Special Appeal No. 613 *of* 1870.

1871.
June 21.

FA'TMA' BIBI', widow of Muhammad Alí. *Appellant.*
THE COLLECTOR OF SU'RAT......................*Respondent.*

Act VI. of 1857—*Award—Appointment of Arbitrators—Joint Judgment of Arbitrators.*

The separately recorded opinions, on different dates, of arbitrators (appointed, under Act VI. of 1857, to assess the value of land taken for a public purpose) who have never met or consulted together, do not constitute an award under the Act. An award to be good must contain the *joint* judgment of the arbitrators up to the latest period previous to the execution of the award.

Where a suit for the recovery of land taken, or compensation for being deprived of it, was filed *after* the expiration of three months from the date of an award, and the Court held the award to be null, the Court, following the procedure laid down in Sec. 31 of Act VI. of 1857, referred the parties to a fresh arbitration.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District of Súrat, in Appeal Suit No. 108 of 1870, confirming the decree of the Assistant Judge at that place.

It was heard before GIBBS and WEST, JJ.

Nánábhái Haridás appeared for the special appellant.

Dhirajlál Mathurádás, Government Pleader, for the Collector of Súrat.

The facts sufficiently appear from the following judgment:—

GIBBS, J.:—The question before us in this special appeal arises out of proceedings taken under Act VI. of 1857 in Súrat. It appears that, land being required for some public purpose in that city, a notice, signed by the Secretary to Government, appeared in the *Government Gazette* stating that some land and a building belonging to the original plaintiff were required for a public purpose. As she and the officer appointed on behalf of Government could not agree as to the amount of compensation, arbitrators were appointed under the Act,—Mr. Motirám Dalpatrám on behalf of the Government, and Mr. Sálim Muhammad on behalf of the plaintiff. These gentlemen made several fruitless attempts

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to appoint a third arbitrator under Sec. 12; but at length a Mr. Kelly was appointed.

It appears that the arbitrators never met or consulted or even viewed the property together; but the plaintiff's arbitrator recorded his opinion, under date the 24th of February 1869, that he considered the compensation to be awarded for the property should be Rs. 1,800. The Government arbitrator, under date the 16th of March following, recorded his opinion that Rs. 800 would be sufficient; and, on the 6th of May next, Mr. Kelly, the third arbitrator, indorsed his opinion on the same paper as that on which the Government arbitrator had written his opinion, that Rs. 800 was the correct valuation to be given.

No formal award was made or signed. The Collector tendered Rs. 800 to the original plaintiff, who refused to receive it, and filed a suit against him for recovery of the premises or Rs. 2,000 compensation. This suit was filed two days after the expiration of three months from the date of Mr. Kelly's opinion, three months being allowed as the limit within which a suit to reverse or alter an award may be made.

The Assistant Judge and the District Judge both found that the award was good, and that Rs. 800 was a fair price, and they visited the original plaintiff with costs.

In special appeal Mr. Nánábhái Haridás, for the special appellant, contended that although he could not ask to have the award reversed or altered, yet he could ask us to decide whether there was an award in accordance with the Act or not. He argued that there was no award at all.

The Government Pleader, on the other side, argued that although very irregular proceedings had been taken, yet that the opinions of the Government and third arbitrator amounted to an award.

The court has to consider in this case whether the special appellant has upheld her objection of "no award" or not. It is a purely technical point, and one on which the decisions of the English Courts appear at first sight not always reconcile-

able. We must in this case take the language of the Act and see what was intended--what was the submission, what the award, which the Act provides. The sixth section provides that in case the party and the Collector cannot agree as to the compensation to be allowed, "the matter shall be referred to the determination of arbitrators, to be appointed in the manner hereinafter provided." This is laid down in Sec. 10, where the Collector and the claimant are each to appoint an arbitrator; and these two must, by Sec. 12, "before they enter upon the matter referred to them, nominate and appoint by writing a third person to act with them as arbitrator." The 20th section then provides that "on the close of the inquiry the arbitrators, or a majority of them, shall deliver a full and complete award in respect of the matter referred to them." And under Sec. 23 every person interested therein shall "be entitled to a copy of the award on plain paper." Now it appears from the above that the three arbitrators must act together; that the first two cannot act until they have appointed a third; that a formal award, duly drawn up and signed by the three arbitrators, or a majority of them, is required; and generally that the arbitrators appointed under the Act are, as to their duties, bound by the ordinary rules regarding arbitrators.

