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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY (*Original Respondent*), *Appellant v.* PATEL HAJI MAHOMED AHMED JANU AND OTHERS (*Original Petitioners*), *Respondents.**

[27th and 28th March, 28th April and 2nd May, 1890.]

Municipal Acts (Bombay) III of 1872 *and IV of* 1878, *s.* 163—*Compensation—Frontage land—Fifteen per cent. addition to compensation not allowed.*

A certain mosque in Bombay was abutted on the north, west and east by public streets. In December, 1886, the Municipal Commissioner, pursuant to s. 166 of the Bombay Municipal Acts III of 1872, and IV of 1878, required the trustees of the mosque to set back the building on the said three sides for the purpose of improving the public streets. It was contended that the amount of compensation to be paid to the trustees was to be measured by the loss of rent which they would have received for certain rooms which they had proposed to build on the land in question.

Held, that the words of s. 163 of the Municipal Acts III of 1872 and IV of 1878 were intended to ensure compensation to the owner for every sort of damage, and not to restrict it to compensation for such damage as he might by his own arrangement reduce it to. Compensation becomes due under the section as soon as the Corporation takes possession, which is when the owner begins to build, and there being no words in the section to show a contrary intention, the compensation must be assessed according to the state of things then existing, and not upon the basis of what the owner may have it in his power to do towards diminishing the damage which would otherwise result to him.

Held, also, that in cases of compensation granted under s. 163 of the Municipal Acts III of 1872 and IV of 1878, the addition of 15 *per cent.* cannot be allowed.

[F., 18 B. 184 (188).]

THIS was an appeal, under s. 3 of Act XII of 1888, against a decision of W. E. Hart, Chief Judge of the Court of Small Causes at Bombay, under s. 504 of the City of Bombay Municipal Act III of 1888, in Municipal appeal No. 2 of 1889.

The respondents were the trustees of a certain mosque in Bombay, called Miya Enoo's mosque, and under s. 504 of the Municipal Act III of 1888 they presented the following petition to the Chief Judge of the Small Cause Court:—

1. "Your petitioners are the trustees of the above-mentioned mosque in whom are vested several immoveable properties at the junction of the Nagdevi Road and Memonwada Street with the Paidhowni Road in the City of Bombay.

[293] 2. "Your petitioners agreeably to s. 165 of the Bombay Municipal Acts, 1872 and 1878, gave notice to the Executive Engineer, Municipality, on 13th December, 1886, of their intention to rebuild on portions of the said properties fronting the said Nagdevi Road, Paidhowni Road and Memonwada Street, subject to certain conditions specified in the said notice, to which the Executive Engineer consented.

3. "On 23rd December, 1886, the then Acting Municipal Commissioner by his notice of that date required your petitioners, pursuant to the provisions of s. 166 of the Bombay Municipal Acts, 1872 and

* Appeal No. 670 under s. 3 of Act XII of 1888.

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1878, to set-back their said buildings for the improvement of the street to the extent of 48'84, 96'75 and 42'79 square yards on the said Paidhowni Road, Nagdevi Road, and old Memonwada Street, respectively.

4. "On the 12th January, 1887, the then Acting Superintendent of Buildings and Roads, by his notice of that date, informed your petitioners that the Town Council had resolved on 22nd December, 1886, to take up for street improvement 48'84, 96'75 and 42'79 square yards of ground at the said Paidhowni Road, Nagdevi Road and Memonwada Street, at the rate of Rs. 20, 20 and 25 *per* square yard respectively, and that sanction was also obtained to the sale of 19'45 square yards of municipal land fronting the said properties at Rs. 20 *per* square yard.

5. "Shortly after the said notice, the Inspector of the district and your petitioners respectively took possession of the areas of land above mentioned.

6. "On the 8th October, 1888, the Acting Executive Engineer, Municipality, in his notice of that date to your petitioners, made the following note:—

"'The ground actually to be taken for set-back at Paidhowni Road is 50'36 square yards instead of 48'84, at Nagdevi Road 88'93 instead of 96'75 and at old Memonwada 25'00 instead of 42'79, and that for set-forward given to you for set-forward is 20'33 instead of 19'45 square yards.'

7. "Your petitioners hold the Municipality to their first notice of 12th January, 1887, and submit that they cannot be compelled to the new terms proposed to be imposed on them after a lapse of over twenty months.

