs. 7,000 as compensation, on the ground that the remaining land had depreciated in value by reason of the fact that the new road when constructed was much higher than the land at its northern end, whereas before the acquisition access to the road could be readily obtained at that point, as the land was on the same level as the road. The Judge and the assessors make the same comment, that the defendant company failed to prove that the damage suffered was to be assessed at Rs. 50,000, the sum claimed by the company. The only direct evidence on the point is that of the Government appraisers of the land, who say that they allowed a 10 per cent. on the market value of the portion acquired for damages for the depreciation of the rest of the land. I agree with the Judge and assessors that the only evidence of damage is the depreciation in value of the rest of the land by reason of a small portion of it not having ready access to the road because of the difference in elevation between the land and the road at the nothern end. The learned counsel for the defendant company urged one main argument on this part of his case. He argued that the damage should be estimated without taking into consideration the purpose for which the land was acquired, and that, therefore, the damage should be assessed upon the footing that as a result of the acquisition the rest of the land was cut off from any access to the high road. In support of this argument he cited two cases, viz., *The Queen v. Brown* [1] and *Cowper Essex v. Acton Loan Board.*[2] In my opinion neither of these cases help him. The decision of *The Queen v. Brown* [1] turned upon the fact that the result of the acquisition was to sever the rest of the land from all access to a highway, and that the fact the Justices had the power to order accommodation works should not make any difference as to the principle upon which the damage caused by the severance should be assessed. The facts of the present case are different. In the view I take both of the facts and the law, as I shall presently proceed to indicate, the rest of the land has not been deprived of access to the public highway at the point of time with reference to which the damage should be assessed.

In regard to the other case, the reasons why it is not applicable to the present case are given in the case of *The Collector of Dinagepore*

[1] *(1867) L. R. 2 Q. B. 630.*

[2] *(1889) 14 A. C. 153.*

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*v. Girja Nath Roy*,[1] in which it has been fully considered. In the case of *The Collector of Dinagepore v. Girja Nath Roy*[1] the interpretation of a clause of section 23 of the Indian Land Acquisition Act (1 of 1889) was considered. The language of that clause is identical with the language of section " 21, thirdly," of our Ordinance. It was there held that the word " acquisition " must be taken to mean, not only the actual taking of the land, but also the purpose for which the land is taken. The reasoning for that holding is entirely applicable to the interpretation of our Ordinance. Our Ordinance requires the Government Agent to take into consideration the matters mentioned in section 21 in determining the amount of compensation. If he is not to take into consideration the purpose for which the land is acquired, it is difficult to see how he is to determine the amount of compensation with reference to many of the matters which he is bound to consider under that section. The words " the damage sustained at the time of awarding compensation " should not be construed as meaning the damage actually suffered at that point of time without reference to the continuing damage caused by the acquisition. The " injurious affecting " must be estimated with reference to the date of the awarding of compensation, and according to the purpose for which the land is proclaimed to be required.

The measure of the *injuria* will differ as the purpose. If the notification be that the land is required for a sewage depôt, the damage would necessarily be greater than where it is notified that the land is being acquired for some other less objectionable purpose, such as the deviation of a road. Moreover, the evidence in this case is that, not only the Government appraisers, but even the defendant company, were aware at the time negotiations were proceeding for the determination of the compensation that the land was required for the deviation of the then existing high road. The precise location and elevation of the new road just as they are at the present day after the completion of the work were shown to the agent of the defendant company from the plans and drawings for the new road. The defendant company as well as the Government appraisers assessed the damage to the rest of the land upon the assumption that the new road would be according to those plans and drawings. The Judge and the assessors visited the scene before making their award. By that date the new road had been actually constructed. They were, therefore, in a position to see for themselves to what extent access to the road had been, in fact, impeded with regard to the rest of the land. It is while in possession of this knowledge they assessed the damage. No argument which was urged has convinced me of any reason for not accepting their assessment of the damages. I would, therefore, accept that assessment.

[1] *(1897) 25 Cal. 346.*

In regard to the order as to costs, I do not think that the Court should have ordered the defendant company to pay the plaintiff's costs. Section 30 (2) of the Ordinance directs that when the amount awarded exceeds the amount tendered by the Government Agent, the costs shall ordinarily be paid by the Government Agent, unless the Court shall be of opinion that the claim of the person who has contested the award was so extravagant that some deduction from his costs should be made, or that he should pay a part of the Government Agent's costs. In the lower Court the defendant company was awarded 25 per cent. more than the Government Agent had offered for the land, but, on the other hand, the defendant company made an extravagant claim. In the circumstances, I think the more equitable order would be to direct that the defendant company should pay half the costs of the plaintiff in the lower Court, and also the whole of the plaintiff's costs in this Court. The award appealed from is to be amended in terms of this judgment.

DE SAMPAYO J.—I agree.

*Varied.*