Now amongst the English cases on this subject there is one which appears to us to exactly meet the present case. We refer to the case of *Wade* v. *Dowling* (*a*), in which three arbitrators having been appointed,—one each by the parties, the third by the two first appointed,—made an award signed by two out of the three. One, who drew up the award, signed it in London and then posted it to the other at Bristol, who there executed it and returned it to his co-arbitrator in London, who published it. The point of whether this was "no award" was reserved by the court in the trial at *Nisi Prius*, and was argued before a Full Bench composed of Coleridge, Wightman, Erle, and Crompton, JJ., who unanimously held it to be no award. In giving judgment,

(*a*) 4 E. & B. 44.

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Coleridge, J., observed:—"The Courts are bound to give to the parties what they stipulate for as the condition of their submission. The parties say: "We refer this matter to three arbitrators; we wish to have the opinion of all the three—at any rate the opinion of two—'up to the last moment;'" and the learned Judge further mentioned the case of *Stalworth* v. *Inns* (b), in which it was well pointed out that something might occur at the last moment to change the opinion of an arbitrator, and, therefore, the Court held the necessity of the award being executed by the arbitrators *simul et semel.*

Erle, J. (afterwards Chief Justice Erle), said even more clearly: "This is not the award for which the submission stipulates. That was to be an award made upon the joint judgment of arbitrators considering all they had heard up to the giving of their judgment. If an execution at two different places were held good, we should get to what seems in fact to have been made here—an award by one arbitrator conditional upon the assent of the other; this is not a joint award."

These observations apply exactly to the present case. It is true that here there was not a voluntary submission, but there was a reference prescribed by law, and in such a case the course directed by the law must be strictly pursued.

There is also a further irregularity, which we think renders the award null. The Act requires that before the two first-appointed arbitrators "enter upon the matter referred to them" they shall nominate a third arbitrator.

In this case we have it clearly on the record that not only did both the Government arbitrator and that of the original plaintiff enter upon the matter referred, but actually each separately recorded his opinion (and that without ever meeting or consulting) before the third arbitrator was appointed.

We have, therefore, no hesitation in holding this to be no award.

It now becomes a question what decree must follow this decision. It appears that under the Act the question of the

(b) 13 M. & W. 469.

land being taken for a public purpose cannot be questioned, neither can the Collector's act in taking possession. And we think, therefore, that, having held the award to be null, all we can do is, following the analogy of the procedure laid down in Sec. 31, to refer the parties to a fresh arbitration.

As to costs, it is clear that the arbitrators of both parties have failed in their duty; but we think that while there may be an excuse for the plaintiff's arbitrator, there can be none for Government, whose officer, exercising the powers vested in him by Sec. 16 of the Act, should have seen that the arbitrators did their duty in accordance with the Act which Government was putting into force. We think, therefore, that each party should pay his or her costs in the first and second courts, and that Government should pay those in this special appeal.

Decrees of lower courts reversed.

June 29.

Special Appeal No. 603 *of* 1870.

BA'I SU'RAJ ....*Appellant.*
THE GOVERNMENT OF BOMBAY and BA'PUBHA'I KHUSHA'LDA'S *et al.* ....*Respondents.*

Special Appeal No. 609 *of* 1870.

BA'PUBHA'I KHUSHA'LDA'S *et al.* ....*Appellants.*
BA'I SU'RAJ and THE GOVERNMENT OF BOMBAY ....*Respondents.*

Majmudári Watan—*Female's right to inherit—Assignment of entire Proceeds to Officiator—Act XI. of* 1843, *Sec.* 13—*Reg. XVI. of* 1827, *Sec.* 20, *Cl.* 1.

Since the passing of Act XI. of 1843 a female can inherit a *majmudári watan.*

The Collector can assign the whole proceeds of a *watan* to the officiating person, who is entitled to retain such proceeds as his remuneration.

THESE were special appeals from the decision of W. H. Newnham, Acting District Judge of Súrat, in cross-appeals Nos. 88 and 103 of 1870, amending the decree of George Ayerst, Assistant Judge.