Privy Council Appeal No. 36 *of* 1938

Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu - *Appellant*

v.

The Revenue Divisional Officer, Vizagapatam - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD FEBRUARY, 1939

Present at the Hearing:

LORD MACMILLAN
LORD ROMER
SIR GEORGE RANKIN

[*Delivered by* LORD ROMER]

This appeal is concerned with the question of what is the proper sum to be awarded to the appellant by way of compensation in respect of the compulsory acquisition by the Vizagapatam Harbour Authority of certain land of his adjoining the Harbour, the respondent being the representative of such authority for the purposes of this appeal. The circumstances in which the land was acquired are as follows.

The Vizagatapam Harbour, the construction of which appears to have been begun in the year 1920, was formed by making excavations in swampy land situate to the south-west of the town of Vizagatapam and by dredging a deep water channel in the creek to the south of that town that led from the swampy land into the Bay of Bengal. On the south of the land acquired by the Harbour Authority for the purpose of these works is situated the property of the appellant known as the Lova Gardens. These gardens are formed by a valley which runs down from high ground on the south-west to low ground on the north-east adjoining the land of the Harbour Authority on the south of the above-mentioned creek. The upper portion of this valley consists of a shallow basin in the hills which forms the catchment area of a spring of water that emerges from the ground at the north-east end of the basin. This spring, which appears to yield even in the dry season an average flow of 50,000 gallons a day of excellent drinking water, is situated at a height of 150 feet above sea level. Until a part of it was diverted by the Harbour Authority, as narrated hereafter, the whole of the water from this spring ran down the valley to the lower end of Lova Gardens and from thence discharged itself into the creek. By the early part of the year 1926 the construction of the harbour had made considerable progress and it was hoped that it would be ready for opening by the end of 1929. With that end

in view a portion of the harbour site had been allocated by the Harbour Authority for the purpose of being used by oil companies and other industrial concerns. The entire south side of the harbour had indeed been allocated for industrial purposes. But the harbour land was very malarious, and so, too, was much of the land to the south of the harbour, including the lower part of the Lova Gardens; a circumstance that gave rise to some anxiety in the minds of the Harbour Authority. They accordingly consulted Mr. Senior White, who is an expert upon the subject, and upon the 1st May, 1926, that gentleman, after making an "anti-malarial survey" of the area, embodied the results of his survey in a report. This report disclosed a serious state of affairs in the villages situated in the area of which there appear to have been at that time no less than 32 of which nine were on the south side of the creek. These villages, or many of them, seem to have been dependent upon wells for their water supply, and these wells formed breeding grounds for the malaria-bearing mosquitoes. It is plain from the report that persons carrying on business at the harbour would run a serious risk of contracting malaria as matters then stood, and this would greatly hamper the development of the harbour site for industrial purposes. Further, as Mr. White pointed out, there was the possibility of shipping at the quays becoming infected, and the mere possibility, which had already been suggested in the Indian Press, was detrimental to the interest of the port. It appears from a letter written by Mr. Rattenbury, the Deputy Engineer in Chief to the Harbour Authority, dated the 14th July, 1926, that in these circumstances, Mr. White was "very keen on closing the wells along the south side", and this, the letter adds, could be done if a gravity water supply were provided instead. Such a supply could be furnished by the spring at the upper end of Lova Gardens, and accordingly the Harbour Authority conceived the idea of using the water from the spring for the purpose of freeing the harbour from malaria. But apart altogether from the assistance that this supply of water would give to the prevention of malaria, there was much to justify its acquisition on its own merits, as was pointed out in a letter of the 2nd October, 1926, written by one of the harbour officials. For the water could be made available as a supply to the oil companies and other industrial concerns that might be established in the southern part of the harbour area. The method of utilizing the water for these purposes that was ultimately adopted was this. The water was to be diverted from the lower part of the valley to which reference has been made and led from a short distance below the spring directly to the harbour area by means of a tunnel to be made through the hilly land to the north-west of the valley. This scheme, which was in due course carried out and is now in operation, involved the acquisition from the appellant of the shallow basin forming the catchment area of the spring, the site of the spring itself, and a narrow strip of land below the spring. In due course the necessary steps were taken for the compulsory acquisition of this land under the provisions of The Land Acquisition Act, 1894, the notification under section

4 (1) of the Act being given on the 13th February, 1928. The public purpose for which the land was needed was stated in the notification to be the execution of anti-malarial works, the total area to be acquired from the appellant being 108·9 acres. Of this acreage the catchment area, including the site of the spring referred to as 2-1D and 2-1E, accounted for 105·92 acres, and the land below the spring referred to as 2-1B (0·53 acres), 2-1C (0·48 acres) and 2-3B (1·97 acres) accounted for the rest.

