

moreover, as [299] the District Judge remarks, were not expressly taken in the first Court.

It has, however, been throughout contended that the jurisdiction of the Court is taken away by s. 133 of the Criminal Procedure Code, which provides that "no order duly made by a Magistrate under this section shall be called in question in any Civil Court." We entirely agree with the lower appeal Court that the decisions of this Court, as well as of the Calcutta High Court, are distinct authorities that the Magistrate's order is not a conclusive determination of the question of title—*Chuni Lall v. Ram Kishen* (1).

With respect to the *onus* of proof we agree with the District Judge that the existence of the Magistrate's order does not of itself shift the *onus* of proof from the defendant to the plaintiff who is in possession. It was for the Court itself to appreciate the whole of the evidence and to come to a conclusion whether it was such as to rebut the ordinary presumption of ownership derived from possession. The District Judge held that it did not rebut it, and was, therefore, right in making a declaration that the plaintiff was the owner of the land on which the *otia* stands. We must, therefore, confirm the decree with costs.

Decree confirmed.

17 B. 299.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

SWAMIRAO (*Applicant*) v. THE COLLECTOR OF DHARWAR
(*Opponent*).* [20th June, 1892.]

Land Acquisition Act X of 1870—Assessor—Disqualifications in an assessor—Bias—Objections to assessor's appointment not raised in time—Waiver—Estoppel—Minor—Assessor not competent to act as witness.

Certain land belonging to the applicant, a minor, was taken by the Municipality of Hubli under the Land Acquisition Act (X of 1870). The Mamlatdar of Hubli, [300] who was an *ex officio* member of the Municipal Committee, took part in the negotiations for the purchase of land. He also gave evidence as to its value in the inquiry before the Collector. As the price offered by the Collector was not accepted by the applicant, the matter was referred to the District Judge, under s. 15 of the Act, for the purpose of determining the amount of compensation.

On this reference the Mamlatdar acted as an assessor appointed by the Collector, and was also examined as a witness as to the value of the land. But no objection was taken to his acting as an assessor. The District Judge eventually upheld the Collector's award. On an application under s. 622 of the Civil Procedure Code (Act XIV of 1832).

Held, that the award was bad. The Mamlatdar had, under the circumstances, a substantial interest in the matter, sufficient to disqualify him from acting as an assessor.

Kashinath v. The Collector of Poona (2), followed.

Held, also, that the minor applicant was not estopped from objecting to the competency of the Mamlatdar by the fact that his guardian had not raised any such objection in the Court below, and might, therefore, be taken to have waived it.

Assuming that there was a waiver, it could not bind the minor, as it was not for his benefit.

(1) 15 C. 460.

* Application No. 40 of 1892,

(2) 8 B. 553.

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Held, also, that a person who is appointed an assessor under s. 19 of the Land Acquisition Act (X of 1870) performs quasi-judicial functions, and is, therefore, incompetent to testify as a witness in the same proceedings.

[R., 37 C. 340 (351) = 11 Cr. L. J. 121 = 14 C.W.N. 422 = 5 Ind. Cas. 365.]

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

Certain land was taken up by the Municipality of Hubli under the Land Acquisition Act, X of 1870.

The applicant, a minor, was owner of the land in question. As he did not accept the compensation offered by the Collector, the matter was referred to the District Judge under s. 15 of the Act.

The Collector appointed the Mamlatdar of Hubli as an assessor on his behalf. This Mamlatdar was an *ex officio* member of the Municipal Committee, and had taken part in the negotiations for the purchase of the land in question. But no objection was taken before the District Judge to the Mamlatdar's acting as an assessor, or to his giving evidence as to the value of the land in question.

[301] The District Judge, agreeing with the Mamlatdar, upheld the Collector's award.

Against this decision the present application was made to the High Court under its extraordinary jurisdiction.

A rule *nisi* was issued to the Collector of Dharwar to show cause why the District Judge's decision should not be set aside.