8. "Your petitioners also submit that the amount of the compensation so offered by the Municipality for the said ground is inadequate.

9. "Your petitioners, therefore, pray that the amount of the compensation payable by the Municipality to your petitioners in the premises, may be ascertained under the provisions of the Municipal Act."

The judgment of the Chief Judge was as follows:—

"This is a petition for the ascertainment of the amount to be paid by the Bombay Municipality to the trustees of the Miya Enoo's mosque in respect of certain portions of the compound of the mosque which have been taken by the Municipality as a set-back under the provisions of s. 163 of the Bombay Municipal Acts of 1872 and 1878 for the purpose of widening the streets which abut on to the mosque premises on the W., N. and E. sides, namely, Nagdevi Street, Paidhowni Street and old Memonwada Street.

[294] "There is no dispute as to the amount taken, *viz.*, 88'45 square yards on the Nagdevi Street side, 50'73 square yards on the Paidhowni Street side and 25 square yards on the Memonwada Street side. It is also agreed that the petitioners have been allowed by the Municipality a set-forward of 21'81 square yards on the Paidhowni Street side. Nor is there any dispute as to the frontage values in Nagdevi Street and Paidhowni Street which the respondent's counsel said he was content to accept as assessed by the petitioners' engineer at Rs. 49 and Rs. 134 *per* square yard.

"As regards the frontage value in Memonwada Street, there is a difference more apparent than real. That assessed by the petitioners' engineer is Rs. 95 *per* square yard. That assessed by respondent's engineer

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is Rs. 83'10 *per* square yard for shop frontages, and this the petitioners' attorney said he was willing to accept as the true value. But this the respondent's engineer contended should be considerably reduced by taking into consideration the much smaller frontage values of private houses and godowns further down in the same street, and striking an average of the whole. I don't think this is the correct system to follow in applying the provisions of s. 163, which enacts that the Municipality 'shall make full compensation to the owner'. I take this to mean the highest value that could reasonably be expected to be realised by applying the frontage to such purpose as the locality allows. A considerable part of Memonwada is occupied by shops, showing that the locality allows of a shop frontage. The fact that some owners in this street do not choose to get the full value they could for their land by applying it to this more lucrative purpose should not, I think, prejudice the petitioners in obtaining 'full compensation' at the rate of the more lucrative purpose for which land in this locality is shown to be suitable and to be actually employed. I should, therefore, allow Rs. 83'10 *per* square yard as the frontage value in Memonwada Street. I have then Rs. 49 *per* square yard as the frontage value in Nagdevi Street, Rs. 134 *per* square yard as the frontage value in Paidhowni Street, and Rs. 83'10 *per* square yard as the frontage value in old Memonwada Street.

"The real contest is, first, as to whether I am to apply the frontage value to the whole of the land taken up, or whether I should take a mean between the frontage value and the back value; and, secondly, whether I should, in assessing the compensation to be paid, allow a percentage for the compulsory taking.

"In regard to the first point, it is clear, as what has been taken is only the narrow strip round three sides of the mosque compound not too wide for depth of the better class of shops in that locality, which, I think, should form the basis of a valuation in which according to the Act 'full compensation' is to be awarded, that what the Municipality have taken from the petitioners is frontage land, and, therefore, I apprehend, for frontage land they must pay. It was said this is not so, because they have not deprived the petitioners of their frontage. To my mind, that is not the question. That the petitioners have not yet been deprived of their frontage, results only from the use to which the Municipality have as yet put the land they have taken. Any private purchaser taking this land would have had to pay frontage value for it even if he had afterwards presented it to the public for the purpose of widening the street. What has been taken by the [295] Municipality, then, being undoubtedly frontage land, it seems to me a fallacy to argue that they are to pay something less than a frontage price for it, because after taking it they have so applied it as now to bring the road which they may hereafter narrow again nearer to the petitioners' back land, albeit they may thereby have for the present increased the value of the latter.