After the giving of the notification and the procedure laid down in sections 6, 7 and 8 of the Act having been followed, the Collector took the steps prescribed by sections 9, 10 and 11 to determine the compensation that ought to be allowed to the appellant for his land. It is provided by section 15 of the Act that in so doing, the Collector shall be guided by the provisions contained in sections 23 and 24, and it will be convenient before continuing this narrative to turn to these provisions. So far as material to the present purpose they are as follows:—

> "23.—(1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—
>
> first, the market-value of the land at the date of the publication of the declaration relating thereto under section 6;
>
> secondly, the damage sustained by the person interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;
>
> thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;
>
> fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner, or his earnings.
>
> 24. But the Court shall not take into consideration—
>
> first, the degree of urgency which has led to the acquisition;
>
> secondly, any disinclination of the person interested to part with the land acquired;
>
> . . . . . .
>
> fifthly, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired."

The general principles for determining compensation that are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act of 1845 before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act of 1919. As was said by Wadsworth J. when giving judgment in the High Court in the present case, "It is well settled that English decisions under the Lands Clauses Act of 1845 lay down principles which are equally applicable to proceedings under the Indian Act". The compensation must be determined, therefore, by reference to the price which a willing vendor

might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth. But the question of what it may be worth, that is to say, to what extent it should affect the compensation to be awarded is one that will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor, a sentimental value far in excess of its "market value". But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at "the market price", to use the words of section 23 of the Indian Act. It is perhaps desirable in this connection to say something about this expression "the market price". There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by "the market value" in section 23. But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under section 4 (1)), but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain

that in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in section 24 (5) of the Act and is sometimes expressed by saying that it is the possibilities of the land and not its realised possibilities that must be taken into consideration.

But how is the increase accruing to the value of the land by reason of its potentialities or possibilities to be measured? In the case instanced above of land possessing the possibility of being used for building purposes, the arbitrator (which expression in this judgment includes any person who has to determine the value) would probably have before him evidence of the prices paid, in the neighbourhood, for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the degree of possibility that the land might never be so required or might not be so required for a considerable time. In the case, however, of land possessing potentialities of such an unusual nature that the arbitrator has not similar cases to guide him, the value of the land must be ascertained in some other way. In such a case, moreover, there will, in all probability, be only a very limited number of persons capable of turning the potentialities of the land to account.

If the owner of the land is the only person who can do so, the value to him must be ascertained by reference to what profit he might thereby have been able to derive from the land in the future. Take as an example the case of an owner of vacant land that adjoins his factory. The land possesses the potentiality of being profitably used for an extension of the factory. But the owner is the only person who can turn that potentiality to account. In valuing the land, however, as between him and a willing purchaser, the value to him of the potentiality would necessarily have to be included.

The same consideration will apply to cases where the owner is not the only person but merely one of the persons able to turn the potentiality to account. The value to him of the potentiality will not be less than the profit that would accrue to him by making use of it had he retained it in his own possession. But now take the case where the owner is himself unable to turn the potentiality to account whether by promotion of a company or otherwise. In such a case there may be several other persons who would be able to do so, or there may be only one. If there are more than one it is recognised by all the authorities that have been cited to their Lordships, and seems to be consistent with common sense, that the owner is entitled to be paid the value to him of the potentiality, though the ascertainment of its value may in many cases be a matter of considerable difficulty.

