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A. HAJI ISMAIL & CO. v. RABIABAI.

form granted by Kay, J., in *Kewney* v. *Attrill*[1]. The assets of the partnership can then be dealt with by the Court by giving directions to the receiver and it is desirable that this procedure should be followed in future.

I discharge the prohibitory order and garnishee notice and give the plaintiffs a charge on the moneys which are in the hands of or which may be taken possession of by the receiver and they must undertake to deal with the charge according to the order of the Court. The charge will be for the judgment debt and costs and interest and the costs of this order. The lien of the solicitors for their costs in the partnership suit will take priority over this charging order.

K. McI. K.

(1) (1886) 34 Ch. D. 345.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1909.
September 6.

IN THE MATTER OF LAND ACQUISITION ACT. IN THE MATTER OF GOVERNMENT AND SUKHANAND GURUMUKHRAI AND ANOTHER.*

Land Acquisition Act (I of 1894)—Compensation—Valuation of residential property—Elements to be considered—Evidence before Acquisition Officer—Practice.

The income of a property whether actual or imaginary is no doubt one of the recognised starting points for a valuation, but it is a mistake to think that it is the only element to be taken into consideration.

In the case of residential property to endeavour to arrive at the market value solely on the basis of an hypothetical rent may work grave injustice to the owner. There are commodities which may possess a value in the market not for the return they give on capital invested but for the advantages and enjoyment which accrue from their possession. Residential property—in the sense of property which a purchaser wishes to acquire for his own residence—is such a commodity.

The first question to determine is whether there is a demand, and if there is a demand the original cost is the most important element for consideration.

* Reference No. 40 of 1908.

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It is the duty of legal practitioners attending before the Acquisition Officer to assist him in arriving at a valuation by putting before him all the information and materials at their disposal.

REFERENCE under s. 18 of the Land Acquisition Act.

The facts appear sufficiently from the judgment of the Court.

Robertson with *Jardine* for the claimants.

Weldon (*Strangman*, Advocate-General, with him) for Government.

MACLEOD, J.—This is a reference by the Special Acquisition Officer under s. 18 of the Land Acquisition Act relating to a piece of land measuring 3,009 square yards with a bungalow erected thereon situated on the Matunga Road which runs between Matunga station on the G. I. P. Railway Company's line and Mahim station on the B. B. & C. I. Railway Company's line. The property was notified by Government for the purpose of being handed over to the G. I. P. Railway Company which required additional land for traffic sidings and waggon sheds. A considerable area of the surrounding land has already been the subject matter of previous references before me. The claimant purchased the land in reference about 1901 at the rate of Rs. 2 per square yard, and after filling it in all over to the extent of about 2 feet built a substantial upper storied bungalow with out-houses. The whole was surrounded with a low wall surmounted by a wooden fence. The compound has been laid out as a garden. This neighbourhood after the plague broke out in Bombay towards the end of 1896 was the first resorted to by persons who wished on that account to live outside the city. A considerable quantity of land changed hands and houses began to be built, but further development was checked when it was ascertained that the Bombay Improvement Trust had notified for acquisition all the land between the two Railways from Dadar to Matunga, so far back as 1898 or 1899. That notice was cancelled about the year 1905 and a fresh notice was issued by Government for acquisition for the Raliway Company on the 22nd February 1906. The demand, however, for suburban residences continued unabated, though it could only be satisfied by erecting houses in Salsette.

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Mr. Murphy, the Special Acquisition Officer, has valued the property on the basis of an hypothetical rent, to the exclusion of all other methods. The claimant after the bungalow had been completed, had occupied the upper floor himself and had occasionally let out the ground floor and parts of the out-houses, so there was no possibility of arriving at the letting value of the whole except by guess-work. Mr. Chambers, for Government, estimated that a fair rent would be Rs. 100 per mensem. Mr. Murphy based his award on a rental of Rs. 120. In his decision he has complained of the attitude adopted by the claimant's legal advisers. The first valuation they brought in was one by Mr. Bryant based on his estimate of the then value of the land plus the value of the buildings. The Company's solicitor contended that this valuation was on a wrong basis, the correct basis being the rental value. Mr. Murphy adopting this contention summarily rejected the claimant's valuation, and apparently expected him to immediately produce a valuation on a rental basis. At a later stage of the proceedings after the Railway Company had opened their case the claimant was allowed as a matter of grace to bring in a valuation also based on an hypothetical rent. Before me both parties have argued the case on the same basis.

Now the income of a property whether actual or imaginary is no doubt one of the recognized starting points for a valuation. The mistake everyone has made in this case lies in thinking that that is the only element to be taken into consideration. In the case of residential property to endeavour to arrive at the market value solely on the basis of an hypothetical rent may work grave injustice to the owner. There are commodities which may possess a value in the market not for the return they give on capital invested but for the advantages and enjoyment which accrue from their possession. Residential property is such a commodity, and here by residential property I mean property which a purchaser wishes to acquire for his own residence. The first question to determine is whether there is a demand, and if there is a demand the original cost is the most important element for consideration. A man who buys land and builds thereon, does not necessarily produce a marketable commodity of the value of

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his outlay but it does not follow that he never does, for if there is a demand for residences in a particular locality and the supply is limited a purchaser will consider not only the procurable rent of houses in the market but the cost to himself of building a new one.