"As to the second point, it was admitted by the respondent's own witness, Mr. Morris, an expert of great experience in land valuations in this city, that he always allowed 15 *per cent.* for compulsory taking, and considered it ought to be done in all cases. I find also this was the rule followed by the Chief Presidency Magistrate in dealing with such cases as the present under the old dispensation. That some percentage should be allowed, I think, is only equitable, for the compulsory taking results in taking so much land of that quality in that neighbourhood out of the

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market, thereby lessening the owner's chance of suiting himself with its equivalent, while the forced sale at a time and under circumstances not of his own choosing necessarily subject him to a risk and delay in finding other similar and suitable land for which the bare selling price of the land taken is not an adequate, far less the 'full,' compensation which I am required by the Act to award. I shall, therefore, allow the 15 *per cent*, which has been hitherto allowed, and which, in the opinion of Mr. Morris, is the fair allowance.

"I have, then, to allow Rs. 49 *per* square yard on 88.45 square yards on the Nagdevi Street side, Rs. 134 *per* square yard on 50.73 square yards on the Paidhowni Street side, and Rs. 83.10 *per* square yard on 25 square yards on the Memonwada Street side, from which must be deducted Rs. 134 *per* square yard on 21.81 square yards in respect of the set-forward on the Paidhowni Street side; and to the amount so arrived at, I must add 15 *per cent.* as the allowance in respect of the compulsory taking, and I award that respondent do pay to the petitioners the sum of Rs. 11,845 in full compensation for the lands in the petition mentioned, together with their Court costs of this petition and processes, if any, and Rs. 45 their attorneys' costs of appearance."

From this decision the Muncipal Commissioner appealed.

Macpherson and *Starling*, for appellant.

Latham (Advocate-General) and *Lang*, for respondents.

JUDGMENT.

SARGENT, C. J.— The question we have to determine turns upon the language of s. 163 of the Municipal Act of 1872. That section contemplates the rebuilding of a house or building which has been taken down, burned down or has fallen down, and enables the Commissioner, on the house being rebuilt, to require the same to be set-back and provides that the portion of land so added to the street shall thenceforth be deemed part of the public street and be vested in the Corporation; and that on taking possession of the ground the Corporation shall make full compensation **[296]** to the owner of any such house for any damage he may thereby sustain.

The Judge of the Small Cause Court has calculated the amount on the basis of the value of the strip round the three sides of the mosque, treating it as frontage land. He held that the circumstance that the petitioners had not lost their frontage was of no importance, as it resulted only from the use to which the Municipality have as yet put the land they have taken, and that it was a fallacy to argue that the Municipality should pay less than a frontage price, because after taking it they have now applied it to bring the road, which they may hereafter narrow again, nearer to the petitioners' back land. This view of the Municipality's liability appears to us to ignore the true nature of the power of the Municipality to insist on the set back. It is only for the purpose of bringing the buildings in question into line with the public street that the power can be exercised; or, in other words, the owner retains all the advantage of frontages which he had previously possessed. It is true that by s. 154 "the Commissioner, with the sanction of the Corporation, may discontinue or stop-up any public street or road;" and by s. 155 sell the land; but this is a contingency to which the property before the set-off was liable to, and cannot have any bearing off the question as to the damage which the owner may sustain by reason of the set-off.

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It was contended, however, by the Advocate-General for the applicant that the circumstance that the applicant will retain his frontage cannot be taken into consideration on the same ground, as the Court of Exchequer in *Senior* v. *The Metropolitan Railway Company* (1) in assessing compensation for injurious affecting under the Land Clause Consolidation Act, 8 and 9 Vic., c. 20, refused to take into consideration the benefit the owner would at times derive from the railway for which the land had been taken up. The above ruling would doubtless be applicable if the Municipality were contending that the applicant had sustained little or no damage owing to the ultimate benefit to the property which might be expected to result from the widening of the roads and **[297]** increase of the traffic. In the present case, however, the question is not as to "a benefit likely to accrue", but one which necessarily results from the exercise of the power, and we cannot doubt that it was intended it should be taken into consideration in determining the damage sustained by the owner. The effect of its being so taken into consideration is to exclude any claim for damage arising from depreciation in the value of the applicants' land to the back of the set-off which, under ordinary circumstances, would result if the set-back had become the property of the Corporation subject to no condition as to the use of it.