It has been suggested that in order to ascertain it, the arbitrator is to hold an imaginary auction. But with all respect to those who have made the suggestion, their Lordships are unable to see how this is going to help the arbitrator. At such imaginary auction, all possible purchasers must, no doubt, be imagined as attending. They will include, therefore, persons who are in no way interested in the land's potentialities, and such persons will bid no higher price than the value of similar land without its potentialities. This value in this judgment is referred to as the "poramboke" value. But they will also include what may be called the purchasers of the potentialities. There may also be present some speculative buyers who will be willing to bid more than the "poramboke" value upon the chance of being able to resell to a purchaser of the potentiality at a profit. It would seem, however, logically, that such purchasers should be disregarded. For the object of the imaginary auction is to discover what a purchaser of the potentiality will be willing to pay for it, and this cannot depend upon the presence at the auction of persons willing to pay less, unless it be that such ultimate purchaser is to be considered willing to pay whatever fantastic price he may be forced up to by competition. And no one suggests this.

Proceeding, therefore, with the imaginary auction at which are present two classes of buyers, viz.: the "poramboke buyers" and the "potentiality buyers", the former will disappear from the bidding as soon as the "poramboke" value has been reached, and the bidding will thereafter be confined to the "potentiality buyers". But at what figure will this bidding stop? As already pointed out it cannot be imagined as going on until the ultimate purchaser has been driven by the competition up to a fantastic price. For he is *ex hypothesi* a willing purchaser and not one who is by circumstances, forced to buy. Nor can the bidding be imagined to stop at the first advance on the poramboke value. For the vendor is a willing vendor and not one compelled by circumstances to sell his potentiality for anything that he can get. The arbitrator will, therefore, continue the imaginary bidding until a bid is reached which, in the arbitrator's estimate, represents the true value to the vendor of the potentiality. The auction will, therefore, have been an entire waste of the arbitrator's imagination. If the value of the potentiality be Rs.X, the imaginary auction will have taken place to ascertain the value of X from the imaginary bidding, and all that can be said is that the bidding will stop at Rs.X.

The truth of the matter is that the value of the potentiality must be ascertained by the arbitrator on such materials as are available to him and without indulging in feats of the imagination.

Their Lordships would not have thought it necessary to deal with this question of the imaginary auction at such length, were it not for the fact that in the argument before them, the respondent's counsel endeavoured to show, by reference to such an auction that when there was only one possible purchaser of the potentiality, the value of it to the

vendor was nil—that is to say that the value of the land with the potentiality was substantially nothing in excess of its value without it. This argument, it may be observed, commended itself to Lord Cullen in the Scottish case of *Glass* v. *Inland Revenue*, (1915) S.C. 449, referred to below, but was rejected by the majority of the Court.

Upon the question of the value of the potentiality where there is only one possible purchaser, there are some authorities to which their Lordships will have to refer. But dealing with the matter apart from authority it would seem that the value should be the sum which the arbitrator estimates a willing purchaser will pay and not what a purchaser will pay under compulsion. It was contended on behalf of the respondent that at an auction where there is only one possible purchaser of the potentiality, the bidding will only rise above the "poramboke" value sufficiently to enable the land to be knocked down to that purchaser. But if the potentiality is of value to the vendor if there happen to be two or more possible purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it. An instance of this is to be found in the case of *Inland Revenue Commissioners* v. *Clay*, [1914] 3 K.B., p. 466. That was a case under section 25 (1) of the Finance (1909-1910) Act, 1910, and is not perhaps strictly relevant to the present case. The facts of it, however, are worth recalling. There was a house of which the value to anyone except certain trustees was no more than £750. These trustees were the owners of a nurses' home which adjoined the house, and they were desirous of extending their premises. They accordingly purchased the house for £1,000, the owner thus receiving £250 for the potentiality his house possessed by reason of its position adjoining the nurses' home. It was held by the Court of Appeal that £1,000 was the value of the house to a willing seller. "To say", said Lord Cozens Hardy M.R., "that a small farm in the middle of a wealthy landowner's estate is to be valued without reference to the fact that he will probably be willing to pay a large price, but solely with reference to its ordinary agricultural value, seems to me absurd". Had the house in that case been acquired compulsorily by a railway company, or local authority under the provisions of the Lands Clauses Consolidation Act, 1845, before its purchase by the trustees, the house ought, in their Lordships' opinion, and for the reasons already given, to have been valued at £1,000 and not merely at £750.