Rao Saheb Vasudev J. Kirtikar, Government Pleader, showed cause.—The applicant did not take any objection in the lower Court to the Mamlatdar's appointment as an assessor. He must, therefore, be deemed to have waived the objection. The nomination of qualified assessors is a provision made by law for the benefit of the claimants to compensation. That benefit they may waive if they please. It is, therefore, too late for the applicant to contend that the Mamlatdar was not qualified to act as an assessor, and on that ground to upset the whole proceedings—*Park Gate Iron Co. v. Coates* (1); *Queen v. Meyer* (2); *MacAllister v. The Bishop of Rochester* (3); *Ardesar Hormasji Wadea v. The Secretary of State for India in Council* (4); *Unniraman v. Chathan* (5); *Maxwell on the Interpretation of Statutes*, 474.

Manekshah Jahangirshah, contra.—The applicant is a minor; his guardian had no authority to waive the objection to the Mamlatdar's competency. If there was any waiver, it cannot bind the minor, as it is clearly of no benefit to him—*Rhodes v. Swithenbank* (6). The Mamlatdar had a real bias in the matter. He had, as a member of the Municipality, taken part in the negotiations for the purchase of the land in dispute. He was examined as a witness for the Municipality both before the Collector and before the Judge. He was, therefore, disqualified from acting as an assessor—*Loburi Domini v. The Assam Railway and Trading Co.* (7); *Kharak Chand Pal v. Tarack Chunder Gupta* (8); *Kashinath v. The Collector of Poona* (9).

JUDGMENT.

[302] JARDINE, J.—The applicant objects to the award of compensation made by the District Judge under the Land Acquisition Act, X of

(1) L.R. 5 C. P. 634.

(4) 9 B.H.C. R. 177.

(7) 10 C. 915.

(2) 1 Q.B.D. 173.

(5) 9 M. 451.

(8) 10 C. 1030.

(3) 5 C.P.D. 194.

(6) 22 Q.B.D. 577.

(9) 8 B. 553.

1870, on the ground that the assessor nominated by the Collector, namely, the Mamlatdar of Hubli, with whose opinion the Judge concurred, had a substantial interest in the matter, sufficient to disqualify him according to the principle enforced by this Court in *Kashinath v. The Collector of Poona* (1). It appears that the Mamlatdar is a member of the Municipal Committee which seeks to acquire the land, and that while holding that position he had acted for the Collector in the negotiations and had given evidence before the Collector as to the value. We are of opinion that these facts bring the present case under the above decision.

It is, however, urged for the opponent that as the applicant took no objection in the Court below to the competency of the Mamlatdar, his conduct amounts to a waiver, and his acquiescence there estops him here. Whether a party acting for himself could have waived the objection to the Mamlatdar acting, as a party can waive the common law objection of interest in the Judge—*Sergeant v. Dale* (2)—we need not determine. Even if the applicant's acquiescence were tantamount to waiver, it was a matter beyond the ordinary conduct of the litigation; and as in *Rhodes v. Swithenbank* (3), where the next friend had waived the right of appeal, the question arises whether it was for the benefit of the minor whom the applicant represents. We cannot hold this to have been the case. In the case of *Kashinath v. The Collector of Poona* the assessor is treated as performing a quasi-judicial function, as an "associate in judgment;" and the learned Chief Justice points out that the opinion of either assessor who carries the Judge along with him determines irrevocably the amount of compensation. The Court set aside the award on the ground that the Mamlatdar, one of the assessors, had a substantial interest which could scarcely have failed to create in him a real bias. This principle pervades the decisions from those collected in Viner's Abridgment (Title, Judges A) to such recent cases as *Queen v. Meyer* (4); and it conflicts with it to [303] suppose that a minor can be benefited in his cause by the presence of a judicial officer having such an interest as imports a bias against him.

It further appears that the Mamlatdar, during the progress of the case before the District Judge, testified as a witness to the value of the land. Having regard to the legal effect of an assessor's opinion, we think the views expressed in *Empress v. Donnelly* (5) on the course to be adopted when a sole Judge has testified as a witness, ought to influence this Court in its disposal of the present case, if there were any doubt.

We must, therefore, set aside the award and direct that fresh proceedings be taken on the reference and a new award passed.

The opponent to pay the costs incurred here. Those incurred in the District Court to be dealt with by that Court when passing a new award.

Rule made absolute.

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(1) 8 B. 553.

(4) 1 Q.B.D. 173.

(2) 2 Q.B.D. 567.

(5) 2 C. 405.

(3) 22 Q.B.D. 577.