What, then, is the damage which the owner sustains by the set-back? Mr Hewson, who acted as surveyor for the applicant, has assessed its value on the basis of the shop rents derived from the land of which it was a part. Mr. Morris, who acted for the Municipality, at cl. 9 of his report says that "as it appears that the trustees have been enabled to provide shop accommodation equal in extent to that which they formerly possessed, and of about the same area as the shops which are in the neighbourhood, and as it further appears that these new shops are of a suitable size for the tenants who occupy them, I do not see how a loss of rent under this head can be shown, and I am of opinion that an estimate based solely upon shop rents would give a price to the land taken up far beyond its real value. It will be apparent that the set-back of the trustees' building has merely deprived it of some of the land upon which it was proposed to construct rear rooms for the shops, and that consequently the only loss they can have sustained is represented by the rent which they would have received had these rooms been available, and that the estimate of compensation should be framed on this basis." This method of assessing the damage makes it depend on the particular circumstances of the applicant's property, and the course he may adopt in view of the requisition of the Commissioner. Indeed, Mr. Morris admits that if the whole of the Paidhowni shop had been taken, and it was not possible to build others at the back of the set-back, he would have taken the whole of the set-back as frontage. The question is not without difficulty. The language of s. 163 shows that the compensation becomes due as soon as the Corporation takes possession of the set-back, which is when the owner **[298]** begins to build, and the set-off, according to the terms of the section, becomes vested in the Corporation; and, there being no words in the section to show a contrary intention, the compensation must, *prima facie*, be assessed according to the state of things then existing, and not upon the basis of what the owner may have it in his power to do, by appropriating other property, which he may have at the back, towards diminishing the damage which would otherwise result to him. The expression "any

(1) 32 L. J. Exch. (N. S.) 225.

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damage he may sustain" is intended, we think, to ensure compensation to the owner for every sort of damage, and not to restrict it to compensation for such damage as he may by his own arrangements contrive to reduce it to.

If this be the true construction of the section, and we are informed that such has been the construction placed on it in practice, then the damage consists in the loss of a strip of land forming part of land having a frontage value, a proportionate part of which must, according to the ordinary mode of valuation, be appropriated to the strip in question, and we think that Mr. Hewson's view is, therefore, more in accordance with the intention of the section. As the frontage values fixed by Mr. Hewson are not disputed, nor the extent of the set-back, the compensation fixed by Mr. Hewson and adopted by the Judge of the Small Cause Court, independent of the question of the 15 *per cent.*, must stand. As to the 15 *per cent*, it is expressly directed to be allowed in addition to the compensation by s. 42 of the Land Acquisition Act of 1870 in consideration of the compulsory nature of the acquisition; but no such provision is to be found in the Municipal Act passed subsequently in 1872. It constitutes no part of the compensation, properly so called, for the owner's loss, and cannot, therefore, without an express provision for the purpose, be allowed by the Court. The 15 *per cent.* must, therefore, be disallowed, which will reduce the compensation to Rs. 13,821.74. Parties to pay their own costs of this appeal.

Attorneys for the appellant:—Messrs. *Crawford, Burder, Buckland* and *Bayley.*

Attorneys for respondents:—Messrs. *Conroy* and *Brown.*

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[299] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Candy.

MAHARANA SHRI JASVATSINGJI FATESINGJI, CHIEF OF LIMDI (*Original Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA (*Original Defendant*), *Respondent.** [30th September, 1889.]

Money paid under protest—Right of suit—Contract of indemnity—Indian Contract Act (IX of 1872, ss. 124, 141, 142.

The Thakor of Limdi possesses several *talukdari* villages in the Ahmedabad District, for which he pays a lump *jama* to Government. One of these villages was Akru. Disputes arose between the Thakor and the *grassias* of Akru as to the ownership of the village. The Thakor filed a suit against the *grassias*, which was ultimately compromised, and a consent decree was passed in 1883, providing (*inter alia*) that the Thakor should assign to the *grassias* a moiety of the village, that the *grassias* should hold the same free from all liability to pay the *jama*, and that the Thakor should alone be responsible for all Government demands.

In accordance with this decree, a moiety of the village was made over to the *grassias*. The Collector demanded *jamabandi* for this moiety. The Thakor intervened, and objected to the demand, on the ground that he paid a lump *jama* for the whole of his taluka, including the moiety of the village assigned to the *grassias*. Government, however, passed a resolution declaring that half of the village belonged to the *grassias*; that from them the Government had a right

* Appeal, No. 13 of 1888.