A case in many respects similar to *Clay's* case is that of *Glass* v. *Inland Revenue* (cit. sup.). That also was a case arising under the Finance (1909-1910) Act, 1910, and was one where land of an agricultural value of £3,379 had been sold in 1911 to certain Water Commissioners for

£5,000, they being the only possible purchasers of the land for other than agricultural purposes. It was held that in valuing the land as on the 30th April, 1909, the possibility that the Commissioners might give more than the agricultural value for the land must be taken into consideration. In Lord Johnston's words, it was necessary in order to fix the value of the land on the 30th April, 1909, to ascertain

> " what is to be attributed to the probability of the Water Commissioners, in the circumstances, desiring to acquire the property, and what figure in a friendly negotiation they would be prepared to pay for it."

But however this may be, it is said that the matter assumes a totally different complexion when the only possible purchaser is the one who has obtained the compulsory powers of purchase, and that this has been established by authorities that should be followed by this Board. Of these authorities, the first one to which reference need be made is that of *In re Gough and The Aspatria Silloth and District Joint Water Board,* [1904] 1 K.B. 417. In that case it was not proved that the acquiring authority was the only possible purchaser and it may be that all that the Court of Appeal decided was that it was not incumbent upon the claimant for compensation to specify that any particular body of persons were possible purchasers, though the judgment of Lord Alverstone L.C.J. seems quite consistent with the view that the potentiality must be valued even if the acquiring authority be its only possible purchaser. But it is contended that Sir Richard Henn Collins M.R. expressed the contrary view. After referring to the particular adaptability of the land that was in question and that it ought to find a place in the estimate of the amount of compensation, he said (423):—

> " That view is supported by authority and long practice; but underlying it is the question, which is one of fact for the Arbitrator, whether there is a possible market for the site, and in determining that the statutory purchase is not to be considered."

But the Master of the Rolls said that the purchase, not the purchaser, was to be left out of consideration. Any enhanced value attaching to the land by reason of the fact that it has been compulsorily acquired for the purpose of the acquiring authority must always be disregarded, and the Master of the Rolls meant no more than that. The case of *Lucas and Chesterfield Gas and Water Board,* [1909] 1 K.B., p. 16, must, however, be considered in greater detail, for it is on certain dicta of Fletcher Moulton L.J. in that case that the respondent chiefly relies. The land that had been compulsorily acquired in that case had potentialities for which the acquiring authority was not the only possible purchaser. The point now being considered, did not, therefore, arise for decision. But in the Court below, [1908] 1 K.B., p. 579, Bray J. had said this:—

> " I come back to the question whether the fact that no buyer for reservoir purposes can be found, except a buyer who has obtained parliamentary powers, prevents the special value of the land being marketable. In my opinion the answer I ought to give to that question is ' No '."

In the Court of Appeal, Vaughan Williams L.J. said (p. 25):—

> "I agree with Bray J. that the fact that no buyer for reservoir purposes can be found except a buyer who has obtained parliamentary powers does not prevent the special value being marketable."

and stated that one of his reasons for so agreeing was that the fact that the board (who were the acquiring authority) might themselves become possible purchasers who would give a special price for the land, ought to be considered. Fletcher Moulton L.J., however, said that the decided cases to his mind laid down the principle that when the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the land to be purchased under it. He added that where there were other possible purchasers there would be competition among them and this fact would enhance the market price. The learned Lord Justice did not specify the authorities which laid down the principle in question and their Lordships are not aware of any that would justify it. It must, of course, be conceded that the existence of the scheme must not be allowed to enhance the price, if by "scheme" is meant the fact that compulsory powers of acquisition have been obtained for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality. The valuation must always be made as though no such powers had been acquired, and the only use that can be made of the scheme is as evidence that the acquiring authority can properly be regarded as possible purchasers. But their Lordships have some difficulty in seeing why the taking into consideration of the fact that the special value exists for those purchasers only should be said to be allowing the existence of the scheme to enhance the value of the lands. The only difference that the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land; and that is a circumstance that is never allowed to enhance the value. If, on the other hand, the Lord Justice meant by "the scheme" the intention formed by the acquiring authority of exploiting the potentiality of the land, his statement can only mean that the value of the land is not to be enhanced by the fact that they are possible purchasers. The result of this would be that even in a case where there are two or more possible purchasers, their existence must not be allowed to enhance the value. For each purchaser must be deemed to have a scheme in the sense supposed, and the enhancement of value due to their competition which the Lord Justice envisages will in fact be due to the "schemes". In these circumstances their Lordships are not prepared to follow the dictum of Fletcher Moulton L.J. in the *Lucas* case and prefer the opinion there expressed by Vaughan Williams L.J. It is said, however, that the dictum of Fletcher Moulton L.J. has already received the approval of this Board on more than one occasion. But in no case to which their Lordships' attention has been called was the question of the