Now I am satisfied that in February 1906 there was a demand for residential property in this locality, that the supply was extremely limited, and that persons of means residing in the native town were anxious to obtain accommodation outside the town during the plague season; further, that the situation of the claimant's property was eminently favourable and that his expenditure on land and building was absolutely normal.

Mr. Chambers, the expert witness for Government, admitted that there was nothing extravagant about the building and that the property could be valued as a residence without fixing on an imaginary rental. Unfortunately Mr. Murphy's award precluded him from forming an unbiased opinion of the value of the property on this basis. The claimant proved that the cost to him had been about Rs. 26,000 but beyond that, he had laid out the compound, planted trees, and brought into existence, as is evident from the photographs put in, an eminently desirable residence available for sale as a going concern. It is not unreasonable for the Court to assume that a purchaser wishing to acquire such a residence in this neighbourhood would realise he could not build at any less cost, in addition he would have to incur considerable trouble and wait for a considerable time before he could enter into residence. If any authority were required for valuing on the basis of cost it can be found in the case of *Government* v. *Dayal Mulji*[1], where the Court went further than I am prepared to go, by awarding the claimant in addition to the estimated cost of his incomplete building, the present value of his land instead of the original cost. There is no reason why this method should be absolutely barred and the owner compensated on the basis of an imaginary rental merely because he happens to have completed his building before the notification. Taking into account the demand for residential

(1) (1906) 9 Bom. L. R. 99.

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property in this locality, the cost of the property to the owner, its favourable situation and the fact that it possesses absolutely normal features, I consider its market value on the 22nd September 1906 was Rs. 25,000. The claimants' valuation on the basis of a rental of Rs. 185 all the year round cannot be considered a reasonable one. If I am to consider an imaginary rent I do not think any one would pay more than Rs. 140 at the outside. The claimant moreover has attempted to increase his valuation by setting up a scheme for separating 816 square yards from the south end of the compound which he alleges would have a value of its own without interfering with the value of the bungalow. No doubt he did ask his engineer before the 22nd February 1906 to prepare plans for a chawl on the south and west boundaries of his property, but I do not feel confident that he ever meant to carry this into execution. A chawl accommodating 80 or 100 people would certainly have prevented the bungalow from being considered a desirable residence.

Apart from that I am entirely against taking such schemes into consideration. There is no objection to giving surplus land a valuation, but it must really be surplus land. In this case the claimant has walled in and laid out the whole of the land which he clearly bought for the purpose of building a bungalow on it. Supposing I valued 816 square yards proposed to be cut off, at Rs. 3 per square yard, I should certainly consider that the value of the bungalow as a residence would be depreciated to a far greater extent. I regret that there should have been any friction between the Special Acquisition Officer and the claimant's solicitor. I am sure the latter intended no disrespect to an officer who was carrying out with great consideration and ability the work entrusted to him by Government. Unfortunately, having fixed in his mind that the only way to value the property was on the basis of an imaginary rent, he seems to have considered himself precluded from accepting any information or suggestions which were not directly pertinent to such a method. On the other hand it is not desirable that legal practitioners attending before an Acquisition Officer should make reference to what may happen if the case is taken to Court. It is their duty to assist the officer in arriving at a valuation by putting

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before him all the information and materials at their disposal. At the same time I deprecate any tendency to treat all such information produced by a claimant with suspicion, and to throw out everything which is not proved according to the rules of evidence which prevail in a Court of Justice, thus necessitating a claimant incurring heavy costs and extending the time occupied by the inquiry to an inordinate length. The Acquisition Officer is in a position to make any inquiry that he may think may help him in making his award but he can hardly expect each individual claimant to produce substantial proof to support his case in respect of details which in the opinion of the officer should be taken into account in making his award.

The claimant has been awarded Rs. 20,205·20. That must be increased by Rs. 4,794·80 to which must be added 15 per cent and interest on the whole at 6 per cent since Government took possession. The claimant must also be paid the costs of this reference.

Attorney for Government: *E. F. Nicholson*, Government Solicitor.

Attorneys for the claimant: Messrs. *Bicknell, Merwanji and Romer.*

K. McI. K.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

WALBAI, PLAINTIFF, *v.* HEERBAI AND OTHERS, DEFENDANTS.*

1909. *September* 3.

Hindu law—Adoption—Mother's sister's son also father's brother's son.

The adoption of a mother's sister's son is invalid, even though he may also happen to be father's brother's son.

The prohibition against the adoption of a sister's son, a daughter's son and a mother's sister's son is general, and not confined solely to persons who are neither Sapindas nor Sagotras.

Ramchandra v. *Gopal*(1), followed.

* Original Suit No. 214 of 1908.

(1) (1908) 32 Bom. 619.