effect of there being only one possible purchaser of the land being considered by the Board, and any approval of the statement of the law by the Lord Justice must be regarded merely as an approval of such statement so far as it affected the particular question then before the Board. It is sufficient in this connection to refer to two of such cases. In *Cedars Rapids Manufacturing and Power Company* v. *Lacoste,* [1914] A.C. at p. 576, Lord Dunedin, in delivering the judgment of the Board, said this:—

> " The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board,* where Vaughan Williams and Fletcher Moulton L.JJ. deal with the whole subject, exhaustively and accurately."

As has already been pointed out, the opinions of the two Lords Justices upon the question now being considered were diametrically opposed to one another. The other case is that of *Fraser* v. *Fraserville,* [1917] A.C. 187, where Lord Buckmaster, in delivering the judgment of the Board, said (p. 194):—

> " The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In re Lucas and Chesterfield Gas and Water Board, Cedars Rapids Manufacturing and Power Co.* v. *Lacoste,* and *Sidney* v. *North Eastern Railway Co.* The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for whch the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case."

It will be observed that Lord Buckmaster makes no reference whatsoever to the present question. But in one of the cases to which the noble and learned Lord referred, viz., *Sidney* v. *North Eastern Railway Co.,* [1914] 3 K.B. 629, Rowlatt J. is thought to have said much the same as had been said by Fletcher Moulton L.J. In that case certain land possessed the potentiality of being used for the purposes of a railway. That potentiality was capable of being turned to account by a railway company who had obtained compulsory powers of acquiring it and by the proprietor of an adjoining colliery. In assessing the compensation to be paid by the railway company for the land, the arbitrator took into account the possibility that but for its acquisition by the railway company, the colliery proprietor might have purchased it, but he did not take into consideration the possibility that the company might in friendly negotiation have been willing to pay more for it than the colliery proprietor. In their Lordships' opinion he was wrong in this. The Divisional Court, however, on a case stated, upheld the decision of the arbitrator. In the course of his judgment Rowlatt J. said this:—

> " Now if and so long as there are several competitors including the actual taker who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of

> their offering for the land is an element of the value in no respect differing from that afforded by the possibility of offers for it for other purposes. As such it is admissible as truly market value to the owner and not merely value to the taker. But when the price is reached at which all other competition must be taken to fail to what can any further value be attributed? The point has been reached when the owner is offered more than the land is worth to him for his own purposes and all that any one else would offer him except one person, the promoter, who is now, though he was not before, freed from competition. Apart from compulsory powers, the owner need not sell to that one and that one would need to make higher and get higher offers. In respect of what would he make them? There can only be one answer—in respect of the value to him for his scheme. And he is only driven to make such offers because of the unwillingness of the owner to sell without obtaining for himself a share in that value. Nothing representing this can be allowed."

If and so far as this means that the value to be ascertained is the price that would be paid by a willing purchaser to a willing vendor, and not the price that would be paid by a "driven" purchaser to an unwilling vendor, their Lordships agree. But so far as it means that the possibility of the promoter as a willing purchaser being willing to pay more than other competitors, or in cases where he is the only purchaser of the potentiality, more than the value of the land without the potentiality is to be disregarded, their Lordships venture respectfully to differ from the learned Judge.

For these reasons, their Lordships have come to the conclusion that, even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers and that he is no more confined to awarding the land's "poramboke" value in the former case than he is in the latter.

It is now necessary to take up once more the narrative of the events that have led up to this appeal.

On the 5th January, 1929, the appellant filed his claim for compensation. It was certainly not lacking in courage but it was lacking strangely enough in any suggestion that the land had a potential value as a source from which water might be supplied to persons or corporations outside Lova Gardens. He did, however, allege that Lova Gardens had a valuable potentiality as a building site and that such potentiality would be destroyed if he were deprived of the spring. He accordingly claimed Rs.2,50,000 in this respect, calling it "Damages sustained by severance", though in strictness it should have been called damages sustained by reason of the acquisition injuriously affecting his other property. He also claimed Rs.1,200 per acre in respect of the land and Rs.16,050 as the value of the masonry structures, roads, and trees on the land, the total claim amounting to Rs.3,96,730.

On the 18th January, 1929, the Land Acquisition Officer made his award. He allowed in all a sum of Rs.17,745.1.3 including the 15 per cent. addition prescribed by section

23 (2) of the Act. It appears from the grounds of award bearing the same date that he thought nothing of the potentiality of Lova Gardens as a building site, and the existence of any such potentiality has now disappeared from the case and need not be referred to again. He valued the land at Rs.50 an acre with the exception of the land numbered 2-3B which he valued at Rs.300 an acre. As to the claim in respect of "Damages sustained by severance", he thought that the rest of the appellant's land was probably better off without the water from the spring than with it. The lower part of the gardens, which was marshy and malarious had too much water as it was. In any case he considered that the appellant would be amply compensated for the loss of the spring water by the Rs.5,000 that he awarded under this head. The appellant's claim of Rs.2,50,000 was, he said, preposterous. He also awarded a sum of Rs.4,493 in respect of trees and buildings. The appellant thereupon required that the matter should be referred to the Court for determination under section 18 of the Act and in due course it came on for hearing before the Subordinate Judge of Vizagapatam. It was then claimed on the appellant's behalf that the spring could, but for its acquisition, have been used by him as a source of water supply either to the Harbour Authority or to the oil companies and others residing or carrying on business in the Harbour Area; and the appellant claimed to be compensated upon this footing. After a lengthy hearing before him in the course of which many questions of law and fact not now in issue were discussed, the learned Judge made his award. He found as a fact, and the fact cannot be disputed, that the water of the spring was on the 13th February, 1928, capable of being used as a source of water supply to persons outside the plaintiff's land. He also found that the only possible buyers of the water at that date were the Harbour Authority itself and the oil companies and labour camps that might be established as a result of the development of the harbour and stated that this fact would be taken into consideration in fixing the amount of compensation. But after considering the authorities on the subject, he came to the conclusion as a matter of law that the value to a vendor of a potentiality of his land can be assessed even though there are no other possible purchasers beyond the acquiring authority. Other principles of law stated by him for his guidance in making his award were that it was the contingent possibility of the user that had to be taken as the basis of valuation and not the realised possibility and that the use to which the acquiring authority had actually put the property could be taken as a strong piece of evidence to show that the property acquired could be put to such use by the owner at the date of acquisition. Applying these principles, he found that the value of the land acquired, including the spring, was Rs.1,05,000, which, with the addition of the 15 per cent. under section 23 (2) of the Act, amounted to Rs.1,20,750. The Rs.17,745.1.3 awarded by the Land Acquisition Officer had been paid to the appellant and received by him under protest, and deducting this sum from the Rs.1,20,750, there

remained Rs.1,03,004.14.9 due to the appellant. This sum he decreed in favour of the appellant with certain interest. The valuation of Rs.1,05,000 was arrived at in this way. Evidence had been given before the learned Judge by two witnesses on behalf of the appellant as to what would be a proper charge for water supplied to the harbour area from the spring, and they estimated the charge at Rs.1.8.0 per 1,000 gallons. The learned Judge, however, said that taking into consideration the conclusions arrived at by him, which were presumably the conclusions of law and findings of fact referred to above, he thought it would be reasonable and proper to fix the value of the acquired property, i.e., the water source on the date of the acquisition on the basis of Re.1 per 1,000 gallons. Taking the normal supply of water at 50,000 gallons a day, this gave as the gross annual value of the water the sum of Rs.18,250. He estimated that maintenance charges, depreciation of machinery, and interest on the capital outlay, would come to Rs.12,273; but taking these items at the round figure of Rs.13,000, the net annual income from the spring would be Rs.5,250. This he capitalised at 20 years purchase and so arrived at the Rs.1,05,000. Having regard, amongst other things, to the extravagant claims put forward by the appellant in the first instance he awarded him no costs.

From this decision an appeal was taken by the present respondent to the High Court at Madras, the appellant lodging a memorandum of cross-objections to the valuation of the Subordinate Judge which need not be specified. The appeal was heard by Wadsworth and Stodart JJ. and judgment allowing the appeal was delivered on the 4th May, 1937. The reasons for this decision given by Wadsworth J., in whose judgment Stodart J. concurred, may be summarised as follows:—

The scheme for utilisation of the water and the carrying-out of anti-malarial operations in the valley (i.e., the Lova Gardens) was not really an independent scheme. It was linked up with a bigger scheme for getting rid of breeding places of mosquitoes all round the southern side of the harbour so as to make the whole of that area fit for development. At the time when this scheme was promulgated the whole of that area was undeveloped. It was full of malaria and was incapable of any profitable use apart from the success of the anti-malarial campaign of which this acquisition was part. It was not conceivable that the present appellant himself would ever have been able to develop a water supply scheme, carrying out the necessary anti-malarial works and thereby encouraging business concerns to occupy the harbour land and buy water from him. The conclusion, therefore, must be that the special adaptability of the land for the supply of drinking water had no value apart from the scheme for which the acquisition was made.

The Harbour Authority, therefore, was at the date of the notification the only reasonably possible purchaser for the drinking water supply on the appellant's land and this being so the Subordinate Judge had erred in awarding

compensation for the special adaptability of the land to supply drinking water to persons outside the appellant's land. After referring to the authorities and in particular the dictum of Fletcher Moulton L.J. in the *Lucas* case (*supra*), he said:—

> " There can be little doubt that this exposition of the law when applied to the facts of the present case as we have found them would justify the conclusion that no value can be awarded to the special adaptability of this land for supplying drinking water to the harbour alone, if it can be shown that the land cannot have any value as a source of drinking water to anyone else."

By the harbour the learned Judge meant, of course, the Harbour Authority. Stodart J., who, as already stated, concurred in the judgment of Wadsworth J., added that:—

> " It is not contended that any other public authority or private undertaker except the Harbour Authority would ever have come forward to develop this area and make it habitable. Thus the value of the . . . spring as a source of drinking water . . . arose entirely from the Anti-Malarial Scheme carried out by the Harbour Authority and depended on the success of that scheme. To my mind section 24 subsection (5) of the Land Acquisition Act is completely applicable to the facts of this case."

The appeal was accordingly allowed with costs there and below and the award of the Land Acquisition officer was restored *in toto*. The memorandum of cross-objections was dismissed with costs. From that judgment, the necessary leave having been obtained, the appellant now appeals to His Majesty in Council.

Their Lordships agree with the High Court that on the 13th February, 1928, the only really possible purchasers of the special adaptability of the appellant's land as a water supply was the Harbour Authority. The position at that time was that the harbour was so far advanced that its opening in a few years was in contemplation. It was expected that when that had taken place oil companies and other industrial concerns, with their attendant labour camps, would be attracted to the harbour area, and they would all require to be supplied with water. It is plain that neither the appellant nor any purchaser from him would encounter any engineering difficulties in conducting the water from the spring to the southern boundary of the harbour area. Nor would they encounter any engineering difficulty in conducting the water from that boundary to the premises of the oil companies and other concerns. They would, however, have had to obtain the consent of the Harbour Authority to lay the necessary pipes in the harbour area itself and the possibility of such consent being refused would have to be taken into consideration in estimating the value to the appellant of the special adaptability of his land, though the risk of such consent being refused was not a serious one, assuming that there was no other source from which the water could be profitably supplied by the Harbour Authority itself. There was, however, on the 13th February, 1928, a much more serious matter to be taken into consideration. As already pointed out, the harbour area was at that date a highly malarious place, little calculated to prove attractive as a site for any industrial concern. Unless,

therefore, this state of affairs was remedied, there would be no customers for the appellant's water and the value to him of the special adaptability was nil. Now it is true that there was a practical certainty of the Harbour Authority taking steps to render the site as free as possible from malaria; for, if they did not, the harbour would not be used to any great extent even as a port of call. But in order to carry out the necessary anti-malarial works, it was essential for the Harbour Authority to obtain a supply of drinking water from some source other than the wells in the area which were largely responsible for the malarious condition of the area and were going to be closed. The appellant on the 13th February, 1928, would therefore have been in this dilemma. If the only other source of water were the appellant's spring, the Harbour Authority would be the only possible purchaser. If, on the other hand, the Authority could obtain water from other sources sufficient both for the anti-malarial work and the supply of the traders in the harbour area, the appellant would almost certainly be refused permission to carry his competing supply over the Authority's land. In point of fact there was at one time an alternative scheme on foot for obtaining water known as the Meghadrigedda Scheme. The scheme was to be for the benefit of the Municipality of Vizagapatam, the Bengal Napur Railway, and the Harbour. The scheme aimed at a supply of one million gallons a day of which the harbour was to have 150,000 gallons a day. The scheme has not been proceeded with, but it is impossible to say what would have been done about it had the spring in the Lova Gardens not been acquired. In these circumstances the possibility of the appellant's water being made available for the harbour by anyone other than the Harbour Authority was altogether negligible, and the only enhancement in the value to the appellant of his land by reason of its special adaptability as a water supply was the sum that the Harbour Authority, as a willing purchaser, would have been willing to give in excess of the land's "poramboke" value.

Their Lordships have given their reasons for thinking, contrary to the view taken by the High Court, that such sum must be taken into consideration in fixing the compensation payable to the appellant, and that such sum is not to be treated as being a negligible one merely because the Harbour Authority was the only possible purchaser.

It remains to deal with section 24 (5) of the Land Acquisition Act. That subsection as applied to the present case means no more than this: that in valuing the appellant's land on the 13th February, 1928, it must be valued as it then stood, and not as it would stand when the land had been acquired and the water on it used for ridding the harbour area of malaria. The Harbour Authority would otherwise be made to pay for the water twice over. But the subsection does not mean that the possibility that a particular purchaser of land will give a higher price for it by reason of its possessing a special adaptability must be disregarded merely because the land will be more valuable

in his hands when he exploits that adaptability than it would be if left in the hands of the vendor who was unable to exploit it. In *Clay's* case (*supra*), for instance, the house after being added to the nurses' home was no doubt more valuable than it was before. That indeed, was the reason why the trustees of the home paid £250 more than any other purchaser would have paid. The house in that case was held to be of the value of £1,000 not because that was its value after being put to the use for which it was acquired, but because that was the price which the willing purchaser was prepared to pay for its acquisition. In the present case the land must be valued not at the sum it would be worth after it had been acquired by the Harbour Authority and used for anti-malarial purposes, but at the sum that the Authority "in a friendly negotiation" (to use Lord Johnston's words) would be willing to pay on the 13th February, 1928, in order to acquire it for those purposes.

Returning to the award made in the present case by the learned Subordinate Judge, it is to be observed that in valuing the land with its special adaptability as being worth Rs.1,05,000 to the appellant, he did so on the footing that the appellant would himself have been in a position to supply the water to the harbour but for its compulsory acquisition by the Harbour Authority. He would also seem to have so valued it upon the footing that the spring could have been made an income-earning concern on the 13th February, 1928. He would otherwise have made a substantial discount from the Rs.1,05,000. It is plain, therefore, that, in view of the fact that the water could not be exploited by the appellant himself and that it would necessarily be some years before the water would become a profit-earning asset in their hands, the Harbour Authority, however willing purchasers they might be, would not have agreed to pay anything like that sum. In these circumstances the matter should in strictness be referred back to the Subordinate Judge to revise his award. Both the parties to this appeal, however, have asked their Lordships, with a view to saving expense, to state what should be the proper amount of the award, and this their Lordships have consented to do. Giving the matter the best consideration they can, their Lordships are of opinion that the total price which the Harbour Authority would have been willing to pay on the 13th February, 1928, for the land acquired, is the sum of Rs.40,000, and this sum with the additional 15 per cent. amounts to Rs.46,000. In their Lordships' judgment the order of the High Court of the 4th May, 1937, should be discharged except in so far as it dismissed the present appellant's memorandum of objections with costs. The amount decreed by the Subordinate Judge in favour of the appellant should be reduced from Rs.103,004.14.9 to Rs.28,254.14.9 with interest as stated in his award. His order as to costs must stand. But the respondent must pay the appellant's costs before the High Court and his costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

14421—3A) Wt:8168—30 190 3/39 P.St. G. 338

In the Privy Council

SRI RAJA VYRICHERLA NARAYANA GAJAPATIRAJU BAHADUR GARU

v.

THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM

DELIVERED BY LORD ROMER

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E.1.

1939